

## **Overview of *Sentencing Amendment (Community Correction Reform) Act 2011*<sup>1</sup>**

Prior to the 2010 Victorian election, the Coalition stated that:<sup>2</sup>

Under a Coalition Government, the current cumbersome and limited range of community based sentences will be replaced with a single, flexible Community Correction Order (CCO) delivering tougher, common-sense sentences targeted directly at both the offender and the offence. ...

The conditions applied to a CCO will reflect the circumstances of the case and the offender concerned, and may include:

- up to 600 hours of community work
- curfews and no-go zones
- conditions on where an offender may live
- driving licence restrictions, suspension or cancellation
- impounding or immobilisation of vehicles
- prohibitions or restrictions on
  - contact with specified associates
  - access to licensed premises
  - use of alcohol
- payment of a cash bond or other surety, which will be liable to forfeiture upon breach of conditions

Courts will also be authorised to require offenders to accept GPS monitoring in cases where the court considers it appropriate, in order to reduce the risk of re-offending or ensure compliance with other conditions.

The *Sentencing Amendment (Community Correction Reform) Act 2011* (the Act) implements most of that policy commitment.<sup>3</sup> In the course of doing so, it introduces a number of structural and procedural changes to the *Sentencing Act 1991* that courts and court users will need to be familiar with.

According to the second reading speech,<sup>4</sup> it is expected that the reforms in

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<sup>1</sup> Prepared by Matt Weatherson, Senior Research Officer, Judicial College of Victoria. This overview has not yet been reviewed or settled by a judicial editor.

<sup>2</sup> <http://vic.liberal.org.au/webData/policies/101123%20Baillieu%20-%20COALITION%20TO%20GIVE%20TEETH%20TO%20COMMUNITY%20BASED%20SENTENCES.pdf>

<sup>3</sup> The Act does not introduce sureties or the impounding or immobilisation of vehicles. It also does not directly include prohibitions or restrictions on the use of alcohol, independent of the restrictions on access to licensed premises.

<sup>4</sup> Victorian Parliamentary Debates, Legislative Assembly, 15 September 2011.

Part 2 of the Act will commence early in 2012, with Part 3 to commence in mid 2012. The default commencement date for the majority of provisions is 30 June 2013.

The Act makes the following key amendments to the *Sentencing Act*:

- abolition of intermediate sanctions;
- introduction of the community correction order;
- reform of contravention of sentences provisions;
- amendment of pre-sentence report provisions;
- amendment of licence cancellation and alcohol interlock conditions;
- minor changes to victim impact statement provisions.

### **Abolition of intermediate sanctions**

The Act abolishes the combined custody and treatment order (CCTO),<sup>5</sup> the intensive correction order (ICO),<sup>6</sup> and the community based order (CBO).<sup>7</sup> These sanctions are replaced by the community correction order (CCO). The Act also removes references to those repealed sanctions throughout the *Sentencing Act*.

Schedule 3 will contain transitional provisions that preserve the continued operation of any existing CCTOs, ICOs and CBOs. In addition, the schedule creates contravention offences for these orders, punishable by up to 3 months imprisonment. These offences apply to contraventions committed on or after the commencement of the amending Act, regardless of when the existing sentence was imposed. The schedule also contains provisions preserving the court's power to deal with the contravention itself, in accordance with regular processes. Contraventions committed prior to the commencement of Schedule 3, or which were committed in a period that straddles the commencement date, are dealt with under the provisions of the *Sentencing Act* which existed before the commencement of the amending Act.<sup>8</sup>

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<sup>5</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* s 12.

<sup>6</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* s 15.

<sup>7</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* s 21.

<sup>8</sup> See *Sentencing Act 1991* Schedule 3, clauses 2, 3, 4 and 12 (as amended).

## Introduction of the community correction order

The main purpose of the amending Act is to introduce the new community correction order. The CCO shares a number of similarities with the CBO. Like the CBO, a CCO is available where the offender has been found guilty of an offence punishable by more than 5 penalty units, the court has received and considered a pre-sentence report and the offender consents to the order. It is a non-custodial order and sits directly above a fine in the hierarchy of penalties. The differences lie in the wider range of conditions available for a CCO, the ability to impose a CCO for a longer period and the ability to impose an "intensive compliance period". These differences seem designed to make the CCO suitable for a wide range of offenders and to cover territory that was previously shared between the CCTO, ICO and CBO.

The maximum penalty of a CCO is 2 years in the Magistrates' Court. In the higher courts, the maximum term is the greater of 2 years and the maximum term of imprisonment for the offence.<sup>9</sup> In utilising this increased flexibility, judicial officers will need to consider the risks associated with lengthy conditional orders. Research on such orders indicates that increases to the length of such orders also increase the probability that the offender will contravene the order at some point.<sup>10</sup>

The court must fix the date on which the CCO commences, which may be up to 3 months after the date of sentencing.<sup>11</sup> The court may combine a CCO with a sentence of imprisonment, provided the term of imprisonment is not more than 3 months and the sentence is not suspended.<sup>12</sup> The CCO portion of a combined imprisonment and CCO sentence commences when the offender is released from imprisonment.<sup>13</sup> The court may exercise this power either by imposing a CCO and imprisonment for one offence, or for multiple offences, subject always to the requirement that the combined sentence of imprisonment for two or more sentences of imprisonment must not exceed 3 months.<sup>14</sup> The court can also combine a fine with a

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<sup>9</sup> *Sentencing Act 1991* s 38(1) (as amended)

<sup>10</sup> See Arie Freiberg, *Sentencing Review: Discussion Paper* (2001), 63-64.

<sup>11</sup> *Sentencing Act 1991* s 38(2) (as amended)

<sup>12</sup> *Sentencing Act 1991* s 44 (as amended).

<sup>13</sup> *Sentencing Act 1991* s 38(2) (as amended).

<sup>14</sup> *Sentencing Act 1991* s 44 (as amended). This provision seems to reverse the interpretation of the previous s36(2) outlined in *R v Young* (1995) 81 A Crim R 70, which had held that the limitation on combining sentences of imprisonment of more than 3 months with a CBO only applied where two sentences are imposed for the one charge. Under s 44, a court cannot combine sentences imposed on one occasion, either on a single charge or multiple charges, to produce a sentence of imprisonment of 3 months or more, or a wholly or partly suspended sentence, in addition to imposing a CCO.

CCO.<sup>15</sup>

An intensive compliance period is a part of the CCO in which the offender must complete one or more conditions specified by the court. This condition might be used to require an offender to complete a treatment or rehabilitation program, while allowing ongoing monitoring for some period. Such a use may reduce the risks associated with lengthy conditional orders, by limiting the most onerous conditions to a manageable period.

A single community correction order can cover multiple offences joined on the one charge-sheet or indictment.<sup>16</sup> The similarities between this power and the power to impose aggregate sentences suggests that it will primarily be relevant to the Magistrates' Court.<sup>17</sup>

Like CBOs, CCO have core conditions (now called "terms") and special conditions (now called, simply, "conditions"), and each order must contain all the statutory "terms" and at least one "condition".<sup>18</sup> The terms generally correspond to the core conditions of the CBO.<sup>19</sup>

The provisions on varying a CCO generally follow the existing provisions on varying a CBO, while adding two new grounds for variation:

- that the rehabilitation and reintegration of the offender would be advanced by deciding to deal with the order; and
- the continuation of the sentence is no longer necessary in the interests of the community or the offender.

In addition, the Act contains a more detailed scheme regarding a court's power to vary a CCO, compared to the previous CBO provisions. The previous scheme which allowed a court to vary or cancel the order, or resentence the offender is replaced by 8 options:

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<sup>15</sup> *Sentencing Act 1991* s 43 (as amended).

<sup>16</sup> *Sentencing Act 1991* s 40 (as amended).

<sup>17</sup> See *Felton v DPP* (2007) 16 VR 214.

<sup>18</sup> *Sentencing Act 1991* ss 45, 47 (as amended).

<sup>19</sup> The previous "obey lawful instructions" condition is now redrafted to a term that "the offender must comply with any direction given by the Secretary that is necessary for the Secretary to give to ensure that the offender complies with the order". This is supported by an explicit power for the Secretary to give written directions regarding a range of practical matters associated with implementing an order, such as the place, date and time for performing unpaid community work or participation at a treatment or rehabilitation program. Failure to comply with the directions of the Secretary is an offence punishable by up to level 11 fine. See *Sentencing Act 1991* ss 46, 83AE, 83AF (as amended).

- Confirm the order in whole or in part;
- Cancel the order and re-sentence the offender;
- Cancel the order and make no further order;
- Vary the order;
- Cancel, suspend, vary or reduce a condition;
- Attach a new condition;
- Cancel, suspend, vary or reduce the obligation to undertake a program;
- Impose a new program that must be undertaken.<sup>20</sup>

A wider class of persons is now able to seek variation of orders, including the informant or police prosecutor (if the offender was sentenced in the Magistrates' Court) and the Secretary to the Department of Justice. The existing power to seek variation by the DPP, the offender or a prescribed person remain.<sup>21</sup>

### *Conditions*

Every CCO must contain one or more conditions under Division 4 of Part 3A (the general conditions) or must contain a justice plan condition.<sup>22</sup> The court may supplement any statutory conditions it imposes with any other condition it thinks fit. These residual conditions cannot cover the same subject matter as a statutory condition and cannot relate to restitution, compensation, costs or damages.<sup>23</sup> The Explanatory Memorandum to the *Sentencing Amendment (Community Correction Reform) Act 2011* gives "Prohibiting the offender from using the Internet" as an example of a residual condition.

The Act specifies three matters the court must consider when attaching conditions: the principle of proportionality, the purposes for which a sentence may be imposed in section 5 and the purposes of community correction orders set out in section 36.<sup>24</sup>

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<sup>20</sup> *Sentencing Act 1991* s48M (as amended).

<sup>21</sup> *Sentencing Act 1991* s48N (as amended).

<sup>22</sup> *Sentencing Act 1991* s 47 (as amended).

<sup>23</sup> *Sentencing Act 1991* s 48 (as amended).

<sup>24</sup> *Sentencing Act 1991* s 48A (as amended). Section 36 states that community corrections orders "may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender".

The statutory conditions created by the Act are:

- Unpaid community work;
- Treatment and rehabilitation;
- Supervision;
- Non-association;
- Residence restriction or exclusion;
- Place or area exclusion;
- Curfew;
- Alcohol exclusion;
- Electronic monitoring;
- Bond;
- Judicial monitoring.

As the Sentencing Advisory Council discussed in Part 2 of its report on suspended sentences, the effectiveness of conditions is dependent on the existence of adequate support services in the community to give effect to the conditions.<sup>25</sup> Pre-sentence reports and submissions from parties may help identify available rehabilitation programs and the capacity of Corrections Victoria to supervise an offender. Corrections Victoria has indicated that, in order to maximise the value of pre-sentence reports, judicial officers should indicate any conditions it is considering imposing when requesting a report so that they can assess whether that condition is suitable for the offender. Procedural fairness considerations suggest that this process, if followed, will require judicial officers to conduct a plea hearing and receive submissions on suitable conditions before requesting a pre-sentence report and may require a subsequent hearing to allow submissions on the recommendations in the report. Courts will need to consider the implications of this on court waiting lists.

A judicial officer setting conditions on a community correction order needs to balance the seriousness of the order against the possibility of breach. Conditions should be sufficiently punitive as to be proportionate with the seriousness of the offence without setting the offender up to fail.<sup>26</sup> Manifestly excessive conditions may create a very high probability of

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<sup>25</sup> See *Sentencing Advisory Council, Suspended Sentences: Final Report Part 2*, 6.79 – 6.82.

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[http://sentencingcouncil.judiciary.gov.au/docs/web\\_new\\_sentences\\_guideline1.pdf](http://sentencingcouncil.judiciary.gov.au/docs/web_new_sentences_guideline1.pdf) at 1.1.13.

breach.<sup>27</sup> Judicial officers should also be aware of the risk of sentence inflation by imposing more conditions than necessary. While the community correction order does not include an equivalent provision to the old section 38(3), which required that the court impose no more special conditions than is necessary to achieve the purpose of the order, this would seem to remain a sound sentencing principle and it is consistent with the obligation to consider the principle of proportionality, the purposes of a sentence and the purposes of the community correction order when attaching conditions.<sup>28</sup>

Despite the differences between Victorian and United Kingdom sentencing law, it is instructive to note that UK experience with equivalent sentencing options suggests that it is not until cases fall just short of requiring a custodial sanction that combining multiple conditions is suitable.<sup>29</sup> This is a substantial difference from Victorian practice in relation to community based orders, where the average number of conditions was 2.4, and courts commonly imposed a CBO with four conditions: unpaid community work, assessment and treatment, supervision and a residual discretionary condition.<sup>30</sup>

#### *Unpaid community work condition*

The unpaid community work condition is very similar to the existing unpaid community work provisions.<sup>31</sup> However, the maximum number of hours is not linked to the maximum penalty of the relevant offence. Instead, there is a statutory maximum of 600 hours that applies for all offences. In addition, the maximum number of hours of unpaid community work a court can impose without a pre-sentence report is raised from 250 hours to 300 hours.<sup>32</sup>

Historically, courts rarely imposed community based orders with more than 200 hours of unpaid community work, with the average being 100 hours.<sup>33</sup> However, the CCO is designed to cover a broader range of

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<sup>27</sup> See *R v Sanerive* Vic CCA 23/6/1995.

<sup>28</sup> Compare former *Sentencing Act 1991* s38(3) and *Sentencing Act 1991* s48A (as amended).

<sup>29</sup> See [http://sentencingcouncil.judiciary.gov.au/docs/web\\_new\\_sentences\\_guideline1.pdf](http://sentencingcouncil.judiciary.gov.au/docs/web_new_sentences_guideline1.pdf) at 1.1.28 - 1.1.32.

<sup>30</sup> See *Sentencing Advisory Council*, *Community Sentences in Victoria: A statistical profile* (2007), 11.

<sup>31</sup> See existing section 39.

<sup>32</sup> *Sentencing Act 1991* s 8A(3) (as amended).

<sup>33</sup> See *Sentencing Advisory Council*, *Suspended Sentences Final Report Part 2*, 187 – 188.

circumstances than the CBO and some of these circumstances may call for a more onerous community work condition.

In fixing the required number of hours of unpaid community work, sentencing courts should consider the findings of the 1978 Sentencing Alternatives Committee:

[T]here is a practical limit to the period of time during which an offender should be required to perform a community service as a punishment. As we have said, the effective carrying out of an order depends upon the continued co-operation of the offender. Any order which required an offender to perform unpaid work over so long a period that he could not reasonably be expected to maintain his co-operation over that time would be self-defeating.<sup>34</sup>

### *Treatment and rehabilitation condition*

The CCO contains broader provisions for treatment and rehabilitation conditions beyond the narrow focus on drugs, alcohol, medical issues and mental health issues under the CBO provisions.<sup>35</sup> A treatment and rehabilitation condition is also more detailed than the personal development condition under the CBO.<sup>36</sup> First, the order can include assessment and treatment at a residential facility for drug or alcohol withdrawal. Secondly, the court can require the offender to attend programs to address factors relating to the offending behaviour, as specified by the court. Thirdly, there is a 'catch-all' provision allowing the court to order any treatment and rehabilitation the court considers necessary. This may include employment, educational, cultural and personal development programs, based on the need to address the underlying causes of the offending and the recommendations contained in the pre-sentence report.<sup>37</sup> Fourthly, the court has the power to specify the treatment the offender should undertake, and is not limited to ordering the offender to undertake treatment as directed by the relevant Regional Manager.<sup>38</sup>

In addition to the treatment specified by the court, the condition allows the Secretary to direct the offender to attend treatment, unless the court

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<sup>34</sup> Sentencing Alternatives Committee of March 1978 at [28]. See also *R v Sanerive Vic* CCA 23/6/1995, where a sentencing judge had, in substance, imposed an unpaid community work condition of 2088 hours over 5 years. The offender completed 425 hours over a year and a half, but failed to complete further work.

<sup>35</sup> See former s38(1)(d).

<sup>36</sup> See existing s41.

<sup>37</sup> *Sentencing Act 1991* ss 48D(2), (3)(c), (3)(f), (3)(g)(as amended).

<sup>38</sup> Compare *Withers v Girotto* [2008] VSC 102.

states otherwise.<sup>39</sup> This is consistent with the special condition a court could impose under a CBO that required an offender to attend educational or other programs as directed by the Regional Manager. However, unlike the CBO provisions which restricted this condition to applying for between one month and one year, the power of the Secretary to direct an offender under the CCO lasts for the duration of the order.

While this condition is focussed on rehabilitating the offender, it is also a highly demanding condition that may not be suitable for less serious offending.<sup>40</sup> Sentencing judges should be careful that, in seeking to maximise the offender's rehabilitation, they do not impose an excessively punitive sentence.

### *Supervision condition*

The Act replaces the CBO provision which state that the purpose of supervision is to allow the rehabilitation and monitoring of a high risk offender in the community<sup>41</sup> with a general statement that the purpose of a supervision condition is to ensure the compliance of the offender with the order. A supervision condition may apply for the whole or part of the period specified in the order.<sup>42</sup>

A supervision condition operates in addition to the general term of all CCOs that the offender must report to and receive visits from the Secretary and must report to a specified community corrections centre within 2 working days of the order coming into force.<sup>43</sup>

### *Non-association condition*

The new non-association condition allows a court to require the offender not to contact or associate with a particular person or a particular class of persons specified by the court, either for the whole of the CCO or part of it. In making this condition, the court must have regard to the effect it would have on the offender's employment.<sup>44</sup>

Experience in other jurisdictions indicates that courts rarely use this condition<sup>45</sup> and the Sentencing Advisory Council's report on suspended

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<sup>39</sup> *Sentencing Act 1991* s 48E(4) (as amended).

<sup>40</sup> See, [http://sentencingcouncil.judiciary.gov.au/docs/web\\_new\\_sentences\\_guideline1.pdf](http://sentencingcouncil.judiciary.gov.au/docs/web_new_sentences_guideline1.pdf), at 1.1.24.

<sup>41</sup> Existing s40.

<sup>42</sup> *Sentencing Act 1991* s 48E (as amended).

<sup>43</sup> *Sentencing Act 1991* ss 45(1)(b) and (c) (as amended).

<sup>44</sup> *Sentencing Act 1991* s 48F (as amended)

<sup>45</sup> NSW Ombudsman, Discussion Paper: The Justice Legislation Amendment (Non-

sentences found no support among those consulted for this condition, with several groups warning that they would be suitable only in exceptional circumstances.<sup>46</sup> The Council considered that non-association conditions should be available to the court in order to promote transparency, as such a condition was previously being imposed administratively by corrections officers through the power to issue directions.<sup>47</sup> However, the Council considered that non-association conditions would only be suitable as part of its suggested reformed intensive correction order and would not be available for the reformed community based order. While this recommendation is not directly applicable due to differences between the Council's recommendations and the structure of the CCO, it indicates that non-association conditions should only be imposed in the more serious examples of offending that warrants a non-custodial sanction and reserved for high risk offenders.<sup>48</sup>

### *Residence and place conditions and curfews*

The Act provides four new conditions that affect the liberty of the accused in relation to his or her movement.<sup>49</sup>

First, the court may require the accused to either reside at a particular place or not reside at a particular place.<sup>50</sup>

Secondly, the court may specify a particular place that the accused must not enter or remain in.<sup>51</sup>

Thirdly, the court may impose an "alcohol exclusion condition". Subject to any exceptions specified by the court, this condition restricts an offender in the following ways:

- The offender must not enter or remain in any licensed premises

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association and Place Restriction) Act 2001 (2003) 12; Ministry of Justice and National Probation Service, *Sentencing Statistics, Quarterly Brief, England and Wales, October to December 2006 (Crown Court and Magistrates' Courts)* (2007).

<sup>46</sup> *Sentencing Advisory Council, Suspended Sentences Final Report Part 2*, 6.106 – 6.109.

<sup>47</sup> See *Sentencing Advisory Council, Suspended Sentences Final Report Part 2*, 6.149 – 6.152.

<sup>48</sup> See *Sentencing Advisory Council, Suspended Sentences Final Report Part 2*, 6.128, Recommendation 5-2.

<sup>49</sup> Of these, non-association and residence restrictions have previously existed in Victorian sentencing law, as special conditions available on community based orders under the *Penalties and Sentences Act 1985* s29(2)(f) and (g).

<sup>50</sup> *Sentencing Act 1991* s 48G (as amended).

<sup>51</sup> *Sentencing Act 1991* s 48H (as amended).

characterised as nightclubs, bars, restaurants, cafes, reception centres or function centres;

- The offender must not enter or remain in the location of a *major event*;<sup>52</sup>
- The offender must not enter or remain in a bar area of any licensed premises not otherwise covered by the first two bullet points;
- The offender must not consume liquor in any licensed premises not covered by the first two bullet points.

This condition may be imposed to address the role of alcohol in the offending behaviour. The court may set this condition to apply either at all times, or only at particular hours of the day.<sup>53</sup>

Finally, a court can impose a curfew condition, requiring the offender to remain at a specified place between specified hours of each day. The court may not specify a period of less than 2 hours or more than 12 hours each day. In addition, the court must set the length that the curfew condition applies for and this may not exceed 6 months.<sup>54</sup>

A court cannot impose residence conditions, place or area exclusion conditions and curfews that are inconsistent with a family violence intervention order or a personal safety intervention order.<sup>55</sup> If the court does impose such an inconsistent condition, then the intervention order prevails to the extent of any inconsistency.<sup>56</sup> This means that courts and those preparing pre-sentence reports will need to check whether any intervention orders exist in relation to the offender and whether the terms of that order affect the operation of any proposed sentence.

Like non-association conditions, the experience in other jurisdictions and the view within Victoria is that place and area exclusions are rarely appropriate.<sup>57</sup> However, the Sentencing Advisory Council considered that place and area exclusions should be preserved as a sentencing option to

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<sup>52</sup> The Act uses the definition of "major event" from the *Liquor Control Reform Act 1998*, which allows the Director of Liquor Licensing to declare an event a "major event".

<sup>53</sup> *Sentencing Act 1991* s 48J (as amended).

<sup>54</sup> *Sentencing Act 1991* ss 48I (as amended).

<sup>55</sup> *Sentencing Act 1991* ss 48G(5), 48H(4), 48I(4) (as amended).

<sup>56</sup> *Family Violence Protection Act 2008* s175A (as amended), *Personal Safety Intervention Orders Act 2010* s130A (as amended).

<sup>57</sup> See *Sentencing Advisory Council, Suspended Sentences Final Report Part 2*, 6.106 – 6.109.

promote transparency and would only be suitable in the more serious cases of offending that warrants a non-custodial sanction.<sup>58</sup>

#### *Bond condition*

The bond condition requires the offender to pay a sum of money to the court as a bond which is returned to the offender on the successful completion of the order or forfeited if the offender contravenes the order.<sup>59</sup> This process has not been used in Victoria in the last 20 years,<sup>60</sup> but has remained part of the Commonwealth sentencing law.<sup>61</sup> The purpose of the bond is to ensure compliance with the order. Unlike the Commonwealth scheme or bail bonds, there does not appear to be any power to require sureties.

The Bond condition is located with Part 3 of the amending Act, which is expected to commence at a later time.

#### *Judicial monitoring condition*

In addition to supervision and monitoring by corrections officers, a court may attach a condition that allows monitoring by the sentencing court. The basis for such an order is that the court is satisfied that it is necessary to review the compliance of the offender with the order. The court may specify when the offender must reappear before the court for a review of the order, along with any information, reports or tests that must be provided on a review. However, this does not allow medical officers to test the offender or make a medical report without the consent of the offender. Monitoring is carried out by the sentencing court constituted by the judge who sentenced the offender or another judge of that court.<sup>62</sup>

On a review, a court may take evidence from the offender, medical practitioners, the Secretary to the Department of Justice, the prosecutor and any other person the court considers appropriate. The court may then cancel or vary the condition or leave it in place, and may give further directions regarding the frequency of review hearings and the information that must be provided on a review.<sup>63</sup>

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<sup>58</sup> See *Sentencing Advisory Council, Suspended Sentences Final Report Part 2*, 6.128, 6.149 – 6.152.

<sup>59</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* s58.

<sup>60</sup> Bonds were part of the *Penalties and Sentences Act 1985* s83, but were not preserved by the *Sentencing Act 1991*.

<sup>61</sup> See *Crimes Act 1914* (Cth) s19B(1)(d) and 20(1)(a).

<sup>62</sup> *Sentencing Act 1991* s 48K (as amended).

<sup>63</sup> *Sentencing Act 1991* s 48L (as amended).

### *Justice Plan conditions*

The provisions regarding justice plans are redrafted, though the essence of the scheme is preserved. There is a new provision requiring judges who are considering imposing a justice plan condition to have regard to the objectives and principles set out in Part 2 of the *Disability Act 2006* which are designed to reduce the likelihood of reoffending. The other amendments in this area appear to be drafting changes, such as replacing the language of "special conditions" with word "conditions".

In addition, the Act separates out the provisions on residential treatment orders from the justice plan condition. This appears to be an attempt to simplify and clarify the legislation, rather than change the underlying scheme.

### **Contravention provisions**

The Act introduces a new Part 3C that deals with contravention of sentences and contains procedural provisions on prosecuting such contraventions. The Act creates new offences of contravention of a sentencing order, which is punishable by up to 3 months imprisonment in the case of a suspended sentence<sup>64</sup> or CCO,<sup>65</sup> level 10 fine for a release on adjournment orders<sup>66</sup> and level 11 fine for contravening directions of the Secretary in relation to a CCO.<sup>67</sup> The provisions on contravention of a direction of the Secretary contains six discrete offences for particular kinds of contravention, each with the same maximum penalty. Courts will therefore need to carefully consider whether the prosecution has charged the correct offence.

The offence of contravening a suspended sentence, CCO or release on adjournment order must be heard in the court that imposed the relevant sentence and proceedings are commenced by charge-sheet (even in the higher courts). The DPP, informant or police prosecutor, Secretary to the Department of Justice and prescribed persons or members of a prescribed class of persons are all authorised to commence contravention proceedings.<sup>68</sup> Proceedings for contravention offences under sections 83AE

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<sup>64</sup> *Sentencing Act 1991* s 83AB (as amended). Under Schedule 3, a person may also be convicted of the offence of contravening a suspended sentence that was imposed before the commencement of the amending legislation, provided the conduct constituting the offence occurred after the commencement of the amending legislation.

<sup>65</sup> *Sentencing Act 1991* s 83AD (as amended). This reverses the uncommenced policy from the *Justice Legislation Amendment Act 2010* to abolish the separate offence of breach of a CBO.

<sup>66</sup> *Sentencing Act 1991* s 83AC (as amended).

<sup>67</sup> *Sentencing Act 1991* ss 83AE and 83AF (as amended).

<sup>68</sup> *Sentencing Act 1991* s 83AG (as amended).

and 83AF (the contravention of directions of the Secretary offences) are heard and determined under the conventional processes for determining offences in the *Criminal Procedure Act 2009*.

The Act significantly changes the time limits for bringing contravention proceedings. Previously, breach proceedings needed to be commenced within 3 years of the commission of the alleged offence. With the commencement of the Act, contravention proceedings must be commenced within 6 months of conviction and within 2 years of the expiry of the order if the contravention involved the commission of another offence. Otherwise, proceedings must be commenced within 1 year of the expiry of the order.<sup>69</sup> The only offences which operate on a limitations period based on the date of the contravention are the contravention of a direction of the Secretary offences, which default to the standard time limit for summary offences – within 12 months of the commission of the offence.<sup>70</sup>

The Act creates two processes for determining contravention offences. The first process applies if:

- a charge-sheet for the contravention offence has been filed;
- a person has been convicted of an offence that constitutes a contravention of an order; and
- the offender is before a court for that other offence.

Under this process, the court which convicted the offender for the offence that constituted a contravention of the CCO may hear and determine the contravention offence, and if it was not the sentencing court, may transfer the proceeding to the sentencing court.<sup>71</sup>

The second process applies if:

- a person has been convicted of an offence that constitutes a contravention of an order; and
- the offender has not been dealt with under the first process.

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<sup>69</sup> *Sentencing Act 1991* s 83AH (as amended).

<sup>70</sup> *Criminal Procedure Act 2009* s7.

<sup>71</sup> *Sentencing Act 1991* s 83AI (as amended). Regrettably, section 83AI is confusingly drafted and on one possible interpretation, it allows any court which hears an offence that constitutes the contravention of a CCO to hear the proceeding for the contravention offence, with the power to transfer proceedings to the sentencing court limited to a court that is not the sentencing court for the CCO. It is assumed that this is not the correct interpretation, and that the power under s83AI(1)(a) to hear the proceeding for a contravention offence is limited to cases where the court is the sentencing court that originally imposed the CCO.

Under the second process, a person entitled to file a charge-sheet may apply to a registrar of the Magistrates' Court for the issue of a contravention summons or warrant to arrest.<sup>72</sup> The main differences between the contravention summons procedure and the charge and summons procedure under the *Criminal Procedure Act 2009* are:

1. The registrar must be satisfied that there are "reasonable grounds to believe that the offender has committed an offence under sections 83AB, 83AC or 83AD", rather than being satisfied that "the charge discloses an offence known to law";<sup>73</sup>
2. The summons can require the offender to attend at the Supreme or County Court if that was the sentencing court, rather than the proper venue of the Magistrates' Court;<sup>74</sup>
3. The time for extension of the return date is "one month" rather than "28 days";<sup>75</sup>
4. Unlike the *Criminal Procedure Act 2009*, the second process does not require a court to inform the accused that he or she has the right, if eligible, to legal aid.<sup>76</sup>

Many of these differences between Part 3C and the *Criminal Procedure Act 2009* can be traced to the previous procedural provisions for breach of a home detention order or a suspended sentence.

The provisions concerning the orders a court can make when a contravention is proven are broader than the previous provisions for breaches, and allow all the options available when a court upholds a request to vary an order. The new provisions also remove the requirement to given written reasons for deciding not to restore a suspended

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<sup>72</sup> Sections 83AI and 83AJ only provides a process for dealing with contravention offences that consist of the commission of some other offence. It is unclear how the courts are meant to deal with other contraventions and whether the charge and summons process under the *Criminal Procedure Act 2009* applies.

<sup>73</sup> Compare *Sentencing Act 1991* s 83AK (as amended) and *Criminal Procedure Act 2009* s12.

<sup>74</sup> Compare *Sentencing Act 1991* s 83AM (as amended) and *Criminal Procedure Act 2009* s15.

<sup>75</sup> Compare *Sentencing Act 1991* s 83AN (as amended) and *Criminal Procedure Act 2009* s19. Part of the policy behind the *Criminal Procedure Act 2009* reforms was to replace time periods measured at one month or less with a specified number of days. This policy has not been carried over to the *Sentencing Amendment (Community Correction Reform) Act 2011*.

<sup>76</sup> Compare section *Sentencing Act 1991* s 83AQ (as amended) and *Criminal Procedure Act 2009* s33.

sentence.<sup>77</sup>

Part 3 of the Act introduces into Division 3 of the new Part 3C a mechanism for the Secretary to deal with contraventions by administrative penalties. The Explanatory Memorandum indicates that Part 3 of the Act will commence later than other provisions. The administrative penalty regime applies where a CCO contains an unpaid community work condition or a curfew condition, the Secretary is satisfied that the offender failed to comply with the order and the matter does not warrant a charge for contravention of the order. In those circumstances, the Secretary may increase the community work condition by up to 16 hours in a 12 month period, or extend the curfew by up to 2 hours a day or the duration of the curfew order by up to 14 days. The order as extended must not breach the statutory maximums concerning the length of unpaid community work or curfew conditions.<sup>78</sup> Extension of a curfew condition in this manner also extends the duration of any associated electronic monitoring condition.<sup>79</sup>

Extension of conditions by administrative decision includes a right to reasons and a right to seek merits review of the decision from the sentencing court. Merits review is in the form of a hearing de novo and must be commenced within 28 days of when the extension decision was made. The Act does not contain any express requirement to provide the offender with a hearing before making an extension decision.

### **Pre-Sentence reports**

The pre-sentence report provisions previously contained in ss 96 – 99 of the *Sentencing Act 1991* are lifted and moved to form new ss 8A – 8D. Following the abolition of the CCTO, ICO and CBO, a pre-sentence report will now be available for the new CCO, as well as youth justice centre orders and youth residential centre order.

The Act significantly broadens the range of matters which may be covered by a pre-sentence report, adding the following to the existing list of matters that may be covered in a pre-sentence report:

- any alcohol, drug and any other substance history disclosed by the offender;
- the ability of the offender to pay a bond;
- any other services that address the risk of recidivism from which the offender may benefit;
- the relevance and appropriateness of any proposed condition;

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<sup>77</sup> See previous section 31(5B).

<sup>78</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* s59.

<sup>79</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* ss56, 57.

- the capacity of the offender to perform unpaid community work;
- the recommended duration of any intensive compliance period of a CCO; and
- the appropriateness of confirming an existing order that applies to the offender.<sup>80</sup>

The Act also gives courts the ability to order that a pre-sentence report be distributed to a person other than the prosecutor, a legal practitioner representing the offender and the offender.<sup>81</sup> The Act also maintains the existing provisions allowing parties to dispute the contents of a pre-sentence report.<sup>82</sup>

Finally, the drug and alcohol assessment report provisions are moved from ss 99 – 99E to new ss 8E – 8I. This process did not introduce any substantive changes, though the abolition of the CCTO reduced the circumstances in which a court must order a drug and alcohol pre-release report, to cases where the court received a drug and alcohol assessment report, the court was satisfied the offender has a drug or alcohol dependency and the court imposed a sentence of not more than 3 months imprisonment in addition to a CCO that commences on release.<sup>83</sup>

### **Licence suspension and alcohol interlocks**

Part 3 of the Act contains a number of changes to the licence disqualification and alcohol interlock provisions. As indicated previously, these will not commence at the same time as Part 2 of the Act.

First, the mandatory disqualification provisions are redrafted. As part of this process, the Act defines the offences where automatic disqualification applies as “serious motor vehicle offences”. This definition is located at the end of the relevant section.

Second, the range of licenses affected by the cancellation provisions are broadened. Under the Act, a license cancellation order also affects the right of the holder of an interstate licence to drive on Victorian roads in the same manner as if the offender held a Victorian licence and extends to cover learner permits, in addition to full licences.<sup>84</sup>

Third, the Act creates a new regime empowering a court to suspend or

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<sup>80</sup> *Sentencing Act 1991* s 8B (as amended).

<sup>81</sup> *Sentencing Act 1991* s 8C (as amended).

<sup>82</sup> Compare existing section 99 and proposed new section 8D.

<sup>83</sup> See *Sentencing Act 1991* s 8H(1)(c) (as amended).

<sup>84</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* s63.

cancel a person's driver licence or learning permit where the person is found guilty of any offence, other than a mandatory disqualification offence. This discretionary disqualification regime allows a judge to either suspend or cancel the offender's licence.<sup>85</sup> The period of cancellation is set by the court and, if the court does not set a period, the default period set by the legislation is 3 months.<sup>86</sup> If the court chooses to cancel a licence, rather than suspend it, then the offender must apply to the Magistrates' Court after the expiry of the disqualification before he or she can obtain a new licence. This process is very similar to the existing provisions where the person is subject to mandatory disqualification, though the offender must obtain an assessment report about his or her drug and alcohol use at least 3 months before applying for a licence restoration, rather than 12 months as under the mandatory disqualification provisions. The court may, in exceptional circumstances, reduce this period.<sup>87</sup>

Fourth, the Act introduces a presumption of concurrency between licence suspension or disqualification orders.<sup>88</sup> This presumption applies when a person is subject to a further licence disqualification or suspension order when there is already such an order in operation. The presumption does not operate when statutory provisions under the *Road Safety Act 1986* specify that suspension or disqualification is cumulative.

Fifth, there is a statutory deeming provision so that a person's licence is automatically cancelled when the court makes a disqualification order.<sup>89</sup> This removes the need for separate cancellation and disqualification orders.

Sixth, a new section 88 specifically states that proceedings under Division 3 of Part 4 of the *Sentencing Act* relate to sentencing for the purpose of s 4(2) of the *Evidence Act 2008*.<sup>90</sup> This means that the provisions of the *Evidence Act* only apply if the court directs that they do.

Finally, the Act redrafts and expands the provisions on alcohol interlock

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<sup>85</sup> *Sentencing Act 1991* s89AB (as amended). If the judge cancels the offender's licence, then the offender is disqualified from seeking a new licence for the period specified by the court.

<sup>86</sup> *Sentencing Act 1991* s89AD (as amended).

<sup>87</sup> *Sentencing Act 1991* s89AE (as amended). Given that the default period of licence disqualification is 3 months, the operation of the default provisions means that unless the court makes orders to the contrary, an offender would generally seek an assessment report immediately after the court makes the licence disqualification order. This reduces the potential for the court to look at rehabilitation over the course of the order.

<sup>88</sup> *Sentencing Act 1991* s89AG (as amended).

<sup>89</sup> *Sentencing Act 1991* s89AH (as amended).

<sup>90</sup> *Sentencing Act 1991* s88 (as amended).

conditions, and includes a tighter regime for the courts to notify Roads Corporation when it finds that an offence was committed under the influence of drugs or alcohol. As part of this, the Magistrates' Court may require Roads Corporation to impose an alcohol interlock condition on a licence obtained after a court has exercised the new discretionary licence cancellation power.<sup>91</sup> The amendments otherwise make little substantive change to the alcohol interlock provisions.

### **Victim Impact Statements**

The victim impact statement provisions have been relocated from ss 95A – 95H to new ss 8J – 8S. Within the provisions, there are minor drafting changes, such as a discrete definitions section, but no substantive changes.

### **Conclusion**

The Act replaces most intermediate sanctions with the new community correction order, while also making several structural changes to the *Sentencing Act 1991*. Courts and court users familiar with the community based order are likely to readily understand the operation of the new CCO provisions, but judicial officers who are not used to imposing a CBO will need to carefully consider the new detailed and complex statutory regime.

While the reforms increase the range of options available to the court, it also elevates the importance of the pre-sentence report. Judicial officers will therefore need to be familiar with the processes for obtaining pre-sentence reports and the time required, as otherwise the pre-sentence report process may frustrate a judicial officer's desire to impose sentence in a timely manner.

The value of the new order will depend in part on the ability of Corrections Victoria to provide pre-sentence reports in a timely manner and to provide or facilitate an adequate range of services to implement the orders in the community. Judicial officers will also need to craft conditions that are well suited to the circumstances of the offender and address the underlying causes of crime. To that extent, the process of formulating a CCO may be more complex than other sentencing tasks, and similar to the current process of imposing an ICO or CBO, or setting the conditions on a family violence or personal safety intervention order.

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<sup>91</sup> See *Sentencing Amendment (Community Correction Reform) Act 2011* s67.