

Judicial Officers' Bulletin

Published by the Judicial Commission of NSW



September 2018, Volume 30 No 8



The sentencing reforms – balancing the causes and consequences of offending with community safety

Pierrette Mizzi

Director, Research and Sentencing, Judicial Commission of NSW

The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (the amending Act) will commence on 24 September 2018.¹ This article provides an overview of the major changes to the *Crimes (Sentencing Procedure) Act 1999* (CSP Act) and the *Crimes (Administration of Sentences) Act 1999* (CAS Act) and corresponding amendments to the *Crimes (Sentencing Procedure) Regulation 2017* (CSP Regulation) and the *Crimes (Administration of Sentences) Regulation 2014* (CAS Regulation) which commence at the same time.² References to sections or clauses of the Acts and regulations are to the Acts and regulations as amended.

The amending Act is the Government's response to the NSW Law Reform Commission's (NSWLRC) recommendations in its 2013 *Sentencing* report.³ One of the report's stated aims was to develop a range of sentencing options flexible to the circumstances of a particular case and that promoted prevention of, and reduction in, reoffending.⁴

The Attorney General, Mark Speakman SC, said in the Second Reading Speech that:

"[the amending Act] will introduce new, tough and smart community sentencing options that will promote community safety by holding offenders accountable and tackling the causes of offending."⁵

This encapsulates the twin aims of the reforms: to balance accountability with a focus on the offender's criminogenic and rehabilitation needs. On the one hand, the sentencing reforms further limit those offenders who can serve a sentence of imprisonment by way of an intensive correction order (ICO),⁶ and introduce a presumption that

1 Assented to 24 October 2017.

2 Amended by the *Crimes (Sentencing Procedure) Amendment (Community-based Orders and Other Matters) Regulation 2018* and the *Crimes (Administration of Sentences) Amendment (Community-based Orders and Other Matters) Regulation 2018*.

3 NSWLRC, *Sentencing*, Report No 139, 2013.

4 *ibid* p xv.

5 NSW, Legislative Assembly, Parliamentary Debates, 11 October 2017, p 1.

6 See below at pp 75–76.

Features

- 73 The sentencing reforms — balancing the causes and consequences of offending with community safety
Pierrette Mizzi

Recent Decisions

- 81 High Court
The Queen v Falzon
DL v The Queen
Nobarani v Mariconte

- 83 NSW Court of Appeal
Hunter Quarries Pty Ltd v Mexon

- 84 Education Calendar
Select legislation
Judicial moves

domestic violence offenders will ordinarily be sentenced to full-time imprisonment or a supervised order.⁷

On the other hand, an important feature of the reforms is also to “help offenders receive the supervision and programs that address their offending behaviour, resulting in less crime and fewer victims”.⁸ Subject to certain limitations, the amendments provide judicial officers with a degree of flexibility in nominating conditions for community-based orders to meet the needs of individual offenders. Assessment reports provided on sentence by Community Corrections will usually provide the evidential basis for making those decisions.

Brief outline of key changes

In summary, the amending Act:

- abolishes home detention orders (previous s 6), community service orders (previous s 8), good behaviour bonds (previous s 9) and suspended sentences (previous s 12) from the CSP Act
- replaces community service orders and good behaviour bonds with community correction orders (CCOs) and conditional release orders (CROs)
- makes various changes to the structure of ICOs principally by enabling a sentencing court to determine for itself the appropriate conditions with respect to a particular offender rather than, as previously, having no such discretion because the conditions of an ICO were mandatory and applied regardless of whether they were appropriate for the offender or met the offender’s particular needs
- confers powers on community corrections officers to vary supervision and certain other conditions imposed at sentence by a court for a community-based sentencing option during the period of the particular order, and
- confers broader powers on the State Parole Authority (SPA) with respect to dealing with breaches of ICOs.

The powers of a court to discharge a person without proceeding to conviction on the condition they agree to participate in an intervention program (in s 10(1)(c)), convict an offender but impose no other penalty (in s 10A) or defer passing sentencing for rehabilitation purposes (in s 11) are not changed.

The NSWLRC concluded that home detention orders and ICOs were underutilised sentencing options.⁹ In relation to ICOs in particular, they were utilised for offenders with a low risk of reoffending while offenders with a higher risk of offending, who would be assisted by greater support in addressing their underlying criminogenic factors, were

not given the benefit of such a sentencing option. The Commission proposed replacing both with a “community detention order” which was perceived to have important advantages in terms of reducing reoffending, reducing costs and keeping offenders out of prison.¹⁰ The changes made to the statutory provisions concerning ICOs are apparently directed towards this proposal.

Transitional provisions — CSP Act 1999

Part 29 of Sch 2 of the CSP Act contains the transitional provisions. The following summarises, in broad terms, how the repealed sentencing orders in force immediately before the “commencement day”¹¹ will be recognised under the new sentencing regime:

Home detention orders are taken to be an ICO subject to the standard ICO conditions,¹² a home detention condition and certain other conditions: Sch 2, Pt 29, cl 71.

Existing ICOs are taken to be an ICO subject to the standard conditions and certain other conditions: Sch 2, Pt 29, cl 72.

Community service orders are taken to be a CCO subject to the standard condition that the offender must appear before court if called upon to do so,¹³ a community service work condition and certain other additional conditions prescribed by the regulations: Sch 2, Pt 29, cl 73.

Section 9 bonds are taken to be a CCO subject to the standard conditions, any other conditions imposed on the bond before 24 September 2018 and any other conditions prescribed by the regulations: Sch 2, Pt 29, cl 74.

Section 10(1)(b) bonds are taken to be a CRO, without proceeding to conviction, subject to the standard conditions,¹⁴ any conditions imposed on the bond under the previous s 95(c) before 24 September 2018 and any other conditions prescribed by the regulations: Sch 2, Pt 29, cl 75.

Suspended sentences continue in force for up to 3 years after 24 September 2018 unless revoked: Sch 2, Pt 29, cl 76.

See the table on p 80 which addresses this in some detail.

An appeal pending on 24 September 2018 with respect to any of the previous sentence options is not affected by the amending Act unless the court hearing the appeal decides to sentence or re-sentence the offender, in which case, it must do so in accordance with the CSP Act as in

7 CSP Act, s 4A, discussed below at pp 79–80.

8 Second Reading Speech, above n 5, p 2.

9 Above n 3, p xviii.

10 ibid, pp xviii, xix.

11 Commencement day is defined as “the day appointed for the commencement of the insertion, repeal or amendment (made by the amending Act) that is relevant to the provision”: CSP Act, Pt 29, Sch 2, cl 70.

12 Set out in CSP Act, s 73 discussed below at p 76.

13 See CSP Act, s 88(2)(b) discussed below at p 79.

14 Set out in CSP Act, s 98 discussed below at p 78.

force from 24 September 2018. Similarly, if an appeal is lodged after 24 September 2018 in respect of a sentence imposed before then, a court re-sentencing the offender must do so in accordance with the Act as in force from 24 September 2018: Sch 2, Pt 29, cl 86.

Assessment reports

An assessment report will be important evidence in the sentence proceedings given that the conditions that may be imposed on community-based orders are intended to meet the individual needs of a particular offender.

The relevant statutory requirements are contained in the new Pt 2 Div 4B (ss 17B–17D) of the CSP Act.

Section 17B(2) provides that the purpose of an assessment report is to “assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender”. The report must be prepared by either a community corrections officer or a juvenile justice officer.¹⁵ Community Corrections uses an evidence-based approach to identify an offender’s risk of re-offending and the interventions required are based on their assessment of the likelihood of re-offending, the individual needs of the offender and the level of supervision and types of programs that will best meet those needs.¹⁶

An assessment report is:

- generally required before making an order for an ICO;¹⁷ and
- must always be obtained before imposing home detention as a condition of an ICO or imposing community service work as a condition of either an ICO or CCO.¹⁸

A sentencing court is not otherwise obliged to request an assessment report for an offender: s 17C(1). While not compulsory, given the importance of considering whether, and what, appropriate conditions would meet the needs of an individual offender it is reasonable to assume a report would be requested in the majority of cases.

Clause 12A(1) of the CSP Regulation sets out the following matters which a report must address:

- the offender’s risk of reoffending;
- any factors related to their offending behaviour;
- any factors impacting on their ability to address their offending behaviour;
- how those matters would be addressed by supervision and the availability of resources to do so;
- any conditions that would facilitate effective supervision of the offender in the community;
- their suitability for community service work;
- a summary of their response to any previous period of management in the community in respect of any relevant order;

- any specific additional matters the court wishes to be addressed.

Although cl 12A(1) is expressed in mandatory terms, cl 12A(3) provides that the report need not address a matter if it is not relevant to the offender’s circumstances or the court does not require it to be addressed.

A report concerning a home detention condition cannot be requested until a sentence of imprisonment has been imposed: s 17D(3).

Clause 12B(1) of the CSP Regulation provides that reports concerning home detention conditions must address:

- the offender’s suitability for home detention;
- any risks with imposing home detention (including risks to the offender or any other person, including children);
- any strategies that could manage the risks, and
- any other matters relevant to administering an ICO with a home detention condition.

Clause 12B(2) provides that if the offender does not have suitable accommodation the assessment report for a home detention condition cannot be finalised until reasonable efforts have been made by Community Corrections, in consultation with the offender, to find suitable accommodation.

The new sentencing options

Intensive correction orders

Under s 7(1) of the CSP Act, a court sentencing an offender to imprisonment for one or more offences may make an ICO directing that the sentence be served by way of intensive correction in the community. An ICO cannot be made for an offender who is under 18: s 7(3).

The sentencing procedures for ICOs are set out in Pt 5 of the CSP Act. Changes made to various of the procedures with respect to ICOs were said to be directed towards “strengthening” the ICO.¹⁹

Section 66 introduces the requirement that community safety is the paramount consideration when a sentencing court is deciding whether to make an ICO and requires the court to:

- assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender’s risk of offending: s 66(2), and
- consider the purposes of sentencing in s 3A, any relevant common law principles and any other matters the court considers relevant: s 66(3).

This requirement, which includes an assessment of whether the order is more likely to address an offender’s risk of re-offending, and the fact a sentencing court has a greater degree of flexibility when determining appropriate conditions largely targeted towards an

¹⁵ CSP Act, s 17B(3).

¹⁶ See R Caruana, “Community Corrections’ service delivery model: an evidence-based approach to reduce reoffending” (2018) 30 JOB 57.

¹⁷ Section 17D(1) although note the qualification in s 17D(1A).

¹⁸ Section 17D(2), (4).

¹⁹ See Second Reading Speech, above n 5, p 2.

offender's individual needs, invites consideration of whether an ICO will continue to always be regarded as a substantial punishment which meets those purposes of sentencing in s 3A such as denunciation and deterrence.²⁰ In *R v Boughen*, Simpson J (as her Honour then was) expressed the view that an offender should not be subject to an ICO unless there was a real need for rehabilitation in the community.²¹ Although that view was subsequently rejected by a five-judge bench in *R v Pogson*,²² the changed approach to setting conditions for an ICO as a result of these reforms, and reducing the number of mandatory conditions, together with the broad powers conferred on Community Corrections and the SPA to deal with breaches of orders, may impact on whether ICOs continue to be made for certain offences.

An order directing that a sentence of imprisonment be served by way of an ICO cannot be made if the sentence:

- exceeds 2 years, in the case of a single offence,²³ or
- exceeds 3 years in the case of either an aggregate sentence under s 53A²⁴ or where separate sentences are imposed but the effective sentence exceeds 3 years.²⁵ The duration of any individual sentence cannot exceed 2 years.²⁶

Section 67(1) identifies the following offences in respect of which an ICO cannot be made:

- murder or manslaughter
- certain terrorism offences
- offences involving the discharge of a firearm
- contraventions of serious crime prevention orders or public safety orders
- prescribed sexual offences, defined in s 67(2), which includes a broad range of State and Commonwealth sexual offences involving children under 16 years old and certain offences of sexual assault against an adult.

The range of excluded offences is more extensive than was the case before these amendments commenced.

It is arguable that s 67(2) is invalid to the extent that it purports to proscribe a NSW court from imposing an ICO for any of the named federal offences because, under s 109 of the Constitution, such a restriction is beyond the legislative power of the State. Section 20AB of the *Crimes Act 1914* (Cth) permits a court sentencing a federal offender to make particular orders such as ICOs, provided a NSW court sentencing a NSW offender in a "corresponding case" is permitted to do so: s 20AB(1)(b).

Whether or not each of the federal offences listed has a "corresponding case" needs consideration.

The term of the ICO is the same as the term of imprisonment in respect of which the order was made and it commences on the date it is made (unless it will be served consecutively with another ICO).²⁷

Specific requirements for assessment reports for ICOs

The general requirements for assessment reports have been discussed above. Although a court cannot make an ICO without an assessment report, s 17D(1A) of the CSP Act provides that there is no need to request one if the court is satisfied it has sufficient information before it to justify making the ICO.

Section 69(1) provides that, when deciding whether to make an ICO, the court is also to have regard to the assessment report, evidence from a community corrections officer and any other information before the court that the court considers necessary for the purpose of deciding whether to make the order.

However, s 69(2) provides that a court is not bound by the assessment report subject to two important qualifications:

1. a court cannot impose home detention or community service work as a condition of an ICO unless the assessment report states that the offender is suitable,²⁸ and
2. an ICO cannot be made if the offender resides in another State or Territory unless the regulations declare that State or Territory to be an approved jurisdiction.²⁹

ICO conditions

An ICO is no longer subject to extensive mandatory conditions.

Every ICO must include the **standard conditions**.³⁰

These are that the offender must not commit any offence and must submit to supervision by a community corrections officer.³¹ An ICO must also include at least one **additional condition**³² but a court is not required to impose an additional condition if satisfied there are exceptional circumstances for not doing so.³³ Additional conditions include: home detention, electronic monitoring, curfews, community service work, rehabilitation, abstention from alcohol and/or drugs, non-association and/or place restrictions.³⁴

20 *R v Pogson* (2012) 82 NSWLR 60 at [106].

21 (2012) 215 A Crim R 476 at [109]–[111].

22 (2012) 82 NSWLR 60.

23 CSP Act, s 68(1).

24 CSP Act, s 68(2).

25 CSP Act, s 68(3)(b).

26 CSP Act, s 68(3)(a).

27 CSP Act, ss 70, 71.

28 CSP Act, s 73A(3).

29 CSP Act, s 69(3). At the time of writing no State or Territory has been declared as an approved jurisdiction.

30 CSP Act, s 73(1).

31 CSP Act, s 73(2).

32 CSP Act, s 73A(1).

33 CSP Act, s 73A(1A). A record must be made of the reasons for not doing so. However, a failure to do so will not invalidate the sentence: s 73 A(1B).

34 CSP Act, s 73A(2).

When community service work is imposed as a condition of an ICO, cl 14(1) of the CSP Regulation prescribes the maximum hours as:

- (a) 100 hours for offences with a maximum term of imprisonment not exceeding 6 months, or
- (b) 200 hours for offences with a maximum term of imprisonment exceeding 6 months but not 1 year, or
- (d) 750 hours for offences with a maximum term of imprisonment exceeding 1 year.

The minimum period such a condition must be in force is set out in cl 14(2) as:

- (a) 6 months if the hours do not exceed 100 hours, or
- (b) 12 months if the hours exceed 100 but not 300 hours, or
- (c) 18 months if the hours exceed 300 hours but not 500 hours, or
- (d) 2 years if the hours exceed 500 hours.

Further conditions may also be imposed provided these are not inconsistent with the standard or additional conditions.³⁵

Before these amendments commenced, an ICO was recognised as a substantial punishment to be utilised in an appropriate case, although it was also accepted that it was an order that reflected a significant degree of leniency.³⁶ However, one basis for concluding that an ICO was a “substantial punishment” appears to have been because the order was subject to mandatory conditions, which in *R v Pogson* were described as “stringent” with the result that an ICO deprived an offender of their liberty “in a real and not merely fictional sense”.³⁷ It may be open to debate whether an ICO continues to have that effect, particularly given the powers conferred on Community Corrections and the SPA to subsequently suspend certain conditions imposed by a sentencing court. Determining the severity, or otherwise, of an ICO as a sentencing option should be done by assessing the statutory scheme as a whole, which includes the relevant provisions in the CAS Act, the CSP Regulation and the CAS Regulation.³⁸

Power of Community Corrections with respect to ICO breaches

The amendments confer significant powers on Community Corrections with respect to dealing with breaches of ICOs and the power to suspend conditions imposed by a court on sentence. Under s 163 of the CAS Act, when an offender fails to comply with their obligations under an ICO, Community Corrections may:

- record the breach but take no action
- give the offender an informal warning
- give, or arrange SPA to give, the offender a formal warning

³⁵ CSP Act, s 73B.

³⁶ *R v Pogson* (2012) 82 NSWLR 60 at [106]; *Whelan v R* (2012) 228 A Crim R 1 at [120].

³⁷ *R v Pogson* at [109].

³⁸ See the discussion in *R v Tannous* (2012) 227 A Crim R 251 at [17]–[24].

³⁹ CAS Act, s 163(3).

⁴⁰ CAS Act, s 82A.

⁴¹ See CAS Act, s 164(2).

⁴² cf CSP Act, s 86(4) as in force before 24 September 2018.

- give the offender a reasonable direction relating to the behaviour which caused the breach
- impose a curfew of up to 12 hours in any 24 hour period.

Alternatively, or in addition, Community Corrections may also refer a serious breach to the SPA and may also make recommendations concerning the action the SPA may take in respect of the offender.³⁹

Community corrections officers also have the power to suspend supervision, curfew, non-association or place restriction conditions originally imposed by the sentencing court on an ICO although a suspension order cannot be made unless approved by a more senior officer.⁴⁰

The State Parole Authority's role with respect to ICO breaches

The SPA has more extensive powers to deal with breaches of ICOs.

Section 81A of the CAS Act gives the SPA powers, similar to those of a sentencing court, with respect to imposing (or varying or revoking) the conditions of an ICO. On the application of a community corrections officer, or the offender, the SPA may:

- impose conditions on an ICO, or
- vary or revoke any conditions of an ICO, including those imposed by the sentencing court.

The limitations to the exercise of that power are identified in s 81A(2).

Under s 164 of the CAS Act, if the SPA is satisfied an offender has failed to comply with their obligations under an ICO, it has the power to deal with the breach more broadly than was previously the case. Previously, sanctions for breach of an ICO dealt with by the SPA were largely punitive. However, now the possible actions on a breach of an ICO range from taking no action to revocation of the ICO.⁴¹

Community correction orders

Community correction orders are provided for in s 8 of the CSP Act and are an alternative to sentencing an offender to a term of imprisonment (s 8(1)). Subject to the specific exceptions identified below, and unlike previously in relation to community service orders, there is no statutory requirement to obtain an assessment report before considering whether a CCO should be made with respect to a particular offender. The imposition of a CCO is not contingent on a requirement that the particular offender first be found suitable for community service work as previously required when making a community service order.⁴² The maximum term of a CCO is 3 years: s 85(2). CCOs must include the standard conditions (identified in s 88).

These are that the offender:

- must not commit any offence, and
- must appear before the court if called upon during the term of the CCO.

Additional or further conditions can be imposed at the time of sentence, or subsequently on the application of either a community corrections officer or the offender: ss 89(1), 90(1). In either case, the court may limit the time during which such conditions are in force.

Section 89(2) provides that the available additional conditions for a CCO are:

- a curfew (not exceeding 12 hours in any 24 hour period)
- community service work for a specified number of hours (but not exceeding 500 hours)
- a condition requiring the offender to participate in a rehabilitation program or receive treatment
- a condition requiring abstention from alcohol or drugs or both
- a non-association or place restriction condition
- a supervision condition.

Supervision cannot be a condition of a CCO if the offender lives in another State or Territory unless that State or Territory is declared to be an approved jurisdiction.⁴³

As is the case with an ICO, community service work cannot be a condition of a CCO without the court first obtaining an assessment report: s 89(4). Nor can it be a condition of a CCO if the *Children (Community Service Orders) Act 1987* applies to the offender,⁴⁴ or if the offender lives in another State or Territory unless the court is satisfied the offender can travel to NSW to complete the community service work or the State or Territory is declared to be an approved jurisdiction.⁴⁵ When community service work is a condition of a CCO, the times allowed for completion are the same as when such work is a condition of an ICO but the specified hours cannot exceed 500.⁴⁶

Home detention, electronic monitoring or a curfew condition exceeding 12 hours in any given 24-hour period cannot be a condition of a CCO: s 89(3).

A court may impose further conditions on a CCO but there is no requirement to do so.⁴⁷ Any further conditions must not be inconsistent with the standard or additional conditions permitted for a CCO or be of a kind that would not be permitted by s 89(3).⁴⁸

Conditional release orders

Conditional release orders (CROs) are provided for in s 9 of the CSP Act and replace the good behaviour bonds which were previously imposed under either the former ss 9 or 10(1)(b).⁴⁹

A fine and a CRO cannot be imposed for the same offence: s 9(1), (3).

A CRO can be made if the court convicts the offender or does not convict them but discharges the person pursuant to a CRO under s 10(1)(b): s 9(1)(a), (b). When considering whether to convict an offender and make a CRO, s 9(2) now requires the court to have regard to:

- the offender's character, antecedents, age, health and mental condition
- whether the offence is of a trivial nature
- the extenuating circumstances in which it was committed
- any other matter the court thinks proper.

Previously a court was only required to consider those matters when deciding whether to dismiss a charge which had been proved or release an offender on a bond without conviction.

The sentencing procedures for CROs are set out in Pt 8 of the CSP Act. In summary:

- a CRO cannot exceed 2 years: s 95(2)
- as with ICOs and CCOs, certain standard conditions must be imposed (s 98) and a court may also impose identified additional or further conditions: ss 99–99A. However, unlike ICOs there is no requirement to impose a supervision condition.

The standard conditions of a CRO are the same as for a CCO, that is, the offender must not commit any offence⁵⁰ and must appear before the court if called upon to do so during the term of the CRO.

Notwithstanding there is no requirement to obtain an assessment report when considering whether to impose a CRO, identifying appropriate additional or further conditions can only be sensibly done with the assistance of such a report.⁵¹ Additional conditions may be imposed either at the time of sentence or after the conclusion of the proceedings on the application of a community corrections or juvenile justice officer or the offender: CSP Act, s 99(1). The available additional conditions for a CRO are identified in s 99(2) and include: supervision, rehabilitation or treatment, abstention from alcohol, drugs or both, and non-association and place restrictions.

⁴³ CSP Act, s 89(4A). As with ICOs, no State or Territory is currently declared to be an approved jurisdiction.

⁴⁴ CSP Act, s 8(2). That is, an offender who was a child when the relevant offence was committed and under 21 years old when they were charged: *Children (Community Service Orders) Act 1987*, s 4.

⁴⁵ CSP Act, s 89(4A), (4B).

⁴⁶ See above at p 77 as per cl 14(1), (2).

⁴⁷ CSP Act, s 90(1).

⁴⁸ CSP Act, s 90(2), (3).

⁴⁹ However, direct comparison is not entirely appropriate as is apparent from the transitional provisions and the summary of those provisions: see above at p 74.

⁵⁰ Clause 186 of the *Crimes (Administration of Sentences) Regulation 2014* (CAS Regulation) states that an offender subject to such a condition is obliged not to commit any offence.

⁵¹ See discussion above at p 75.

Similar to ICOs and CCOs, s 99A permits the imposition of further conditions either on sentence or afterwards provided those further conditions are not inconsistent with the standard or the additional conditions.

Procedures for revocation or variation of CCOs and CROs

A community corrections (or juvenile justice) officer or an offender can apply to the court to impose, vary or revoke additional or further conditions of a CCO⁵² or a CRO.⁵³ The procedures for making and dealing with such applications are set out in cl 13 of the CSP Regulation.

Applications for imposing, varying or revoking additional or further conditions of either a CCO or CRO are required by the CSP Regulation to be made in writing within specified time parameters.⁵⁴

The court is required to give notice of the date fixed for hearing to the offender or to Community Corrections (depending on who is the applicant).⁵⁵

On dealing with such an application, a court can:⁵⁶

- refuse an offender's application if satisfied it is without merit
- deal with an application in the parties' absence provided they consent
- deal with the application in open court or in the absence of the public.

Breaches of CCOs and CROs

Courts retain the power to deal with breaches of CCOs and CROs⁵⁷ and the procedure for dealing with breaches is substantially the same as before 24 September 2018.

Both orders include a standard condition that the offender must appear before the court if called upon to do so "at any time during the term of the ... order"⁵⁸ which suggests breach proceedings must commence during the period of the order and cannot be dealt with once the particular order has expired.

Previously a court may have dealt with the breach of an order by imposing a more severe penalty. However, courts appear to have a greater degree of flexibility in dealing with breaches of CCOs or CROs because, upon breach, the conditions of the original order (except for the standard conditions) can be varied, revoked or further conditions may be imposed.⁵⁹ The power to vary or add

particular conditions suggests orders can evolve to meet the needs of the community and those of the individual offender.

Increased powers of Community Corrections

The powers of Community Corrections to deal with breaches of any of the community-based sentencing options are significantly expanded as a result of the reforms.

Community corrections officers⁶⁰ are now empowered to suspend a supervision condition or curfew, non-association or place restrictions originally imposed by a sentencing court on ICOs, CCOs or CROs.⁶¹

When considering whether to suspend a supervision condition, cl 189I(1) of the CAS Regulation requires a community corrections officer to take into account the following:

- a. the risk of the offender re-offending
- b. the seriousness of their criminal history
- c. the likely benefits of the supervision condition continuing to apply and the effect of any other measures that are being, or may be, taken to address the risk of the offender re-offending
- d. the resources available to supervise the offender and other offenders who may be at a higher risk of re-offending.

A suspension order with respect to supervision cannot be made unless it is approved by a more senior officer than the community corrections officer.⁶²

Domestic violence offenders

The amending legislation creates special requirements for offenders sentenced for domestic violence offences. A "domestic violence offence" is defined in s 3 as having the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007*. Section 11 of that Act states that such an offence means one committed by a person against another person with whom the first person has, or had, a domestic relationship.

Offenders sentenced for domestic violence offences are to be sentenced to full-time imprisonment or a supervised order: CSP Act, s 4A(1). A "supervised order" is defined as an ICO, CCO or CRO which includes a supervision condition: s 4A(3).

52 CSP Act, ss 89(1) and 90(1).

53 CSP Act, ss 99(1) and 99A(1).

54 *Crimes (Sentencing Procedure) Regulation 2017* (CSP Regulation), cl 13.

55 CSP Regulation, cl 13(4), (5).

56 See CSP Act, s 91 for CCOs and s 100 for CROs.

57 See CAS Act, Pt 4B for CCOs and Pt 4C for CROs. In particular, see CAS Act, ss 107C and 107D (for breaches and revocation of CCOs) and ss 108C and 108D (for breaches and revocation of CROs).

58 CSP Act, s 88(2)(b) for CCOs and s 98(2)(b) for CROs.

59 CAS Act, ss 107C(5) and 108C(5).

60 For this purpose, a community corrections officer includes a juvenile justice officer — see CAS Act, ss 107E(7) and 108E(7). An order for suspension made by a juvenile justice officer can be revoked by a community corrections officer if the particular offender has turned 18 — see ss 107E(8) and 108E(8).

61 See CAS Act, s 82A (ICOs), s 107E (CCOs) and s 108E (CROs)

62 CSP Regulation, cl 189I(2).

An ICO must not be made for a domestic violence offence unless the court is satisfied the victim, and any person with whom the offender is likely to reside, will be adequately protected (either by conditions attached to the ICO or for some other reason): s 4B(1). The ICO cannot include a home detention condition if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2).

The court must consider the victim's safety before making either a CCO or CRO: s 4B(3).

Conclusion

Whether the reforms successfully balance the objectives of enabling offenders to address their offending behaviour and reduce crime rates cannot be predicted at this stage. As a result of the increased restrictions imposed on the use of an ICO alone, it is not unreasonable to assume that more offenders will serve sentences of full-time imprisonment.

The reforms do have the capacity to reduce recidivism because conditions may be tailored to meet the individual offender's criminogenic and rehabilitation needs. If Community Corrections are sufficiently resourced on an ongoing basis to provide the interventions and programs required to address these, recidivism rates potentially should reduce.

Sentencing options table: before and after 24 September 2018*

Pre-24 Sept order	Status after commencement of Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017
Home detention order	<p>Taken to be an intensive correction order (ICO) subject to:</p> <ul style="list-style-type: none"> • standard ICO conditions under s 73(2) • a home detention condition • any conditions imposed under s 103(1)(b) or (c) or s 103(2)(a) <i>Crimes (Administration of Sentences) Act 1999</i> and in force immediately before 24 September 2018 in respect of the home detention order • any other conditions prescribed by or determined under the regulations <p>See Sch 2, Pt 29, cl 71 <i>Crimes (Sentencing Procedure) Act 1999</i></p>
Existing intensive correction order	<p>Taken to be an ICO subject to:</p> <ul style="list-style-type: none"> • standard ICO conditions under s 73(2) • any conditions imposed under s 81(3) <i>Crimes (Administration of Sentences) Act</i> and in force immediately before 24 September 2018 • a condition that requires the offender to undertake a minimum of 32 hours of community service work a month, as directed by a community corrections officer • any other conditions prescribed by or determined under the regulations <p>See Sch 2, Pt 29, cl 72 <i>Crimes (Sentencing Procedure) Act 1999</i></p>
Community service order (CSO)	<p>Taken to be a community correction order (CCO) subject to:</p> <ul style="list-style-type: none"> • the standard condition under s 88(2)(b) — that the offender must appear before the court if called on to do so at any time during the term of the order • a community service work condition (specifying the same number of hours required for the performance of community service work as were specified in the CSO) • any other conditions prescribed by or determined under the regulations • an additional condition under s 89(2)(c) (a rehabilitation or treatment condition), if the CSO had a condition of participation in a development program under s 90 (as in force before 24 September 2018) • an expiry date 12 months from the date of the order if the required number of hours is less than 300, or 18 months from the date of the order if the required number of hours is 300 or more (or if the order is extended for any further period before 24 September 2018, at the end of that further period) <p>See Sch 2, Pt 29, cl 73 <i>Crimes (Sentencing Procedure) Act 1999</i></p>
Section 9 bonds	<p>Taken to be a CCO subject to:</p> <ul style="list-style-type: none"> • standard CCO conditions under s 88(2) • any conditions referred to in section 95(c) <i>Crimes (Sentencing Procedure) Act</i> that were imposed on the s 9 bond before 24 September 2018 and in force immediately before that day • any other conditions prescribed by or determined under the regulations <p>See Sch 2, Pt 29, cl 74 <i>Crimes (Sentencing Procedure) Act 1999</i></p>
Section 10(1)(b) bonds	<p>Taken to be a conditional release order (CRO) without proceeding to conviction subject to:</p> <ul style="list-style-type: none"> • standard CRO conditions under s 98(2) • any conditions referred to in section 95(c) <i>Crimes (Sentencing Procedure) Act</i> that were imposed on the s 10(1)(b) bond before 24 September 2018 and in force immediately before that day • any other conditions prescribed by or determined under the regulations <p>See Sch 2, Pt 29, cl 75 <i>Crimes (Sentencing Procedure) Act 1999</i></p>
Suspended sentences	<ul style="list-style-type: none"> • suspended sentences continue in force despite the repeal of s 12, for a period of 3 years from 24 September 2018. • if a suspended sentence order is still in force immediately before the end of that period, the offender must appear before the court to be re-sentenced <p>See Sch 2, Pt 29, cl 76 <i>Crimes (Sentencing Procedure) Act 1999</i></p>

* Table collated by Amanda Jamieson, Senior Research Officer, Judicial Commission.