Transforming Criminal Justice

DISCUSSION PAPER | JUNE 2015

Better Sentencing Options: Creating the Best Outcomes for Our Community

Attorney-General's Department

"Putting People First"

Government of South Australia
Attorney-General's Department

Contents

Feedback on this Discussion Paper can be provided via email to justicereform@sa.gov.au or to Justice Sector Reform, Office of the Chief Executive, Attorney-General's Department, GPO Box 464, ADELAIDE SA 5000.

Feedback must be lodged by **29 August 2015**.

Important information about your submission

If you do not want the public to read your answers, please write "confidential" on your submission. Please be aware that unless you write "confidential" on your submission it may be made public.

If someone asks for your answers through the Freedom of Information Act process, and if you have told us your answers are confidential, we will contact you and explain what is happening. However, we have to follow the law. Even if your answers are confidential, we may still have to let someone read your confidential answers, if they ask for them through the Freedom of Information Act process.

Introduction

The South Australian community deserves a criminal justice system that enhances community safety and operates efficiently and effectively. The criminal justice system must hold offenders accountable for their actions and must ensure they face appropriate consequences for their actions. The system must attempt to deter reoffending.

The question is: What is the best way to achieve this?

This Discussion Paper on Better Sentencing Options continues the Government's conversation with the community about criminal justice sector reform and in particular, what the appropriate consequences are for offenders who commit crimes and how best the community can be served through sentencing.

Community protection must remain the primary objective. Community safety is enhanced when the rate at which people commit crimes is reduced and by ensuring people in our community are deterred from committing crimes.

The Government is asking the community to consider whether some individuals, who would otherwise be sentenced to imprisonment, could be punished and rehabilitated in other ways.

By remaining in the community, an offender has better opportunities to rehabilitate and therefore may be less likely to commit more criminal offences. By providing an improved and more flexible sentencing regime we want to contribute to lower rates of recidivism, thereby enhancing community safety and slowing the increase in prisoner numbers.

We are already achieving significant success in managing offenders in the community, for example, through the management of offenders in their homes with electronic monitoring and intensive supervision.

New technologies, such as GPS, have created new ways of both protecting the community and supervising offenders in our community more effectively and efficiently.

Through this Discussion Paper the Government is asking the community to consider that the community could be better served by not imprisoning some offenders.

The community is asked to consider what purpose is served from imprisonment and that serving a sentence in the community can provide better long term outcomes for South Australia. The intention of this Discussion Paper is to reconsider the appropriate sentences for those offenders who can be rehabilitated.

However, the Government will not compromise community safety and therefore acknowledges that for many offenders, imprisonment will remain the only option. Public safety must continue to be the primary objective.

Executive Summary

In December 2014 the Attorney-General released the "Transforming Criminal Justice: Putting People First" Strategic Overview (the Strategic Overview) which raised questions with the community and the legal profession about the operation of the criminal justice system as a whole.[1] The Strategic Overview outlined the Government's intention to progress reform of the criminal justice system to enhance community protection and reduce the rate of crime and the rate at which people offend and reoffend.

The criminal justice system is made up of a number of agencies and organisations with each playing a central role in addressing crime in our community. An overview and explanation of the operation of the criminal justice system can be found in the Strategic Overview, available at: www.agd.sa.gov.au/tcj.

The Strategic Overview noted that we need to explore ideas to improve the effectiveness of rehabilitation and reintegration services so that communities continue to become safer. The Strategic Overview also included a "Map of Ideas" setting out the areas of reform that need to be considered.

The Map of Ideas included consideration of community based sentencing options, intensive alternatives to custody, rehabilitation and reintegration and step down correctional and non-correctional facilities, all of which are explored further in this Discussion Paper.

Through this Discussion Paper, the Government intends to provide the community with an enhanced understanding of sentencing options so as to begin a conversation about how sentencing can better serve the community.

Our criminal justice system protects our community; the criminal justice system is just and fair and there are successful programs currently in place. However, there is a need to challenge the status quo and explore innovative and new ways to improve results.

The Government is committed to the use of home detention. Home detention is already used within the youth justice system. However, for adult offenders there are very limited circumstances in which home detention is available as a sentencing option, although home detention is being used to facilitate rehabilitation through an early release program. Consideration must be given to the expanded use of home detention for the right offenders.

Through any reform, community safety will remain paramount. This Discussion Paper puts to the community a range of further sentencing options, whereby an offender is not imprisoned but is subjected to other types of restrictions whilst remaining in the community. This Discussion Paper asks the community how South Australians can benefit from the introduction of such sentencing options.

The community is asked to consider how this approach to sentencing could reduce the chances of a person committing further crimes.

[1] Copies of the Strategic Overview and material concerning Transforming Criminal Justice are available at: www.agd.sa.gov.au/tcj

What is Sentencing?

Sentencing in South Australia is governed by the *Criminal Law (Sentencing) Act 1988* (the Sentencing Act).

The Sentencing Act was enacted in 1988. Whilst the Sentencing Act has been amended on numerous occasions since it was introduced, the time has now come to reconsider our approach to sentencing in South Australia. A complete review of the Sentencing Act will be undertaken throughout 2015. Whilst this Discussion Paper is focussed solely on better sentencing options that provide an alternative to custody in sentencing, the review of the Sentencing Act provides an opportunity to reconsider issues such as the factors to be taken into account in sentencing and the stated purposes of sentencing.

Parliament is responsible for deciding what kind of behaviour will be treated as a criminal offence by passing new laws and changing old ones. Parliament also decides the nature and range of penalties that courts can use when sentencing offenders convicted of various offences. Importantly, the maximum penalty for any offence against a law of South Australia is determined by the parliament of South Australia. Over time the courts have also developed the "common law" which is the collated principles of law extracted from all the decisions handed down in the senior courts in Australia, England and other countries that share our type of legal system. These types of decisions of the court set a precedent which any lower court must follow (noting that South Australian courts are only bound to follow decisions from the higher courts of South Australia and the High Court of Australia, not decisions form interstate or overseas).

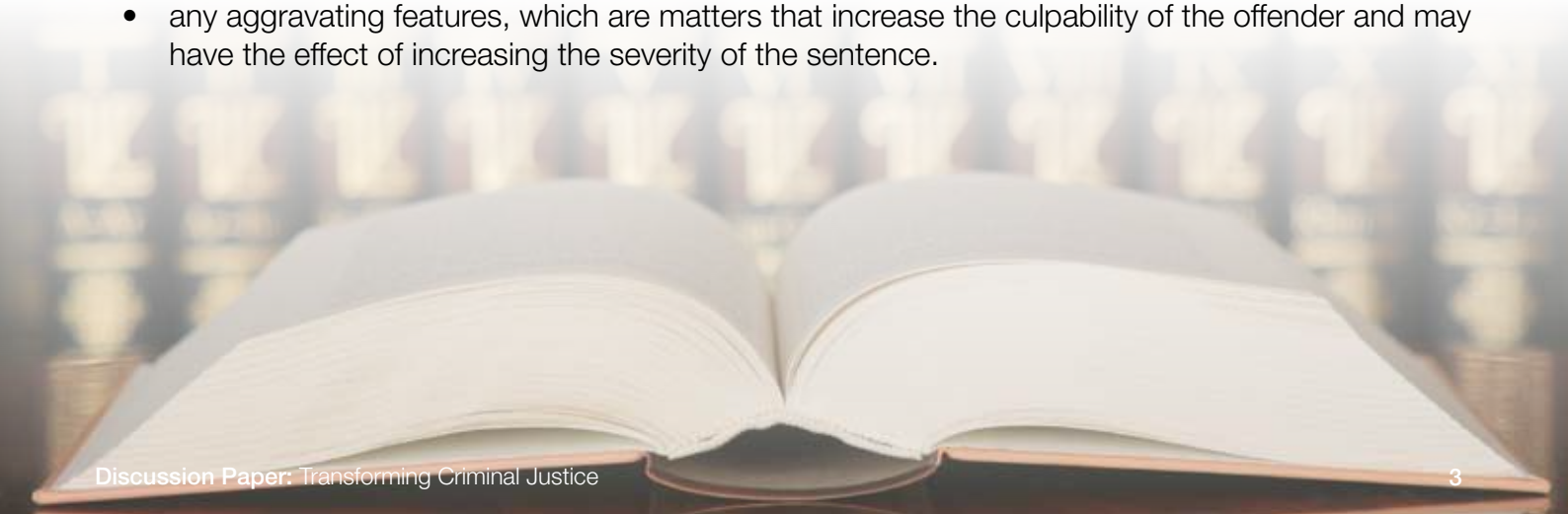
After a person has pleaded guilty to, or has been found guilty of, an offence or offences, a judge or magistrate must take a number of different considerations into account when imposing a sentence. The judge or magistrate will identify all relevant factors and make a decision about the appropriate sentence in accordance with the Sentencing Act and the common law.

The circumstances of the offence, and the offender, must be considered. Different considerations must be weighed up.

During a sentencing hearing, information is presented to the court to assist in deciding the most appropriate sentence in the circumstances. The court must first follow decisions made in past hearings for similar crimes that create sentencing principles (referred to as precedents) and laws set by Parliament, as well as also considering any reports which are provided and victim impact statements.

In very simple terms there are three main issues that a judge or magistrate must consider, being:

- the purpose/s to be achieved by the sentence;
- any mitigating factors, which are generally matters that decrease the culpability of the offender and may have the effect of reducing the severity of the sentence;
- any aggravating features, which are matters that increase the culpability of the offender and may have the effect of increasing the severity of the sentence.



The Sentencing Act provides a number of other considerations which judges and magistrates must follow such as the setting of mandatory minimum non-parole periods and the need to make a declaration if a person falls into the category of a serious and repeat offender.

Section 10 of the Sentencing Act provides a list of factors that a court can take into consideration in sentencing.

In addition, the Sentencing Act also outlines the purposes that may be considered when imposing a sentence, including but not limited to:

- the need to ensure that the offender is adequately punished for the offence;
- the deterrent effect any sentence under consideration may have on the offender or other persons;
- the rehabilitation of the offender;
- the safety of the community.

Sentencing Options

It is for the judge or magistrate to determine the appropriate sentence for an offender after taking into account all relevant circumstances set out above. However, the judge or magistrate is bound by the maximum penalty for an offence.

Currently the following options are available to a judge or magistrate when he or she imposes a sentence.

Imprisonment

Under the Sentencing Act a sentence of imprisonment can only be imposed if the court takes the view that a sentence of imprisonment is necessary to give proper effect to the policies outlined in section 10 of the Sentencing Act or if, in the opinion of the court:

- the offender has shown a tendency of violence towards other persons; or
- the offender is likely to commit a serious offence if not imprisoned; or
- the offender has previously been convicted of an offence punishable by imprisonment; or
- any other sentence would be inappropriate, having regard to the gravity and circumstances of the offence.

In some cases legislation will provide that the only penalty applicable is a fine and therefore imprisonment is not an available sentencing option.

Suspended Sentence

If the court sentences an offender to imprisonment, it will then decide if there is good reason to suspend the sentence. In some circumstances a sentence of imprisonment cannot be suspended unless there are exceptional circumstances.

When a sentence of imprisonment is suspended the offender signs a bond (which is an agreement) under which they promise to be of good behaviour for a set period of time and to comply with all the conditions set out in the bond. They are then released, usually under the supervision of a community corrections officer. If they keep their promise during the set period of time they will not have to serve the sentence in prison. If an offender breaks the promise, they are guilty of the offence of breaching the bond and will be brought back before the court to determine whether the suspension of the sentence should be lifted and they should serve the original sentence, or part of the original sentence, in prison.

Good behaviour bond

The court may decide not to fix a term of imprisonment, but simply have the offender sign a bond and promise to be of good behaviour for a stipulated amount of time. Additional conditions will usually be imposed such as supervision, payment of a specified sum of money by the offender for failure to comply with the bond or any other condition the court thinks appropriate. The court has a number of powers if an offender fails to keep their promise to be of good behaviour which includes imposing a sentence for the original offence (including a sentence of imprisonment).

Community service

Community service is available as a primary penalty or as a condition on either a good behaviour or suspended sentence bond. It is often used as an alternative to imprisonment when an offender has been unable to pay a fine or compensation order. This involves the court setting a total number of hours of unpaid community work that an offender must complete within a certain time frame.

Repay SA is the Department for Correctional Services (DCS) offender community service program whereby adult offenders are ordered to repay their debt to society through supervised community work projects such as property clean ups, graffiti removal and rubbish collection. More information about Repay SA is provided in the Supplementary Fact Sheet on Rehabilitation and Reintegration available at: www.agd.sa.gov.au/tcj.

Fine

The court may impose a fine in certain circumstances, however it must not order the payment of a fine unless satisfied that the offender has the means to pay the fine. In addition, the court must be satisfied that ordering payment of a fine would not unduly prejudice the welfare of the offender's dependent/s.

Compensation

The court can also order that the offender pay compensation for injury, loss or damage resulting from the offence and should give priority to compensation over fines. However, like a fine, however, the court must not order compensation if the offender does not have the means to pay it or it would unduly prejudice the welfare of the offender's dependent/s.

Home Detention

For an adult offender there are very limited circumstances in which home detention is available as a sentencing option. The Sentencing Act states that if the court suspends a sentence of imprisonment on the ground that it would be unduly harsh for the offender to serve any time in prison because of ill health, disability or frailty, the court may (in addition to any other conditions included in the bond) include a home detention condition.

The home detention condition must require the offender to reside in a specified place and to remain at that place for a specified period of no more than 12 months. The bond must also include a condition that the offender be under the supervision of a community corrections officer.

In addition, the conditions of the bond must also provide that the offender not leave that place except for one of the following purposes:

- remunerated employment;
- necessary medical or dental treatment for the offender themselves;
- averting or minimising a serious risk of death or injury (whether to the offender or some other person);
- any other purpose approved or directed by the community corrections officer to whom the offender is assigned.

Home detention is available for adult offenders who have been sentenced to imprisonment and who are released on parole having spent time in custody. Information about the current scheme is set out below with respect to a possible expansion of the use of home detention for adults. Home detention is available as a sentencing option in the Youth Court. The Young Offenders Act 1993 (SA) (the YO Act) allows the Youth Court to sentence a young offender to home detention for a period of up to six months, provided that appropriate accommodation is available.

Major Penalties Imposed

The table below demonstrates the major penalty imposed per case in South Australian adult criminal courts, for 2013-14[2]:

	Magistrates Court	Supreme and District Court	Total
No Penalty	5,915	28	5,943
Rising of the Court	7	1	8
Other Order	781	1	782
Compensation	386	2	388
Fine	16,371	31	16,402
Suspension of Driver's Licence	6,841	4	6,845
Bond / Obligation	4,351	30	4,381
Community Service Order	619	2	621
Suspended Imprisonment	2,495	540	3,035
Imprisonment	1,277	583	1,860
Home Detention	Nil	Nil	Nil

[2]Notes: A case is a group of charges finalised in the same court involving a single defendant. Multiple defendants are counted as separate cases. Each retrial is counted as a separate case. Procedural hearings, appeals and applications are excluded. The major charge convicted or found guilty is the charge receiving the most sever major penalty. More than one penalty type may be imposed per charge during sentencing - the major penalty is the most severe penalty for a charge. Where an offence is prisonable, time spent remanded in custody may have been taken into account during the sentencing phase. Information prepared by the Office of Crime Statistics and Research, Attorney-General's Department, South Australia.

Current Initiatives

Criminal Justice Sector Reform Council

The key to successful reform of the criminal justice system is ensuring that the sector works together, developing a shared vision of what a future criminal justice system should look like. The Government has made a strong commitment to support the sector to work together.

The Criminal Justice Sector Reform Council (the Council) plays a vital role in the development of the shared vision of a criminal justice system that is just and fair, efficient, people-focussed, visible and accessible. The Council, which was formed in July 2013, is chaired by the Hon. John Rau MP Attorney-General and Minister for Justice Reform.

The Council consists of the Hon. Tony Piccolo MP Minister for Police and Minister for Correctional Services, the heads of relevant agencies across the criminal justice sector: South Australia Police (SAPOL), the Courts Administration Authority (the CAA), the Legal Services Commission (the LSC), DCS, the Director of Public Prosecutions (DPP), the Attorney-General's Department (AGD) and the Department for Communities and Social Inclusion (DCSI), together with the Deputy Under Treasurer.

The Chief Justice of the Supreme Court of South Australia, the Chief Judge of the District Court of South Australia and the Chief Magistrate are observers.

The Council provides a forum for high level discussions and debate.

The Council aims to promote and support a contemporary, effective and efficient criminal justice system which maintains justice and integrity inspiring the confidence of the public.

The Council has committed to supporting initiatives to deliver the following outcomes across the criminal justice sector:

- improve service delivery and ensure service is fair and just;
- increase public confidence;
- increase efficiency;
- where possible reduce costs; and
- build continuous improvement capability.

Discretion, Diversion and Expiation

Amongst other projects, the Council is overseeing a SAPOL sponsored project considering appropriate diversion options for minor offending. Through the appropriate use of discretion, some offenders may be diverted out of the criminal justice system. However, there must be safeguards to ensure that community safety is not compromised through diversion.[3]

In addition, the Government through the Council is also exploring the expanded use of expiation notices. An expiation notice can be issued for some minor offences, meaning that rather than a person being charged with an offence, they are issued with a notice that alleges the person committed an offence and provides for a fee to be paid. If the fee is paid, the person is then not prosecuted for the offence.

[3]Information about the other projects can be found in the Strategic Overview available at: www.agd.sa.gov.au/tcj.

Sentencing Act Review

As noted above, a complete review of the Sentencing Act will be undertaken in 2015.

Through this review the community will be provided with an opportunity to reconsider issues such as the factors to be taken into account in sentencing and the stated purposes of sentencing.

The Government is committed to sentencing reform whereby the safety of the community must be the paramount consideration in sentencing.

This Discussion Paper is deliberately focussed on one type of offender: an offender who is facing a sentence of imprisonment but for whom a punishment that is an alternative to custody may be a more appropriate and a more effective response.

The Government firmly acknowledges that there are a large number of offenders in prison who should be there, and must be there, to preserve community safety. However, for some offenders, it may be that if the courts had more flexibility in sentencing, prison may not have been the answer.

Intervention Programs

South Australia currently has a number of intervention programs operating in the Magistrates Court. These intervention programs aim to reduce the likelihood of an offender committing more criminal offences by addressing the causes of their offending. In general, this occurs by providing treatment and other services.

An Intervention Program is defined in section 3 of the Sentencing Act as a program that provides -

- supervised treatment; or
- supervised rehabilitation; or
- supervised behaviour management; or
- supervised access to support services; or
- a combination of one or more of the above.

An offender undertakes the program prior to being sentenced. The successful completion of an intervention program is then taken into consideration by the magistrate when sentencing and could result in a reduction in the length or severity of the sentence imposed.

The key intervention programs currently operating in South Australia are the Treatment Intervention Program, the Treatment Intervention Court and the Magistrates Court Division Program.[4]

[4]For further information see the Courts Administration Authority website at: http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Treatment-Intervention-Court.aspx and the Courts Administration Authority Annual Report 2013-2014 available at: http://www.courts.sa.gov.au/OurCourts/CourtsAdministrationAuthority/Lists/CAA%20Annual%20Reports/Attachments/19/CAA%20Annual%20Report%202013-14.pdf

Better Sentencing Options: Alternatives to Custody

Overview

Set out below are initiatives that provide for alternative sentencing options to replace the traditional approach of imprisonment.

Public comment and feedback is sought as to how these initiatives, if implemented, could be of benefit to the South Australian community.

Currently, community based partnerships play a vital role in our criminal justice system and are an important part of resolving how best to address the needs of both the community and offenders living in the community.

The Government is asking the community to consider how offenders in South Australia are punished for the crimes they commit and whether some individuals should not go to prison but should be punished and rehabilitated whilst living in the community.

The Government is determined that any new sentencing options will not be used, or seen, as a "get out of jail" free card. Offenders must, and will, be required to work towards rehabilitation and becoming productive members of society.

An improved and more flexible sentencing regime should, over time, contribute to reduced rates of reoffending by providing every opportunity for offenders to rehabilitate whilst living in the community. It is not anticipated that by diverting some offenders out of the prison system there will be an immediate impact on South Australia's prisoner numbers. However, any reduction in rates of reoffending not only enhances community safety but may, in the future, slow the growth in prisoner numbers.

Intensive Correction Orders

A number of jurisdictions have introduced new types of sentencing orders, referred to as intensive correction orders but also referred to as community custody orders and intermediate sentencing orders. These intensive correction orders are used as an alternative to imprisonment whereby the offender is deemed to be serving a term of imprisonment but does so in the community. These types of orders are designed to place stricter conditions upon an offender than would be traditionally applied when a sentence of imprisonment is suspended or an offender is placed on a good behaviour bond.

Intensive correction orders are designed to create a sanction that offer some of the 'bite' of custody but spare offenders many of the social disadvantages of imprisonment such as disconnection with family and community, loss of employment and limited access to programs that could address factors underpinning offending, for example, drug and alcohol, gambling and mental health supports. If the offender is spared these disadvantages, then efforts at rehabilitation should be more successful. As such, an intensive correction order can provide a better outcome to the community as a whole than imprisonment of the offender.

Under the order, the offender is returned to their home, job and community but only under intensive supervision and subject to strict conditions. These orders provide for community based intensive supervision and treatment for offenders who meet clear eligibility criteria.

Home detention can be a primary component of an intensive correction order. Offenders placed back into the community can be monitored on a daily basis (or a less regular basis based on a tiered rating system) by community corrections officers. In addition, an intensive correction order can include provisions requiring the offender to be electronically monitored, to abide by strict curfews and to not be in certain locations or spend time with certain people.

These orders generally include additional conditions relating to rehabilitation, which work together with the other conditions and assist with the ultimate goal of reducing reoffending.

These types of orders, by being served in the community, allow an offender to work and perform community service while being restricted to behavioural parameters, home detention and curfew times. As such, an offender may be better placed to financially compensate victims.

If these orders are to be introduced in South Australia, careful consideration must be given to the appropriate consequences for breaching such an order. Generally speaking, those who violate the order could be returned to custody to serve out their remaining sentence, however we must ensure that offenders are not merely set up to fail.

There are benefits to the whole community in using these orders. They offer a credible alternative to custody. These orders may reduce the possibility of offenders serving short terms of imprisonment which may increase an individual's risk of reoffending upon release (due to antisocial networking and loss of employment, housing and relationships).

By remaining in the community an offender can maintain links with family and the wider community. If the offender is employed and has, or can develop, positive relationships in the community, then allowing the offender to remain in the community will minimise the harm and economic loss often associated with imprisonment (as a result of separation from family and support services, family loss of income and loss of employment and housing).

By minimising these harms the offender is given a second chance: an opportunity to rehabilitate and reintegrate into the community. The offender should be less likely to resort to criminal activity. Such a reduced risk of reoffending assists in reducing rates of crime, thereby enhancing community safety.

The Government is keen to provide judges and magistrates with enhanced flexibility in sentencing, to provide for better outcomes. Intensive correction orders could provide this flexibility.

Consideration needs to be given as to whether these types of orders should be introduced and would be of benefit to the community of South Australia. In addition, consideration needs to be given as to whether any specific type of offender should be excluded from eligibility for an intensive correction order.

Examples of different types of intensive correction orders from Victoria, Queensland, New South Wales and the Northern Territory are set out in Appendix 1.

The key features of community based sentencing orders across jurisdictions include;

- the order can be categorised as either an alternative to a custodial sentence or a community sentence in its own right, being second in order of severity to imprisonment and more severe than a suspended sentence;
- the order involves an intensive curriculum of activity offering rehabilitation, punishment and reparation through partnerships between the police and statutory, voluntary and private sector organisations;
- an order can be a stand-alone sentencing option or operate as a form of early release from prison;
- an order can require the offender to fulfil certain social obligations, for example, go to work and undertake education, while at the same time denying other privileges through curfews, home detention, drug and alcohol testing, restricting contact with particular groups and people and restricting movement;

- the orders need to be considered by both the judiciary and the community as an acceptable substitute for imprisonment but remain sufficiently flexible (in duration and with respect to conditions imposed) to assure proportionality in sentencing; and
- the orders must be capable of advancing sentencing objectives that extend beyond prison to promote rehabilitation and offer a multi-dimensional sanction that promotes multiple sentencing goals.

Home Detention

The Government is seeking comment through this Discussion Paper, from the community and people practising in the criminal justice system, on punishments other than imprisonment. This includes the potential to expand the use of home detention for adult offenders.

Sentencing

Currently, as noted above, there are very limited circumstances in which home detention is available as a sentencing option. The Sentencing Act states that, if the court suspends a sentence of imprisonment on the ground that it would be unduly harsh for the offender to serve any time in prison because of ill health, disability or frailty, the court may (in addition to any other conditions included in the bond) include a home detention condition.

The home detention condition must require the offender to reside in a specified place and to remain at that place for a specified period of no more than 12 months. The bond must also include a condition that the offender be under the supervision of a community corrections officer.

In addition, the conditions of the bond must also provide that the offender not leave that place except for one of the following purposes:

- remunerated employment;
- necessary medical or dental treatment for the offender themselves;
- averting or minimising a serious risk of death or injury (whether to the offender or some other person);
- any other purpose approved or directed by the community corrections officer to whom the offender is assigned.

Home detention could be used as sentencing option whereby a sentencing court orders that a period of imprisonment be served on home detention rather than in prison.

As noted above, home detention can be a primary component of an intensive correction order.

Early Release

Home detention is currently available for adult offenders who have been sentenced to imprisonment and who are released on parole having spent time in custody.

Currently the Correctional Services Act 1982 (SA) (the CS Act) enables a prisoner to apply for early release into home detention once they have served 50% of their non-parole period. However, the offender may only serve up to a maximum of 12 months on home detention. Life sentenced prisoners, sex offenders and terrorist offenders are not eligible for this early release. This regime is administered by DCS.

There may be some benefits to our community in expanding this scheme and providing DCS with more flexibility in releasing offenders from custody onto home detention.

Community feedback is sought as to the potential benefit in removing the requirement to serve 50 per cent of the non-parole period in custody prior to being eligible to apply for home detention and increasing the maximum period that can be spent on home detention. This would allow a broader category of prisoners to be released into the community under strict conditions and monitoring, provided they have demonstrated a high level of compliance and also provided they have been assessed as posing a low risk to the community.

As of 3 June 2015, there were 120 offenders who had been in custody and have been released to complete their sentence on home detention.

The successful completion of a sentence on home detention has remained consistently high. In 2013-14, 88% of offenders released into home detention successfully complied with their conditions. When on home detention, these offenders are intensively case managed by community corrections officers, complemented by the use of electronic monitoring equipment, which can include GPS monitoring.

This regime for release into home detention is highly structured and the level of monitoring is determined taking into account the degree of risk the individual presents to the community. In addition, DCS recently implemented a targeted, risk based model of offender management, known as Enhanced Community Corrections. Improving public safety and managing offenders based on their level of risk are the key principles behind Enhanced Community Corrections.

Enhanced Community Corrections strengthens the capacity of DCS to effectively and rigorously manage adult offenders in the community with a focus on public safety, public confidence, offender responsibility and the rights of victims.

As of 27 March 2015 there were 471 offenders being electronically monitored with GPS by DCS which represents a steady increase (when compared to 387 offenders who were electronically monitored on the 3rd of October 2014 at commencement of GPS monitoring).

DCS may also order community service work if an offender on home detention has no employment or is not undertaking any study. This gives an offender the opportunity to make restitution and gain vocational skills that may lead to employment.

Individual conditions are set by DCS when the release into home detention is approved.

Community Residential Facilities and Step Down Facilities

If home detention provisions are enhanced in South Australia, consideration must be given to the fact that some offenders do not have suitable housing.

This is also a relevant factor in an assessment of whether South Australia should adopt the use of intensive correction orders.

Lack of suitable accommodation can occur for a variety of reasons. For example, an offender may be homeless or may be a perpetrator of domestic violence and the victim and/or their children may be residing in the family home making it entirely inappropriate to recommend the offender be released on home detention (either on bail, as part of their sentence or as part of early release from prison) to reside with their victim.

The Government has already committed to developing a bail accommodation support program.

The availability of appropriate accommodation can be the determining factor between an alleged offender being remanded in custody or remaining in the community on bail. A bail accommodation support program can provide accommodation for alleged offenders who would otherwise be refused bail due to a lack of suitable accommodation in the community.

Such programs are aimed at providing judges and magistrates with a viable alternative to remand for suitable offenders that either have no or unsuitable accommodation. In addition, by having suitable accommodation alleged offenders have the opportunity to maintain links to the community, family, employment, government services and education whilst awaiting the outcome of their criminal charges.

Such programs often involve the Government partnering with the non-government sector to provide the accommodation and undertake day to day management functions.

A bail accommodation support program can address the issue of persons who have been charged with a criminal offence having no suitable accommodation for the purpose of a bail agreement. However, if this same person is convicted, the court will be faced with the same problem at the time of sentencing. An offender may have no suitable accommodation available for home detention or to facilitate the making of an intensive correction order.

South Australians need to consider whether, as a community, we are best served by our current approach to punishment or whether the community would benefit by providing alternative accommodation for offenders as a legitimate alternative to prison.

Community based residential facilities can provide accommodation and supervision of offenders as part of an intensive correction order. In addition, when considering early release to support reintegration into the community or early release on home detention, if an offender has no suitable accommodation, then a residential step down facility could allow the offender to be released and begin reintegrating into the community.

This type of supported accommodation has been a long standing feature of the criminal justice system in the United Kingdom and is funded and legislated on a national scale. Bail hostels are residential establishments that are designated for the purpose of accommodating people as a condition of their bail or as a condition of a sentence being served in the community. Currently there are approximately 100 approved hostels for people on bail, licence, probation or serving a community sentence operating across England and Wales.

A bail hostel for young Aboriginal offenders has been operating since 1997 in New South Wales, run by the Department of Juvenile Justice. The facility is supervised 24 hours a day and offers clients a range of services including cultural awareness, personal skills development, access to education and assistance in addressing their offending behaviour.

However, whilst a 24 hour a day supervised facility may provide supported accommodation for a young person on bail, it may not necessarily be the best accommodation option if it allows the young person to develop close ties with other young offenders.

The alternative is the provision of enhanced support for young people on bail with individually arranged accommodation provided by non-Government organisations (such as suitable family-based care) to suit individual needs with non-Government agencies also providing other support services.[5]

If a pilot of supported accommodation is undertaken and proven successful in South Australia, this provides potential for the Government to work with the non-government organisations and/or the private sector to scale up trials with the option of a “payment for results” model.

[5]See for example the New South Wales Youth on Track program: http://www.youthontrack.justice.nsw.gov.au/

"Bankruptcy": Forfeiture and Restitution

Whilst a sentencing court in South Australia cannot order a person to be "bankrupt" consideration should be given to financial penalties beyond imprisonment and a fine, particularly in fraud cases.

Such a penalty could be used as part of an intensive correction order or as a stand-alone sentencing outcome.

The *Criminal Assets Confiscation Act 1996* (SA) empowers the DPP to take proceedings to recover from a convicted offender property wholly or partially derived from the commissioning of an offence (being the proceeds of a crime) or any property that is an instrument of an offence (meaning property used in, or in connection with, the commission of an offence).

The community is asked to consider an expansion of this scheme: should some offenders not only lose their property but also lose the right to acquire property (such as housing and motor vehicles) for a set period of time?

Since 2011 the Government has been attempting to pass legislation targeting serious drug offenders so that all of the property of certain drug traffickers (known as prescribed drug offenders) should be confiscated, whether or not it has any link to crime at all and whether or not legitimately earned or acquired. The proposed provisions are contained in the Criminal Assets Confiscation (Prescribed Drug Traffickers) Amendment Bill 2015 (the Prescribed Drug Offenders Bill).

This type of scheme originated in the *Western Australian Criminal Property Forfeiture Act 2000* (WA). Under that scheme, if a person is taken to be a declared drug trafficker under legislation or is declared as such, then, effectively, all of their property is confiscated without any exercise of discretion at all and whether or not it is lawfully acquired.

The proposed scheme in South Australia targeting drug offenders is similar with two prescribed situations being subject to the forfeiture provisions; a convicted drug trafficker of a certain kind and an absconding accused.

The Prescribed Drug Offenders Bill states that the prescribed drug trafficker will forfeit everything except what a bankrupt would be allowed to keep. These are to be found in regulation 6.03 of the *Commonwealth Bankruptcy Regulations* 1996 (Cth). The lists are extensive but the general principle is that the forfeiture does not extend to household property (including recreational and sports equipment) that is reasonably necessary for the domestic use of the bankrupt's household, having regard to current social standards.

Rather than fraud offenders being sentenced to lengthy terms of imprisonment, a similar scheme could be adopted whereby not only are proceeds of crime and instruments of crime confiscated, but other assets can also be seized.

Currently, the court can order that the offender pay compensation for injury, loss or damage resulting from an offence. However, the court must not order compensation if the offender does not have the means to pay it or it would unduly prejudice the welfare of the offender's dependent/s.

The community is asked to consider whether enhanced forfeiture legislation would provide an effective deterrent and appropriate punishment for financial fraud as an alternative to lengthy imprisonment but also an improved means by which victims of financial fraud could be better compensated.

Restorative Justice

Restorative justice can be a pathway through which an appropriate sentence is determined.

Alternatively, restorative justice processes can be undertaken quite separately to the traditional criminal justice system. Restorative justice involves offenders taking responsibility for their offending (including taking responsibility for the harm it has caused) and requires the participation of the victim.

Restorative justice must be a bona fide process which results in a reduced risk of an offender committing further crimes. Restorative justice cannot be seen, or used, as a "get out of jail" free card.

Community feedback is sought as to whether the Government should be considering the expanded use of restorative justice to provide better outcomes for victims of crime, the community and offenders.

Restorative justice takes many forms. The Centre for Innovative Justice noted that the term restorative justice:

> *"refers to a broad range of practices which attempt to repair the harm caused by a crime by collectively including those with a stake in the offence in its resolution."*[6]

Restorative justice conferencing involves a facilitated, safe and structured encounter between the victim and the offender, providing an opportunity to repair the harm caused by the offending.[7]

In South Australia restorative justice conferencing is used for young offenders (as outlined in detail in Appendix 2) and in addition, is used in the sentencing of adult Aboriginal offenders.

South Australia operates an Aboriginal Sentencing Court, known as the Nunga Court. Nunga Courts are sentencing courts made available at some locations to Aboriginal adults who have pleaded guilty to an offence. Nunga Courts:

> *"provide an opportunity for Aboriginal court users to have their voice heard in a culturally appropriate manner, and family members and support persons are encouraged to attend and speak directly to the court."*[8]

The presiding magistrate in the Nunga Court is assisted by Aboriginal Elders and/or respected persons.

In addition to the Nunga Courts, in 2005 a new section (section 9C) was inserted into the Sentencing Act to empower a court in any criminal jurisdiction in South Australia to convene an Aboriginal Sentencing Conference prior to sentencing an Aboriginal offender. This process provides a chance for every participant to have their say around a table and Aboriginal offenders are encouraged to explain the background behind their offending. It also provides an opportunity for victims to contribute to the sentencing process.

An Aboriginal Sentencing Conference may provide restorative justice opportunities for the victim and the offender and may enable the court to better understand the cultural and societal influences relevant to the offending. The involvement of an Aboriginal Elder, family members and the wider community may also assist the offender in desisting from offending.

[6]Centre for Innovative Justice "Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community" May 2014, referencing, H Strang, "Restorative Justice as Evidence-Based Sentencing", in J Petersilia and K Reitz (eds), The Oxford Handbook of Sentencing and Corrections (Oxford University Press, 2012), 215-243; J Braithwaite, Restorative Justice and Responsive Regulation (Oxford University Press, 2002); T Marshall, Restorative Justice: An Overview (1996) Home Office— United Kingdom, 5.

[7]Centre for Innovative Justice "Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community" May 2014.

[8]Courts Administration Authority webpage: see http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/Pages/Aboriginal-Sentencing-Courts-and-Conferences.aspx

The continued use of restorative justice for young people is supported. However, consideration should be given as to whether restorative justice should be formally recognised for all adult offenders and/or all young adult offenders.

Restorative Justice in New Zealand

In 2004 the Ministry of Justice in New Zealand published the "Restorative Justice Best Practice in New Zealand" document which "demonstrates the collaborative working relationship between the government and community that is vital for the continued development of restorative justice in New Zealand."[9]

The Ministry notes that it was in 2002 that New Zealand formally recognised restorative justice processes within their criminal justice system, although Family Group Conferences had been in use in the juvenile justice system since 1989.

Formal recognition occurred through the passage of three pieces of legislation: the Sentencing Act 2002 (NZ), Parole Act 2002 (NZ), and the Victims' Rights Act 2002 (NZ).

The New Zealand Ministry of Justice notes that these three Acts:

- give greater recognition and legitimacy to restorative justice processes;
- encourage the use of restorative justice processes wherever appropriate; and
- allow (and require) restorative justice processes to be taken into account in the sentencing and parole of offenders, where these processes have occurred.[10]

Young Offenders

As noted above, restorative justice conferencing is available to young offenders in South Australia and the process by which young offenders access family conferencing is set out in Appendix 2.
In addition, under the YO Act, home detention is already a sentencing option in the Youth Court.

The YO Act allows the Youth Court to sentence a young offender to home detention for a period of up to six months, provided that appropriate accommodation is available. The Government is committed to the use of home detention for young offenders and later in 2015 will be releasing draft legislation seeking public comment on a number of changes including the expanded use of home detention for young people.

However, there is potential to include young offenders when considering the introduction of intensive corrections orders. Although home detention is already a sentencing option, the use of home detention combined with intensive case management and supervision, treatment, employment, education and family support should be contemplated.

There is an important role played in the criminal justice system by DCSI, being responsible for Youth Justice.

Youth Justice runs the Adelaide Youth Training Centre (AYTC). The AYTC is designed to provide a safe and secure environment for young people detained in custody. Within DCSI, Community Youth Justice manages young people serving long term custodial orders and young people on community based youth justice orders.

Youth Justice seeks to contribute to a safer South Australia by supporting children and young people to stop re-offending, to recognise the impact of their crime on victims and access opportunities to participate safely and productively in the community.

AYTC currently works in partnership with the Department for Education and Child Development (DECD) to meet client needs for reengagement, training and work readiness and new opportunities are currently being explored to broaden access.

[9]Ministry of Justice webpage "Restorative Justice in New Zealand best practice" available at: http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice

[10]See above no. 8.

Rehabilitation and Reintegration

Any consideration or analysis of alternatives to imprisonment must include an examination of the current approach to rehabilitation (both within the prisons system and in the community) and offender reintegration.

Community based organisations are central to the provision of rehabilitation and reintegration services. The Supplementary Fact Sheet on Rehabilitation and Reintegration (available at: www.agd.sa.gov.au/tcj) sets out the current approach to rehabilitation and reintegration taken by DCS. However, alternative approaches need to be considered and analysed, focussing on offender rehabilitation in the community.

We need to consider whether taking a different approach could benefit the community as a whole. For example, if an offender facing a term of imprisonment is provided with an alternative punishment that allows them to live in the community, should South Australia implement a cost recovery model whereby an offender who is employed or receives income support pays for court ordered treatment and/or court mandated accommodation services?

In Singapore the Yellow Ribbon Project was launched in 2004. The Yellow Ribbon Project sought to create awareness of the need to give offenders a second chance at life, generate acceptance of offenders and their families in the community and to inspire community action to support the rehabilitation and reintegration of offenders leaving prison back into the community. The Yellow Ribbon Project identified that the stigma offenders endure after they are released from prison can often be more punishing than the prison sentence itself.

The Yellow Ribbon Project established rehabilitative and aftercare programs to facilitate the reintegration of an offenders into the community. In addition, Singapore also transformed the entire prison service from a custody focussed mindset to a rehabilitation centred culture.[11]

[11] Further information about the Yellow Ribbon Project can be found at: http://www.yellowribbon.org.sg/. See also the Hawaii Opportunity Probation and Enforcement (HOPE) Program with information available at: http://www.courts.state.hi.us/special_projects/hope/about_hope_probation.html and information about the Singapore prison service at: http://www.sps.gov.sg/

Conclusion

Reform of sentencing in South Australia must not impact negatively on community safety.

The Government will not compromise community safety and therefore acknowledges that for many offenders, imprisonment remains the only option.

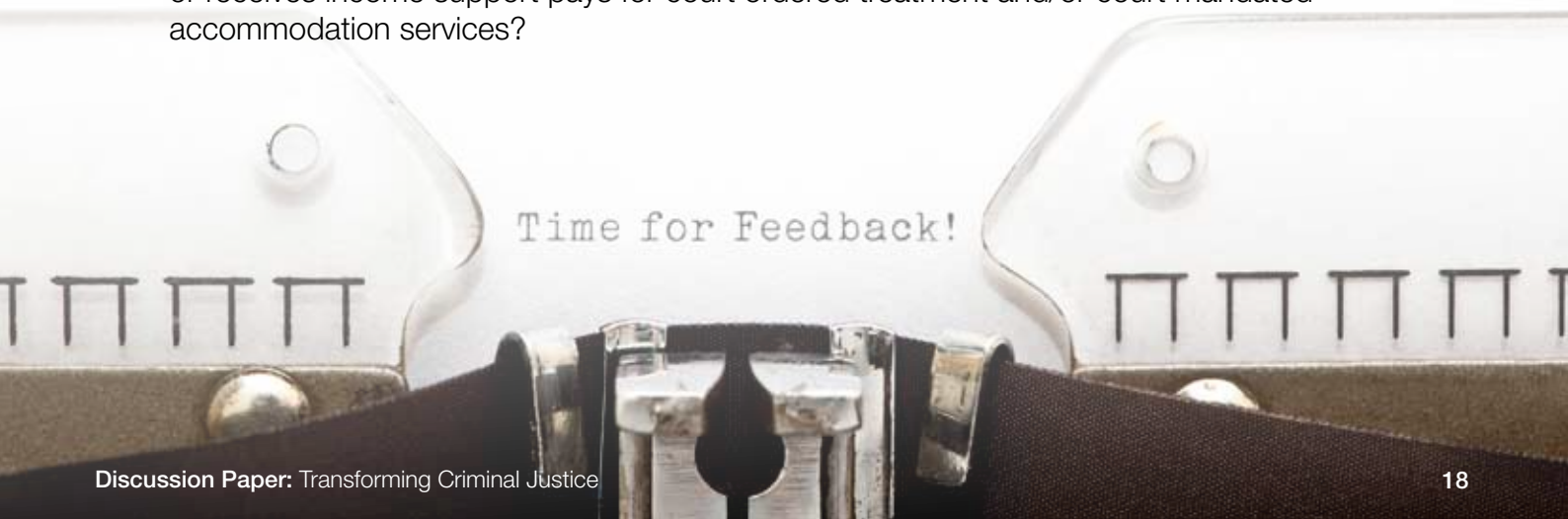
This Discussion Paper is, however, asking the community of South Australia to reconsider sentencing and evaluate who we imprison. We need to consider what purpose is served from imprisonment and how alternative punishments, served in the community, can provide better outcomes for the community of South Australia.

The intention of this Discussion Paper is to reconsider what the appropriate sentencing outcomes are for those offenders for whom rehabilitation is a possibility.

This Discussion Paper is seeking general feedback.

However, some specific issues for consideration are:

- What benefits could be achieved by South Australia introducing a form of intensive correction order to provide more flexibility for the courts in sentencing?
- Would South Australia benefit by expanding the use of home detention as a sentencing option?
- What benefits could be realised if the Department of Correctional Services were given more flexibility in ordering the early release of offenders into home detention?
- What benefits could be achieved by providing offenders with the opportunity to maintain employment, community and family ties?
- If South Australia establishes community facilities so that offenders are able to live in the community, how can this be done without compromising community safety?
- Should the Government be considering the expansion of the current forfeiture schemes so that some offenders not only lose their property but also lose the right to acquire property (such as housing and motor vehicles) for a set period of time?
- Would enhanced forfeiture legislation provide an effective deterrent and appropriate punishment for financial fraud as an alternative to lengthy imprisonment?
- Would enhanced forfeiture legislation provide an improved means by which victims of financial fraud could be better compensated?
- Would the expanded use of restorative justice provide better outcomes for victims of crime?
- Would the expanded use of restorative justice provide better outcomes for offenders?
- If an offender facing a term of imprisonment is provided with an alternative punishment that allows them to live in the community, are there foreseeable benefits to the community of South Australia in implementing a cost recovery model whereby an offender who is employed or receives income support pays for court ordered treatment and/or court mandated accommodation services?



Appendix 1

Examples of Intensive Correction Orders

Victoria

The following summary concerning Community Correction Orders (CCOs) in Victoria was compiled using the February 2014 Sentencing Advisory Council (Victoria) CCO Monitoring Report.

Victoria introduced CCOs in January 2012.

According to the Sentencing Advisory Council of Victoria the CCOs were introduced as a sentencing option in Victoria to provide a non-custodial sentencing option that is more flexible than the orders it replaced.

CCOs replaced the community-based order (CBO), the intensive correction order (ICO), and the combined custody and treatment order (CCTO).

When compared to the orders that have been replaced, CCOs could be imposed for longer maximum durations in the higher courts. In addition:

- courts could order a higher maximum number of hours for unpaid community work, meaning CCOs could be used for "a wider range of offending behaviours"; and
- a greater range of conditions could be attached to a CCO than to the orders it replaced providing the courts with increased capacity to address the specific circumstances of the offender.[14]

At the time of the introduction of CCOs, suspended sentence of imprisonment were being "phased out" in Victoria and CCOs were intended to be a replacement for suspended sentences "in cases where the court considers immediate custody unnecessary to fulfil the purposes for which the sentence is imposed".[15]

The Second Reading Speech introducing CCOs stated as follows:

> *Community-based sentences are an important part of the sentencing spectrum. They provide courts with a way to intervene in the lives of offenders who deserve more than a fine, but should not be sent to prison. A community based sentence allows an offender to remain in the community. Offenders are able to maintain their employment, live at home and draw on the support of their family and friends. At the same time, offenders are subject to certain obligations – for example, they may have to report to Corrections Victoria, undertake unpaid community work or complete programs that address the reasons for their criminal conduct.*[16]

The Sentencing Advisory Council of Victoria has noted that an important element of the new CCO is that, like the CBO, it is a sentence in its own right, rather than a sentence of imprisonment.[17]

[12] Sentencing Advisory Council, Victoria "Community Correction Orders Monitoring Report" February 2014 available at: https://www.sentencingcouncil.vic.gov.au/publications/community-correction-orders-monitoring-report

[13] See above no.12.

[14] See above no. 12.

[15] See above no.12.

[16] Victoria, 'Sentencing Amendment (Community Correction Reform) Bill', Parliamentary Debates, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General) available at: http://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2011/Assembly_Daily_Extract_Thursday_15_September_2011_from_Book_13.pdf

[17] See above no. 12.

The relationship between the CCO and imprisonment was also explained in the Second Reading Speech:

> *The CCO will also provide an alternative sentencing option for offenders who are at risk of being sent to jail. These offenders may not yet deserve a jail sentence but should be subject to significant restrictions and supervision if they are going to live with the rest of the community. The broad range of new powers under the CCO will allow courts wide flexibility to tailor their response to address the needs of offenders and set appropriate punishments. Instead of using the legal fictions of imposing a term of imprisonment that is suspended or served at home, the courts will now openly sentence offenders to jail or, where appropriate, use the CCO to openly sentence the offender to a community-based sentence. Unlike the CCTO and ICO, which are technically sentences of imprisonment, the CCO is a community-based sentence. There is no legal fiction involved. The CCO can be combined with a jail sentence, but it will not pretend to be one. The CCO is a transparent sentence that can be understood by everyone in the community.*[18]

Section 36 of the Sentencing Act 1991 (Vic) (the Victorian Act) provides that the purpose of a CCO is to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender. Section 36 also provides that, without limiting when a CCO may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment.

Section 37 of the Victorian Act states that a court may make a CCO in respect of an offender if:

- the offender has been convicted or found guilty of an offence punishable by more than 5 penalty units; and
- the court has received a pre-sentence report (if required) and has had regard to any recommendations, information or matters identified in the report; and
- the offender consents to the order.

Section 38 of the Victorian Act provides that the period of a CCO is the period determined by the court which, in the case of an order made by the Magistrates' Court, must not exceed:

- in respect of one offence, 2 years; or
- in respect of 2 offences, 4 years; or
- in respect of 3 or more offences, 5 years.

However, in the case of a CCO made by the County Court or the Supreme Court, the period must not exceed the greater of:

- the maximum term of imprisonment for the offence; or
- 2 years.

[18] See above no. 16.

Section 41 of the Victorian Act specifically provides that if a court makes separate CCOs, there is a presumption that they are concurrent. Sections 43 and 44 of the Victorian Act provide that a court may impose a CCO in addition to a fine or a sentence of imprisonment of up to two years.

Section 45 provides that the following terms are attached to each CCO:

- the offender must not commit, whether in or outside Victoria, during the period of the order, an offence punishable by imprisonment;
- the offender must comply with any obligation or requirement prescribed by the regulations;
- the offender must report to, and receive visits from the Secretary (being the Secretary of the Department of Justice) during the period of the order;
- the offender must report to the community corrections centre specified in the order within 2 clear working days after the order coming into force;
- the offender must notify the Secretary of any change of address or employment within 2 clear working days after the change;
- the offender must not leave Victoria except with the permission, either generally or in relation to a particular case, of the Secretary;
- 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.

The powers and functions of the Secretary of the Department of Justice are delegated to community corrections officers employed by the Department.[19]

Section 47 provides that when making a CCO, a court must also attach at least one condition, being either a condition listed in Division 4 of the Victorian Act or a condition under Division 2 of Part 3BA of the Act.

In addition to the conditions attached in accordance with section 47, section 48 also provides that a court making a CCO may attach any other condition to the order that the court thinks fit, other than a condition about making restitution or the payment of compensation, costs or damages.

Section 48A provides that the court must attach conditions to a CCO in accordance with:

- the principle of proportionality; and
- the purposes for which a sentence may be imposed as set out in section 5; and
- the purpose of a CCO set out in section 36.
- The Division 4 conditions are:
- unpaid community work;
- treatment and rehabilitation;
- supervision;
- other conditions;
- justice plan conditions;
- residual conditions.

[19]See above no. 12.

New South Wales

In New South Wales, after a court imposes a sentence of imprisonment on an offender, the court may then refer the offender for assessment as to the suitability of the offender for home detention or for an intensive correction in the community.

Section 6 of the Crimes *(Sentencing Procedure)* Act 1999 (NSW) (the NSW Act) provides that a court that has sentenced an offender to imprisonment for not more than 18 months may make a home detention order directing that the sentence be served by way of home detention.

Part of the NSW Act spells out the sentencing procedures for home detention orders.

Intensive Correction Orders

Section 7 of the NSW Act provides that if a court has sentenced an offender to imprisonment for not more than 2 years, the court may make an intensive correction order directing that the sentence be served by way of intensive correction in the community.

In addition, if a court makes an intensive correction order directing that a sentence be served by way of intensive correction in the community, the court is not to set a non-parole period for the sentence.

In accordance with section 66 of the NSW Act an intensive correction may not be made in respect of a sentence of imprisonment for a prescribed sexual offence or with respect to an aggregate sentence of imprisonment with respect to 2 or more offences, any one of which is a prescribed sexual offence.

These intensive correction orders are considered to be custodial sentences served in the community.

Section 65 of the NSW Act provides that the offender's obligations under an intensive correction order are the obligations that the offender has under section 82 of the Crimes (Administration of Sentences) Act 1999 (NSW) as a consequence of the court making of the order.

An intensive correction order is also subject to any conditions imposed by the sentencing court under section 81 of the Crimes (Administration of Sentences) Act 1999 (NSW).

The Crimes *(Administration of Sentences)* Regulation 2014 (NSW) provide as follows:

> *Regulation 186*
>
> *The following are the mandatory conditions of an intensive correction order to be imposed by a court under section 81 of the Act:*
>
> *(a) a condition that requires the offender to be of good behaviour and not commit any offence,*
>
> *(b) a condition that requires the offender to report, on the date fixed as the date of commencement of the sentence or on a later date advised by the Commissioner, to a local office of Corrective Services NSW or other location advised by the Commissioner,*
>
> *(c) a condition that requires the offender to reside only at premises approved by a supervisor,*
>
> *(d) a condition that prohibits the offender leaving or remaining out of New South Wales without the permission of the Commissioner,*
>
> *(e) a condition that prohibits the offender leaving or remaining out of Australia without the permission of the Parole Authority,*
>
> *(f) a condition that requires the offender to receive visits by a supervisor at the offender's home at any time for any purpose connected with the administration of the order,*
>
> *(g) a condition that requires the offender to authorise his or her medical practitioner, therapist*

or counsellor to provide to a supervisor information about the offender that is relevant to the administration of the order,

(h) a condition that requires the offender to submit to searches of places or things under his or her immediate control, as directed by a supervisor,

(i) a condition that prohibits the offender using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained,

(j) a condition that requires the offender to submit to breath testing, drug testing or other medically approved test procedures for detecting alcohol or drug use, as directed by a supervisor,

(k) a condition that prohibits the offender possessing or having in his or her control any firearm or other offensive weapon,

(l) a condition that requires the offender to submit to surveillance or monitoring (including electronic surveillance or monitoring) that a supervisor may direct, and comply with all instructions given by a supervisor in relation to the operation of surveillance or monitoring systems,

(m) a condition that prohibits the offender tampering with, damaging or disabling surveillance or monitoring equipment,

(n) a condition that requires the offender to comply with any direction given by a supervisor that requires the offender to remain at a specified place during specified hours or that otherwise restricts the movements of the offender during specified hours,

(o) a condition that requires the offender to undertake a minimum of 32 hours of community service work a month, as directed by a supervisor from time to time,

(p) a condition that requires the offender to engage in activities to address the factors associated with his or her offending as identified in the offender's assessment report or that become apparent during the term of the order, as directed by a supervisor from time to time,

(q) a condition that requires the offender to comply with all reasonable directions of a supervisor,

(r) a condition that requires the offender to submit to a medical examination by a specified medical practitioner, as directed by a supervisor, in relation to the offender's capacity to undertake community service work or to otherwise comply with the offender's obligations under the intensive correction order.

Regulation 187

The following are the additional conditions that may be imposed on an intensive correction order by the sentencing court under section 81 of the Act:

(a) a condition that requires the offender to accept any direction of a supervisor in relation to maintaining or obtaining employment,

(b) a condition that requires the offender to authorise contact between any employer of the offender and a supervisor,

(c) a condition that requires the offender to comply with any direction of a supervisor as to the kinds of occupation or employment in which the offender may or may not engage,

(d) a condition that requires the offender to comply with any direction of a supervisor that the offender not associate with specified persons or persons of a specified description,

(e) a condition that prohibits the offender consuming alcohol,

(f) a condition that requires the offender to comply with any direction of a supervisor that the offender must not go to specified places or districts or places or districts of a specified kind.

Queensland

Queensland has community based orders, which are intermediate orders (being probation orders and community service orders and intensive correction orders.

Intensive Correction Order

Part 6 of the Penalties and Sentences Act 1992 (Qld) (the QLD Act) provides for the making of intensive correction orders.

Section 112 of the QLD Act provides that if a court sentences an offender to a term of imprisonment of 1 year or less, the court may make an intensive correction order for the offender.

In accordance with section 113 the effect of the order is that the offender is to serve the sentence of imprisonment by way of intensive correction in the community and not in a prison.

Section 114 provides that the intensive correction order must contain requirements that the offender:

- must not commit another offence during the period of the order; and
- must report to an authorised corrective services officer at the place, and within the time, stated in the order; and
- must report to, and receive visits from, an authorised corrective services officer at least twice in each week that the order is in force; and
- must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order; and
- must perform in a satisfactory way community service that an authorised corrective services officer directs during the period of the order; and
- must, during the period of the order, if an authorised corrective services officer directs, reside at community residential facilities for periods (not longer than 7 days at a time) that the officer directs; and
- must notify an authorised corrective services officer of every change of the offender's place of residence or employment within 2 business days after the change happens; and
- must not leave or stay out of Queensland without the permission of an authorised corrective services officer; and
- must comply with every reasonable direction of an authorised corrective services.

In addition, under section 115 the intensive correction order may contain requirements that the offender:

- submit to medical, psychiatric or psychological treatment; and
- comply, during the whole or part of the period of the order, with conditions that the court considers are necessary:
    - o to cause the offender to behave in a way that is acceptable to the community; or

- to stop the offender from again committing the same type of offence for which the order was made; or
- to stop the offender from committing other offences.

The court can only make or amend the intensive correction order if the offender agrees to the order being made or amended and also agrees to comply with the order as made or amended.

Northern Territory

Legislation commenced in the Northern Territory in 2011 introduced two new sentencing orders, a community based order and a community custody order.

Community Based Order

In accordance with sections 39A and 39B of the Sentencing Act (NT) (the NT Act), the court make a community based order for an the offender provided that the offender was not convicted of a sexual offence, a violent offence (meaning an offence involving the use, or threatened use, of violence) or an offence against section 188(1) of the Criminal Code if a circumstance of aggravation specified in section 188(2) of the Criminal Code exists or another offence prescribed by regulation.

In addition, the court must have received a pre-sentence report and the court may make the order in addition to imposing a fine on the offender but not in addition to a sentence of a term of imprisonment.

A community based order must not exceed 2 years.

Section 39E provides that the community based order is subject to the following conditions:

- the offender must not, during the period the order is in force, commit another offence (whether in or outside the Territory) punishable on conviction by imprisonment;
- the offender is under the ongoing supervision of a probation and parole officer and must report to a probation officer at a specified place within 2 clear working days after the order comes into force;
- the offender must tell a probation and parole officer of any change of address or employment within 2 clear working days after the change;
- the offender must not leave the Territory except with the permission of a probation and parole officer;
- the offender must:
  - give a sample of the offender's voice for use with an approved monitoring device for the period specified in the order; and
  - comply with the reasonable directions of a probation and parole officer in the use of the device for the effective monitoring of the offender's activities.

In addition, the Commissioner may, by written notice given to the offender (and subject to certain limitations) require the offender to:

- reside at a specified place; and
- wear or have attached an approved monitoring device for the period specified in the notice (the temporary monitoring period); and

- allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device.

Section 39F provides that the court must impose at least one (but may impose more than one) of the following conditions on the order:

- the offender must undertake prescribed programs as directed by the Commissioner for a period of not less than one month or more than one year;
- the offender must:
    - o undergo assessment and treatment for misuse of alcohol or drugs; or
    - o submit to medical, psychological or psychiatric assessment and treatment as directed by the Commissioner;
- the offender must not consume or purchase alcohol or a drug (other than as prescribed by a medical practitioner or other health practitioner).

In addition, the court may impose all of the following conditions on the order:

- the offender must reside at a specified place;
- the offender must wear or have attached an approved monitoring device for the period the order is in force or the lesser period ordered by the court;
- the offender must allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device.

Also, the court may impose another condition the court considers necessary or desirable, other than a condition about the making of restitution or the payment of compensation, costs or damages.

A prescribed program specified in the order must be designed to address the personal factors that contribute to the offender's criminal behaviour and may be residential or community-based.

In accordance with section 39G the court may impose a condition on the order that the offender must perform community work as directed by the Commissioner.

Section 39G specifically states that the purpose of imposing the condition requiring the offender to perform community work is to allow for the adequate punishment of the offender in the community.

Community Custody Order

In accordance with sections 48A and 48B of the NT Act, the court may order the sentence of imprisonment be served by way of a community custody order, provided the court has decided to impose a sentence of imprisonment on the offender of not more than 12 months and also provided that the offender was not convicted of a sexual offence, a violent offence (meaning an offence involving the use, or threatened use, of violence) or an offence against section 188(1) of the Criminal Code if a circumstance of aggravation specified in section 188(2) of the Criminal Code or another offence prescribed by regulation.

Section 48B provides that the court may order the sentence of imprisonment be served by way of a community custody order only if it receives a pre-sentence report and the court must not make the order if it makes an order suspending the sentence.

In addition, if the offender is convicted of more than one offence in the same proceeding, the court may make the order only if the total period of imprisonment imposed for all the offences does not exceed 12 months.

The court may make the order in addition to imposing a fine on the offender.

The period the community custody order is in force is the period of the term of imprisonment imposed.

Section 48E of the NT Act states that the community custody order is subject to the following conditions:

- the offender must not, during the period the order is in force, commit another offence (whether in or outside the Territory) punishable on conviction by imprisonment;
- the community work and program condition (set out later in the legislation);
- the offender must report to a probation and parole officer at a specified place within 2 clear working days after the order comes into force;
- the offender must report to, and receive visits from, a probation and parole officer at least twice during each week the order is in force or the shorter period specified in the order;
- the offender must tell a probation and parole officer of any change of address or employment within 2 clear working days after the change;
- the offender must not leave the Territory except with the permission of a probation and parole officer;
- the offender must:
    - o give a sample of the offender's voice for use with an approved monitoring device for the period specified in the order;
    - o comply with the reasonable directions of a probation and parole officer in the use of the device for the effective monitoring of the offender's activities;
- the offender must, for 12 hours during each week the order is in force, attend at the place specified in the order, or as otherwise directed by a probation and parole officer, for:
    - o performing community work for not less than 8 of the hours but no more than 8 hours in a day; and
    - o spending any balance of the hours undertaking a prescribed program, or undergoing counselling or treatment, as directed by the Commissioner.

The counselling or treatment must relate to the offender's psychological or psychiatric problem or the offender's misuse of alcohol or drugs.

Under the NT Act, the Commissioner may, by written notice given to the offender, require the offender to reside at a specified place, wear or have attached an approved monitoring device for the period specified in the notice (the temporary monitoring period) and allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device.

Section 48F provides that the court making a community custody order may impose either or both of the following conditions on the order:

- the offender must undertake one, or more than one, specified prescribed programs during the period the order is in force, or a shorter period specified in the order, if the pre-sentence report recommends the court impose a condition of that kind for a specified purpose;
- the offender must not consume or purchase alcohol or a drug (other than as prescribed by a medical practitioner or other health practitioner).

In addition, the court may impose all of the following conditions on the order:

- the offender must reside at a specified place;
- the offender must wear or have attached an approved monitoring device for the period the order is in force or the lesser period ordered by the court;
- the offender must allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device.

If the offender breaches the community custody order and the breach was by committing an offence while on the order, the court must revoke the order and unless there are exceptional circumstances which would make it unjust to do so, sentence the offender to imprisonment for the unexpired portion of the term of imprisonment originally ordered.

If the offender breaches any other condition of the order, the court may confirm, vary or revoke the order and sentence the offender to imprisonment for the unexpired portion of the term of imprisonment originally ordered.

Appendix 2

Minor Offences and Admission of Offence

The *Young Offenders Act 1993* (SA) (the YO Act) allows for formal and informal cautions, and for family conferences to be convened, in response to minor offences.

Under the YO Act a minor offence is an offence that should, in the opinion of the police officer in charge of the investigation of the offence, be dealt with as a minor offence because of:

- the limited extent of the harm caused through the commission of the offence; and
- the character and antecedents of the alleged offender; and
- the improbability of the youth reoffending; and
- where relevant—the attitude of the youth's parents or guardians.

Once an offence has been categorised as a minor offence, the police have a number of options as to how to address the offending, provided the youth admits to the commission of the minor offence.

Informal Caution

If the police officer is of the opinion that the matter does not warrant any formal action, the officer may informally caution the youth against further offending. If a youth is informally cautioned, no further proceedings may be taken against the youth for the offence and the informal caution given to a youth does not constitute a criminal record.

Formal Caution

In other cases, again if the youth admits committing a minor offence, a police officer may administer a formal caution against further offending and exercise any one or more of the following powers:

- the officer may require the youth to enter into an undertaking to pay compensation to the victim of the offence;
- the officer may require the youth to enter into an undertaking to carry out a specified period (not exceeding 75 hours) of community service;
- the officer may require the youth to enter into an undertaking to apologise to the victim of the offence or to do anything else that may be appropriate in the circumstances of the case.

Before the police officer proceeds to deal with an offence by way of a formal caution, the officer should explain to the youth the nature of the offence and of the circumstances out of which it is alleged to arise, that the youth is entitled to obtain legal advice and that the youth is entitled (irrespective of whether he or she exercises the right to obtain legal advice) to require that the matter be dealt with by the court.

If the youth does not require the matter to be dealt with by the court, the officer should put the admission into written form and, if possible, get the youth to sign the admission.

An explanation given to a youth or the signing of an admission by a youth should take place, if practicable, in the presence of a guardian of the youth or if a guardian is not available—an adult person nominated by the youth who has had a close association with the youth or has been counselling, advising or aiding the youth.

A charge may only be laid if the youth requires the matter to be dealt with by the court or if, in the opinion of the police officer, the matter cannot be adequately dealt with by the officer or a family conference because of the youth's repeated offending or some other circumstance of aggravation.

If the youth enters into an undertaking to apologise to the victim of the offence, the apology must be made in the presence of an adult person approved by a police officer.

If the youth enters into an undertaking above, the undertaking must be signed by the youth, a representative of the Commissioner of Police, and, if practicable, by the youth's parents or guardians. In addition, the undertaking will have a maximum duration of three months.

If a youth does not comply with a requirement of a police officer or an undertaking the officer or some other police officer may refer the matter to a Youth Justice Coordinator so that a family conference may be convened or if the youth requires the matter to be dealt with by the court, lay a charge for the offence before the court.

If a formal caution is to be given, the police officer must explain to the youth the nature of the caution. In addition, the officer must explain that evidence of the formal caution may, if the youth is subsequently dealt with for an offence, be treated as evidence of commission of the offence in respect of which the caution is administered.

If practicable, the formal caution must be administered in the presence of a guardian of the youth or, if none are available, an adult person nominated by the youth who has had a close association with the youth or has been counselling, advising or aiding the youth.

The formal caution must be put in writing and acknowledged in writing by the youth.

Before requiring a youth to enter this undertaking the police officer must take all reasonable steps to give the guardians of the youth an opportunity to make representations with respect to the matter. In addition, in exercising their powers under these provisions, the police officer must also have regard to sentences imposed for comparable offences by the court, have regard to any guidelines on the subject issued by the Commissioner of Police.

If a youth is cautioned, and no further requirements are made of the youth or if all requirements made of the youth under this section (including obligations arising under an undertaking) are complied with, the youth is not liable to be prosecuted for the offence.

Family Conference

If a young person admits to a minor offence the police officer may notify a Youth Justice

Coordinator so that a family conference may be convened to deal with the matter.

Before the police officer proceeds to deal with an offence by way of a family conference, the officer should explain to the youth the nature of the offence and of the circumstances out of which it is alleged to arise, that the youth is entitled to obtain legal advice and that the youth is entitled (irrespective of whether he or she exercises the right to obtain legal advice) to require that the matter be dealt with by the court. The same provisions as noted above concerning a formal caution apply with respect to the admission and the signing of the admission, and when a charge may be laid.

The police officer notifying the Youth Justice Coordinator provides details such as the names and addresses of the guardians of the youth, any relatives of the youth or persons closely associated with the youth who may be able to participate usefully in the family conference.

The police officer also provides information about the victim of the offence and, if the victim is a youth, the guardians of the victim.

The Youth Justice Coordinator then fixes a time and place for the family conference and issues a notice requiring the youth to attend. The Youth Justice Coordinator will invite the persons referred to above and in the case of the victim of the offence, will invite the victim to bring along a person of the victim's choice to provide assistance and support. The Youth Justice Coordinator can also invite other persons, whom the Youth Justice Coordinator, after consultation with the youth and members of the youth's family, thinks appropriate to attend the conference.

A family conference consists of a Youth Justice Coordinator (as chair), the youth, the persons invited to attend the conference and a representative of the Commissioner of Police.

A family conference should act if possible by consensus of the youth and such of the persons invited to attend the conference as attend in response to that invitation.

A decision by a family conference is not however to be regarded as validly made unless the youth and the representative of the Commissioner of Police concur in the decision.

A youth is entitled to be advised by a legal practitioner at a family conference.

If a family conference fails to reach a decision, the Youth Justice Coordinator must refer the matter to the court and the court may decide any question, and exercise any power, that could have been decided or exercised by the family conference.

The powers of a family conference are spelt out in section 12 of the YO Act as follows:

- the conference may administer a formal caution against further offending;
- the conference may require the youth to enter into an undertaking to pay compensation to the victim of the offence;
- the conference may require the youth to enter into an undertaking to carry out a specified period (not exceeding 300 hours) of community service;
- the conference may require the youth to enter into an undertaking to apologise to the victim of the offence or to do anything else that may be appropriate in the circumstances of the case.

In exercising powers under this section, the family conference must have regard to sentences imposed for comparable offences by the court. If a formal caution is administered, the caution must be put in writing and acknowledged in writing by the youth.

An undertaking will have a maximum duration of 12 months.

If a youth fails to attend a family conference, does not comply with a requirement of the family conference or does not comply with an undertaking then a police officer may lay a charge before the court for the offence.

If a youth is cautioned, and no further requirements are made of the youth through the family conference or if all requirements made of the youth are complied with, the youth is not liable to be prosecuted for the offence.

When a family conference is convened, the Youth Justice Coordinator must ask the victim of the offence whether he or she wishes to be informed of the identity of the offender and how the offence has been dealt with and if the victim indicates that he or she does wish to have that information—give the victim that information.

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