



# **SENTENCING REFORMS IN NEW SOUTH WALES: DON'T FENCE ME IN**

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Matthew Davis, Barrister  
4 Selborne Chambers  
[www.4selborne.com.au](http://www.4selborne.com.au)



## Introduction

On 24 September 2018, a series of sentencing reforms were introduced in New South Wales. They are a product of recommendations made in the 2013 NSW Law Reform Commission Sentencing Report, in which the NSW Law Reform Commission raised concerns about the adequacy of available sentences, and their effect on offenders and the community under the old regime. The changes are designed to hold offenders accountable, reduce re-offending (benefiting both the offender and the community) and reduce the number of offenders receiving short term full-time prison sentences (particularly those of 6 months)<sup>1</sup>. The reforms aim to meet those objectives by introducing more options involving supervision of the offender and by giving the court a greater ability to impose tailored sentences suitable to the offence and offender.

## How did we get here?

The reforms were brought about by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) (“**the Amendment Act**”), passed by NSW parliament on 18 October 2017, effective 24 September 2018. That Act amends the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“**the CSPA**”), the *Crimes (Administration of Sentences) Act 1999* (NSW) (“**the CASA**”), the *Crimes (Sentencing Procedure) Regulation 2017* (NSW) (“**the CSPR**”) and the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (“**the CASR**”). The reforms are part of a suite of changes made under the NSW Government’s “Strategy to Reduce Reoffending”, which also includes early appropriate guilty plea, parole and high-risk offender reforms.

## Summary of changes

The key changes are as follows:

- Certain sentences have been abolished. Suspended sentences have been abolished entirely. Home detention orders, community service orders and good behaviour bonds have been removed as stand-alone sentences but feature as discretionary conditions under new community based sentences and amended existing sentences.
- New types of sentences have been introduced. The less onerous Conditional Release Order (“**CRO**”) and the more onerous Community Correction Order (“**CCO**”) have been introduced, being 2 new forms of community based sentences. They are comprised of 2 mandatory “standard conditions” and can also be comprised of discretionary “additional orders” (which are exhaustive) and/or “further orders” (which are non-exhaustive but subject to exceptions).
- Intensive Correction Orders (“ICOs”) have been overhauled. ICOs now also have 2 mandatory “standard conditions” and can also be comprised of discretionary “additional orders” (which are exhaustive) and/or “further orders” (which are non-exhaustive but subject to exceptions). All offenders who receive an ICO are required to be supervised by Community Corrections officers. The court may add conditions such as home detention, electronic monitoring, curfews and community service work (community service no longer being mandatory).

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<sup>1</sup> <https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>

- Existing sentences are being converted to new sentence orders. Save for suspended sentences, all current sentences have been converted to their new regime equivalents.
- Domestic Violence Offenders provisions have been changed. There is now a presumption that domestic violence offenders will either receive a supervised community-based sentence or full-time imprisonment, unless the court gives clear reasons as to why another sentence is more appropriate.
- Sentencing Assessment Reports (previously known as “Pre-Sentence Reports”) have been streamlined. Only one assessment report is now required (where applicable) irrespective of the type of sentence the court is considering, and the prescribed matters to be addressed in the reports have changed.

**Annexure A to this paper contains comparative hierarchies of available sentences under the old and new regimes.**

## **Abolition of sentences – What’s out?**

Under the reforms, home detention orders (former s 6 of CSPA), community service orders (former s 8 of CSPA), good behaviour bonds (former s 9 of CSPA), non-conviction discharge to good behaviour bonds (former s 10(1)(b) of CSPA) and suspended sentences (former s 12 of CSPA) have been abolished.

### Non-conviction discharge to good behaviour bond

The substance of the former non-conviction discharge to good behaviour bond (former s 10(1)(b) of CSPA) remains in the form an order discharging the offender under a CRO pursuant to the new s 10(1)(b). Where a court makes an order discharging the offender under s 10(1)(b), it must then proceed to make a CRO under section 9.

Any non-conviction bonds imposed under s 10(1)(b) that had already been ordered as at 24 September 2018 will convert to a discharge under CRO under the new ss 10(1)(b) and 9.<sup>2</sup>

### Other abolished sentences (other than suspended sentences)

While home detention orders, community service orders and good behaviour bonds are no longer available on a stand-alone basis, they are still available as conditions of either CROs, CCOs or ICOs.

The rationale behind some of these changes is set out in the NSW Law Reform Commission’s 2013 report as follows:

*“Home detention and ICOs are underused sentencing options. They have important advantages in terms of reducing reoffending, reducing costs, and keeping offenders out of prison. There have been difficulties in making home detention and ICOs available across the state, and there are significant limitations on the offences for which they are available. A large proportion of those who have received ICOs have been low risk offenders needing little in the way of intervention. At the*

<sup>2</sup> CSPA, Sch 2, Pt 29, Clauses 71-78.

*same time, those for whom an intervention is appropriate have been excluded. There have also been problems with the regional availability of ICOs and home detention. Dissatisfaction was widely reported about the unnecessary delay arising from the need for separate suitability assessments to be made for ICOs and home detention.”<sup>3</sup>*

Home detention orders, community service orders and good behaviour bonds that had already been ordered as at 24 September 2018 have been converted to CROs, CCOs or ICOs.<sup>4</sup> These conversions are dealt with later in this paper.

### Suspended Sentences

On the topic of suspended sentences, the NSW Law Reform Commission found in its 2013 report that:

*“The key problem with suspended sentences is that they are conceptually flawed. They require a court to decide that no sentence other than imprisonment is appropriate, yet no imprisonment in fact takes place unless the s 12 bond is breached and revoked. This conceptual flaw has important practical implications, as the sentence can be at once too lenient and too harsh. Particularly in cases of unsupervised suspended sentences, an offender may not be required to do anything under the sentence other than not reoffend. In these cases, if the s 12 bond is not breached, the sentence appears to be too lenient for an offence for which no penalty other than imprisonment was appropriate. However, if the s 12 bond is breached—even if only one day before the end of the sentence—and the bond is revoked, the offender must serve the full term of imprisonment. This can be an unduly harsh result”.<sup>5</sup>*

Since the re-introduction of suspended sentences in 2000, their use has increased at the expense of community-based sentencing options e.g. good behaviour bonds or community service orders. The increase appears to have led to an increase in the prison population, being the opposite of the intended effect.

Whilst suspended sentences can no longer be imposed, those suspended sentences that had already been ordered as at 24 September 2018 will remain in place.<sup>6</sup>

## **New Sentences – What’s in?**

The reforms introduce two new types of sentence: the Conditional Release Order (ss 9 and 10(1)(b) of the CPSA) and the Community Correction Order (s 8 of the CSPA).

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<sup>3</sup> NSW Law Reform Commission (‘LRC’) in Report 139 – Sentencing (2013), [0.21-0.22] (<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-139.pdf>)

<sup>4</sup> *Supra*, 2.

<sup>5</sup> NSW Law Reform Commission (‘LRC’) in Report 139 – Sentencing (2013), [10.26-10.27] (<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-139.pdf>)

<sup>6</sup> CSPA, Sch 2, Pt 29, Clause 76.

CROs and CCOs are both comprised of their respective standard conditions (mandatory). They may also include additional conditions (discretionary and exhaustive) and further conditions (discretionary a non-exhaustive, but subject to exceptions).

## CROs

The NSW Department of Justice has stated that it is intended that CROs be ordered in cases of first-time and less serious offences where the offender is unlikely to present a risk to the community. The CRO acts as a warning and provides the option to divert less serious offenders out of the criminal justice system, freeing up resources to deal with the offenders who cause the greatest concern to the community. They allow a court to impose conditions such as drug and alcohol abstention, rehabilitation programs, non-association orders and place restrictions, where appropriate. CROs can have a supervision condition<sup>7</sup>.

## CROs - Availability

CROs are available for fine-only offences and offences punishable by imprisonment. A CRO cannot be ordered in tandem with a fine<sup>8</sup>. A CRO may be imposed on an offender under the age of 18 years. Before making a CRO in respect of a domestic violence offence, the court must consider the safety of the victim of the offence<sup>9</sup>.

In deciding whether to make a CRO, the court is to have regard to the following factors:

- (a) the person's character, antecedents, age, health and mental condition;
- (b) whether the offence is of a trivial nature;
- (c) the extenuating circumstances in which the offence was committed; and
- (d) any other matter that the court thinks proper to consider<sup>10</sup>.

## CROs - Key features

Similar to the former sections 9 and 10(1)(b) bonds, CROs can be ordered with or without a conviction<sup>11</sup>. If the court orders the discharge of a person under a CRO (i.e. a CRO without conviction), it must proceed to make a CRO under s 9. A CRO without a conviction may be made if the court is satisfied that it is inexpedient to inflict any punishment (other than nominal punishment on the person) or that it is expedient to discharge the person under a CRO (as per previous regime)<sup>12</sup>.

The features of a CRO are set out in Part 8 of the CSPSA (ss 94 to 100). The maximum term of a CRO is 2 years<sup>13</sup>. A CRO commences on the date on which it is made<sup>14</sup>. A CRO is subject to standard conditions, any additional conditions imposed by the court and any further conditions imposed by the court<sup>15</sup>.

A CRO is a non-custodial sentence.

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<sup>7</sup> <https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>

<sup>8</sup> s 9(3) of the CSPSA

<sup>9</sup> s 4B(3) of the CSPSA

<sup>10</sup> s 9(2) of the CSPSA

<sup>11</sup> s 9(1) of the CSPSA

<sup>12</sup> s 10(2) of the CSPSA

<sup>13</sup> s 95(2) of the CSPSA

<sup>14</sup> s 96 of the CSPSA

<sup>15</sup> s 97 of the CSPSA

## CROs - Standard Conditions

The 2 standard conditions, which are mandatory, are as follows:

- (a) the offender must not commit any offence; and
- (b) the offender must appear before the court if called on to do so at any time during the term of the CRO<sup>16</sup>.

The requirement “not to commit any offence”, i.e. not to commit a fresh offence, appears to provide a different threshold than the previous regime that required an offender to “be of good behaviour”. It may be that the new threshold is an attempt to move towards a plain English condition, or a condition that is more readily understandable by offenders. Alternatively, it has been posited by Legal Aid NSW that the requirement not to commit any offence sets higher threshold than the former requirement. It is argued that the requirement to be of “good behaviour” could have potentially had the effect that an offender who misbehaved (e.g. used illicit drugs) was in breach of the order even in the absence of a fresh offence. If the potential interpretation raised by Legal Aid NSW is the preferred view, there is a likelihood that fewer breaches will need to be reported by Community Corrections (for CROs and CCOs) and the Parole Authority (for ICOs). The proper construction of the new threshold will likely be clarified by appellate commentary.

## CROs - Additional Conditions

The additional conditions, which are discretionary, are as follows:

- (a) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment;
- (b) an abstention condition requiring abstention from alcohol or drugs or both;
- (c) a non-association condition prohibiting association with particular persons;
- (d) a place restriction condition prohibiting the frequenting of or visits to a particular place or area;
- (e) a supervision condition requiring the offender to submit to supervision by a community corrections officer (or in the case of a juvenile, a juvenile justice officer)<sup>17</sup>.

An additional condition must not include:

- (a) a home detention condition;
- (b) an electronic monitoring condition;
- (c) a curfew condition; or
- (d) a community service work condition<sup>18</sup>.

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<sup>16</sup> s 98(2) of the CSPA

<sup>17</sup> s 99(2) of the CSPA

<sup>18</sup> s 99(3) of the CSPA

The court may limit the period during which an additional condition under a CRO is in force<sup>19</sup>.

### CROs - Further Conditions

The further conditions, which are discretionary, are dealt with in s 99A of the CSPA. Under that section, the court may impose any further condition it desires, save that such condition must not be inconsistent with a standard or additional condition (whether or not it has been imposed under the CRO) and must not be a condition that is excluded under s 99(3) (referred to above).

On the one hand, the flexibility of the “further conditions” provisions will allow the court to tailor a sentence specific to the offender’s needs. For example, in respect of a traffic offence, it would be open to the court to disqualify the offender from driving unless it is for work purposes during specific hours. It would also be open to the court to order that the offender apologise to a victim. Conversely, the flexibility will potentially allow a court to impose unique or novel sentences whose consequences have not been researched and may not necessarily be desirable for the offender’s welfare or the community. On one view, the court will have a *carte blanche* on sentencing, able to create and impose sentences without precedent (subject to the few exceptions referred to in s 99A of the CSPA). Of some concern is the omission of any express reasonableness or appropriateness requirement in the “further conditions” provisions, which is commonly found in catch-all provisions e.g. “as the court sees fit”, “as the court considers appropriate” or “as is reasonable in the circumstances”. One would expect that the scope of the sentencing discretion will be confined by such things as the manifest excess sentence appeal ground and the purpose of sentencing provisions, being:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other persons from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender;
- (g) to recognise the harm done to the victim of the crime and the community.<sup>20</sup>

Another question that arises with the court’s broad power to impose “further conditions” is its ability to order the offender to pay compensation in relation to the offence. The provision under the old regime prohibiting the court from making an order to pay a fine or compensation as a condition of a good behaviour bond (former s 95(c) of the CSPA) has now been abolished, and there is currently no provision prohibiting the court from imposing a “further condition” of compensation under a community based sentence. Given that a CRO cannot be ordered in tandem with a fine for a single offence (as opposed to CCOs), it is open to argument as to whether compensation is prohibited from being ordered at least in respect of CROs. It is

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<sup>19</sup> s99(4) of the CSPA

<sup>20</sup> s 3A of the CSPA

likely that the power to impose a further condition of compensation will not be affected by the absence of a fines power, given the conceptual differences between each of them.

The court may limit the period during which a further condition under a CRO is in force<sup>21</sup>.

## CCOs

The court can utilise CCOs to punish offenders for crimes that do not warrant full-time imprisonment or an Intensive Corrective Order, but are too serious to be dealt with by a fine or lower level penalty. The benefit of CCOs, as with CROs, is that they are a flexible sentence that the court can tailor to reflect the nature of the offender and the offence. The court can select from a range of conditions which include, in addition to those available under CROs, community service work (up to 500 hours) and curfews<sup>22</sup>.

### CCOs - Availability

CCOs are available for offences punishable by imprisonment. They are not available for fine-only offences (as opposed to CROs). While this is not expressly stated in the legislation, it can be inferred from the contrast in the drafting of the provisions for CROs and CCOs. Section 9(1) of the CSPA provides that a CRO can be imposed “instead of imposing a sentence of imprisonment or a fine or both”, whereas section 8(1) of the CSPA provides that a CCO can be imposed “instead of imposing a sentence of imprisonment”.

A CCO may be ordered in tandem with a fine. As with CROs, a CCO may be imposed on an offender under the age of 18 years. Before making a CCO in respect of a domestic violence offence, the court must consider the safety of the victim of the offence<sup>23</sup>.

### CCOs - Key features

The features of a CCO are set out in Part 7 of the CPSA (ss 84 to 91). The maximum term of a CCO is 3 years.<sup>24</sup> A CCO commences on the date on which it is made<sup>25</sup>. A CCO is subject to standard conditions, any additional conditions imposed by the court and any further conditions imposed by the court.<sup>26</sup>

A CCO is a non-custodial sentence.

### CCOs - Standard Conditions

The 2 standard conditions, which are mandatory, are the same as the standard conditions under CROs.

They are as follows:

- (a) the offender must not commit any offence; and
- (b) the offender must appear before the court if called on to do so at any time during the term of the CCO<sup>27</sup>.

### CCOs - Additional Conditions

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<sup>21</sup> s 99A(3) of the CSPA

<sup>22</sup> <https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>

<sup>23</sup> s 4B(3) of the CSPA

<sup>24</sup> S 85(2) of the CSPA.

<sup>25</sup> s 86 of the CSPA

<sup>26</sup> S 87 of the CSPA.

<sup>27</sup> s 98(2) of the CSPA

The additional conditions, which are discretionary, are as follows:

- (a) a curfew condition imposing a specified curfew (not exceeding 12 hours in any period of 24 hours);**
- (b) a community service work condition requiring the performance of community service work for a specific number of hours (not exceeding 500 hours or the number of hours prescribed by the regulations, whichever is lesser);**
- (c) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment;
- (d) an abstention condition requiring abstention from alcohol or drugs or both;
- (e) a non-association condition prohibiting association with particular persons;
- (f) a place restriction condition prohibiting the frequenting of or visits to a particular place or area;
- (g) a supervision condition requiring the offender to submit to supervision by a community corrections officer (or in the case of a juvenile, a juvenile justice officer)<sup>28</sup>.

**[The additional conditions are the same as those under CROs, save for those set out in bold above]**

Any additional condition must not include:

- (a) a home detention condition;
- (b) an electronic monitoring condition;
- (c) a curfew condition imposing a curfew exceeding 12 hours in any period of 24 hours<sup>29</sup>.

A community service work condition must not be imposed under a CCO if it is made in relation to an offender to whom the *Children (Community Service Orders) Act 1987* (NSW) applies<sup>30</sup>, or if it is made in relation to an offender who resides, or intends to reside, in another State or Territory unless the court is satisfied that the offender is able and willing to travel to NSW to complete the community service work, or the State or Territory is declared by the regulations to be an approved jurisdiction<sup>31</sup>. The CSPR currently does not declare any other state or territory to be an approved jurisdiction. Before a court imposes a community service work order under a CCO, an Assessment Report must state that the offender is suitable to be subject to the community service work condition<sup>32</sup>.

The court may limit the period during which an additional condition under a CCO is in force<sup>33</sup>.

#### CCOs - Further conditions

The further conditions, which are discretionary, are dealt with in s 90 of the CSPA. Under that section, the court may impose any further condition it desires, save that such condition must not be inconsistent with a

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<sup>28</sup> s 89(2) of the CSPA

<sup>29</sup> s 89(3) of the CSPA

<sup>30</sup> s 8(2) of the CSPA

<sup>31</sup> s 89(4B) of the CSPA

<sup>32</sup> s 89(4) of the CSPA

<sup>33</sup> s 89(5) of the CSPA

standard or additional condition (whether or not it has been imposed under the CCO) and must not be a condition that is excluded under s 89(3) (referred to above).

The court may limit the period during which a further condition under a CCO is in force<sup>34</sup>.

## Differences between CROs and CCOs

To summarise, the differences between CROs and CCOs are as follows:

- The maximum term of CROs is 2 years, whereas the maximum term of CCOs is 3 years.
- A CRO may be recorded without a conviction. That is not possible with a CCO.
- CROs and CCOs have the same available additional conditions, save that CCOs have a further 2 additional conditions available, namely a curfew of less than 12 hours in any 24 hour period and community service work. Conversely, CROs and CCOs have the same excluded conditions, save that CROs have a further 2 additional excluded conditions, namely a curfew of any sort and community service work. CCOs exclude curfews of longer more than 12 hours in any 24 hour period.
- A CCO can be ordered in addition to a fine, whereas a CRO cannot.
- A CRO can be ordered in respect of a fine-only offence or an offence punishable by imprisonment, whereas a CCO can only be ordered in respect of an offence punishable by imprisonment.
- Unless otherwise ordered by the court, no Assessment Report is required for CROs. An assessment report will be required for CCOs in circumstances where a community service work condition is to be imposed or if otherwise ordered by the court.

## Additions, variations and revocations of CRO or CCO

The court may vary, add or revoke conditions at any time after the sentence (even without breach of a condition) on the application of a Community Corrections officer, Juvenile Justice officer or the offender<sup>35</sup>. As explained by the Attorney General in the second reading speech for the Amendment Act, these provisions “*will provide a much wider range of tools to deal with problematic behaviour in the community before it escalates to the point where the order must be revoked*”<sup>36</sup>.

The court may refuse to consider such application by the offender if it is satisfied that the application is without merit.<sup>37</sup> Oddly enough, the same merit test does not apply to applications made by a Community Corrections officer or Juvenile Justice officer. There is no legislative guidance on what constitutes “without merit”. Although not expressly provided for in the new legislation, Legal Aid NSW has suggested that it would likely extend to multiple applications in the absence of a material change in circumstances. If that is what was intended, one wonders why the legislation simply does not say it. This aspect of the legislation will likely be subject to interpretation by higher courts before a concluded position can be arrived at.

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<sup>34</sup> s 90(3) of the CSPA

<sup>35</sup> Ss 99(1) and 99A(1) for CROs and ss 89(1) and 90(1) for CCOs

<sup>36</sup> <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1323879322-99200/HANSARD-1323879322-99199>

<sup>37</sup> S 100(1) for CROs and s 91(1) for CCOs

One concerning feature of the new regime is that it appears that a court's decision to refuse to consider an application for addition, variation or revocation by an offender for want of merit may not be amenable to the appeal provisions contained in the *Crimes (Appeal and Review) Act 2001* (NSW) and *Criminal Appeal Act 1912* (NSW) given the decision under review would be a decision refusing to consider an application to vary an order, not an appeal against conviction or sentence. It is likely that such a refusal is amenable to the supervisory power of the Supreme Court.

The court may, with the consent of the Community Corrections officer/Juvenile Justice officer (as applicable) and the offender, deal with the application with or without parties being present and in open court or in the absence of the public<sup>38</sup>. The application is to be made to the sentencing court. Regulation 13 of the CSPR sets out the procedural requirements in relation to such application.

There is no statutory time limit within which an application to add, vary or revoke is to be filed, nor is there any statutory restriction on the number of times such application can be made. It will be interesting to see whether such applications are made in lieu of appeals, particularly given that the application need not be made before the same sentencing judicial officer<sup>39</sup>.

There is no guidance in the legislation about the reasons for a court to vary the conditions of a CRO or CCO (or ICO for that matter). The Victorian legislation sets out 5 exhaustive bases on which such an application to vary may be made. They are as follows:

- (a) the circumstances of the offender have materially altered since the order was made, and as a result the offender will not be able to comply with a condition of the order;
- (b) the circumstances of the offender were wrongly stated or were not accurately presented to the court or to the author of an assessment report before the order was made;
- (c) the offender no longer consents to the order;
- (d) the rehabilitation and reintegration of the offender would be advanced by the making of the decision to vary the order;
- (e) the continuation of the sentence is no longer in the interests of the community or the offender<sup>40</sup>.

It may be the case that NSW courts will be guided by the Victorian provisions and any consequent case law in that jurisdiction.

Separately to the above, a Community Corrections officer may suspend the application of a supervision condition to an offender for a period or periods indefinitely<sup>41</sup>. The suspension may be unconditional or subject to conditions<sup>42</sup>. A failure to comply with a condition of the suspension is taken to be a failure to comply with the obligations of the CRO or CCO<sup>43</sup>. Before suspending any of these conditions, the Community Corrections officer must take into account the risk of the offender re-offending, the seriousness of the offender's criminal history, the likely benefits of the supervision condition continuing to apply, the

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<sup>38</sup> S 100(2) for CROs and s 91(2) for CCOs

<sup>39</sup> s 100(3) for CROs and s 91(3) for CCOs

<sup>40</sup> s 48M(1) of the Sentencing Act 1991 (VIC)

<sup>41</sup> s 108E(2) for CROs, s 107E(2) for CCOs and 82A for ICOs of the CASA

<sup>42</sup> s 108E(4) for CROs and s 107E(4) for CCOs of the CASA

<sup>43</sup> s 108E(5) for CROs and s 107E(5) for CCOs of the CASA

other measures that are being or may be taken to address the risk of re-offending and the resources available to supervise the offender and other offenders who may be at a higher risk of re-offending<sup>44</sup>.

## **Breach of CRO or CCO**

The consequences of a breach of a CRO or CCO are set out in the CASA. The procedure is substantially the same as the former procedure for call-up of a section 9 or 10(1)(b) good behaviour bond. In short, in the case of a breach, it is open to the court to make no further order, to vary the CRO or CCO or to revoke the CRO or CCO entirely and re-sentence the person for the original offence.

If the court suspects that an offender may have failed to comply with any of the conditions of a CRO or a CCO:

- (a) the court that made the order, or
- (b) any other court of like jurisdiction; or
- (c) with the offender's consent, any other court of superior jurisdiction,

may call on the offender to appear before it<sup>45</sup>.

For purposes of (c) above, a court is of superior jurisdiction to the court that made the CRO or CCO if it is a court to which the offender has (or has had) a right of appeal in respect of the conviction or sentence from which the order arises<sup>46</sup>. If the offender fails to appear, the court may issue a warrant for the offender's arrest or authorise an authorised officer to do so<sup>47</sup> (an authorised officer having the same meaning as in the Criminal Procedure Act 1986 (NSW), i.e. a Registrar of the court or a duly authorised employee of the Attorney General).

Importantly, if it is satisfied that an offender appearing before it has failed to comply with any of the conditions of a CRO, a court:

- (a) may decide to take no action in respect of the failure to comply, or
- (b) may vary or revoke any conditions of the order (other than standard conditions) or impose further conditions on the order, or
- (c) may revoke the order<sup>48</sup>.

If a court revokes a CRO, it may sentence or re-sentence the offender for the offence to which the order relates<sup>49</sup>.

Regulation 329 of the CASR sets out the procedure for dealing with breaches of CROs and CCOs.

## **Intensive Correction Orders – What's changed?**

An ICO is a custodial sentence which is served in the community.

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<sup>44</sup> Regulation 189I(1) of CASR

<sup>45</sup> s 108C(1) for CROs and s 107C(1) for CCOs of the Crimes (Administration of Sentences) Act 1999 (NSW)

<sup>46</sup> s 108C(4) for CROs and s 107C(4) for CCOs of the Crimes (Administration of Sentences) Act 1999 (NSW)

<sup>47</sup> s 108C(2) for CROs and s 107C(2) for CCOs of the Crimes (Administration of Sentences) Act 1999 (NSW)

<sup>48</sup> s 108C(5) for CROs and s 107C(5) for CCOs of the Crimes (Administration of Sentences) Act 1999 (NSW)

<sup>49</sup> s 108C(1) for CROs and s 107(1) for CCOs of the Crimes (Administration of Sentences) Act 1999 (NSW)

It is the most serious sentence that an offender can serve in the community.

Under the recent reforms, the structure of the ICO available under s 7 of the CSPA has been amended to be in line with the “standard/additional/further condition” structure of CROs and CCOs. Several other changes have been made to ICOs, including that supervision is mandatory, community service work is no longer mandatory, that home detention is an available discretionary condition and that domestic violence offences are subject to specific sentencing considerations.

The primary drive behind the changes is the need for community safety. In the second reading speech for the Amendment Act, the Attorney General stated that:

*“Community safety is not just about incarceration. Imprisonment under 2 years is commonly not effective at bringing about medium to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective than this.”<sup>50</sup>*

In addition, ICOs have a number of advantages over full-time imprisonment, including the reduction of re-offending, keeping offenders out of prison and the reduction of costs.

#### ICOs - Availability

ICOs are not available to offenders under the age of 18 years, nor are they available to offenders who reside, or intend to reside, in another State or Territory, unless the State or Territory is declared by the regulations to be an approved jurisdiction.<sup>51</sup> The CSPR currently does not declare any other State or Territory to be an approved jurisdiction. The reforms have also expanded the range of offences in which an ICO cannot be imposed. The offences in respect of which an ICO could previously not be imposed were limited to certain sexual offences. The offences are now as follows:

- (a) murder or manslaughter;
- (b) a prescribed sexual offence (prescribed in s 67(2) of the CSPA);
- (c) a terrorism offence;
- (d) an offence involving the contravention of a serious crime prevention order;
- (e) an offence involving the contravention of a public safety order;
- (f) an offence involving the discharge of a firearm;
- (g) an offence that includes the commission of, or intention to commit, one of the above offences;
- (h) an offence of attempting, or of conspiracy or incitement, to commit one of the above offences<sup>52</sup>.

Having regard to the above, if the court is satisfied that there is no option other than imprisonment in respect of a prescribed sexual offence, the court will have no option but to impose a sentence of full-time imprisonment<sup>53</sup>. If, however, the court is not satisfied that imprisonment is the only option, CROs and CCOs are still, somewhat curiously, available, as no exclusions similar to (b) above apply to CROs or

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<sup>50</sup> Second reading speech

<sup>51</sup> s 69(3) of CSPA

<sup>52</sup> s 67(1) of the CSPA

<sup>53</sup> s 5(1) of the CSPA

CCOs. That mechanism in the CSPA raises the question why ICOs cannot be ordered in respect of the prescribed sexual offences in the first place or, alternatively, why similar excluded offences do not apply to CROs and CCOs.

In addition, the court cannot make an ICO in respect of a domestic violence offence unless it is satisfied that the victim of the offence, and any person with whom the offender is likely to reside, will be adequately protected (whether by the conditions of the ICO or for some other reason)<sup>54</sup>. The onus is on the offender to establish that the victim will be adequately protected.

In considering whether to order an ICO, community safety is the paramount consideration<sup>55</sup>. When considering community safety, the court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending<sup>56</sup>. When deciding whether to make an ICO, the court must also consider the provisions of section 3A (purposes of sentencing), any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant<sup>57</sup>. It is an odd feature of the new legislation that courts are expressly required to have regard those matters in making an ICO but the CSPA remains silent on the point as regards CROs, CCOs and other lesser sentences. That may be a matter which will receive some judicial or appellate attention.

The court must also have regard to the contents of any Assessment Report obtained in relation to the offender and evidence from a Community Corrections officer and any other information that is before the court which it considers necessary for the purpose of deciding whether to make such an order<sup>58</sup>. The court is not bound by the Assessment Report, save that it must not impose a home detention condition or community service work condition unless the report states that the offender is suitable to be subject to same<sup>59</sup>.

### ICOs - Key Features

The features of an ICO are set out in Part 5 of the CPSA (ss 64 to 73B). The term of an ICO is the term of imprisonment in respect of which the order is made, unless sooner revoked<sup>60</sup>, however regard should be had to the limitations set out in s 68 of the CSPA. Section 68 of the CSPA provides that an ICO must not be made in respect of a single offence if the duration of the term of imprisonment imposed for the offence is more than 2 years<sup>61</sup>. An ICO may be made in respect of an aggregate sentence of imprisonment, but only if the duration of the term of the sentence is not more than 2 years<sup>62</sup>. 2 or more ICOs may be made in respect of each of 2 or more offences, unless:

- (a) the duration of the term of any individual term of imprisonment is more than 2 years; and
- (b) the duration of the term of imprisonment imposed for all of the offences is more than 3 years<sup>63</sup>.

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<sup>54</sup> s 4B(1) of the CSPA

<sup>55</sup> s 66(1) of the CSPA

<sup>56</sup> s 66(2) of the CSPA

<sup>57</sup> s 66(3) of the CSPA

<sup>58</sup> s 69(1) of the CSPA

<sup>59</sup> ss 69(2) and 73A(3) of the CSPA

<sup>60</sup> s 70 of the CSPA

<sup>61</sup> s 68(1) of the CSPA

<sup>62</sup> s 68(2) of the CSPA

<sup>63</sup> s 68(3) of the CSPA

In other words, ICOs are now available for single sentences up to a maximum of 2 years, and for aggregate sentences up to a maximum of 3 years. An ICO commences on the date on which it is made, unless the ICO is to be served consecutively (or partly concurrently and partly consecutively) with some other ICO<sup>64</sup>. Whilst a court may impose an ICO which is to be served concurrently with, or consecutive to, a previous ICO, it must not do so where the duration of any individual term of imprisonment exceeds 2 years; and, the duration of the term of imprisonment imposed for all of the offences exceeds 3 years.<sup>65</sup>

An ICO is subject to standard conditions, any additional conditions imposed by the court and any further conditions imposed by the court. Unlike with CROs and CCOs, an ICO is also subject to any conditions imposed by the Parole Authority under s 81A or 164 of the CASA<sup>66</sup>. These provisions are discussed later in this paper.

### ICOs - Standard Conditions

The standard conditions of ICOs, which are mandatory, are slightly different from those of CROs and CCOs. They are as follows:

- (a) a condition that the offender must not commit an offence; and
- (b) a condition that the offender must submit to supervision by a community corrections officer<sup>67</sup>.

### ICOs - Additional Conditions

The additional conditions, which are discretionary, are as follows:

- (a) a home detention condition;**
- (b) an electronic monitoring condition;**
- (c) a curfew condition imposing a specified curfew;
- (d) a community service work condition requiring the performance of community service work for a specified number of hours **(not exceeding 750 hours);**
- (e) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment;
- (f) an abstention condition requiring abstention from alcohol or drugs or both;
- (g) a non-association condition prohibiting association with particular persons;
- (h) a place restriction condition prohibiting the frequenting of or visits to a particular place or area<sup>68</sup>.

**[The additional conditions are the same as those under CCOs, save for those set out in bold above]**

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<sup>64</sup> s 71 of the CSPA

<sup>65</sup> s 68(3) of the CSPA

<sup>66</sup> s 72 of the CSPA

<sup>67</sup> s 73(2) of the CSPA

<sup>68</sup> s 73A(2) of the CSPA

The court must impose at least one additional condition under an ICO unless there are exceptional circumstances<sup>69</sup> (as opposed to CROs and CCOs where no additional condition needs to be imposed). The court must make a record of its reasons for not imposing an additional condition<sup>70</sup>.

Unlike with CCOs, the curfew condition is not limited in any way, and the maximum number of community service hours is 750 (as opposed to 500 for CCOs). As stated earlier in this paper, the court must not impose a home detention or community service work condition unless an Assessment Report states that the offender is suitable to be subject to same<sup>71</sup>.

The court must not impose a home detention condition under an ICO in respect of a domestic violence offence if it reasonably believes that the offender will reside with the victim of the offence<sup>72</sup>.

The court may limit the period during which an additional condition under an ICO is in force<sup>73</sup>. As with CROs and CCOs, it is also possible for the court to structure certain conditions in order that they operate in a tiered way. By way of example, a court could conceivably make an ICO for a period of 12 months with a cascading effect such that during the first 3 months the offender is subject to a home detention condition, during the next 3 months the offender is subject to an electronic monitoring condition, during the next 3 months the offender is subject to a curfew condition and the final 3 months the offender is subject only to the standard conditions. This would enable the court to manufacture a sentence that gives effect to the objects of holding offenders accountable, tackling offending behaviour and intensively managing offenders with complex issues, all of which were referred to in the Attorney-General's Second Reading Speech.

### ICOs - Further Conditions

The further conditions, which are discretionary, are dealt with in s 73B of the CSPA. Under that section, the court may impose any further condition it desires, save that such condition must not be inconsistent with a standard or additional condition, whether or not it has been imposed under the ICO<sup>74</sup>.

The court may also limit the period during which a further condition under a ICO is in force<sup>75</sup>.

## **Additions, variations and revocations of ICO**

Prior to the reforms, an ICO could only be added to, varied or revoked (in circumstances other than breach) by application to the court by the Commissioner of Corrective Services of the offender<sup>76</sup>. Under the new legislation, such application is no longer made to the court but to the Parole Authority<sup>77</sup>. The offender is not bound to meet any "merit requirements", as required under the provisions regarding the addition to, variation of or revocation of CRO or CCOs. It appears that the power to decline to hear an application that is frivolous or vexatious (as appeared in the previous version of the CASA) has been removed.

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<sup>69</sup> ss 73A(1) and 73A(1A) of the CSPA

<sup>70</sup> s 73A(1B) of the CSPA

<sup>71</sup> s 73A(3) of the CSPA

<sup>72</sup> s 4B(2) of the CSPA

<sup>73</sup> s 73A(4) of CSPA

<sup>74</sup> s 73B(2) of the CSPA

<sup>75</sup> s 73B(3) of the CSPA

<sup>76</sup> Former s 81 of the CASA

<sup>77</sup> s 81A of the CASA

When considering such an application, the Parole Authority must not vary or revoke a standard condition. It must not impose or vary a condition unless the court could have imposed the condition or varied condition at first instance. It must not impose a condition imposing a period of home detention or community service work unless an assessment report states that it is appropriate in the circumstances. If it revokes an additional condition which is the only additional condition, it must impose a replacement additional condition unless the Parole Authority is satisfied that there are exceptional circumstances<sup>78</sup>. There is no requirement that the Parole Authority record the exceptional circumstances in writing, in contrast to the requirement on the court to do so upon sentencing.

Under these provisions, it is open to the Parole Authority to impose “further conditions” on an ICO. The same concerns regarding the breadth of a court’s power to order “further conditions” at large, as referred to earlier in this paper, also exist in the case of the Parole Authority.

Separately to the above, a Community Corrections officer may suspend a supervision condition, curfew condition, non-association condition or place restriction condition under an ICO<sup>79</sup>. The suspension may be unconditional or subject to conditions<sup>80</sup>. Before suspending any of these conditions, the community corrections officer must take into account the risk of the offender re-offending, the seriousness of the offender’s criminal history, the likely benefits of the supervision condition continuing to apply, the other measures that are being or may be taken to address the risk of re-offending and the resources available to supervise the offender and other offenders who may be at a higher risk of re-offending<sup>81</sup>.

## Breach of ICOs

If the Commissioner of Corrective Services or a Community Corrections officer is satisfied that the offender has failed to comply with his or her obligations under an ICO, a Community Corrections officer may:

- (a) record the breach and take no further action;
- (b) give an informal warning to the offender;
- (c) give, or arrange to be given to, the offender a formal warning that further breaches will result in a referral to the parole authority;
- (d) give a reasonable direction to the offender relating to the kind of behaviour by the offender that caused the breach; or
- (e) impose a curfew on the offender of up to 12 hours in any 24-hour period<sup>82</sup>.

Alternatively, the Commissioner of Corrective Services or a Community Corrections officer may refer the breach to the Parole Authority and recommend any action to be taken<sup>83</sup>. That constitutes an expansion of the options available to the commissioner of a community corrections officer in response to a breach of an ICO.

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<sup>78</sup> ss 81(2), (3) and (4) of the CASA

<sup>79</sup> s 82A(1), (2) and (3) of the CASA

<sup>80</sup> s82A(4) of the CASA

<sup>81</sup> Regulation 189I(1) of CASR

<sup>82</sup> s 163(2) of the CASA

<sup>83</sup> s 163(3) of the CASA

Once referred to the Parole Authority, that body may:

- (a) record the breach and take no further action;
- (b) give a formal warning to the offender;
- (c) impose any conditions on the ICO;
- (d) vary or revoke any conditions of the ICO;
- (e) make an order revoking the ICO<sup>84</sup>.

In the case of a revocation of an ICO under s 164(2)(e), a warrant is issued and the offender is to be taken into custody. The offender would ordinarily serve the remaining balance of the sentence in full-time imprisonment because the sentencing court is not able to set a non-parole period when imposing an ICO. However, the Parole Authority can make an order reinstating the ICO<sup>85</sup>. A reinstatement application can be made by the offender after he or she has served at least 1 month in custody following the revocation of the ICO<sup>86</sup>. If a reinstatement order is made, the offender would serve the remaining balance of the sentence by way of ICO.

Prior to the reforms, the Commissioner of Corrective Services had the power to take the steps set out in (a) and (b) above. Those powers have now been handed over to the Parole Authority.

## **Additional Conditions under CROs, CCOs and ICOs**

### Non-association and place restriction condition

As set out earlier in this paper, a non-association and place restriction condition may be imposed as an additional condition under a CRO, CCO or ICO. This does not affect the court's ability to order a stand-alone non-association or place restriction order under s 17A of the CSPA. Interestingly:

- When imposed under s 17A, the restriction is subject to a 12-month limitation<sup>87</sup>. There is no such limitation when the restriction is imposed as a condition under a CRO, CCO or ICO.
- The restriction under s 17A is available only in respect of offences which are punishable by imprisonment of 6 months or more. There is no such temporal restriction with CROs, CCOs or ICOs.
- A contravention of s 17A is a discrete offence, whereas a breach of a sentence condition is not (although the underlying behaviour in breach of a condition may be as a result of the commission of a fresh offence).

### Supervision condition

The most prominent feature of the new reforms is the focus on and availability of supervision conditions across community based sentences. Research indicates community supervision and programs are far more effective at reducing rates of reoffending than short-term gaol sentences (of less than 2 years), and

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<sup>84</sup> s 164(2) of CASA

<sup>85</sup> s 165(1) of the CASA

<sup>86</sup> s 165(2)(a) of the CASA

<sup>87</sup> s 17A(5) of the CSPA

that supervision has the greatest impact on offenders who are assessed as being at medium or high-risk of reoffending<sup>88</sup>. Indeed, the NSW Bureau of Crime Statistics and Research noted in 2017 that there was an 11% to 31% reduction in the odds of re-offending for an offender who received an ICO when compared to an offender who received a prison sentence of up to 24 months.<sup>89</sup>

A supervision condition may not be imposed in respect of an offender who resides, or intends to reside, in another State or Territory, unless the State or Territory is declared by the regulations to be an approved jurisdiction<sup>90</sup>. The CSPR currently does not declare any other State or Territory to be an approved jurisdiction. However, in the case of offenders who wish to serve their sentences interstate, each case would need to be considered in light of the *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW) and any corresponding interstate legislation. Consideration of both the NSW and interstate legislation is important as the only place at present which has been declared to be a participating jurisdiction for the purpose of transferring community based sentences to or from New South Wales is the Australian Capital Territory.<sup>91</sup>

Supervision requires an offender to regularly report to and obey reasonable directions from his or her Community Corrections officer. According to the NSW Department of Justice, “*evidence shows supervision of offenders at risk of returning to crime, combined with rehabilitation, is the best way to reduce reoffending... When supervising offenders, officers use cognitive and behavioural interventions to reduce the risk that the offender will return to crime*”<sup>92</sup>. Supervision includes supervision of curfews and the continued participation in rehabilitation programs, where applicable. The NSW Department of Corrective Services is in the process of recruiting about 200 new Community Corrections staff for this purpose, noting that they will be supervising thousands of offenders who were previously unsupervised in the community. More specifically, an offender who is subject to a supervision order under a CRO or CCO has the following obligations:

- (a) to report to a community corrections officer as soon as practicable after (but not later than 7 days after) the supervision condition is imposed (noting that a supervision condition may be imposed at the time the order is made or at a later time);
- (b) to report to a community corrections officer at the times and places directed by the officer;
- (c) to comply with all reasonable directions of a community corrections officer relating to any of the following:
  - (i) the place in which the offender is to reside;
  - (ii) participating in programs, treatment, interventions or other related activities;

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<sup>88</sup> [https://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0005/29579/Sentencing-reform-FAQs.pdf](https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0005/29579/Sentencing-reform-FAQs.pdf)

<sup>89</sup> Wang and Poynton, *Contemporary Issues in Crime and Justice No 207*. Intensive correction orders versus short prison sentence: A comparison of re-offending, BOCSAR (2017).

<sup>90</sup> S 99(3A) for CROs and s 89(4A) for CCOs

<sup>91</sup> *Crimes (Interstate Transfer of Community Based Sentences) Regulation 2015* (NSW), r 4; *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW), ss 8 & 10 – see also: Pts 4, 5 and 5A of that Act

<sup>92</sup> <https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx>

- (iii) participating in employment, education, training or other related activities;
  - (iv) not undertaking specified employment, education, training, volunteer, leisure or other activities;
  - (v) not associating with a specified person;
  - (vi) not frequenting or visiting a specified place or area;
  - (vii) ceasing drug use;
  - (viii) ceasing or reducing alcohol use;
  - (ix) drug and alcohol testing;
  - (x) requirement for purposes of monitoring compliance with the order; and
  - (xi) giving consent to third parties providing information to a community corrections officer about the offender's compliance with the order;
- (d) to comply with any other reasonable directions of a community corrections officer;
  - (e) to permit a community corrections officer to visit the offender at the offender's place of residence at any time and, for that purpose, to enter the premises;
  - (f) to notify a community corrections officer of any change to the offender's place of residence, contact details or employment<sup>93</sup>.

#### Community Service Work condition

The maximum number of hours of community service work in an additional condition under a CCO or ICO are as follows:

- for offences with a maximum term of imprisonment of 6 months - 100 hours;
- for offences with a maximum term of imprisonment for 1 year - 200 hours;
- for offences with a maximum term of imprisonment exceeding 1 year - 500 hours for CCO and 750 hours for ICO<sup>94</sup>.

The minimum period that a community service work condition under a CCO must be in force is:

- where the number of hours ordered is 100 hours or less - 6 months;
- where the number of hours ordered is 101-300 hours - 12 months;
- where the number of hours ordered is 301-500 hours - 18 months;
- where the number of hours orders exceeds 500 hours - 2 years <sup>95</sup>.

Part 10, Division 2 of the Crimes (Administration of Sentences) Regulation 2014 (NSW) makes further provision about standard and additional conditions.

## **Transitional Provisions and Sentence Conversions**

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<sup>93</sup> Regulation 188(1) of the Crimes (Administration of Sentences) Regulation 2014 (NSW)

<sup>94</sup> Regulation 14(1) of the CASA

<sup>95</sup> Regulation 14(2) of the Crimes (Sentencing Procedure) Regulation 2017 (NSW)

Part 29 of Schedule 2 of CPSA (ss 70 to 87) sets out the transitional provisions in relation to sentencing, including how existing and continuing sentences are to be treated now that the legislation has changed. By these provisions, most sentences existing as at the date of the reforms (24 September 2018) were converted to sentences under the new regime. The conversion is automatic, and no court order is required. In summary, the conversions are as follows:

<b>Old sentence</b>	<b>New sentence</b>
Home Detention Order	New ICO with home detention condition
ICO	New ICO with same and standard conditions
Section 12 Suspended Sentence	Remains in force unless breached and revoked, then either: <ul style="list-style-type: none"><li>- Re-sentence to full time imprisonment, or</li><li>- Re-sentence to new ICO</li></ul>
Community Service Order	CCO with community service condition
Section 9 Good Behaviour Bond	CCO with same and standard conditions
Section 10(1)(b) Good Behaviour Bond	CRO without conviction with same and standard conditions

## **Further domestic violence and sexual offence provisions**

A presumption now exists to the effect that if the court finds a person guilty of a domestic violence offence, it must impose either full time imprisonment or a supervised order under a CRO, CCO or ICO, unless the court is satisfied that a different sentencing option is more appropriate in the circumstances and the court gives reasons for reaching that view <sup>96</sup>.

It is important to keep in mind that:

- an ICO cannot be imposed in respect of certain prescribed sexual offences<sup>97</sup>; and
- as referred to earlier in this paper, the court cannot make an ICO in respect of a domestic violence offence unless it is satisfied that the victim of the offence, and any person with whom the offender is likely to reside, will be adequately protected (whether by the conditions of the ICO or for some other

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<sup>96</sup> ss 4A(1) and (2) of CSPA

<sup>97</sup> s 67 of the CSPA

reason)<sup>98</sup>. It is to be noted that a similar express provision does not appear to exist in relation to CROs and CCOs.

## Assessment Reports

Under the new sentencing regime, Community Corrections will be able provide information about the offender, and suitability for different sentencing options, at the time of sentencing by way of a single Assessment Report.<sup>99</sup> There is no longer a requirement for separate reports for each different type of sentencing order. In his second reading speech, the Attorney-General explained that under the old regime, the requirement for different Pre-Sentence Reports for different sentences was “overly complex” and gave rise to adjournments and delays<sup>100</sup>.

The new division 4B of the CSPA provides that the purpose of an Assessment Report is to assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender during sentencing proceedings<sup>101</sup>. An assessment report is made by a Community Corrections officer or a Juvenile Justice officer<sup>102</sup>.

Obtaining an Assessment Report is at the court’s discretion, except if required for purposes of a home detention condition, community service work condition <sup>103</sup>. In addition, an Assessment Report will be required for all ICOs unless the court is satisfied that there is sufficient information before it to justify the making of an ICO without obtaining an Assessment Report<sup>104</sup>.

If a court refers an offender for assessment where a sentence of imprisonment has been imposed in respect of the relevant offence, the referral stays the execution of the sentence and the offender is to be remanded in custody unless granted bail in accordance with the *Bail Act 2013* (NSW)<sup>105</sup>.

The CSPR prescribes the matters to be addressed in an Assessment Report. They are (without limitation) as follows:

- (a) the offender’s risk of re-offending;
- (b) any factors related to the offender’s offending behaviour;
- (c) any factors that may impact on the offender’s ability to address his or her behaviour;
- (d) how the matters referred to in (b) and (c) above would be addressed by supervision and the availability of resources to do so;
- (e) any conditions that would facilitate the effective supervision of the offender in the community;
- (f) the offender’s suitability for community service work;

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<sup>98</sup> s 4B(1) of the CSPA

<sup>99</sup> S 17D(5) of the CSPA

<sup>100</sup> Second reading speech

<sup>101</sup> s 17B(2) of the CSPA

<sup>102</sup> s 17B(3) of the CSPA

<sup>103</sup> ss 17C(1) and (2) of the CSPA.

<sup>104</sup> s 17D(1A) of the CSPA

<sup>105</sup> s 17C(2) of the CSPA

- (g) a summary of the offender's response to any previous period of management in the community in respect of any relevant order;
- (h) any additional matters that the court wishes to have specifically addressed<sup>106</sup>.

An Assessment Report need not address the above matters if it is not relevant to the circumstances relating to the offender or the court does not require the matter to be addressed<sup>107</sup>.

An Assessment Report in relation to a home detention condition must address the offender's suitability for home detention, any risks associated with imposing home detention (including any risks to the offender or other persons including children), any strategies that could manage those risks and any other matters relevant to administering an ICO with a home detention condition<sup>108</sup>. If it appears that the offender does not have accommodation suitable for the purposes of home detention, the Assessment Report is not to be finalised until reasonable efforts have been made by a Community Corrections officer, in consultation with the offender, to find suitable accommodation.<sup>109</sup> This could potentially cause substantial delays in imposing a sentence.

The list of matters set out in regulation 12A(1) (referred to in (a) to (h) above) is substantially smaller than the prescribed list of matters under the old regime. The above list no longer refers to, *inter alia*, the offender's criminal record, whether the offender will have suitable accommodation for the duration of the community based sentence, whether any circumstances of the offender's residence, employment, study or other activities would inhibit effective implementation of a community based sentence, whether the persons with whom the offender is likely to reside understand the requirements of the community based sentence and are prepared to live in conformity with them, any dependency of the offender on alcohol or drugs, any physical or mental health conditions of the offender that would affect compliance with the sentence and the existence of any self-harm risk. The reason for the deletion of those express considerations was not addressed in the Attorney General's Second Reading Speech. While Assessment Reports can still refer to these matters, for example under regulation 12A(1)(h) of the CSPR, it will be interesting to see how often they are addressed in reports under the new regime.

## Conclusion

The recent sentencing changes are attended with a degree of complexity both in the imposition and the administration of sentences in New South Wales. Given their recent enactment, there is a paucity of appellate authority to guide practitioners. When applying the changes in practice, particularly during the early stages of the new regime's operation, it would appear that a working knowledge of both the terms and the objects of the legislation is imperative. That is especially so given the apparent shift towards a greater degree of supervision and management of offenders in the community. Until such time as the various provisions are the subject of appellate authority, the Attorney-General's Second Reading Speech, and potentially data published by the NSW Bureau of Crime Statistics and Research, will be an important part of any defence lawyer's armoury.

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<sup>106</sup> Regulations 12A(1) and (2) of the CSPR

<sup>107</sup> Regulation 12A(3) of the CSPR

<sup>108</sup> Regulation 12B(1) of the CSPR

<sup>109</sup> Regulation 12B(2) of the CSPR

**MJ Davis**

4<sup>th</sup> Floor, Selborne Chambers

174 Phillip Street

SYDNEY NSW 2000

P: (02) 9236 4900

E: [mdavis@4selborne.com.au](mailto:mdavis@4selborne.com.au)

ANNEXURE A

COMPARATIVE SENTENCING HIERARCHIES

FORMER REGIME		NEW REGIME
S 10(1)(a) dismissal		S 10(1)(a) dismissal
S 10(1)(b) bond without conviction	✘	S 10(1)(b) CRO without conviction (Can include rehabilitation program/treatment, abstinence from alcohol or drugs, non-association condition, place restriction condition)
S 10(1)(c) intervention without conviction		S 10(1)(c) intervention without conviction
S 10A conviction – no further penalty		S 10A conviction – no further penalty
Fine		Fine
S 9 Good behaviour bond	✘	S 9 CRO with conviction (Can include rehabilitation program/treatment, abstinence from alcohol or drugs, non-association condition, place restriction condition)
S 8 Community Service Orders	✘	S 8 CCO (Can include limited curfew, limited community service work, rehabilitation program/treatment, abstinence from alcohol or drugs, non-association condition, place restriction condition)
S 12 Suspended Sentence	✘	S 7 ICO (Can include home detention, electronic monitoring, curfew, community service work, rehabilitation program/treatment, abstinence from alcohol or drugs, non-association condition, place restriction condition)
S 7 ICO		Imprisonment
S 6 Home Detention	✘	
Imprisonment		