



## **COMMUNITY CORRECTION ORDERS: GUIDELINES FOR SENTENCING COURTS**

**NOTE:** These guidelines reflect the views expressed in the Guideline Judgment delivered by the Court of Appeal in [Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen \[2014\] VSCA 342](#) on 22 December 2014. This document is intended, however, to be used by sentencing courts without the need to refer to the full judgment.

### **Part 1: General Principles**

- 1 A CCO is a new and flexible sentencing option which can be for a term of up to the maximum term of imprisonment prescribed for the offence in question. It serves a different purpose from community-based orders or suspended sentences, which have now been abolished.
- 2 In some cases, it will be appropriate to impose a CCO (with or without an added sentence of imprisonment) for relatively serious offences which would previously have attracted quite substantial terms of imprisonment.
- 3 In determining whether to sentence an offender to a CCO, the Court should first assess the objective nature and gravity of the offence and the moral culpability of the offender.
- 4 The Court should then consider whether:
  - a) the crime as so assessed is so serious that nothing short of a sentence wholly comprised of an immediate term of imprisonment will suffice to satisfy the requirements of just punishment; or
  - b) a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment.

### ***Proportionality and suitability***

- 5 Proportionality and suitability are the governing principles for deciding whether to impose a CCO, and (if so) of what length and with what conditions attached.
- 6 Section 48A of the *Sentencing Act 1991* ('the Act') provides that the attachment of conditions to a CCO must be effected in accordance with:

- a) the principle of proportionality; and
  - b) the purposes for which a sentence may be imposed as set out in s 5; and
- the purpose of a community correction order set out in s 36.

- 7 The principle of proportionality requires that the sentence imposed not exceed what is appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.
- 8 Section 36 of the Act requires the Court to consider the offender's suitability for a CCO, and to ensure that the terms of the order suit the offender's particular circumstances.

### *Young offenders*

- 9 A CCO is likely to be a particularly important sentencing option in the case of young offenders, where there may be a perceived conflict between the need to punish the offender and the importance – both to the community and to the offender – of rehabilitating the offender to prevent re-offending.
- 10 Since the CCO can be used to rehabilitate and punish simultaneously, the conflict is likely to be reduced. Instead of needing to give less weight to denunciation or specific or general deterrence in order to promote the young offender's rehabilitation, the Court will be able to fashion a CCO which adequately achieves all purposes at once.

### **Part 2: Imprisonment or CCO?**

- 11 Subsection 5(4C) of the Act prohibits the imposition of a sentence of imprisonment unless the sentencing court has paid specific and careful attention to:
- a) the purpose or purposes for which sentence is to be imposed on the offender; and
  - b) whether that purpose, or those purposes, can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached.
- 12 The purposes of sentencing include just punishment, denunciation, general and specific deterrence and rehabilitation.

### *Just punishment*

- 13 Axiomatically, nothing is as punitive as prison. In practice, therefore, a conclusion that imprisonment is the only appropriate punishment means that the retributive and deterrent purposes of punishment must take precedence.

*General deterrence*

- 14 Until now, a sentence of imprisonment has been conceived of as providing the greatest degree of general deterrence. A CCO can, however, provide substantial general deterrence.
- 15 A CCO is intrinsically punitive and, depending on the length of the order and the nature and extent of the conditions imposed, it is capable of being highly punitive.
- 16 The mandatory conditions, which are attached to each CCO by force of s 45(1), affect an offender's liberty and autonomy. During the period of the order, the offender:
- must not commit (whether in or outside Victoria) any offence punishable by imprisonment;
  - must report to and receive visits from the Secretary;
  - must notify the Secretary of any change of address or employment;
  - must not leave Victoria without the Secretary's permission; and
  - must comply with any direction given by the Secretary. [**add**]
- 17 The range and nature of the conditions which may be attached to a CCO are variously coercive, restrictive and/or prohibitive. When a condition of that kind is attached to a CCO, the offender's life will be regulated – for the duration of the order – by the obligation to comply with the condition.
- 18 Contravention of any condition attached to a CCO (except for a contravention of a direction by the Secretary) is itself an offence, punishable by three months' imprisonment. Contravention of a CCO also carries with it the prospect that the offender will be resentenced on the original offence.
- 19 If a CCO is to operate as an effective general deterrent, it is essential that the sentencing court sufficiently explain its reasons for concluding that the CCO will be sufficient punishment of the offender for the offence.
- 20 A sentence of imprisonment may operate as a specific deterrent. But a CCO can also provide very substantial specific deterrence. First, it will be a real punishment and therefore should deter repeat offending.
- 21 Secondly, there is also the mandatory condition attached to every CCO, prohibiting the commission of an offence punishable by imprisonment. The commission of such a breaching offence will potentially lead to the imposition of three separate penalties, as follows:
- a) a penalty for the offence itself;
  - b) a penalty for the contravention of the CCO condition; and

c) a resentencing for the original offence in respect of which the CCO was first imposed.

22 Thirdly, the focus of the conditions attached to the CCO will be to minimise the risk of re-offending – by ensuring appropriate treatment to address the causes of the offending and/or by prohibiting the offender from visiting places or associating with persons which might lead to criminal activity. In that way, a CCO can serve the purpose of protecting the community (which is the object of specific deterrence).

23 The sentencing reasons should explain how the conditions imposed give effect to both general and specific deterrence.

### *Rehabilitation*

24 The opportunities for rehabilitation in prison are severely limited. In contrast, a CCO demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places.

25 In many cases, therefore, a CCO will enable all of the purposes of punishment to be served simultaneously, in a coherent and balanced way.

26 Even in cases of relatively serious offences - which would previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and, in some rare and exceptional circumstances, homicide) - the sentencing court may find that a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation.

### *Combining a CCO with a sentence of imprisonment*

27 A CCO can be combined with other sentencing options, including a fine and/or a term of imprisonment of up to two years. The availability of that kind of combination adds to the flexibility of the CCO regime.

28 Consequently, even in cases of objectively grave criminal conduct, the Court may conclude that some or all of the punitive, deterrent and denunciatory purposes of sentencing can be sufficiently achieved by a short term of imprisonment of up to two years if coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending, directed at rehabilitative purposes.

29 Whether an additional sentence of that kind is warranted must be decided consistently with the governing principles of proportionality and suitability.

*Are there any offences for which a CCO is unsuitable?*

- 30 At this stage, it is too soon to define the category of cases for which a CCO should not be regarded as a suitable sentencing option. Reconsideration of accepted views about a sentence of imprisonment as the only option will take time and will be informed by experience.
- 31 Sentencing judges should proceed on the basis that there is now a very broad range of cases in which it will be appropriate to impose a suitably structured CCO, either alone or in conjunction with a shorter term of imprisonment, including cases where a sentence of imprisonment would formerly have been regarded as the only option.

### **Part 3: Determining the length of a CCO**

*No correlation between length of CCO and length of prison term*

- 32 There is no necessary correlation between the term of a CCO and the term of imprisonment which might otherwise have been imposed. All that can be said is that, because imprisonment is more punitive than a CCO, a CCO alone is imposed, it is likely to be of longer duration than the term of imprisonment which might otherwise have been imposed.

#### *The power to vary or cancel a CCO*

- 33 Section 48M(2) of the Act confers on the court a range of powers enabling it to vary or cancel a CCO (or one or more of the conditions attached to the order).
- 34 The court may consider cancelling a CCO if the offender is either unwilling or unable to comply with the order, or one or more of its conditions (for example because of very severe illness). It may also do so if the offender's rehabilitation makes any further compliance with conditions unnecessary.
- 35 In doing so the court should consider whether the continuation of the CCO, or of particular conditions, is:
- advancing the rehabilitation and reintegration of the offender;
  - in the interests of the community; and/or
  - in the interests of the offender.
- 36 Over the period of a sentence, an offender's circumstances, health, disposition and maturity – and, accordingly, the risk which the offender presents to society – are likely to change. Changes of that kind are all the more likely to occur in the case of a community-based disposition, given the opportunity it creates for the offender – and the responsibility which it imposes on him/her – to address the causes of the offending and to work actively towards his/her rehabilitation and reintegration.

- 37 Sentencing judges should bear in mind, however, that just as a sentencing judge may not take into account the possibility of future executive action, the power to impose a CCO should be exercised on the assumption that the offender will have to comply with the order for every day of its duration.

### *Determining the appropriate period*

- 38 In considering the period over which an offender's rehabilitation would be facilitated by a CCO, a sentencing court will be assisted by:
- a) an estimate of the period of time which is likely to be required for the offender to benefit substantially from any treatment, monitoring or other condition that is to be imposed; and
  - b) any material bearing on the period over which an offender's risk of reoffending should be managed by the deterrent effect of a CCO.

### *Pre-sentence reports*

- 39 Under s 8A(2) of the Act, a court considering the making of a CCO must order a pre-sentence report:
- a) to establish the offender's suitability for the order;
  - b) to establish that any necessary facilities exist; and
  - c) to gain advice concerning the most appropriate condition or conditions to be attached to the order.
- 40 A report of that kind is not required if the Court is considering a CCO with a single condition attached, being an unpaid community work condition of up to a maximum of 300 hours.
- 41 The pre-sentence report should also inform the Court of any material which sheds light on the period of time over which the offender is likely to need support in achieving rehabilitation, and is likely to need a form of monitoring or otherwise be deterred from committing further offences. That may include information, based on empirical research or experience, concerning the periods of time required to overcome or at least manage substance abuse problems.

### *The offender's consent*

- 42 A CCO cannot be imposed unless the offender consents. This must be an informed consent. Hence, before imposing a CCO, the sentencing court must satisfy itself that the offender has consented and that before the consent was given:
- a) the offender was made aware of the proposed length of the order and of the proposed conditions; and

- b) those representing the offender had had a reasonable opportunity to explain to him/her the nature and effect of the proposed conditions and what compliance with them would be likely to involve, together with the serious consequences of non-compliance.

#### **Part 4: Determining the conditions to be attached to a CCO**

##### *Treatment and rehabilitation condition*

43 By introducing the CCO regime, Parliament has equipped sentencing courts with an unprecedented capacity to fashion a sentencing order which will 'address the underlying causes of the offending'.

44 Under s 48D of the Act, the Court may attach a condition to a CCO 'that requires the offender to undergo treatment and rehabilitation specified by the court'. Under s 48D(3) of the Act, the Court may specify:

- assessment and treatment for drug or alcohol abuse or dependency;
- medical assessment and treatment; and
- mental health assessment or treatment (defined to include psychological, neuropsychological and psychiatric treatment).

45 A treatment and rehabilitation condition may provide for involvement in programmes which address factors relating to the offending behaviour or other treatment or rehabilitation which the Court considers necessary. They may include employment, educational, cultural and personal development programs consistent with the purpose of the treatment condition.

46 For a CCO to be effective, the sentencing Court must be made aware the offender's personal circumstances, including the factors which may have contributed to the offending behaviour or which might otherwise affect the offender's prospects of rehabilitation.

47 Treatment and rehabilitation conditions are imposed for the protection of the community as well as for the benefit of the offender. But sentencing courts must still bear in mind that it is impermissible to impose a CCO of longer duration, or to attach more onerous treatment and rehabilitation conditions, than are proportionate to the gravity of the offending.

##### *Anticipated difficulties of compliance*

48 Where an offender has been assessed as suitable for treatment and rehabilitation conditions, the sentencing court should proceed on the assumption that – whatever difficulties of compliance there may be initially – they are likely to abate once the

treatment process gets under way.

- 49 Relapse into addiction during treatment is a common occurrence, but the court should not come too quickly to a pessimistic conclusion about future compliance, when the very purpose of requiring the offender to commence treatment would be to address the problems which would otherwise create the risk of non-compliance.
- 50 Concern about difficulties of compliance should not necessarily be viewed as precluding the imposition of a CCO. Ordinarily, the court should assume – as the legislation itself does – that such conditions are likely to be effective.
- 51 There is ample capacity for the terms of the order to be revisited at any time, should the problem of non-compliance prove to be insoluble. That would be an obvious case for an application for cancellation (or variation) of the order under s 48M.

### *Judicial monitoring conditions*

- 52 Section 48K of the Act permits the imposition of a condition directing that the offender be monitored by the court, if the court is satisfied that it is necessary to do so to review the offender's compliance with the order. A judicial monitoring condition may specify the times at which the offender must reappear before the court for a review and any information, report or test that must be provided. Section 48L sets out the powers of the court in reviewing the offender's compliance with the order under a judicial monitoring condition.
- 53 Judicial monitoring conditions may impose a heavy burden on courts which are not well equipped or funded to supervise offenders.
- 54 Nevertheless, research to date suggests that careful use of judicial monitoring conditions has the potential to enhance the rehabilitation of young offenders and of those who offend because they are drug-addicted, and is likely to encourage compliance with court orders such as the requirement to abstain from alcohol use.