BOULTON v R

CLEMENTS v R

FITZGERALD v R

COURT OF APPEAL

MAXWELL P, NETTLE, NEAVE, REDLICH and OSBORN JJA

31 July, 1 August, 22 December 2014
[2014] VSCA 342

Criminal law — Sentencing — Sentencing principles — Guideline judgment — Introduction of community correction order (CCO) — Underutilisation of CCOs — Guidelines for sentencing courts — Need for guidance to ensure CCOs used as intended — Need for sentencing consistency — Promotion of public confidence in criminal justice system — Sentencing Act 1991 (No 49) ss 5(1), 6AA–6AE, 8A, 36–48Q.

Criminal law — Guideline judgment — Non-custodial sentence — Community correction order (CCO) — Purposes of sentencing — Proportionality and suitability — Punitive effect of CCO — Advantages of non-custodial disposition — Community protection — Rehabilitation — Reducing risk of re-offending — Disadvantages of imprisonment — Specific deterrence — General deterrence — Need for government to explain benefits of CCO — Flexibility — Combining imprisonment and CCO — Parsimony — Application to young offenders — Judicial monitoring — Variation and cancellation — Non-compliance — CCO or non-parole period — Pre-sentence reports — Offender's consent — Sentencing Act 1991 (No 49) ss 5(1), (4C), 36–48Q.

Criminal law — Sentence — Armed robbery and recklessly causing injury — Total effective sentence of time served plus three months' imprisonment and CCO of eight years — Appeal allowed — Offender re-sentenced to three months' imprisonment together with CCO of two years and six months.

Criminal law — Sentence — Armed robbery and attempted armed robbery — Sentenced to CCO for 10 years and fined $4000 — Appeal allowed — Duration of CCO reduced to six years.

Criminal law — Sentence — Common assault — Sentenced to five year CCO — Eighteen months pre-sentence detention — Appeal allowed — Sentence reduced to time served in pre-sentence detention.

In January 2012, a new sentencing option — the Community Correction Order ("CCO") — became available to Victorian courts. Three offenders, each sentenced to a CCO (either alone or in combination with another penalty), applied to the Court of Appeal for leave to appeal against their sentences.

Pursuant to s 6AB(1) of the Sentencing Act 1991, the Director of Public Prosecutions asked the Court of Appeal, in hearing the sentence appeals, to consider giving a guideline judgment to assist sentencing courts in utilising the CCO as a sentencing option.

Pursuant to s 6AD of the Act, the Sentencing Advisory Council was notified of the application and invited to convey its views to the court. The Director and Victoria Legal Aid were given an opportunity to appear before the court and make submissions.

The guideline judgment application

Held, allowing the application: (1) This was a proper case for a guideline judgment. The CCO was a radical new sentencing option, with the potential to transform sentencing in Victoria. It was vitally important, therefore, that sentencing courts be given as much guidance as possible about how a CCO could serve the various purposes for which a sentence was imposed. [4].

(2) The giving of such a judgment should promote consistency in sentencing and public confidence in the criminal justice system. It should also ensure that the CCO system operated as intended. [25].

(3) The overarching principles which should govern the CCO regime were proportionality and suitability. [63].

Channon v R (1978) 20 ALR 1; *Freeman v Harris* [1980] VR 267; *Veen v R [No 2]* (1988) 164 CLR 465; *Chester v R* (1988) 165 CLR 611; *Hoare v R* (1989) 167 CLR 348; *Ryan v R* (2001) 206 CLR 267 referred to.

(4) Section 48D of the Act expressly empowered the court to attach a condition to a CCO that required the offender to undergo treatment and rehabilitation specified by the court. Parliament had thus equipped sentencing courts with an unprecedented capacity to fashion a sentencing order which would address the underlying causes of the offending and was therefore likely to be more effective in reducing the risk of re-offending. [73]–[76].

(5) The (relative) severity of a penal sanction could be assessed by reference to its impact on the offender's rights and interests. The more important the rights and interests intruded upon, and the more significant the intrusion, the severer was the sanction. Attention should therefore be directed to the degree to which the sanction would affect fundamental rights and interests such as the offender's freedom of movement, choice regarding his/her activities, choice of associates, and privacy. [90].

(6) Viewed in this way, a CCO had obvious punitive elements. First, the mandatory conditions attached to each CCO by force of s 45(1) of the Act, materially impinged on an offender's liberty. Secondly, a contravention of any condition attached to a CCO (except for a contravention of a direction by the Secretary) was itself an offence, punishable by three months' imprisonment. Contravention of a CCO also carried with it the prospect that the offender would be resentenced on the original offence. Thirdly, the available conditions were variously coercive, restrictive and/or prohibitive, and the obligations and limitations which they imposed bound the offender for the entire duration of the order (subject to any contrary order). Moreover, the court was empowered to fix an "intensive compliance period" within which the offender must fully comply with one or more conditions as specified in the order. [94], [95].

Director of Public Prosecutions v Edwards [2012] VSCA 293 referred to.

(7) The availability of the CCO had dramatically changed the sentencing landscape. The sentencing court could choose a sentencing disposition which enabled all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which was skewed towards retribution and deterrence. [113]–[116], [141].

R v Dixon (1975) ACTR 13; *Mainwaring v R* [2009] NSWCCA 207; *Director of Public Prosecutions v Anderson* (2013) 228 A Crim R 128 considered.

(8) In relation to general deterrence, the responsibility for communicating to the public how and why a CCO operated punitively rested not with the courts but with the executive branch of government, which was responsible for public safety and law enforcement. [123]–[127].

Director of Public Prosecutions v Russell (2014) 44 VR 471 approved.

(9) A CCO could very effectively serve the purpose of specific deterrence. [129].

(10) A CCO might be suitable even in cases of relatively serious offences which might 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 some categories of homicide). The sentencing judge might find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration was capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation. It was both undesirable and unnecessary to seek to impose in advance any outer limits on the availability of this sentencing option. [131]–[135].

(11) It was incorrect to suggest that — the community work condition apart — the sentencing court was required to treat punishment as a subsidiary, or lesser, purpose in determining the length of a CCO or its conditions. [151].

(12) The fact that a CCO could be used to rehabilitate and punish simultaneously significantly diminished the conflict between sentencing purposes which was particularly acute in relation to young offenders. No longer would the court be placed in the position of having to give less weight to denunciation, or specific or general deterrence, in order to promote the young offender's rehabilitation. Rather, the court would be able to fashion a CCO which adequately achieved all of those purposes. A shorter CCO might be justified for a young offender than would be appropriate for an older offender in comparable circumstances. [183]–[190].

R v Mills [1998] 4 VR 235; *R v Wyley* [2009] VSCA 17; *Azzopardi v R* (2011) 35 VR 43; *CNK v R* (2011) 212 A Crim R 173; *R v Anderson* (2013) 228 A Crim R 128 considered.

(13) Appendix 1 to the judgment contained a set of guidelines for sentencing courts to use in deciding whether to impose a CCO and, if so, of what length and with what conditions. The content of the guidelines reflected the views expressed in the guideline judgment and should be read and understood in that context. Those guidelines were intended, nevertheless, to be free-standing and to be suitable for use without the need to refer back to the judgment. [204].

The individual appeals

Held, granting leave and allowing the first offender's appeal: (14) The sentence imposed on the first offender was disproportionate to the gravity of the offending and the first offender's reduced culpability. The first offender should be re-sentenced to a total effective sentence of three months' imprisonment together with a CCO of two years and six months. A judicial monitoring condition should be added to the conditions imposed by the sentencing judge. [240]–[247].

Held, granting leave and allowing the second offender's appeal: (15) The sentence imposed on the second offender was in breach of the principle of parity having regard to the sentence imposed on a co-offender of the second offender. The term of the CCO imposed below should be reduced from 10 years' to six years' duration. All other terms and conditions of the order would be confirmed. [260], [261], [274]–[280].

Held, granting leave and allowing the third offender's appeal: (16) The third offender should be resentenced to a sentence equivalent to the time served in pre-sentence detention. [302]–[321].

Applications for leave to appeal against sentence and application for guideline judgment

These were three applications for leave to appeal against sentence by offenders sentenced to community corrections orders and an application by the Director of Public Prosecutions for a guideline judgment in accordance with s 6AB(1) of the Sentencing Act 1991. The facts are stated in the judgment.

M D Stanton for the appellant Boulton.

D A Dann and *J M Fallar* for the appellant Clements.

S R Johns for the appellant Fitzgerald.

J R Champion QC DPP, *B F Kissane* and *P J Doyle* for the Director of Public Prosecutions.

G J Lyon QC and *K Argiropoulos* for the Victorian Government Solicitor.

H Fatouros and *T Karp* for Victoria Legal Aid.

A Freiberg for the Sentencing Advisory Council.

Cur adv vult.

Maxwell P, Nettle, Neave, Redlich and Osborn JJA.

Introduction

1 Since January 2012, the sentencing option of a community correction order ("CCO") has been available to Victorian courts. The CCO is a non-custodial order, to which are attached certain mandatory conditions laid down by the legislature. In addition, the sentencing court can attach to a CCO a range of conditions which are variously coercive, prohibitive, intrusive and rehabilitative.

2 The CCO is a flexible sentencing option, enabling punitive and rehabilitative purposes to be served simultaneously. The CCO can be fashioned to address the particular circumstances of the offender and the causes of the offending, and to minimise the risk of re-offending by promoting the offender's rehabilitation.

3 The Director of Public Prosecutions has applied under s 6AB(1) of the Sentencing Act 1991 ("the Act") for this court to give a guideline judgment to assist sentencing courts in deploying the CCO as a sentencing option. In each of the appeals before the court, the offender was sentenced to a CCO. The Director submits that, by giving a guideline judgment in these appeals, the court will serve the statutory objectives of promoting consistency of approach and promoting public confidence in the criminal justice system.

4 This is the first time the court has been asked to give a guideline judgment. For reasons which follow, we have concluded that this is a proper case for such a judgment. The CCO is a radical new sentencing option, with the potential to transform sentencing in this State. It is vitally important, therefore, that sentencing courts be given as much guidance as possible about how a CCO can serve the various purposes for which a sentence is imposed.

5 As explained below, the advent of the CCO calls for a re-consideration of traditional conceptions of imprisonment as the only appropriate punishment for serious offences. This in turn will require a recognition both of the limitations of imprisonment and of the unique advantages which the CCO offers.

6 The judgment falls into two principal parts. Part 1 contains the guideline judgment, which comprises:

(a) our reasons for concluding that this is an appropriate case for a guideline judgment; and

(b) our analysis of the CCO as a sentencing option and, in particular, our reasons for concluding that a CCO can serve all of the purposes of punishment even in quite serious cases.

Part 2 contains the judgments in the three individual appeals.

7 There are three appendices, as follows:

- Appendix 1 contains a set of guidelines, based on the views expressed in the guideline judgment, in a form suitable for use by sentencing courts;
- Appendix 2 contains the provisions of the Sentencing Act 1991 which authorise this court to give a guideline judgment;
- Appendix 3 contains the CCO provisions as in force at the date of this judgment.

The power to give a guideline judgment

8 The power of the Court of Appeal to give a guideline judgment is conferred by Pt 2AA of the Act, which was inserted into the Act in 2003. The relevant provisions for present purposes are as follows:

> **6AB Power of Court of Appeal to give or review guideline judgments**
>
> (1) On hearing and considering an appeal against sentence, the Court of Appeal may (on its own initiative or on an application made by a party to the appeal) consider whether —
>
> (a) to give a guideline judgment; or
>
> (b) to review a guideline judgment given by it in a previous proceeding.
>
> …
>
> (3) The Court of Appeal may give or review a guideline judgment even if it is not necessary for the purpose of determining any appeal in which the judgment is given or reviewed.
>
> (4) A decision of the Court of Appeal to give or review a guideline judgment must be a unanimous decision of the Judges constituting the Court.
>
> (5) A guideline judgment may be given separately to, or included in, the Court of Appeal's judgment in an appeal.
>
> (6) Nothing in this Part requires the Court of Appeal to give or review a guideline judgment if it considers it inappropriate to do so.
>
> **6AE Matters to which Court of Appeal must have regard**
>
> In considering the giving of, or in reviewing, a guideline judgment the Court of Appeal must have regard to —
>
> (a) the need to promote consistency of approach in sentencing offenders; and
>
> (b) the need to promote public confidence in the criminal justice system; and
>
> (c) any views stated by the Sentencing Advisory Council and any submissions made by the Director of Public Prosecutions or a lawyer under section 6AD.

9 Section 6AD of the Act further provides that, if the Court of Appeal decides to give a guideline judgment, it must:

(a) notify the Sentencing Advisory Council ("SAC") and consider any views stated by the Council; and

(b) give the Director of Public Prosecutions and Victoria Legal Aid.[1] ("VLA") an opportunity to appear before the court and make submissions.

The Director's application

10 Each of the three appellants — Boulton, Clements and Fitzgerald — was sentenced to a CCO. Each applied under s 278 of the Criminal Procedure Act 2009 for leave to appeal against sentence. Pursuant to s 6AB(1)(a) of the Act, the Director then made application (as a party to each appeal) for the court to give a guideline judgment in those proceedings.

11 The Director's application came on before the court (Nettle, Redlich and Coghlan JJA) on 14 November 2013. The Director submitted that there was a need for guidance from this court to sentencing judges and magistrates about the considerations which should be brought to bear in deciding whether a CCO was an appropriate sentencing disposition in a particular case and, if so, what the duration of the order should be and what conditions should be attached to it. The Director was thus seeking a guideline judgment within the meaning of paragraph (d) of the definition in s 6AA, that is, a judgment containing guidelines that will apply "to a particular penalty or class of penalty".

12 At that time, the application was opposed by counsel for each of the appellants and by counsel for VLA. The grounds of opposition were twofold. First, it was said, the CCO provisions had been enacted so recently that there were insufficient first instance decisions to inform the consideration necessary for a guideline judgment. Secondly, it was submitted that:[2]

> … as a matter of principle … the traditional technique of the common law of proceeding on a case by case basis, and thereby offering such guidance as is appropriate in the circumstances of the particular case in hand, is a surer and more certain way of providing guidance in the long term.

13 The court concluded that the Director's application should go forward for hearing by a bench of five:[3]

> [A]s has been urged by the Director, we are here dealing with Community Correction Order provisions which are new and radically different to any which have appeared in the Sentencing Act 1991 before now, and it is arguable that, in the circumstances which apply, there is both a unique opportunity and need for the court to provide guideline judgments to avoid sentencing disparity in the short and medium term ahead.
>
> In any event, all things considered, we are persuaded it is sufficiently arguable that it might be appropriate to give a guideline judgment in each of the three proceedings that the Director's applications for guideline judgment should be referred to a court of not less than five members, or such other number as may be determined by the President, for determination at the same time as the hearing and determination of the appeal in each proceeding.

14 Although no decision had then been made about whether a guideline judgment would be given, the court decided, consistently with s 6AD, that both the SAC and VLA should be given notice of the Director's application and invited to make

1. The section specifies that submissions should be made by "a lawyer representing Victoria Legal Aid … or a lawyer arranged by Victoria Legal Aid". In the event, VLA was represented by its Director of Criminal Law.
2. Unreported, Court of Appeal, Nettle, Redlich and Coghlan JJA, 14 November 2013, [3].
3. At [5]–[6].

submissions. The court granted leave to appeal in each case, gave directions for the service of documents on the SAC, VLA and the Attorney-General, and directed the filing of detailed submissions on the guideline judgment questions.

15 The court subsequently received detailed submissions from each of the institutional participants, and from each of the appellants. The submissions were of the highest quality and, as will appear, they have been of very great assistance to the court in the consideration of the issues raised.[4]

16 The Sentencing Advisory Council has significant responsibilities imposed on it by Pt 9A of the Act. One of its most important functions is the provision of statistical information on sentencing and the conduct of research on sentencing matters.[5] Sentencing courts every day derive assistance from Council publications, in particular the Sentencing Snapshots.

17 Importantly, the legislation which established the Council also established the scheme for the giving of guideline judgments. The first of the listed functions of the Council is:[6]

> to state in writing to the Court of Appeal its views in relation to the giving, or review, of a guideline judgment.

In the present case, the Council's views were communicated in the form of a very detailed set of draft guidelines, entitled "Structure for possible guidance". In addition, the court invited the Chair of the Council, Professor Freiberg, to appear at the hearing and to make oral submissions. Professor Freiberg was the founding chair of the Council, and his expert advice informed the decision of the Victorian Government to introduce the guideline judgment provisions.

18 These provisions also give VLA the right to appear and make submissions, in its institutional capacity, if the Court of Appeal decides to give a guideline judgment.[7] VLA is, of course, heavily involved in the criminal justice system, as it funds the legal representation of defendants in approximately 80 per cent of indictable crime cases in this State. As the present hearing illustrated, VLA's accumulated experience in the defence of criminal charges gives it a unique institutional understanding of sentencing law. The submissions advanced by VLA reflected that understanding.

The sentence appeals

19 The three sentence appeals, and the Director's application for a guideline judgment, came on for hearing on 31 July 2014 before the court as presently constituted. After hearing a brief opening submission from each of the institutional participants on the guideline questions, the court proceeded to hear the individual sentence appeals, in turn. It was common ground that this should occur before any decision was made about whether the court would give a guideline judgment.

20 For reasons set out in Pt 2, we have concluded in each appeal that the appeal should be allowed and the appellant resentenced.

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4. Where a footnote is asterisked, this means that the footnote was part of the submission of the relevant participant.
5. The Act 1991 ss 108C(1)(b) and (c).
6. Ibid s 108C(1)(a).
7. Ibid s 6AD(b)(ii).

PART 1: THE GUIDELINE JUDGMENT

The case for a guideline judgment

21 On the hearing of his appeal, Mr Boulton was represented by different counsel. On this occasion, he submitted that it would be appropriate for the court to give a guideline judgment:[8]

> in order to promote the consistency of approach of sentencing offenders, and to promote public confidence in the criminal justice system.

Each of the other appellants (Clements and Fitzgerald) maintained his opposition to the giving of a guideline judgment. The submission for Mr Clements was that there was no evidence of any inconsistency in sentencing such as would warrant the giving of a guideline judgment. The submission for Mr Fitzgerald was that a guideline judgment was premature and that any decision on a guideline judgment should wait until the courts had had greater experience with the CCO as a sentencing option.

22 Each of the institutional participants — the Director, VLA and the SAC — submitted that the court should give a guideline judgment. The Director and the Council each submitted a draft set of guidelines. The Attorney-General did not make a formal submission on the threshold question but described his position as "generally supportive" of the pronouncement of a guideline judgment. The Attorney-General's submission expressed substantial agreement with the drafts submitted by the Director and the Council.

23 The Director identified three "imperatives" which were said to support the giving of a guideline judgment, namely:

(a) the need to promote consistency in determining the period of CCOs;
(b) the need to promote public confidence in the criminal justice system; and
(c) the need to ensure that the CCO scheme was operating as intended.

As the Director pointed out, the first two of these are specified in the Act as considerations to be addressed by the court in deciding whether to give a guideline judgment.[9]

24 VLA advanced the following considerations in support of the giving of a guideline judgment:

a) The CCO is a new and highly flexible order, designed to replace a range of intermediate sanctions. Despite its protean nature, the new conditions available under a CCO are used infrequently, and few CCOs make use of the increased available range as regards duration. The conditions and duration of the CCOs that have been imposed "are very similar to those for the community-based orders (CBOs) that CCOs have replaced". Given the scope and flexibility of the CCO, it is arguable that CCOs are not currently being used as intended by Parliament.
b) There is a lack of transparency in the reasoning adopted by courts regarding the purpose for which the sanction and its particular length, condition(s) and combination of conditions are selected.[10]

8. The submission referred here to s 6AE of the Act.
9. See s 6AE set out above.
10. *In VLA's institutional experience, there is a similar lack of transparency in the approach taken in the summary jurisdiction.

c) There is a need for greater clarity and appellate court guidance regarding the proper use of CCOs, given that, save for exceptional cases, CCOs are unlikely to be tested by traditional appeal processes.[11]

d) The current uncertainty as to the reach of a CCO makes it difficult for parties to assist the court and advise clients in respect of pleading guilty, sentencing outcomes and appeal prospects.

e) A guideline judgment will assist courts by structuring the approach to be taken in determining whether to impose a CCO and the length and conditions of a CCO. This will enhance consistency and transparency,[12] and promote greater public confidence in the criminal justice system.

f) The need for guidance is particularly timely. Suspended sentences will no longer be available in the Magistrates' Court after 14 September 2014.[13] A clear articulation of the approach to be taken in selecting between sanctions and in determining the structure of CCOs will assist the Magistrates' Court to utilise CCOs as Parliament intended.

25 We accept these submissions. We are satisfied that this is an appropriate case for a guideline judgment. In particular, we agree that the giving of such a judgment should:

(a) promote consistency in sentencing and public confidence in the criminal justice system; and

(b) ensure that the CCO system operates as intended.

Consideration of the individual appeals has reinforced this view.

26 By enacting the provisions of Pt 2AA, Parliament affirmed the importance of this court providing guidance to sentencing courts. The giving of a guideline judgment is not a substitute for the case-by-case development of the law. The one complements the other. The great advantage of the case-by-case process is that it ensures that the development of legal principles is informed by the practical realities of individual cases. The great advantage of a guideline judgment is that it enables this court to deal systematically and comprehensively with a particular topic or topics relevant to sentencing, rather than being confined to the questions raised by particular appeals.

27 Just as importantly, the giving of a guideline judgment does not fetter the discretion of the sentencing court in any way. The only constraints on the exercise of the sentencing discretion are those imposed by the common law[14] and by the substantive provisions of the Act. The function of a guideline judgment is to provide assistance to sentencing courts in the application of the law. Such

11. *Only two successful CCO appeals were finalised in the January 2012 — July 2013 period. This comprises 0.4 per cent of the CCOs imposed over that time period (data provided by SAC on request, 2 May 2014).

12. *CCOs were established in the context of the phasing out of suspended sentences with the aim of providing "a *transparent* sentence that can be understood by everyone in the community" (emphasis added): Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General) (second reading). The lack of transparency in sentencing approach evident from the qualitative analysis undertaken by the SAC suggests this intention has not been achieved.

13. *If not proclaimed earlier. In 2010, 7638 offenders in the Magistrates' Court received suspended sentences (9.7 per cent of all offenders). This dropped to 5410 offenders (6.4 per cent) in 2012.

14. *House v R* (1936) 55 CLR 499.

assistance seems particularly appropriate in the present case, given how new the CCO regime is and how markedly different it is from the sentencing options previously available.

28 We deal first with consistency and public confidence. As s 6AE of the Act makes clear, these are key considerations when this court is deciding whether to give a guideline judgment.

Consistency and the need to promote public confidence in the criminal justice system

29 The first stated purpose of the Act is to promote consistency of approach in sentencing of offenders.[15] The fourth and fifth stated purposes of the Act are as follows:[16]

> (d) to prevent crime and promote respect for the law by —
>
> (i) providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character; and
>
> (ii) providing for sentences that facilitate the rehabilitation of offenders; and
>
> (iii) providing for sentences that allow the court to denounce the type of conduct in which the offender engaged; and
>
> (iv) ensuring that offenders are only punished to the extent justified by —
>
> (A) the nature and gravity of their offences; and
>
> (B) their culpability and degree of responsibility for their offences; and
>
> (C) the presence of any aggravating or mitigating factor concerning the offender and of any other relevant circumstances; and
>
> (v) promoting public understanding of sentencing practices and procedures;
>
> (e) to provide sentencing principles to be applied by courts in sentencing offenders;

30 Section 6AE of the Act picks up primary elements of these purposes. It requires in the first instance that, in considering whether to give a guideline judgment, the Court of Appeal must have regard to:

(a) the need to promote consistency of approach in sentencing offenders; and

(b) the need to promote public confidence in the criminal justice system.

The first requirement mirrors precisely the language of the first stated purpose of the Act, while the second picks up the core concern of promoting respect for the law which is found in the statements of further purpose to which we have referred.

31 Both the statements of purpose and the specified considerations to which this court must have regard in considering whether to give a guideline judgment imply a need to promote underlying consistency of outcomes from the criminal justice system. The context in which this arises requires some elaboration.

32 The statement of purposes contained in s 1 of the Act demonstrates that consistency of approach must be sought in a sentencing system which gives effect to diverse and potentially competing purposes, including just punishment,

15. The Act s 1(a).
16. The Act ss 1(d) and (e).

deterrence, rehabilitation and denunciation. This complexity of purposes is further reflected in the governing principles stated in Pt 2 of the Act. Section 5(1) of the Act provides that the only purposes for which sentences may be imposed are as follows:

> (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
> (b) to deter the offender or other persons from committing offences of the same or a similar character; or
> (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
> (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
> (e) to protect the community from the offender; or
> (f) a combination of two or more of those purposes.

33 Section 5(2) of the Act further provides:

> (2) In sentencing an offender a court must have regard to —
> (a) the maximum penalty prescribed for the offence; and
> (ab) the baseline sentence for the offence; and
> (b) current sentencing practices; and
> (c) the nature and gravity of the offence; and
> (d) the offender's culpability and degree of responsibility for the offence; and
> (daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated; and
> (daa) the impact of the offence on any victim of the offence; and
> (da) the personal circumstances of any victim of the offence; and
> (db) any injury, loss or damage resulting directly from the offence; and
> (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
> (f) the offender's previous character; and
> (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

34 The discretionary decision which must be made to give effect to the purposes stated in s 5(1) of the Act, and take account of the factors listed in s 5(2), is further guided by the principles of parsimony,[17] proportionality and totality. Different approaches to the primacy of the various purposes for which sentences should be imposed in particular classes of cases, and different weighting of the factors to which the court must have regard, might produce substantially inconsistent results. If this is to be avoided, what is required is the adoption of a unified approach in principle to the sentencing synthesis in any given case. In response to this need, the courts have developed a body of principle bearing on the evaluation of factors such as moral culpability and the relevance of considerations such as mental illness, youth and the ingestion of drugs.

35 Nevertheless, all of the matters referred to in s 5(2) of the Act must be taken into account as they affect the justice of a particular case, and in circumstances where both social behaviour generally and patterns of criminal behaviour in

17. The Act ss 5(3), (4), (4B), (5), (6) and (7).

particular, change over time. The prevalence of particular drug-related offending, or of particular kinds of violence or dishonesty, is not static. There is also constant development in our understanding of the neurology and functioning of the human mind, the nature and consequences of criminal behaviour, the consequences of different forms of penalty, and the potential opportunities which may be available to the sentencing court to facilitate rehabilitation. Sentencing is an inherently difficult task.

36 The potential for inconsistency which derives from this complexity of purpose and from the breadth of relevant factual considerations is particularly acute when a radically new sentencing option such as the CCO becomes available. The addition of CCOs makes the sentencing task, in this sense, even more complex.

37 Promotion of consistency of approach to the utilisation of such options is desirable for two fundamental reasons. First, the promotion of consistency of approach is necessary to avoid the perception of injustice which may result from differences in the treatment of individual cases. Secondly, there is a need to promote public understanding of, and confidence in, the use of the new sentencing option by promoting the principled application of it.

38 The underlying policy considerations were encapsulated by Mason J in *Lowe v R*:[18]

> Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.[19]

39 To similar effect, Gleeson CJ observed (in dissent) in *Wong v R*:[20]

> One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.[21]

40 The provision of a guideline judgment can promote consistency and public confidence in the sentencing process by articulating elements that must be taken into account in a particular sentencing context, and by giving guidance as to a unified approach. It can also facilitate the development of coherent sentencing practice by way of unified application of principle and, in turn, assist the identification of relevant similarities and differences between cases.

41 In *R v Jurisic*,[22] Spigelman CJ explained how sentencing guidelines promote consistency:

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18. (1984) 154 CLR 606.
19. At 610–11.
20. (2001) 207 CLR 584.
21. At 591, [6].
22. (1998) 45 NSWLR 209.

> The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders. However, public confidence in the administration of criminal justice requires consistency in sentencing decisions. As I have said, inconsistency is a form of injustice ….
>
> The existence of multiple objectives in sentencing — rehabilitation, denunciation and deterrence — permits individual judges to reflect quite different penal philosophies. This is not a bad thing in a field in which "[t]he only golden rule is that there is no golden rule": *R v Geddes*. Indeed, Judges reflect the wide range of differing views on such matters that exists in the community. However, there are limits to the permissible range of variation. The courts must show that they are responsive to public criticism of the outcome of sentencing processes. Guideline judgments are a mechanism for structuring discretion, rather than restricting discretion.

42 In the present case, the Director submitted that there was a real risk of inconsistency in the use of CCOs unless this court provided an authoritative statement of the principles to be applied in determining the period of a CCO. This was said to be illustrated by the fact that the orders made in relation to the three appellants were all "statistical outliers".

43 We agree that the innovative aspects of CCOs as a sentencing option, and the apparent variations in the approach of courts towards them, make it desirable that this court give guidance. There is a need for a framework which promotes consistency of sentencing approach. There is no sufficient body of current sentencing practice capable of fulfilling this function.

44 Both the Director and VLA further submitted that the bases on which CCOs were being imposed lack transparency. According to the SAC analysis, sentencing judges were giving little indication in their reasons as to the basis on which they were determining the duration of the CCOs which they were imposing. The sentencing decisions under appeal here illustrate this deficiency.

45 As well as helping to ensure that variations in the duration of CCOs are maintained within acceptable limits, the provision of guidelines should encourage greater transparency in sentencing. Given a framework in which to determine the appropriate period and conditions of CCOs, sentencing courts should be in a position to request relevant plea material (including in pre-sentence reports) and — most importantly — to explain the reasons for imposing a CCO of a particular length.

46 As the Director submitted, greater clarity in sentencing reasons as to why an order was imposed of a particular duration or subject to particular conditions will have two obvious benefits. First, both the offender and Corrections Victoria will be clear about the court's assumptions and expectations as to what should occur during the life of the CCO. Secondly, it will draw attention to circumstances which may in future warrant the variation or cancellation of the order.

Ensuring CCOs are given their intended operation

47 As explained further below, Parliament intended CCOs to replace not only Community Based Orders (CBOs), but Intensive Correction Orders (ICOs) and suspended sentences. Recent data collected by the SAC, however, suggests that CCOs are not yet being fully utilised. The SAC's research shows that the higher courts have tended to impose CCOs of the same length as CBOs, and to impose the same kinds of condition. The new kinds of conditions now available as part of CCOs have been used only rarely.

48 Both the Director and the Attorney-General submitted that CCOs (and the new conditions) were being under-utilised. They drew attention to the following findings of the SAC's research, covering the period January 2012 — December 2013:

- as the rate of imposition of suspended sentences decreased by 16.8 per cent, sentences of imprisonment rose by 11.4 per cent but the use of CCOs rose by only 2.3 per cent;
- the median length of CCOs imposed by the higher courts was two years, with only 15 per cent being of longer duration; and
- in the vast majority of cases, the conditions attached to a CCO in the County Court were those requiring offenders to undergo assessment and treatment (81 per cent), or supervision (75 per cent) or community work (74 per cent).

49 The Director's submission included the following helpful table showing the very limited use of other, novel, types of conditions:

Condition type	**Magistrates' Court**	**Higher courts**
Judicial monitoring	10.6	14.3
Non-association	1.4	4.3
Residence restriction	0.4	3.3
Place restriction	1.0	1.1
Curfew	0.5	0.9
Alcohol Exclusion	1.0	0.9

50 According to the Attorney-General's submission, these findings demonstrated that there was:

> scope for greater use of CCOs, including at the higher end consistently with the intention of Parliament. In particular, there is scope for the higher courts to impose CCOs that have a greater number of and more onerous conditions attached, and with a duration of more than two years.

The content of the proposed guidelines

51 In his initial application, the Director submitted that the guidelines should address two issues, namely:

(a) whether a CCO was an appropriate sentencing disposition in a particular case; and

(b) what length CCO should be imposed, the maximum period being equal to the maximum term of imprisonment for the relevant offence.

52 According to the Director's first submission:

> Guidelines directed to these topics will be of particular use in cases, like these, which concern serious offending which may otherwise warrant a term of imprisonment. In such cases, the courts would be assisted by guidance on the following kinds of questions:
>
> (a) what are the criteria to be applied in selecting between a CCO and other sentencing alternatives?[23]
>
> (b) are punishment, denunciation and general deterrence relevant sentencing considerations in determining the period of a CCO?

23. See the Act s 6AC(a).

(c) to what extent are specific deterrence and community protection relevant considerations in determining the period of a CCO?
(d) is a court entitled to take into account the capacity for a CCO to be varied pursuant to s 48N of the Act in determining the period?
(e) what kinds of evidentiary material would assist the court in determining an appropriate period for a CCO? For example, is the appropriate period for a CCO something which should be specifically addressed in pre-sentence reports?
(f) what are the kinds of circumstances in which very lengthy CCOs will be appropriate?
(g) what are the kinds of circumstances in which very lengthy CCOs will be inappropriate?

53 In a later submission, the Director suggested that all of these specific questions could be related to a "single, overarching question", namely: "What is the relationship between the sentencing purposes set out in s 5(1) of the Act and the different components of a CCO?" These reasons will confirm the centrality of that question, and the importance of providing guidance to sentencing courts on how to approach it.

The legislative history

54 The CCO regime commenced on 16 January 2012.[24] Until recently, the jurisdiction to impose community-based dispositions of greater than two years' duration was conferred only on the County and Supreme Courts. It has now been extended to the Magistrates' Court.[25] As amended, s 38(1) of the Act provides:

> **38 Period and commencement of a community correction order**
> (1) The period of a community correction order is the period determined by the court which must not exceed —
> (a) in the case of an order made by the Magistrates' Court —
> (i) in respect of one offence, 2 years; or
> (ii) in respect of 2 offences, 4 years; or
> (iii) in respect of 3 or more offences, 5 years; or
> (b) in the case of an order made by the County Court or the Supreme Court whichever is the greater of —
> (i) the maximum term of imprisonment for the offence;[26] or
> (ii) 2 years.

55 Under the sentencing regime which was replaced when CCOs were introduced, ICOs and Combined Custody and Treatment Orders (CCTOs) could not exceed 12 months,[27] while CBOs could not exceed two years in length.[28]

56 In the Second Reading Speech for the amending Act which introduced CCOs, the Attorney-General said:[29]

> The existing range of community-based sentences does not provide courts with sufficient flexibility to directly target the offender and the offence. The combined

24. See *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 98, [3]. The regime was introduced by the Sentencing Amendment (Community Correction Reform) Act 2011.
25. Justice Legislation Amendment (Confiscation and Other Matters) Act 2014 s 55.
26. Emphasis in original.
27. The Act ss 18Q and 19 (version 126, effective 23 November 2011).
28. Ibid s 36(3).
29. Parliamentary Debates, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General).

custody treatment order (CCTO), for example, is rarely used by the courts and intensive correction orders are generally considered an inflexible option.

The Sentencing Advisory Council, in the Suspended Sentences — Final Report — Part 2, noted that the overuse of suspended sentences in Victoria is at least partly due to the failings of intermediate sentencing orders.

The new CCO introduced in this bill will replace these orders with a single comprehensive and highly flexible order.

…

Specifically, the CCO will replace the combined custody treatment order, intensive correction order (ICO), the intensive correction management order (which has not come into effect) and the community-based order (CBO).

…

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.

Structure of the CCO

Under the old regime, the longest a community-based sentence could last for was two years. In addition, offenders given the more serious community-based sentences, such as the CCTO and ICO, are only subject to obligations for a maximum of one year. These limited sentencing orders simply do not allow the courts sufficient flexibility.

A key feature of the new order is that it will allow the courts to tailor the length of an order rather than limiting the order to a fixed time period. A CCO can last for up to two years in the Magistrates Court. In the higher courts, the bill does not set a uniform maximum duration. Instead, the maximum duration will be determined by the maximum term of imprisonment for the relevant offence. Importantly, a CCO may be combined with a fine and/or jail for up to three months.

57 Two points should be noted. First, it was contemplated that CCOs would be able to be used in place of sentences which were, strictly speaking, sentences of imprisonment (such as suspended sentences and intensive correction orders). Secondly, and to that end, it was recognised that courts would need flexibility in determining both the duration of the order and the conditions to be attached. As the Director submitted, the conferral of jurisdiction to impose CCOs for a period up to the maximum term of imprisonment for an offence can be seen as a key aspect of the flexibility which Parliament intended the courts to have, and a key feature of CCOs which makes them suitable for use in more serious cases. Hence this statement in the Explanatory Memorandum:

> The longer maximum duration in the higher courts is because a CCO can be imposed for more serious offences in the higher courts.

58 As the Director's submission pointed out, legislative guidance concerning the sentencing purposes underlying community-based dispositions was first introduced in response to the Report of the Victorian Sentencing Committee

chaired by Sir John Starke QC in 1988 ("the Starke Committee").[30] The Starke Committee conducted a comprehensive review of sentencing law and practice in Victoria. At the time of the review, CBOs were already in place as a statutory disposition.[31] In its discussion paper, published shortly after the introduction of CBOs, the Committee stated:

> Another concern that has been expressed is that it is difficult to know precisely what sentencing purpose is being served by a community based order. Some combinations of available options would result in a greater emphasis being given to retribution, and others to rehabilitation. It has been suggested that there is no guidance in the legislation as to which of these options should be followed.

59 In its final Report, the Starke Committee recommended that the purposes of CBOs be defined as follows:[32]

> [T]he purpose of a Community Based Order —
>
> — containing a supervision condition or an educational or other program condition is to allow for the *rehabilitation in the community* of an offender who has committed a serious offence and who:
>
> i. has a personal problem which contributed to the commission of the offence, and
> ii. has acknowledged the existence of the problem and wishes to try to overcome the problem, and
> iii. is capable of overcoming the problem in response to help offered by supervision in the community.
>
> — Containing a community service condition … is to allow for the adequate *punishment in the community* of an offender who has committed a serious offence.[33]

60 The distinction between the rehabilitative components of a CBO, namely the supervision and program conditions, and the punitive element of a CBO, namely community work, found expression in the following provisions of the Act:

> **39 Community service condition**
>
> The purpose of a community service condition is to allow for the adequate punishment of an offender in the community.
>
> …
>
> **40 Supervision**
>
> The purpose of a supervision condition is to allow for the rehabilitation of an offender in the community and the monitoring, surveillance or supervision of an offender who demonstrates a high risk of re-offending.
>
> **41 Personal development condition**[34]
>
> The purpose of a personal development condition is to allow an offender with high needs in areas directly related to his or her criminal behaviour to participate in programs which will address those needs.

30. Victorian Sentencing Committee, *Sentencing* (1988) ("Starke Report").
31. *CBOs were introduced by the Penalties and Sentences Bill 1985. They were designed to combine three types of existing community based dispositions: probation orders, community service work orders and attendance care orders. The CCO continues this combined structure.
32. Starke Report, 352.
33. Ibid (emphasis added).
34. *This provision referred to a program condition provided for by s 38(1)(d) of the Act which required the offender to attend "educational or other programs" as directed. The substance of this condition is now replicated in s 48D(3)(g) of the Act.

61 As can be seen, the supervision condition was directed not only to promoting rehabilitation but also to mitigating the risk of re-offending, through monitoring and surveillance. In the same way, an alcohol exclusion condition attached to a CCO may assist an offender's rehabilitation, through addressing a problem with alcohol, while at the same time protecting the community. Such conditions may be attached in order to address "the role of alcohol in the offending behaviour".[35]

62 The CCO provisions reflect both the punitive and rehabilitative components of community-based sentencing. As will appear, there was disagreement between the participants concerning the punitive purpose, and effect, of a CCO. We deal with this question below.

Proportionality

63 The SAC submitted, and VLA agreed, that the "overarching principles" which should govern the CCO regime were proportionality and suitability. This submission should be accepted. We deal first with proportionality.

64 The principle of proportionality requires the sentencing court to ensure that the sentence imposed:[36]

> should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.

Australian sentencing law recognises the concept of proportionality as a "fundamental principle" which fixes the outer limit of permissible sentences:[37] As Deane J explained in *Veen v R [No 2]*:[38]

> It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors — such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence — will point to what is the appropriate sentence in all the circumstances of the particular case.

65 The Act gives statutory recognition to this principle in its identification of "just punishment" as one of the purposes for which a sentence may be imposed.[39] Moreover, one of the express purposes of the Act itself is:[40]

> (d) to prevent crime and promote respect for the law by —
>
> …
>
> (iv) ensuring that offenders are only punished to the extent justified by —
>
> (A) the nature and gravity of their offences; and
>
> (B) their culpability and degree of responsibility for their offences; and

35. The Act s 48J(4).
36. *Hoare v R* (1989) 167 CLR 348 at 354.
37. *Chester v R* (1988) 165 CLR 611 at 618; *Ryan v R* (2001) 206 CLR 267 at 283, [48].
38. (1988) 164 CLR 465 at 491 ("*Veen [No 2]*").
39. The Act s 5(1)(a). We note that Pt 3, Div 2 Subdiv (1A) of the Act permits the imposition of indefinite sentences, in respect of serious offences, in order to protect the community. In addition s 6D, which governs the sentencing of serious offenders, requires the court to regard the protection of the community as the principal purpose for which the sentence is imposed and to consider whether a disproportionate sentence is required to protect the community. This provision does not appear to apply to a CCO because it is only relevant when the court considers that "a sentence of imprisonment is justified". But it may have some relevance in deciding whether a CCO should be combined with a term of imprisonment. In the future, questions may arise about the relationship between the serious offender provisions and the availability of CCOs as a sentencing disposition.
40. The Act s 1(d)(iv).

(C) the presence of any aggravating or mitigating factor concerning the offender and of any other relevant circumstances; …

66 Of more immediate relevance is s 48A of the Act, which provides that the attaching of conditions to a CCO must be done 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
(c) the purpose of a community correction order set out in s 36.

67 The authorities on proportionality establish two propositions of importance to the present task. First, the principle of proportionality permits the fixing of a sentence by reference to all of the purposes of punishment — retribution, denunciation, specific deterrence, general deterrence and protection of the community. That is, to treat the gravity of the offence as the limiting consideration *does not* preclude the fixing of a sentence for purposes directed at protecting society. Secondly — and this is an important qualification to the first proposition — the principle of proportionality *does* preclude the imposition of a (longer) sentence *merely* for the purpose of protecting society (by enabling the offender to be treated for a condition which contributed to the offending).

68 As to the first point, the protection of society is the ultimate purpose of punishment, as Brennan J explained in *Channon v R*:[41]

> The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.

69 In *Veen [No 2]*,[42] the High Court affirmed that a sentence should not be increased beyond what was proportionate to the crime "in order merely to extend the period of protection of the community from the risk of recidivism". At the same time, the court said, the purpose of protecting the community could properly be taken into account in fixing the sentence:[43]

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

70 Their Honours acknowledged, however, that:[44]

> … the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.

41. (1978) 20 ALR 1 at 5.
42. (1988) 164 CLR 465.
43. At 473.
44. At 474.

Their Honours went on to emphasise that there was no opposition between the principle of proportionality and the imposition of a sentence which took into account the propensity of the offender — whether on account of mental illness or otherwise — to commit violent crime, and the consequent need to protect the community.[45]

71 In the case of an offender with a "mental abnormality", their Honours said:[46]

> … the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions. And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.

72 The second proposition is that a sentence cannot be imposed — or extended — merely for the purpose of protecting society, by ensuring treatment of an offender's mental abnormality or addiction to drugs or alcohol.[47] In this regard, Professor Freiberg drew our attention to the decision of the Full Court in *Freeman v Harris*, where Murphy J observed:[48]

> In sentencing, the punishment in the particular case should be proportionate to the offence. It is not open to the Court to punish an offender more, because he is ill, and because it is considered to be for his own benefit to try and cure him. The gravity of the offence must be the first and paramount consideration.

To similar effect, Starke J said:[49]

> Furthermore in my judgment a lengthy term of imprisonment cannot be imposed for the purpose of curing a disease — for this purpose treating an addiction to a drug as a disease.

73 This proposition is of particular importance given that the legislation (s 48D) expressly empowers the court to 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;
- any medical assessment and treatment; and
- mental health assessment or treatment (defined to include psychological, neuropsychological and psychiatric treatment).

45. At 475.
46. At 476–7; see *Director of Public Prosecutions v Patterson* [2009] VSCA 222 at [50]–[51].
47. *Channon v R* (1978) 20 ALR 1 at 9.
48. [1980] VR 267 at 281.
49. At 272.

74 Parliament has thus equipped sentencing courts with an unprecedented capacity to fashion a sentencing order which will "address the underlying causes of the offending".[50] These powers have obviously been conferred on the assumption, and in the expectation, that treatment of this kind can be delivered in a sustained and targeted way — the more so because the offender is not in custody — and is therefore likely to be more effective in reducing the risk of re-offending.

75 In that sense, conditions of this kind are to be imposed for the protection of the community. What cannot be done, however, is to impose a CCO of longer duration, or to attach more onerous treatment and rehabilitation conditions, if the resulting order would be disproportionate to the gravity of the offending.

76 Nor, of course, is the position affected by the offender's consent to the order. Under s 37(c) of the Act, it is a condition of the making of a CCO that the offender consents to the order. But the willingness of the offender to consent to treatment proposed as part of a CCO does not relieve the court of the obligation to ensure that the order remains within the bounds of proportionality.[51]

Suitability

77 VLA submitted that the principle of suitability required a court to give effect to the applicable sentencing purposes "in the most appropriate way, having regard to an offender's circumstances and capacity to comply (while remaining subject to the principle of proportionality)". The principle of suitability was said to derive authority from the text and purpose of the CCO provisions.

78 VLA drew particular attention to s 36 of the Act, which identifies the purpose of a CCO as being to provide for 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*".[52] According to VLA, this means that the court must consider the offender's suitability for a CCO, and must ensure that the terms of the order suit the offender's particular circumstances.[53]

79 Reference was also made to s 8A(2) of the Act, which requires a court when considering a CCO to order a pre-sentence report, so that the court can:[54]

> (a) establish the person's *suitability* for the order being considered; and
> …
> (c) … gain advice on the most appropriate condition or conditions to be attached to the order.

80 At the same time, VLA urged that the suitability principle not be used in a way that resulted in disproportionate or unfair sentencing outcomes. The following examples were given:

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50. The Act s 48D(2).
51. Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria*, Lawbook, 3rd edition, (2014), [3.85].
52. The Act s 36 (emphasis added). See also s 48A(c).
53. *In respect of some conditions, the need to consider the appropriateness or suitability of the order is also explicitly stated. For example, before ordering an electronic monitoring condition, the court must be satisfied that "the offender is a *suitable* person to be electronically monitored": the Act s 48LA(4)(b)(i) (emphasis added).
54. *The court must have regard to the pre-sentence report in determining whether to order a CCO: the Act s 37(b). The only exception to the requirement to order a pre-sentence report is where the court seeks to impose a community work only CCO: the Act s 8A(3). (Emphasis added).

Offenders should not be deemed unsuitable for a CCO simply because they have a disadvantage or disability that makes it more difficult for them to comply. Courts should consider whether, having regard to the circumstances of an offender, a CCO can be structured in a more suitable way, while still giving effect to the principle of proportionality and the relevant sentencing purposes.

The fact that an offender has a disability or illness should not be used to justify a more punitive CCO than is necessary or proportionate. The conditions and length of a CCO should be structured in the least restrictive way possible, having regard to the circumstances of the offence, the offender and the sentencing purposes to be achieved.

Example Scenario

David pleads guilty to an offence of mid-range objective seriousness. The court determines that the seriousness of the offending warrants a sanction greater than a fine but that imprisonment may be disproportionate. David has significant mental health issues, is addicted to ice and is homeless. Each of these factors compromises his ability to comply with a CCO.

In applying the guiding principles, the court:

- should not escalate the sentence to imprisonment simply because David's mental health issues, drug addiction and homelessness make it more likely he will breach his CCO. Rather, the court should have regard to these characteristics in selecting the most suitable CCO structure and package of conditions (considering the importance of not setting David up to fail);
- should not impose greater restrictions on David than the sentencing purposes to be achieved require. For example, although David's risk of re-offending might be reduced by a lengthy period in a residential rehabilitation facility, such a restriction on liberty is only justifiable if it is commensurate with the seriousness of the offending.

81 The last proposition accords with what we have already said about proportionality. Greater difficulty arises, however, where (as in the example) the offender's mental health and addiction problems "compromise his ability to comply with a CCO". We return to this issue below.

82 VLA further submitted that, for the purposes of determining suitability, a pre-sentence report should not be treated as the end of the inquiry:

> [W]hile the court is required to take into account a pre-sentence report in determining the suitability of the order and its potential conditions,[55] the court must still exercise its sentencing discretion, having regard to the information provided in the report and the submissions of the parties.[56]

83 As a statement of principle, this submission is undoubtedly correct. It properly emphasises the need for the court to make its own judgment about the appropriate order, and in particular to ensure that a CCO is carefully tailored to the circumstances, and particular needs, of the offender. But the court's judgment as to what is required in the particular case will, inevitably, depend heavily on the recommendations in the pre-sentence report, not least because — unlike the court — the maker(s) of the report will have seen and assessed the offender.

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55. *The Act ss 37(b), 8A(2), 48D(2)(b) (treatment and rehabilitation condition), 48E (supervision condition), 48JA (bond condition), 48LA(3)–(4) (electronic monitoring condition). A pre-sentence report is not required for community-work only CCOs (of up to 300 hours): the Act s 8A(3).

56. *As "with any other report or opinion obtained in the course of a plea it should only be given the weight to which it is entitled": *R v Ngo* [1999] 3 VR 265 at 281, [48] per Ormiston JA. The court's hands are not tied by the contents of the report, which may, for example, in the context of a busy Magistrates' Court, rely on a short interview with an accused by a Corrections Officer.

84 We turn now to address the specific issues which need to be resolved in order to determine what guidance can properly be given. We deal first with the CCO as a form of punishment, as distinct from being an instrument of rehabilitation. In addressing this issue, we first consider the CCO as a stand-alone sentencing option. The alternative of a CCO combined with a short term of imprisonment will be considered separately.

To what extent can a CCO be punitive?

85 As noted earlier, it was Parliament's express purpose that CCOs be used "for a wide range of offending behaviours".[57] Moreover, as the recently-enacted s 36(2) makes clear, Parliament expressly contemplated the imposition of a CCO in circumstances where a suspended sentence might previously have been imposed.

86 As the Director's submission pointed out, however, there is a significant difference between a non-custodial order, like a CCO, and a suspended sentence. Before a sentencing court could have concluded that a suspended sentence was appropriate, the court must first have concluded that a sentence of imprisonment was the only kind of sentence which met the purposes of sentencing in the particular case. This must be so since, as the Director pointed out, s 5 of the Act provides as follows:

> 5(3) A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.
>
> 5(4) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.

87 The Director's submission posed the following rhetorical question:

> How, then, could a CCO be an appropriate sentence for cases which previously attracted terms of imprisonment?

According to the submission, the answer lies in the differences between a CCO and the non-custodial disposition which it replaces, the community-based order (CBO). The Director's contention is that the CCO "has the potential to be a more robust sentencing disposition" than the CBO, because of:

(a) the broader range of conditions which may be attached to a CCO (including a curfew condition (s 48I), a non-association condition (s 48F) and an alcohol exclusion condition (s 48J)); and

(b) the fact that the maximum period of a CCO is greater than that for a CBO.

88 According to the Director's submission, these features of CCOs mean that the sentencing court may more readily conclude that a term of imprisonment is not necessary. The sentencing purposes of deterrence, community protection and rehabilitation may be satisfied by the imposition of a CCO in a case where, previously, imprisonment might have been thought to have been necessary to satisfy those purposes.

89 It is of central importance, therefore, to consider the extent of the punishment which a CCO can be seen to inflict. While the principle of proportionality requires that a sentence not exceed what is warranted by the gravity of the

57. The Act s 36(1).

offence, the sentencing court is also obliged to satisfy itself that the sanction imposed is no less than is required for "just punishment" of the offender.

90 The (relative) severity of a penal sanction can be assessed by reference to its impact on the offender's rights and interests. The more important the rights and interests intruded upon, and the more significant the intrusion, the severer is the sanction. Attention should therefore be directed to the degree to which the sanction will affect fundamental rights and interests such as the offender's freedom of movement, choice regarding his/her activities, choice of associates, and privacy.[58]

91 Viewed in this way, a CCO has obvious punitive elements. First, the mandatory conditions, which are attached to each CCO by force of s 45(1), do materially impinge on an offender's liberty. Thus, during the period of the order, the offender:

- 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 necessary to ensure compliance with the order.

92 Secondly, a 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.[59] Contravention of a CCO also carries with it the prospect that the offender will be resentenced on the original offence.[60] In *Director of Public Prosecutions v Edwards*,[61] Warren CJ described these as "significant burdens" on an offender.[62] We respectfully agree. We would also wish to emphasise, as counsel for Mr Boulton argued, that these provisions should have a powerful deterrent effect.[63]

93 We think, however, that the punitive character of a CCO is most clearly illustrated by the range and nature of the conditions which may be attached to such an order. The available conditions are variously coercive, restrictive and/or prohibitive, and the obligations and limitations which they impose will bind the offender for the entire duration of the order (subject to any contrary order).

94 Moreover, the court is empowered to fix a period — defined as "the intensive compliance period" — within which the offender must fully comply with one or more conditions as specified in the order. By this means, the court can both increase the punitive burden and seek to maximise the benefits of compliance.

95 Some examples will illustrate the nature of the conditions available to the sentencing court. As noted below, s 48D authorises the court to attach a condition requiring the offender to undergo "treatment and rehabilitation specified by the court". A condition of this kind is both coercive and intrusive. For example, a condition imposed under s 48D may require an offender:

- to have treatment for drug or alcohol abuse;

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58. Von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles*, Oxford University Press, (2005), 147–8.
59. The Act s 83AD.
60. Ibid s 83AS (1)(c).
61. [2012] VSCA 293.
62. At [135].
63. See [129] below.

- to be tested and treated at a residential facility for "withdrawal from or rehabilitation for" drug or alcohol dependency;
- to have treatment in a hospital or residential facility for any medical or mental health problem.

96 Likewise, the court has power to attach conditions:

- prohibiting the offender from contacting or associating with a person (or class of persons) specified in the order;[64]
- requiring the offender to reside, or prohibiting the offender from residing, at a particular place;[65]
- prohibiting the offender from entering or remaining in a specified place or area;[66]
- imposing a curfew, requiring the offender to remain at a specified place between specified hours of each day;[67] and
- prohibiting the offender from entering licensed premises or the location of any major event, or from consuming alcohol in any licensed premises.[68]

97 Plainly enough, an order attaching conditions of this kind, whether singly or in combination, is likely to interfere very significantly with the offender's freedom to live as he/she chooses. Compliance with such conditions may require a drastic alteration of daily life. Indeed, by attaching conditions prescribing where the offender must live, and which locations and persons he/she must avoid, the court can effectively require the offender to embark on a new life.

98 Under s 48LA, moreover, a court (other than the Magistrates' Court) may require an offender to be electronically monitored. The punitive effect of electronic monitoring is self-evident. This requirement can be attached for the purpose of monitoring the offender's compliance either with a curfew condition or with a condition relating to exclusion from a place or area (both called a "monitored condition"). This can only be done, however, if a pre-sentence report provides a positive statement (and the court is then satisfied) that the person is suitable for such a condition, and there are appropriate resources to enable this monitoring.

Assessing the punitive effect

99 At this early stage, it is difficult for sentencing courts to assess the punitive effect of a CCO. Whereas the seriousness of a deprivation of liberty is well enough understood, it is hard to know how onerous it will be for a particular offender to comply with conditions requiring, for example, attendance at treatment; supervision; separation from acquaintances; exclusion from clubs and bars; and the obtaining of permission from the Secretary for interstate movements.

100 Moreover, comparisons between orders will be more difficult than when the comparison is simply between different periods of imprisonment. Not only will the particular "cocktail" of conditions vary from case to case, according to the offender's particular circumstances, but the same condition (eg non-association)

64. The Act s 48F.
65. Ibid s 48G.
66. Ibid s 48H.
67. Ibid s 48I.
68. Ibid s 48J.

is likely to have a quite different impact on different offenders. For some, compliance with such a condition will require a radical change in behaviour, while for others in different circumstances the burden of compliance will be less significant.

101 This analysis highlights the particular responsibility of defence counsel who wishes to argue for the imposition of a CCO. No longer will it be sufficient merely to recite the offender's personal circumstances, as conventionally occurs on a plea in mitigation. When a CCO is proposed, counsel will need to make submissions directed at the formulation of an order which directly addresses those personal circumstances. Attention will need to be paid to the formulation of conditions which will address the offender's particular needs, and the causes of the offending, and which will promote the necessary changes in the offender's life to reduce the risk of re-offending.

102 This analysis also highlights the "quintessentially discretionary" nature of the judgment made by the court in fashioning a CCO — both in length and in conditions attached — to suit an offender. As a corollary, there is likely to be a broader range within which opinions can reasonably differ about what was appropriate for the particular offence and the particular offender. It may, as a result, be more difficult to establish on appeal that a decision to impose a CCO was "not reasonably open".[69]

Comparing a CCO with a prison sentence

103 The challenge for sentencing courts in the early years of the CCO regime will be to re-examine the conventional wisdom about the types of offending which ordinarily attract a term of imprisonment. For reasons which follow, such a re-examination is essential if the CCO is to fulfil its potential as a sentencing option, in accordance with the legislature's clearly-expressed intention.

104 For so long as imprisonment has appeared to be the only option available for offending of any real seriousness, sentencing courts have had no occasion to reflect either on the severity of imprisonment as a sanction or on its ineffectiveness as a means of rehabilitation. As to the first, imprisonment is uniquely punitive because of that feature which distinguishes it from all other forms of sanction, namely, the complete loss of liberty. But imprisonment has a number of other punitive features, apart from the loss of physical freedom.

105 There is the loss of personal autonomy and of privacy, and the associated loss of control over choice of activities and choice of associates. The prisoner is subject to strict discipline, restriction of movement, forced association with other prisoners and — for a substantial part of each day — confinement in a small cell (in many instances, a cell shared with a cellmate not of the prisoner's choosing). There is, moreover, exposure to the risks associated with the confinement of large numbers of people in a small space — violence, bullying, intimidation.

106 On any view, this is severe punishment.[70] As the New South Wales Court of Criminal Appeal said in *Mainwaring v R*:[71]

> Any period of imprisonment must be understood for what it is: onerous, unpleasant, oppressive and burdensome. It is, as it should be, the last available punitive resort in any

69. *Clarkson v R* (2011) 32 VR 361 at 384, [89].
70. *Power v R* (1974) 131 CLR 623 at 627.
71. [2009] NSWCCA 207 at [71].

> civilised system of criminal justice. Public discussions about the need to deter crime by the imposition of heavier sentences are not always obviously, or at least apparently, informed by an appreciation of the significance of full-time incarceration upon men and women who receive such sentences.

107 Importantly for present purposes, these features of the restrictive prison environment also have the consequence that the opportunities, and incentives, for rehabilitation are very limited. For example, there is no access to sustained treatment for psychological problems or addiction. Access to anger management and sex offender treatment programs is rationed, and such programs are often unavailable to those sentenced to short prison terms.

108 In addition, imprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage.

109 These same points were made with great force 40 years ago by Fox J in *R v Dixon*.[72] His Honour said:

> In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. … Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement. The irony is that prison authorities are among the strongest advocates of reform.
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> …
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> When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.

110 In 2013, this court in *Director of Public Prosecutions v Anderson*[73] endorsed Fox J's criticisms:

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72. (1975) 22 ACTR 13 at 19–20.
73. (2013) 228 A Crim R 128 at 144, [65] ("*Anderson*").

> There is no reason to believe that in 2013 the adult prison system has changed sufficiently to remove these concerns, notwithstanding considerable efforts by many people over a long period. The community would still ask today, as his Honour suggested then, why the prison system has to be "so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation are given a real opportunity for self-improvement". Time and again, courts are told that correctional authorities are simply not adequately resourced to provide the sorts of facilities which are essential if those in prison — many of whom have very serious psychological and behavioural problems — are to be meaningfully rehabilitated and assisted so that, when they are released, they will have some real prospect of reintegration into the community.

111 Axiomatically, imprisonment is a sentence of last resort. As s 5(4) of the Act makes clear, such a sentence must not be imposed unless the court considers:

> that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.

112 Given the adverse features of imprisonment to which we have referred, the conclusion that imprisonment is the only appropriate punishment amounts to a conclusion that the retributive and deterrent purposes of punishment must take precedence. Put another way, it is a conclusion that the offender's "just deserts" for the offence in question require imprisonment, even though the court is well aware that the time spent in prison is likely to be unproductive, or counter-productive, for the offender and hence for the community.

113 The availability of the CCO dramatically changes the sentencing landscape. The sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence.

114 The CCO option offers the court something which no term of imprisonment can offer,[74] namely, the ability to impose a sentence which 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. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide.

115 In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her. On this analysis, if defence counsel submits that a CCO would be appropriate, it is no answer for a prosecutor (or a judge) to say, "How could a CCO be appropriate given that an offence of this seriousness has always received imprisonment?" As we have endeavoured to explain, that question should mark the beginning, not the end, of the court's consideration.

116 As the Attorney-General submitted, the CCO:

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74. As noted previously, we are not here considering the "combination" option of a CCO and a term of imprisonment.

> … is intended to be available in serious cases where an offender may be at risk of receiving an immediate custodial sentence, but the court considers that immediate custody is not necessary to fulfil the statutory purposes of sentencing given the range of options provided by a CCO.

In this sense, the Attorney submitted, the CCO has "the robustness and flexibility to be imposed in a wide variety of circumstances". We agree.

The 2014 amendment

117 The views we have expressed are reinforced by the recent insertion into the Act of s 5(4C). This provision came into force on 29 September 2014, after the completion of argument in the present proceeding.[75] The new subsection provides as follows:

> A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions referred to in sections 48F, 48G, 48H, 48I and 48J are attached.

The new provision is a companion provision to s 5(4), referred to above.

118 According to the Director's supplementary submission, this new subsection is:

> … a declaratory tool, intended to "highlight" the punitive potential of a CCO that includes the named (and under-utilised) restrictive conditions, without diminishing the punitive potential of CCOs that do not include these conditions.

The submission drew attention to the following passage from the Explanatory Memorandum accompanying the 2014 amending Bill:[76]

> The purpose of this provision is to highlight that a community correction order can have a punitive effect and may be an appropriate sentence to address serious offending. It is not intended to suggest that a community correction order without the above listed conditions may not be punitive, or that the sole purpose of attaching the above conditions is to punish the offender.

119 VLA's further submission also quoted this passage, and emphasised that the particular conditions identified in the subsection had so far been used very infrequently. At the same time, VLA submitted, the specification of particular conditions in the subsection should not be construed as implying that one or more of those conditions had to be attached to a CCO in order to justify a conclusion that imprisonment was not necessary.

120 These submissions of the Director and VLA should be upheld. They capture correctly, in our view, the intention of the new subsection. What is most powerful about s 5(4C) is that it prohibits the imposition of a sentence of imprisonment unless the sentencing court has paid specific and careful attention to:

(a) the purposes for which sentence is to be imposed on the offender; and
(b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached.

121 The process of deliberation which this provision requires should assist in the reconceptualisation of sentencing options to which we have referred. In particular, that process will throw into much sharper focus the distinction we

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75. Sentencing Amendment (Emergency Workers) Act 2014 s 16 ("Emergency Workers Act").
76. Explanatory Memorandum, Sentencing Amendment (Emergency Workers) Bill 2014, 10–11, cl 16.

have sought to draw, between the narrow punitive purpose (and effect) of imprisonment, on the one hand, and the multi-purpose character of the CCO. The sentencing court should ask itself a question along the following lines:

> Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?

No correlation between prison term and CCO term

122 There was debate at the hearing about the extent (if any) to which the sentencing court, when considering the appropriate length of a CCO for a particular offender and offence, is likely to be assisted by considering the term of imprisonment which might previously have been imposed on such an offender for such an offence. In our view, given the differences between the two types of sanction in punitive character and in rehabilitative capability, the comparison is likely to be of very limited assistance. Perhaps all that can be said is that, other things being equal, the term of a CCO is likely to be longer — often, markedly longer — than the term of imprisonment which might otherwise have been imposed.

General and specific deterrence

123 The principle of general deterrence requires the sentencing court to bear in mind, in determining an appropriate sentence, the need to deter others who might contemplate engaging in offending conduct of the relevant kind.[77] As a general rule, the effectiveness of an individual sentence as a deterrent depends on two things:

(a) the degree to which the sentence is, and will be perceived by the relevant section of the community to be, punitive in nature; and

(b) the extent to which the fact of the sentence, and its punitive character, is communicated to those whom it is intended to deter.

Both conditions must be satisfied. Self-evidently, a sentence of which the public are unaware can have no deterrent effect on anyone other than the offender.

124 These issues assume particular importance in relation to CCOs. As we have explained, a CCO is intrinsically punitive and is capable — depending on the length of the order and the nature and extent of the conditions imposed — of being highly punitive. It follows that, as a matter of principle, a CCO can operate to deter others. But, unlike a prison term, a CCO is not self-evidently punitive.

125 It will be a particular challenge, therefore, to communicate adequately to the public how and why a CCO operates punitively. In the most obvious respect, as we have said, the CCO is less punitive than prison. There is no incarceration. In other important respects, however, the CCO is a very significant punishment.

126 Necessarily, the punitive features of a CCO will require explanation. The task of communication must begin with the sentencing court. When it is concluded that a CCO sufficiently punishes the offender for the offence, the reasons for that conclusion should be clearly set out.

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77. The Act s 5(1)(b).

127 Overwhelmingly, however, the responsibility for communicating "the message" about CCOs rests with government. As this court said recently in *Director of Public Prosecutions v Russell*,[78] courts have neither the expertise nor the resources to undertake the kind of systematic public communication on which the theory of general deterrence depends. That is properly a function of government, which is responsible for public safety and law enforcement.

128 As noted earlier, the Attorney-General submitted that there should be greater utilisation of CCOs and that they were perfectly capable of serving the purposes of punishment and deterrence.[79] But whether the CCO is utilised more widely, and whether it can be seen to serve the purpose of general deterrence, will to a very large degree depend upon there being an active and well-funded program of public communication. Otherwise, the use of the CCO may well attract the kinds of public criticisms which have characterised the increasingly punitive debate about sentencing in recent years.

129 The question of specific deterrence is much more straightforward. There are several reasons why, in our view, a CCO can very effectively serve the purpose of specific deterrence. First, because it will be a real punishment, it should deter repeat offending. Secondly, there is the mandatory condition attached to every CCO, prohibiting the commission of an offence punishable by imprisonment.[80] The commission of such an offence will potentially lead to the imposition of three separate penalties, as follows:[81]

- a penalty for the offence itself;
- a penalty for the contravention of the CCO condition; and
- a resentencing for the original offence in respect of which the CCO was first imposed.

We agree with the Director's submission that these provisions, in combination, create "powerful disincentives" to re-offending, which last for the full length of the CCO.

130 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 this way, the purpose of protecting the community, to which specific deterrence is directed, can be well served by a CCO.

Are there offences for which a CCO would ordinarily be unsuitable?

131 It follows from what we have said that a CCO may be suitable even in cases of relatively serious offences which might 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 some categories of homicide). The sentencing judge may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, 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.

78. *Director of Public Prosecutions v Russell* (2014) 44 VR 471 at 473, [5]–[6], 483–4, [69]–[73].
79. See [48]–[50] and [56] above.
80. The Act s 45(1)(a).
81. Ibid ss 83AD, 83AS.

132 The Attorney-General submitted that even a lengthy CCO would not be appropriate in cases of culpable driving or manslaughter, unless there were "very exceptional circumstances". The Director took a different position, submitting that if (contrary to his primary position)[82] the length of a CCO could serve the purpose of punishment, there was "no obvious reason why CCOs of up to 20 years could not be imposed for some cases of culpable driving or manslaughter".

133 It is, in our view, both undesirable and unnecessary to seek to impose in advance any outer limits on the availability of this sentencing option. First, these are early days, and the scope for utilising CCOs is largely unexplored. Secondly, realising the full potential of CCOs will require, as we have said, a re-examination of accepted views about offences for which imprisonment has been thought to be the only option. That process of rethinking and re-evaluation will take some time.

134 Thirdly, and most importantly, the readiness of sentencing courts to impose CCOs for serious offences will depend on these orders being shown to be effective. And they will not be effective unless they are properly supported and resourced by Corrections Victoria. Proper resourcing is essential to enable courts to attach conditions — both punitive and rehabilitative — in the knowledge that compliance with the conditions is likely to produce meaningful results. Otherwise, this new sentencing option will simply not realise its potential.

135 We would add this. Sentencing courts are uniquely placed to monitor the adequacy of the resourcing provided, and should be astute to draw attention to any shortfall.

Combining a CCO with a sentence of imprisonment

136 When the CCO provisions were first enacted, the sentencing court was empowered to make a CCO in addition to imposing a sentence of imprisonment, provided that the term of imprisonment did not exceed three months. The Emergency Workers Act, however, replaced the three month limit with a two year limit.[83] (In what follows, we will refer to a sentence which combines a CCO and a term of imprisonment as a "combination sentence"). Pre-sentence detention is not counted for this purpose.[84]

137 The Director submitted that the lifting of the maximum imprisonment term to two years supported his contention that the duration of a CCO must be justified by its capacity to serve sentencing purposes other than punishment.[85] When imposing a combination sentence, the Director submitted, it will ordinarily be appropriate:

> … for the court to pursue punishment primarily through the custodial component. It would be undesirable for the court to seek also to punish through the duration and conditions of the CCO (allowing that the court will need to have regard to the intrinsic punitive quality of conditions imposed for other purposes …

82. See [147] ff below.
83. The Act s 44(1). The Justice Legislation (Confiscation and Other Matters) Act 2014 effected an increase in the jurisdictional threshold of the Magistrates' Court in respect of CCOs and combination sentences for multiple offences, from two years to up to five years in respect of three or more offences: the Act s 44(1B).
84. See [239] below.
85. See [147] ff below.

138 We are not persuaded by that submission. For reasons given in the next section,[86] the Director's approach mischaracterises the nature and purpose of a CCO. It is punitive in nature, and is intended — and expected — to operative punitively for every day of its operation.

139 More importantly, the adoption of the Director's split-level approach to a combination sentence — prison for punishment, CCO for rehabilitation — would tend to reinforce traditional views of sentencing options. By effectively inviting the sentencing court to ignore the punitive effect of a CCO, this approach would likely result in prison continuing to be viewed as the only real option for offending of any seriousness. That is precisely the view which the introduction of the CCO was intended to change.

140 There will, of course, be cases where the sentencing court concludes, after engaging in the deliberation now required by s 5(4C), that certain sentencing purposes — typically, just punishment, denunciation and/or deterrence — cannot be sufficiently served by the making of a CCO, even with onerous conditions. Consistently with the principle of parsimony, the court would then impose the shortest term of imprisonment consistent with the achievement of those purposes.[87]

141 The availability of the combination sentence option adds to the flexibility of the CCO regime. It means that, even in cases of objectively grave criminal conduct, the court may conclude that all of the purposes of the sentence can be served by a short term of imprisonment coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending.

142 According to VLA, the particular benefit of imposing a CCO to commence on completion of the term of imprisonment would be:

> … in its capacity to assist an offender's rehabilitation and reintegration, and to reduce the negative effects of having served a custodial term.
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> …
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> [T]he sentencing purposes for imposing a back end CCO and the emphasis in selecting its component parts should be primarily rehabilitative in nature. However, this is not to say that other purposes are not capable of being pursued. Like parole, a back-end CCO can, for example, assist in facilitating community protection and specific deterrence.

143 VLA accepts that, when a CCO follows imprisonment, it can also be used for the purpose of punishment, but submits that the pursuit of that objective:[88]

> … should be in the context of attaining broader rehabilitative and reintegrative outcomes, for example by enabling a "progressive reduction in the level of punishment and supervision to which an offender is subject". If the benefit of a back end CCO is primarily to assist with rehabilitation and reintegration, a punishment heavy CCO (for example, a CCO that contains significant community work, curfews, electronic monitoring and other restrictions) may inhibit those intended aims.

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86. See [146] ff below.
87. The sentence imposed in Mr Boulton's case is an example of this. See also *Director of Public Prosecutions (Cth) v Zarb* [2014] VSCA 347.
88. Citations omitted.

144 The VLA submissions also draw attention to the position of an offender who at the date of sentence has already served time in custody on remand. (Mr Fitzgerald was in that position). In such a case, the court may conclude that there is no warrant for further imprisonment beyond time served but that the proportionate sentence requires a significant degree of further punishment. The CCO must be fashioned accordingly. (In Mr Fitzgerald's case, as we have explained in our reasons, no further punishment was warranted beyond the time served, and there was hence no basis for the imposition of a CCO.)

145 VLA's submissions are consistent with our analysis of the CCO regime, and should be accepted.

How significant a factor is punishment in determining the length of a CCO?

146 A proper approach to the determination of the period of any CCO will involve consideration of the purposes of sentencing which are being met by the order. Naturally, those purposes inform both the fixing of the period of the CCO, and the decision as to which conditions should be attached.

147 The Director's submission sought to distinguish between the punitive *effect* of a CCO, on the one hand, and the part to be played by punishment as a *purpose* in determining the length of a CCO. According to the submission:

> [O]n a proper construction of the statutory regime governing CCOs, punishment would generally not be a significant consideration in the determination of the period of a CCO. That is, while the punitive effect which a CCO will have over its lifetime must be taken into account by a sentencing court in determining its period, imposing long CCOs on offenders for the *sole* purpose of punishing them is not what is contemplated by the statutory scheme.

148 This construction was said to be supported by two features of the CCO regime. The first was that the community work condition available under s 48C was the only condition expressly said to have the purpose of punishing the offender.[89] The Director also drew attention to s 48C(7), which provides as follows:[90]

> If a court attaches an unpaid community work condition as the sole condition under this Division of a community correction order for up to a maximum of 300 hours, **the order expires on the satisfactory completion of those hours of work.**

149 According to the Director's submission:

> This provision suggests that, at least where a community work condition is the sole condition of an order, the punitive component of the order is exhausted on completion of the community work. Looked at another way, if an offender was obliged to remain subject to a CCO for its entire period as a component of their punishment, it would not be open to them to truncate this period, and hence mitigate their punishment, simply by completing their community work promptly.
>
> To take an example, an offender might be subject to an order which requires as its sole condition that they complete 200 hours of community work, and is for a period of 12 months. It would be open to the offender to complete this community work, and bring the order to an end, in only 5 weeks.

89. The Act s 48C(2).
90. Emphasis in original.

150 The submission from VLA rejected the distinction between punitive effect and punitive purpose. According to VLA, a CCO operates punitively for its entire duration and there is no reason to doubt that punishment is one of the purposes to be considered in determining the duration of the order, as well as the conditions to be attached.

151 In our view, VLA's submission must be upheld. The Director's emphasis on the purposes of rehabilitation, deterrence and community protection is wholly consistent with the provisions but it is, we think, incorrect to suggest that — the community work condition apart — the sentencing court must treat punishment as a subsidiary, or lesser, purpose in determining the length of a CCO or the conditions to be attached.

152 As we have said, the sentencing court will want to be satisfied — and the community would expect — that the imposition of a CCO will "punish the offender to an extent and in a manner which is just in all the circumstances".[91] Both the period of the CCO, and the conditions attached, bear upon the extent of the punishment inflicted. In the particular case, the punitive effect will be determined by the extent, and duration, of the curtailment of the offender's freedoms.

153 The Director also drew attention to the broad powers conferred by s 48M to cancel, suspend or vary a CCO or its conditions. Such an alteration can be made, *inter alia*, where the court considers that this will advance "the rehabilitation and reintegration of the offender" or that the continuation of the sentence "is no longer necessary in the interests of the community or the offender".

154 The Director argues that, the proper measure of just punishment is determined by the criminal conduct and is therefore "in a sense, irrevocable". Changes in the offender's circumstances could not, it is said, alter the proper measure of punishment. It follows, so the Director contends, that to impose a lengthy CCO as a punitive measure would be inconsistent with the broad discretion to vary or cancel the order.

155 We do not agree. As VLA pointed out, the determination of the head sentence for an offence is invariably informed by the purpose of just punishment, among other purposes. The court must sentence on the basis that the offender may have to serve every day of the sentence.[92] (The same assumption must be made when considering the length of a CCO.) But, in the very act of fixing a non-parole period, the court recognises the probability that the head sentence will not be served and that, subject to the progress of the offender's rehabilitation, the offender will instead be released on parole upon or soon after the expiry of the non-parole period.

156 That this probability exists has never been thought to make the fixing of a head sentence other than a proper vehicle for inflicting just punishment. The same was true when remissions of sentence were available, that is, when "the sentence imposed as appropriate to the gravity of the crime" could be remitted or cut short by reason of good behaviour while it was being served.[93]

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91. The Act s 5(1)(a).
92. *Director of Public Prosecutions v Karipis* [2005] VSCA 119 at [15].
93. *Hoare v R* (1989) 167 CLR 348 at 353–4.

The power to vary or cancel a CCO

157 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). These powers are exercisable if the court is satisfied that:

(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 any condition of the order; or

(b) the circumstances of the offender were wrongly stated or were not accurately presented to the court, or to the author of a pre-sentence report or drug and alcohol report, before the order was made; or

(c) the offender no longer consents to the order; or

(d) the rehabilitation and reintegration of the offender would be advanced by the making of the decision to deal with the order; or

(e) the continuation of the sentence is no longer necessary in the interests of the community or the offender.

158 The conferral of these powers represents another radical change in the court's sentencing function.[94] When a court is sentencing an offender to a term of imprisonment, the sentencing decision is made once and for all. The court is required to make its best forecast, on the material available at that time, of the likely progress of the offender's rehabilitation while in custody. There is no scope for subsequent amendment of the sentence, either by the sentencing court or by this court,[95] in the event that the offender makes significantly better, or faster, progress towards rehabilitation than the judge anticipated. Post-sentence intervention is solely a matter for the executive.

159 The conditions laid down for the exercise of these powers also highlight the distinctive features of CCOs. The legislature has expressly contemplated that it will be appropriate for the court to consider cancelling a CCO if the offender is either unwilling[96] or unable[97] to comply with the order (or one or more of its conditions), and to 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.

160 It will not, of course, be the court's function to monitor the offender's progress, except where a "judicial monitoring condition" has been attached.[98] In the absence of such a condition, the responsibility for monitoring is implicitly imposed on those who under s 48N are authorised to make application for an order of variation or cancellation, namely, the informant, the Director, the offender, and the Secretary.

161 These provisions recognise the reality that, over the period of any sentence, an offender's circumstances, health, disposition and maturity — and, accordingly, the risk which the offender presents to society — are likely to change. Changes

94. There was a much more limited power of variation in relation to CBOs: see the former s 46, which contained no equivalent to the new ss 48M(1)(d) and (e) or s 48M(2).
95. Except where an appeal against sentence succeeds on other grounds and the question of resentencing arises.
96. The Act s 48M(1)(c).
97. Ibid s 48M(1)(a).
98. See [191] ff below.

of that kind are all the more likely to occur in the case of a community-based disposition, given the opportunity which this 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. That being so, it seems highly desirable that there be a power to modify, or revoke, a CCO in the light of changing circumstances.

162 One particular question addressed in submissions was whether, in fixing the period of a CCO, the sentencing court should take into account the possibility of its future variation or revocation. In our opinion, that is not a matter which should be taken into account. Just as the sentencing court may not take into account the possibility of future executive action,[99] so 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.

163 As we said earlier, that is the assumption on which a court fixes the head sentence of a custodial term. The fact that a non-parole period is also fixed, and that in all likelihood the offender will be released on or soon after the completion of the minimum term, justifies neither a longer nor shorter head sentence than would otherwise be fixed. In the same way, it would be wrong in principle for a judge to make the term of a CCO longer than would otherwise be justified merely because of the possibility that a successful application for variation or cancellation might be made before the full period of the order had been served.

164 The analogy with the fixing of a non-parole period may be explained in this way. A CCO is premised on the assumption that the offender's compliance with the sentence is likely to effect an improvement in the offender's health/behaviour/attitude/employability. Moreover, the order gives the offender the opportunity (by participating actively and energetically in the prescribed programs) to help to bring this about. In this sense, the offender's ability to apply for variation or revocation should operate as an incentive to compliance,[100] just as the opportunity to seek release on parole on the expiry of the non-parole period is an incentive to rehabilitation in custody.

165 An example will illustrate. A judge concludes that a CCO of seven years' duration is warranted for the offending in question. Part of the reason for deciding on a CCO rather than a term of imprisonment is that the particular offender has already shown a strong disposition towards rehabilitation and is therefore likely to make good use of rehabilitative programs. Although contemplating the possibility that the offender will have to serve the full seven years, the judge nevertheless anticipates that the offender may be fully rehabilitated by (say) year four or five, in which case an application for revocation of the order may well succeed. There is no inconsistency between the two.

Estimating the periods required

166 We agree with the submission made by the Director that, in considering the period over which an offender's rehabilitation would be facilitated by a CCO, a sentencing court would be assisted by material specifically directed to this issue. As the Director put it, such material should include:

> (a) an estimate of the period of time which is likely to be required to enable the offender to complete any courses or programs he or she is likely to be directed to attend; and

99. The Act s 5(2AA)(a).

100. As VLA pointed out, s 48M was recommended by the SAC as a "form of reward for compliance".

(b) any material bearing on the period over which an offender's risk of re-offending should be managed by the deterrent effect of a CCO.

167 There was discussion in the course of argument of how difficult it is likely to be to make any reliable forecast of the period required to treat an offender, or of the offender's likely response to treatment. It seems inevitable, however, that the period required in any case will be a topic for submission by defence counsel and for qualitative response from the prosecutor. Clearly, those submissions should be as informed as possible.

168 As VLA submitted:

> The court should place emphasis on evidence-based decision making in determining the length of an order. For example, in respect of low-risk offenders for whom rehabilitation is the primary sentencing aim, inappropriate intervention (for example intense intervention over an extended period of time) may increase rather than decrease the risk of re-offending, potentially counteracting the intended benefits of rehabilitative components.

169 Neither of the CCO assessments for Boulton or Clements contained any material which would have enabled the judge to make an estimate of the period required for rehabilitative programs to be effective. Plainly, however, if such material can be obtained in relation to a particular offender, it is likely to be of central importance in the fashioning of a CCO.

170 Obviously, the sentencing court will require assistance in this respect from experts, both as to the efficacy of particular types of rehabilitative programs and — wherever possible — as to the needs of the offender and his/her likely responsiveness to particular programs. It is to be expected that opinions of this kind would form part of the pre-sentence report, as discussed below.[101]

Anticipated difficulties of compliance with conditions

171 As VLA pointed out, there will be cases in which the very difficulties which have contributed to the offending — mental illness, drug addiction and/or homelessness — raise serious questions about the ability of the offender to comply with the conditions which would need to be attached to a CCO. It would be a paradoxical outcome if such anticipated difficulties of compliance led the court to conclude that a CCO was not an appropriate disposition for the offender, even though the causative problems could be addressed by the very kinds of treatment and rehabilitation programs which a CCO could require the offender to undertake.

172 As VLA submitted, it is important that prison not become the default option in such a case. On the contrary, where the offender has been assessed as suitable for (for example) treatment and rehabilitation conditions, the sentencing court should proceed on the assumption that — whatever difficulties of compliance there may be initially — these are likely to abate once the treatment process gets under way. We recognise that relapse into addiction during treatment is a common occurrence, but it would be wrong for the sentencing court to 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.

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101. See [170]ff below.

173 There will, of course, be cases where the court concludes that, because there is no realistic prospect of compliance, a CCO is not appropriate. As a rule, however, the court should assume — as the legislation itself does — that rehabilitative conditions are likely to be effective. There is, moreover, ample capacity for the terms of the order to be revisited at any time, should the problem of non-compliance prove to be insoluble. This would be an obvious case for an application for cancellation (or variation) of the order under s 48M.[102] As we have said, the existence of that power relieves the court of the burden of making an assessment about the future once and for all.

174 There is a related question, concerning the appropriate length of a CCO in such a case. Counsel for Mr Boulton argued that a CCO should not be made longer because it is thought that an offender may be non-compliant, or that treatment may be ineffective. To the extent that this submission relies on the principle of proportionality discussed earlier, it is plainly right. But otherwise we think that a sentencing court may properly have regard to the offender's likely compliance with conditions when determining what the period of the CCO should be.

The content of a pre-sentence report

175 Under s 8A(2) of the Act, the court considering the making of a CCO must order a pre-sentence report, so that it may:

(a) establish the offender's suitability for the order;
(b) establish that any necessary facilities exist; and
(c) "gain advice concerning the most appropriate condition or conditions to be attached to the order".

No such report is required, however, 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.[103]

176 As the Director correctly submitted, the sentencing court must be properly apprised of the offender's personal circumstances. It is particularly important for the court to be informed:

> … in sufficient detail of matters personal to the offender, and particular factors which may have contributed to the offending behaviour, or which might otherwise affect the offender's prospects of rehabilitation.

Furthermore, the court should be informed:

> … to the extent possible, of any material which sheds light on the period of time over which an 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. This material may include information, based on empirical research or experience, concerning the periods of time required to overcome or at [least] manage substance abuse problems.

177 As we have said, this is an area in which expert assistance is likely to be of particular importance to the court's assessment. In the course of the hearing, accordingly, the court sought submissions on the feasibility of the author of a pre-sentence report offering an opinion about the length of time required for treatment of the particular offender.

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102. The Act s 48M(2)(b).
103. Section 8A(3).

178 In a supplementary submission, the Director informed the court that he had sought advice from Corrections Victoria and from clinicians at Forensicare. On the basis of that advice, the Director submitted as follows:

> Currently, pre-sentence reports prepared by the Secretary to the Department of Justice do not provide advice or recommendations concerning the length of order necessary to perform particular conditions.
>
> The Department can inform courts about the period of order necessary to permit participation in particular programs, having regard to referral, assessment, waiting, preparation, and treatment/participation periods. The Department can also inform courts of the time required to complete particular programs. For example, at present the sex offender program suggests that an 18 month order is required to ensure sufficient time to complete that program.
>
> The Department does have some capacity to offer assessments about duration of order likely to support the rehabilitative purposes of sentencing, using a tool that indicates the general risk of re-offending.[104] The Department advises that individual assessments may be more feasible on reviews conducted for the purpose of judicial monitoring hearings, or on variation applications.
>
> ***Clinical assessments (Forensicare)***
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> Where offenders present with apparent or asserted psychological conditions or substance abuse issues, courts regularly obtain, or are presented with, expert clinical reports. These reports may certainly express opinions on current treatment needs and the durational requirements of particular treatment programs. If an opinion extends beyond those matters, Judges need to be aware of the limits to clinical expertise and the barriers to reliable longer term risk assessment.
>
> Clinical assessments about desirable treatment programs do rely on accepted empirical evidence about "what works", and indeed there is a well evidenced link between "higher dosage" (longer duration or more intensive) treatment and improved rehabilitative outcomes for high risk offenders. However, this sense of "longer duration" does not match the longer "duration" now available for CCOs. Instead, it will be exceptional that treatment would be anticipated to last longer than two years.[105]
>
> Clinical reports, like Departmental reports, are particularly limited by the difficulty of making reliable risk assessments. This is because the response of individual offenders to interventions or other life-changes is highly unpredictable, thereby undermining any attempt to define prior to sentence the duration of intervention needed to achieve any particular result. Finally, just as Departmental reports are limited by the author's lack of clinical expertise, clinicians may lack the necessary understanding of correctional processes to comment knowledgeably on the rehabilitative or protective capacity of supervision or restrictive orders.

179 Three points should be made in response to these submissions. First, it is essential that the sentencing court be provided with as much material of this kind as possible, bearing on the likely duration of order required. Secondly, the Department of Justice will need to co-ordinate arrangements for pre-sentence

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104. *The tool uses such factors as the number of prior convictions, history of offending before the age of 16, employment history, and whether the person holds antisocial attitudes and has antisocial associates. These would not be individualised clinical assessments that identify the specific treatment needs of an individual. Nor would they be based on empirical evidence regarding the impact of different orders or order durations on offender rehabilitation. This tool measures risk by comparing the offender to groups of offenders with similar characteristics. It does not measure an individual's risk of re-offending.

105. *Currently there is no reliable empirical evidence regarding the impact of very long duration orders (ie longer than two or three years) on offender rehabilitation, or that longer orders will enhance the therapeutic effect of treatment or rehabilitation interventions.

reports so that any clinical assessment obtained from Forensicare is included in the Department's own report. The court should not have to call for a separate clinical report.

180 Thirdly, it is clear — for the reasons set out by the Director — that even the best expert opinion can only provide limited guidance to the court in determining the appropriate period of a CCO. To a significant degree, it seems, the court will be left to make its own assessment — doing the best it can — of how long the particular offender should be required to submit to therapeutic intervention. It is to be hoped that, as experience with CCOs grows, a body of information will develop which will assist courts in making such assessments.

181 The court also invited submissions concerning the funding of the treatment required by a treatment and rehabilitation condition. The Director's response was in these terms:[106]

> Corrections Victoria does not fund medical or mental health treatment for offenders. Instead offenders subject to orders access these services on the same basis as any other member of the community. Corrections' role in relation to these services is supporting and enabling referrals followed by engagement with the practitioner to confirm attendance and progress of treatment. Corrections also has referral pathways to facilitate access to mental health services. This means funding for treatment services will be available on an open-ended basis, subject primarily to the offender obtaining necessary general practitioner referrals.

182 We view this as an encouraging response. It accords with our experience of the critical role played by Corrections Victoria in assisting offenders to obtain appropriate medical treatment.

The CCO and young offenders

183 Consideration of sentencing for young offenders begins with the well-known decision in *R v Mills*,[107] where the court approved these three propositions:

> i. Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.
> ii. In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender).
> iii. A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. (This proposition is a particular application of the general principle expressed in s 5(4) of the Sentencing Act 1991).

184 Thus, as the court said in *Anderson*,[108] it is "a cardinal principle of sentencing law" that, when a young offender is to be sentenced, the sentencing disposition should be tailored — so far as possible consistently with other applicable

106. There are, however, other limits on treatment availability, including basic resource availability and provider assessments about the utility of ongoing treatment.
107. [1998] 4 VR 235 at 241 ("*Mills*").
108. (2013) 228 A Crim R 128 at 140, [49].

sentencing principles — to promote the offender's rehabilitation. This serves the interests both of the individual and of the community. In *R v Wyley*,[109] Maxwell P said:[110]

> *Mills* constantly reminds sentencing courts, and this Court on appeal, that there is great public benefit in the rehabilitation of an offender and in maximising the prospect that the offender will carry on a law-abiding life in the future. But that consideration is not unique to young offenders. Nor is there any one correct answer as to how the balance is to be struck between that consideration and others which may point towards a period, or a longer period, of imprisonment, rather than a non-custodial sentence. Thus understood, the later cases of *Director of Public Prosecutions v Lawrence* and *R v Nguyen*, are not to be viewed as "excluding the principles in *Mills*", but simply as instances of how those principles are to be applied.
>
> As counsel properly conceded towards the end of his submissions, there is a role for general deterrence to play in relation to every class of case. In relation to certain classes of case, however, general deterrence may have a particularly important role to play. The present case is of that kind. Violence of this kind, in circumstances of this kind, is so prevalent, that general deterrence is seen to have particular importance. But, again, the role of general deterrence will vary with the circumstances of the case.

185 These issues were recently considered in *Azzopardi v R*,[111] where Redlich JA (with whom Coghlan and Macaulay AJJA agreed) said:[112]

> The general proposition which flows from these authorities is that where the degree of criminality of the offences requires the sentencing objectives of deterrence, denunciation, just punishment and protection of the community to become more prominent in the sentencing calculus, the weight to be attached to youth is correspondingly reduced. As the level of seriousness of the criminality increases there will be a corresponding reduction in the mitigating effects of the offender's youth. But only in the circumstances of the gravest criminal offending and where there is no realistic prospect of rehabilitation may the mitigatory consideration of youth be viewed as all but extinguished.

186 As discussed earlier, the CCO can be used to rehabilitate and punish simultaneously. This significantly diminishes the conflict between sentencing purposes, particularly acute in relation to young offenders. No longer will the court be placed in the position of having to give less weight to denunciation, or specific or general deterrence, in order to promote the young offender's rehabilitation. Rather, the court will be able to fashion a CCO which adequately achieves all of those purposes.

187 At the same time, as VLA pointed out in a supplementary submission, there are particular considerations which militate against the imposition of a lengthy CCO on a young offender. First, research indicates that most offenders "disengage from criminal behaviours when they are in their early 20s", with relatively few becoming "life course persistent" offenders.[113] Since "offending by a young

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109. [2009] VSCA 17.
110. At [20]–[21] (citations omitted).
111. (2011) 35 VR 43 ("*Azzopardi*").
112. At 57, [44]. Cf *Director of Public Prosecutions v Terrick* (2009) 24 VR 457 at 470–1.
113. *Chu and Ogloff, "Sentencing of Adolescent Offenders in Victoria: A Review of Empirical Evidence and Practice", (2012) 19(3) *Psychiatry, Psychology and Law* 325, 331, referring to Farrington "Developmental and life-course criminology: key theoretical and empirical issues" (2003) 41, *Criminology* 221; Moffitt, "Life-course-persistent" and "adolescence-limited" antisocial behaviour: A developmental taxonomy (1993) 100 *Psychological Review* 674.

person is frequently a phase which passes rapidly", it is said, sentencing dispositions should avoid alienating a young person and diminishing "protective factors".[114]

188 Secondly, VLA argues, time has a "wholly different dimension" for young offenders.[115] As a result, a longer order is likely to have a greater impact on a young offender.[116] Thirdly, young offenders may be more receptive to change and hence "able to respond more quickly to interventions".[117]

189 VLA also draws attention to the research which this court noted in *CNK v R*,[118] highlighting "the potential for the immature brain to respond to punitive punishments in such a way as to make recidivism more rather than less likely".[119] According to VLA's submission, a lengthy CCO:

> … may perpetuate the stigma of being associated with a criminal sanction (which, according to "labelling theory" may serve to "amplify deviance",[120] and may impact detrimentally on protective factors (eg employment opportunities and social ties).[121] As such, rehabilitation may be better manifested by protecting a young person from lengthy intervention.[122]

190 These are, in our view, important considerations, which may justify a shorter CCO for a young offender than would be appropriate for an older offender in comparable circumstances.

Judicial monitoring condition

191 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 for it to review the offender's compliance during the course of the order. A judicial monitoring condition may specify the time or times at which the offender must reappear before the court for a review, and may specify any information, report or test that must be provided for that purpose.

192 Section 48L sets out the powers of the court in reviewing the offender's compliance with the order. They include a power to invite, or require, the offender to answer questions or provide information, and to invite any medical practitioner who has examined the offender to provide a medical report on the offender.

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114. **UK Youth Guideline* [3.7], [4.2].
115. *Judge Newman, South Australian Youth Court Advisory Committee, Annual Report 1983, 6–7 (although referring to "children", this quote remains relevant for young offenders).
116. **UK Youth Guideline*, [3.7]. Given the tendency of youth to discount the future and be more concerned with short term consequences, the punitive value of length of the CCO may not be fully appreciated at the time of sentence …
117. **UK Youth Guideline*, [3.7]. This may be because their personality characteristics and behaviour are "malleable" and "susceptible to suggestion": ibid, 337.
118. (2011) 32 VR 641 at 662, [77].
119. * *CNK v R* (2011) 32 VR 641 per Maxwell P, Harper JA, Lasry AJA, citing Steinberg, "Adolescent Development and Juvenile Justice" (2009) *Annual Review of Clinical Psychology* 47, 65–8. See also Cauffman and Steinberg, "Emerging Findings from Research on Adolescent Development and Juvenile Justice" (2012) 7 *Victims and Offenders* 428. This analysis of punitive sanctions is relevant to both custodial and non-custodial orders.
120. *Young people may be "particularly affected by a strong stigmatization", given they are still developing their identities: Ascani, "Labelling Theory and the Effects of Sanctioning on Delinquent Peer Association: A New Approach to Sentencing Juveniles" (2012) *Perspectives* 80, 83. See further: Sentencing Advisory Council, *Sentencing Children and Young People in Victoria*, Sentencing Advisory Council, (2012), 54.
121. *There may also be a greater risk of "peer contagion" (eg where group treatment programs are engaged in over an extended period).
122. **UK Youth Guideline*, [4.2].

193 Judicial monitoring conditions may impose a heavy burden on courts which are not equipped or funded to supervise offenders. Academic and other commentators who have supported judicial monitoring in other contexts, however, argue that the interaction between a judicial officer and an offender is likely to encourage compliance with court orders such as the requirement to abstain from alcohol use.

194 As yet there has been little long-term research on the effects of imposing judicial monitoring conditions, either in the context of CCOs or otherwise. But a randomised trial of intensive judicial supervision in the Parramatta Drug Court, conducted by the New South Wales Bureau of Crime Statistics and Research, showed that the group of drug offenders who were judicially monitored were less likely to use illicit substances during the period of monitoring than those who were under other forms of supervision. The report recognised the limitations of the research, but commented that "the interaction with the judicial officer is considered to be a particularly important feature of drug courts". The supervision relationship is thought to be conducive to the offender's continuation in treatment, at least in part by "communicat[ing] to participants — often for the first time — that someone in authority cares about them and is closely watching what they do".[123]

195 Although more research is needed on the long term effects of the imposition of judicial monitoring, we consider that careful use of this condition has the potential to enhance the rehabilitation of young offenders and of those who offend because they are drug addicted.

CCO or non-parole period?

196 As noted earlier,[124] the effectiveness of a CCO is likely to depend on the court's ability to determine:

(a) whether the offender is suitable for a CCO; and

(b) what conditions should be attached to the order to address the particular needs and circumstances of the offender.

As VLA points out, the ability to make such assessments will inevitably diminish the longer the time between the making of the order and the commencement of operation of the CCO.

197 In the case of a short term of imprisonment, there should ordinarily be little difficulty in undertaking the suitability assessment. Where, however, the court proposes to impose a term of imprisonment of 12 months or more, the difficulties may be quite considerable. As VLA points out, the court has a discretion in those circumstances to fix a non-parole period and/or to impose a CCO.

198 In some circumstances, it will be more beneficial to fix a non-parole period than to attach a CCO. The Adult Parole Board will then be able to assess, as the expiry of the non-parole period approaches, the offender's rehabilitative prospects, having regard to how he/she has fared in custody, and will be able to tailor parole conditions to the offender's needs as they then appear to be.

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123. Jones "Intensive Judicial Supervision and Drug Courts Outcomes: Interim Findings from a Randomised Controlled Trial" (2011) 152 *Crime and Justice Bulletin*, quoting "Defining Drug Courts: The Key Components" (US Office of Justice Programs, 1997).

124. See [79] above.

199 VLA made detailed submissions about the advantages and disadvantages of combining a non-parole period with a CCO.[125] We agree, for the reasons advanced by VLA, that there are significant conceptual and practical difficulties in such a combination, and that the sentencing court should ordinarily treat them as alternatives.

200 VLA included a helpful submission on the matters which should be taken into account in weighing up whether a non-parole period or a CCO was more suitable. We would adopt that submission, which we set out in full:

> In weighing up whether a NPP or a CCO is more suitable, the following matters are relevant:
>
> *Proximity to the date of sentencing* — the closer the period of conditional freedom to the date of sentence, the better placed the court is to determine an offender's suitability for that order, and the more likely an offender's consent to an order can be said to be meaningful (see above, paragraphs 18–19). The less proximate the date of sentencing, the more likely the Adult Parole Board will be better placed to consider the offender's rehabilitative prospects and treatment needs, having regard to how the offender has fared in custody.
>
> Given the contaminating effect of incarceration and the potential loss of protective factors (including family and social connections, employment and housing), an offender's rehabilitative prospects may change markedly in custody. Where an imprisonment term remaining to be served is lengthy, it may be particularly difficult for a court to predict an offender's treatment and rehabilitative needs on release. Conditions imposed by the court at sentence may no longer be relevant. For example, residence restrictions and curfews may no longer be appropriate where access to housing is lost while in custody. Drug and alcohol issues may no longer be an issue on release (given detoxification and access to treatment programs), or conversely, habits may have developed during incarceration.
>
> *The extent to which the intended purpose for imposing conditional freedom is capable of being achieved* — the purpose of parole is to "provide for mitigation of the punishment of the offender in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all of the circumstances of the offence".[126] Parole is said to serve the offender, by assisting with rehabilitation and providing an incentive to behave well in prison, as well as serving the interests of the community.[127] While courts are prohibited from taking into account the likelihood of executive action reducing the length of time actually spent in custody,[128] recent reforms to the parole system[129] call into question whether the rehabilitative purposes of parole can be realised in respect of those receiving short terms of imprisonment.
>
> Subsequent to the recent reforms of the parole system, fewer short-term prisoners appear to be paroled on their earliest release date, with some eligible offenders not being

125. The Act s 44.
126. * *Power v R* (1974) 131 CLR 623 at [10]. See further Freiberg, *Fox and Freiberg's Sentencing* (2014).
127. *Freiberg, *Fox and Freiberg's Sentencing* (2014).
128. *The Act, s 5(2AA)(a); see further *R v Kasulaitis* [1998] 4 VR 224 at 232: "the fixing and length of a non-parole period must not lead to the overlooking of the possibility that the applicant may have to serve every day of the head sentence" per Batt JA, with whom Phillips CJ and Callaway JA agreed.
129. *The review by the Honourable Ian Callinan AC in 2013 led to significant changes to the parole regime, including a new requirement that "the Board must give paramount consideration to the safety and protection of the community in determining to make or vary a parole order, cancel a prisoner's parole or revoke the cancelation of parole": Corrections Act 1986 s 73A, as inserted by the Corrections Amendment (Parole Reform) Act 2013 s 11.

released on parole at all.[130] It has also been noted that "meaningful parole" may not be able to be facilitated by the Board in respect of short terms of imprisonment, given that rehabilitative programs may take a longer period of time than is available, or may not commence on a suitable date and therefore be unavailable to an offender.[131]

Unlike NPPs, a back end CCO *guarantees* that the offender will step down from the highly controlled custodial environment, to a specified period of conditional freedom in the community;[132] and may be designed so as to enable sufficient time to complete required programs.

In what may be a reflection that parole boards are not ideally suited to determine the date for conditional release in respect of short terms of imprisonment, in other jurisdictions such as New South Wales and Queensland, courts alone are entitled to determine the date of parole where imprisonment is of short duration.[133]

The extent to which the possibility of release on parole operates as an incentive — the possibility of release on parole (as opposed to the *guarantee* of release on a CCO)

130. *There has been a "dramatic" reduction (of 36 per cent) in the number of parole orders made during the 2013–2014 financial year as compared to the 2012–2013 financial year (there was, however a 12.1 per cent increase in the number of offenders eligible for parole as at 30 June): Adult Parole Board of Victoria Annual Report 2013–2014 (2014), 7, 14. Although the Annual Report does not provide data on how proximate an offender's release is to their eligibility date, there is, at least, anecdotal evidence to suggest that recent reforms have led to significant delays in parole assessments and determinations: Farrow and Pillai (Adult Parole Board Members), "Updates on New Adult Parole Board Processes", VLA Criminal Law Conference, 10 October 2014. The issue of delay is likely to be particularly pronounced in respect of those imprisoned for sexual offences or serious violent offences (SVOSOs). For such offenders (which includes those who have committed the offence of threat to kill), release on parole must be approved by both a general division and a special division of the Board (known as the SVOSO Division): see Corrections Act s 74AAB. To satisfy the obligation of giving paramount consideration to community protection and safety, the Board commissions a clinical risk assessment. Depending on the prison, there may be lengthy delays in the completion of that assessment. If the assessment requires a violence intervention program, by the time that has occurred, there may no longer be sufficient time for the offender to be released on parole: Farrow and Pillai (Adult Parole Board Members), "Updates on New Adult Parole Board Processes", VLA Criminal Law Conference, 10 October 2014.

131. *Farrow and Pillai (Adult Parole Board Members), "Updates on New Adult Parole Board Processes", VLA Criminal Law Conference, 10 October 2014.

132. *This approach appears to be the basis for the recent determination by Judge Cohen in *Director of Public Prosecutions v Diamond* (unreported, County Court of Victoria, Judge Cohen, 6 October 2014) at [65]–[66]: "I have considered imposing a straight sentence which once completed would mean your immediate release with no ongoing supervision by community corrections. Given your past history, I do not consider that to be in the community's interests, and to an extent not in yours … In my view you do need some supervision on release from imprisonment, either through the parole system or under a Community Corrections Order. I have decided in all the circumstances, and notwithstanding the assessment report I obtained, that it would be appropriate in your case to impose a term of imprisonment followed by a Community Corrections Order. That *guarantees your release from imprisonment when the time I impose has been served but you would immediately commence a Community Corrections Order and its supervision*". (emphasis added). (revised remarks; permission granted for use in these submissions).

133. *In New South Wales, where the term of imprisonment imposed is less than three years, the court — not the parole board — must determine the date of release: Crimes (Sentencing Procedure) Act 1999 (NSW) s 50(1). The court may also impose conditions: s 51(1). In Queensland, for sentences of three years or less (where the offender has not had a parole order previously cancelled, and where the offending did not include serious violent or sexual offending), the court must fix a date for the offender to be *released* on parole: Penalties and Sentences Act 1992 (Qld) s 160B(3). For serious violent and sexual offences, or where the offender has had a previous parole order cancelled, the court must fix the date the offender is *eligible* for parole: ss 160B(2); 160D.

> may operate as a powerful incentive for offenders to display good behaviour and to take steps to further their rehabilitation while in prison. This incentive, however, will be less powerful in respect of short imprisonment terms, where the offender is aware that release on parole is unlikely (because there may not be time for the Parole Board to consider and determine their eligibility for parole), or where rehabilitative programs are unavailable given the lack of time.
>
> The matters above reaffirm the importance of a guideline judgment. In exercising the discretion between imposing a NPP and/or a CCO, the comments of Riley CJ in *Whitehurst v R* (albeit in the context of suspended sentences and parole) are apt:[134]
>
> In choosing [between options] … the sentencing Judge must consider many things including any relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must actually be served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation. Consideration of the personal circumstances of the offender and his prospects for rehabilitation are likely to involve determining how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision, and, if so, the nature of that supervision; the existence of, and the nature of, any support mechanisms available to the offender outside the custodial setting; the identification of impediments and risks to rehabilitation and so on.

The offender's consent

201 As noted earlier, it is a condition of the making of a CCO that the offender consents to the order.[135] No doubt Parliament intended that there be a meaningful, informed consent, not a mere formality. There are good reasons for this. The most obvious is that a CCO imposes significant personal responsibility on the offender. Depending on the nature and extent of the conditions attached, the offender may need to re-organise his/her life and daily activities to a very substantial degree. Moreover, given the serious consequences of breach, it is both appropriate and necessary for the court to be satisfied that the offender's consent is based on an adequate appreciation of the seriousness of the responsibility being undertaken.

202 Consequently, in order to ensure that the offender's consent is properly informed, the sentencing court will need to satisfy itself, before the consent is given, that:

(a) the offender has been made aware of the proposed length of the order and of the proposed conditions; and

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

Guidelines for sentencing courts

203 Given the length of these reasons and the range of issues which have had to be addressed, it is both necessary and desirable that there be a set of guidelines, of manageable length, for the use of sentencing courts. To that end, the Director and the SAC each submitted a draft set of guidelines for the court's consideration. We have found the drafts of great assistance.

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134. * [2011] NTCCA 11 at [28] per Riley CJ with whom Mildren and Martin JJ agreed. See further Freiberg, *Fox and Freiberg's Sentencing* (2014).
135. The Act s 37(c).

204 Appendix 1 contains a set of guidelines for sentencing courts to use in deciding whether to impose a CCO and, if so, of what length and with what conditions. The content of the guidelines reflects the views expressed in the guideline judgment and should be read and understood in that context. The guidelines are intended, nevertheless, to be free-standing and to be suitable for use without the need to refer back to the judgment.

PART 2: THE INDIVIDUAL APPEALS

Boulton v The Queen

205 The appellant,[136] James Boulton, pleaded guilty to one charge of armed robbery (charge 1) and one charge of recklessly causing injury (charge 2). When he was sentenced for these offences on 20 June 2013, he had served 265 days in custody.

206 As we explain below, there is some uncertainty about the effect of the sentencing orders made by the sentencing judge. It appears that his Honour intended to sentence the appellant on the armed robbery charge to a term of three months' imprisonment and, on his release from imprisonment, an eight year CCO; and on the charge of recklessly causing injury, to a term of imprisonment equivalent to time served and a CCO of five years. The CCO on charge 2 was to be served concurrently with the CCO imposed on the first charge. The maximum term of imprisonment for armed robbery is 25 years and the maximum term for recklessly causing injury is five years.

207 The conditions of the CCO imposed included:

- supervision by a Community Corrections Officer for a period of 8 years;
- a three year intensive period of compliance, during which the appellant was required to perform 300 hours of unpaid community work as directed by the Regional Manager; and
- in relation to treatment and rehabilitation, a requirement to undergo:
  - assessment and treatment (including testing) for drug abuse or dependence, as directed by the Regional Manager;
  - assessment and treatment (including testing) for alcohol abuse or dependence, as directed by the Regional Manager;
  - medical assessment and treatment, including but not limited to general or specialised medical treatment, or treatment in a hospital or residential facility, as directed by the Regional Manager;
  - programs or courses aimed at addressing factors related to the offending, as directed by the Regional Manager; and
- payment of compensation to the victim in the aggregate sum of $371.57.

208 The sole ground of appeal is that:

> the sentence imposed was manifestly excessive, having regard to the appellant's plea of guilty, remorse, personal background and antecedents, mental impairment, prospects of rehabilitation and current sentencing practices.

For reasons which follow, we would uphold that ground, allow the appeal and resentence the appellant.

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136. This court granted leave to appeal on 13 November 2013.

Circumstances of the offending

209 Mr Boulton was drinking in a park with a group of five or six young men, including his stepson. He had consumed eight or nine small bottles of Scotch and was very drunk. When the victim of the offence walked past the group, the appellant produced a knife, which was about three to four inches long. He lunged towards the victim, and yelled at him to give him cash. The victim struggled with Mr Boulton and tried to grab the hand holding the knife. He was punched and kicked by members of the appellant's group, who also removed items from the victim's bag and stamped on them. The victim grabbed the knife from Mr Boulton, and was cut on his hands.

210 Mr Boulton was dragged away by joggers who came to the victim's assistance, but he continued to follow and threaten the victim. The victim went back to the area where he had been assaulted to retrieve his glasses, which had fallen off in the struggle. The victim turned to confront Mr Boulton, pushed Mr Boulton to the ground, holding the knife blade at his neck, and said "It's not worth it. I have got the knife. Let it be".

211 One of the joggers pulled the victim's arm away and the police were called. The victim found that $20 was missing and the police saw a $20 note fall out of Mr Boulton's pocket. The victim was treated at Box Hill hospital where a finger on his right hand was stitched. He had a minor injury to the other hand and some swelling and bruising to his forehead.

212 When interviewed by the police, Mr Boulton said he did not really remember much about the struggle, because he was drunk. In his sentencing reasons the judge accepted that he was remorseful. The Crown conceded that he had pleaded guilty at the first opportunity.

Circumstances of the offender

213 Mr Boulton is a 31 year old disability pensioner. Like many of those who commit criminal offences, he suffered an appalling childhood. After being beaten and abused by his birth mother he was adopted by another family, but was frequently physically assaulted by his adoptive father. He was introduced to alcohol at the age of eight. A report prepared by forensic psychologist, Dr Julie Janev, said:[137]

> Mr Boulton impressed as a man deeply traumatised by early neglect, abandonment, and abuse experiences. He reported no positive role models or strong attachments throughout life, except with his wife and children, and reported great difficulty accepting emotional nurturance and support from other people, preferring to manage his emotions alone. The latter was attributed in part to ongoing post-traumatic stress symptomatology, that is, he reported intrusive memories, physiological reactivity to reminders of trauma, hypervigilance, severe anxiety, aggressive outbursts, and feelings of estrangement.

214 Mr Boulton told Dr Janev that he became an alcoholic by the age of 12 and began using cannabis at the same time. He later used MDMA, hallucinogenics and amphetamines and became dependent on amphetamines in his mid-teens. Later he substituted heroin for amphetamines.

215 Dr Janev made the following diagnoses:[138]

137. Psychological report from Dr Julie Janev, dated 6 March 2013, para 2.3.
138. Psychological report from Dr Julie Janev, dated 6 March 2013, paras 8.1–8.2.

> In my professional opinion, Mr Boulton currently meets the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) criteria for a diagnosis of the following conditions:
>
> Substance dependence disorder:
>
> - Opioid dependence disorder in early remission
> - Alcohol dependence disorder in early remission
> - Cannabis dependence disorder in early remission
> - Amphetamine dependence disorder in full remission
>
> Depressive disorder not otherwise specified — active
>
> Post-traumatic stress disorder — active
>
> Borderline Personality Disorder — active
>
> … Mr Boulton's conditions are of a pervasive nature, dating back to his childhood years. Therefore, they are likely to require a comprehensive and long-term treatment approach to achieve complete diminution of symptomatology. Although some of his disorders are currently in remission, his presentation is fragile, therefore, it is my opinion that he is at frequent risk of relapse and mental decline unless the correct level of treatment can be established and implemented.

216 Dr Janev recommended that Mr Boulton be referred for psychiatric/psychological assessment and treatment, for assistance with transition into employment and for relapse prevention strategies to address his substance abuse.

217 Mr Boulton did not have an extensive criminal history. His most serious prior conviction was in 2000, when he was sentenced to two years in a Youth Training Centre for attempted armed robbery. He also had two convictions in 2008 of using and possessing cannabis, for which he was fined. In Dr Janev's view, Mr Boulton was at modest risk of re-offending.

218 Dr Rachel Hutchens, who provided a neuropsychological report to the court, at the request of Mr Boulton's solicitors, considered that Mr Boulton's prospects of rehabilitation were "dependent on his ability to receive treatment for and management of his mental health and drug and alcohol problems".[139] She said:[140]

> His limited criminal history over the past 12 years (single charges of possession, use, and cultivation of cannabis) further suggests that when his mental health is better managed, he is able to refrain from offending. His commitment to drug and alcohol counselling over the past year is commendable but unfortunately appears to have opened up a number of issues and traumatic memories stemming from his past. Although Mr Boulton attempted to access further services to assist in addressing these issues through Koonung Clinic, he was provided with an assessment but not offered treatment. I also note that Dr Julie Janev's report (30.01.13) indicated that Mr Boulton benefited from ten sessions of coping skills training with Psychologist David Ball in the past but was discontinued due to a lack of funding.
>
> Encouragingly, during the current assessment Mr Boulton reported a strong desire to engage in psychiatric or psychological treatment following his release from prison. He stated that he had seen someone within MRC briefly to address his mental health issues but felt that they had not been very responsive to him. It is strongly recommended that Mr Boulton be provided access to long-term psychiatric or psychological treatment

139. The judge also had before him a neuro-psychological report from Dr Rachel Hutchens, provided at the request of Victoria Legal Aid, dated 20 April 2013. Dr Hutchens noted his expression of remorse for offending and his intention to address his alcohol and other psychological problems. The judge also took account of a report from his general practitioner Dr Becky Radcliffe.

140. Neuropsychological report from Dr Rachel Hutchens, dated 20 May 2013, p 11.

> while in prison and upon his release and that any treatment is provided by someone who specialises in trauma. In addition to receiving psychological therapy, Mr Boulton may benefit from a referral to Adults Surviving Child Abuse (ASCA) who can provide support and education regarding the impact of early abuse and neglect on the development of interpersonal and coping skills.

219 Mr Boulton had had two previous hospitalisations for mental illness: one occurred when he was 18 years old and one was for a short period when he was 20. In more recent years, he had 10 treatment sessions with psychologist David Ball. He found these helpful, but had to discontinue them when funding ran out.

220 In January 2012, before he committed these offences, Mr Boulton had sought treatment for his alcohol and drug problems from the Eastern Drug and Alcohol Service, after it was recommended that he do so by a Family Protection Case Worker. Ms Bronwyn Campbell of the Eastern Drug and Alcohol Service reported that, between the period 9 February to 26 February 2012, Mr Boulton attended 13 appointments and missed six. These were rescheduled or unattended appointments. He had failed to attend or required a new appointment because of his parenting responsibilities or because he had not been sent a reminder SMS message. Ms Campbell did not attribute this to a lack of commitment to counselling.

221 Ms Campbell said that, in the period before Mr Boulton offended, he was suffering from uncontrollable and distressing memories about his childhood and a person who had died. His attempts to refrain from drug use made it more difficult for him to deal with these memories.

222 He had also reported severe dental pain and concern about his stepson. Ms Campbell had attempted to find an appropriate mental health professional with experience in dealing with traumatic stress, but had not been able to do so before Mr Boulton offended and was taken into custody. He was taking methadone and prescribed medications for his anxiety and depression.

223 Mr Boulton's partner is drug addicted and, up to the time of his incarceration, he was involved in caring for his stepchildren and the child that he had with her.

Plea hearing and sentencing reasons

224 At the plea hearing, the judge discussed the imposition of a CCO, which was opposed by counsel for the Crown. His Honour expressed the preliminary view that a CCO would be inappropriate, but ordered a pre-sentence assessment in order to decide whether that was the case.

225 The pre-sentence report noted that "Mr Boulton showed some insight into his offending", although he reported having little memory of the incident because he was intoxicated. It noted that Mr Boulton had accepted the prosecution's version of events and had expressed remorse for his actions. The report assessed him as suitable for a CCO and recommended conditions similar to those which the judge later imposed, but provided no guidance as to the period during which he would require treatment for his addictions.

226 His Honour found that Mr Boulton's mental condition reduced his moral culpability and accepted that a prison term would adversely affect his mental health.[141] His Honour observed that, despite the difficulties faced by Mr Boulton, he had only committed one minor offence over the past 10 years and that "this

141. *R v Verdins* (2007) 16 VR 269.

was indicative of some inner strength" which gave some hope for Mr Boulton's rehabilitation. Having considered an expert report on Mr Boulton's suitability for a CCO, the judge imposed the sentences described above.

Counsel's submissions

227 Mr Boulton's counsel argued that the eight year CCO term was disproportionate to the offending. Mr Boulton was not only subjected to the onerous conditions of the CCO imposed on charge 1, including 300 hours of unpaid work, but had been sentenced to three months' imprisonment, as well as having served approximately nine months in custody on remand. By the time he was released on the CCO, he would have served a year's imprisonment in total.

228 Counsel for Mr Boulton submitted that, having regard to the fact that Mr Boulton had only robbed the victim of $20, his lack of premeditation, his guilty plea and remorse, and the applicability of *Verdins* factors, it was unlikely that Mr Boulton would have been required to serve a term of imprisonment of more than about a year for this offence.

229 He submitted that the judge was required to take account of the purposes of sentencing set out in s 5 of the Act. It was not open to his Honour to impose a disproportionately long sentence solely for therapeutic purposes, or to protect the community from the possibility that Mr Boulton might offend in the future. The length of the term of the CCO showed that his Honour had done so. The sentence imposed fell outside the range of CCOs which had been imposed in other cases. Its duration could not be justified by the nature and gravity of the offence, and did not take account of the reduction in Mr Boulton's culpability because of his mental illness.

230 As noted earlier, the judge sentenced Mr Boulton to three months' imprisonment, and an eight year CCO, on charge 1. On charge 2, Mr Boulton was sentenced to 265 days' imprisonment, in addition to the five year CCO. This term was equivalent to the time served on remand. The order made on that day stated that the total effective sentence was 265 days and three months' imprisonment and that both CCOs commenced "pursuant to s 44(3) of the Act on the release of the offender from imprisonment". His Honour declared 265 days as pre-sentence detention "which is to be deducted administratively".

231 The form of these orders suggests that his Honour was intending to sentence Mr Boulton to 265 days imprisonment on charge 2, a period equivalent to time already served, and then to declare 265 days pre-sentence detention. In his sentencing reasons his Honour referred to s 44(3) of the Act. He then said that he would:[142]

> … deduct the 265 days, which I will make the imprisonment, I make them cumulative, so the sentence would be 265 days plus three months s 44(1)(b) will mean that that period is already deducted. That would leave three months to go. So effectively your client is getting a prison sentence of 265 days plus three months, but a community protection order is still possible under this.

Mr Boulton's counsel agreed with that analysis.

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142. *Director of Public Prosecutions v Boulton* (unreported, County Court of Victoria, Judge McInerney, 18 June 2013) at [47] ("*Boulton Reasons*").

232 Mr Boulton was released from gaol, apparently because of some confusion about the effect of the order. On 20 July 2013 the judge made a new order amending, but not replacing, the original order. The new order directed that three months of the sentence on charge 1 be served cumulatively upon the sentence imposed on charge 2, that Mr Boulton be sentenced to the two CCOs and that, pursuant to s 44(3) of the Act, those orders commence on his release from imprisonment.

233 Section 44 (as then in force) provided that a court could make a CCO in addition to imposing a term of imprisonment only if:

> (1)(b) the sum of all the terms of imprisonment to be served (after deduction of any period of custody that under s 18 is reckoned to be a period of imprisonment or detention already served) is 3 months or less.[143]
>
> …
>
> (3) If a court makes a community correction order in respect of an offender in addition to imposing a sentence of imprisonment in accordance with this section, the community correction order commences on the release of the offender from imprisonment.[144]

234 Our initial view was that this provision did not permit the judge to impose a sentence of 265 days' imprisonment in relation to charge 2 (a period equivalent to time served), because that period exceeded the then maximum period of three months' imprisonment. Further, the sum of the periods of imprisonment served in relation to the two charges was more than three months. This is consistent with the submission of Mr Boulton's counsel, which proceeded on the basis that Mr Boulton was sentenced to about a year in gaol in addition to the CCOs.

235 The question of whether the legislation, as it then stood, permitted the judge to impose a sentence of the 265 days served, made it necessary to consider the effect of the words "after deduction of any period of custody that under s 18 is reckoned to be a period of imprisonment or detention already served", which appear in parenthesis in s 44(1(b) of the Act. The court sought further submissions on this issue.

236 The Director submitted that the natural meaning of the provision, and the only meaning which would give effect to the words in parenthesis, was that "a court may combine a CCO with a sentence of imprisonment if the custodial period remaining after deduction of pre-sentence detention is three months or less". The purpose of the provision was to make clear that the phrase "to be served", immediately preceding the words in parenthesis, referred to the time remaining to be served after sentence, and not the time calculated from the date when the offender went into custody, which is taken into account under s 18 of the Act.

237 The Director submitted that this interpretation was consistent with the approach taken in *Hancock v R*.[145] In that case, this court when resentencing an offender imposed a sentence of 249 days' imprisonment, which was equivalent to time served, combined with a two year CCO. VLA and SAC adopted the Director's submission.[146]

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143. The Act s 44(1)(b).
144. Ibid s 44(3).
145. [2013] VSCA 199.
146. The Attorney-General made submissions which were also in essential agreement with the Director.

238 We accept the Director's submission. At the same time, we note that this interpretation of s 44(1)(b) produces a counter-intuitive result. It means that there is no difference for this purpose between a person who has served a lengthy period of pre-sentence detention, and a person who has not served any pre-sentence detention at all. Both can be sentenced to a term of imprisonment (of up to two years' imprisonment)[147] in addition to a CCO. Moreover, if s 18 were for some reason[148] inapplicable to a period of pre-sentence detention, the provision for the deduction of that period in calculating the additional term to be served by reference to s 44(1)(a) would not apply, so that the person could be given a term of three months' imprisonment in addition to the time already served. Of course, the sentencing judge would need to take these matters into account when applying the totality principle.

239 It follows that there was no sentencing error in this case. We now turn to consider the ground of manifest excess.

Manifest excess

240 In our view, it was well within the judge's sentencing discretion to impose on Mr Boulton a prison sentence of three months (in combination with time served). His Honour accepted that the knife was brought to the scene of the crime by one of the youths and not by Mr Boulton. Nevertheless, the use of a knife in an armed robbery is very serious, since it has the potential to result in a victim's death or serious injury. Although the victim was only robbed of a small amount of money, the attack occurred in the company of other young men. The fact that Mr Boulton offended in the company of youths much younger than he was is particularly troubling, and belies the concern which he had professed to Ms Campbell about his stepson.

241 We also consider that, having regard to Mr Boulton's circumstances, it was entirely appropriate for the judge to sentence him to a CCO on each of the charges. He was likely to benefit from a period of supervision. He was remorseful, had pleaded guilty at an early stage, had few prior convictions and had sought treatment for his alcohol and drug problems prior to committing these offences and *Verdins* factors were relevant.

242 As earlier observed in these reasons, it is in the interests of the community to give Mr Boulton an opportunity to obtain treatment for his addictions and mental health problems, which will help him to avoid re-offending. As we have said, a CCO enables the court to reconcile the goals of just punishment, and both specific and general deterrence, whilst at the same time supporting the offender's rehabilitation. As courts have frequently observed, rehabilitation is an important means of protecting the community, because it reduces the chance that the offender will continue to offend.

243 In our opinion, however, the combination of an eight year CCO and the term of imprisonment which Mr Boulton would actually have served by the time the CCOs commence breached the principle of proportionality. The combined punitive effect of 12 months in custody[149] and being subject to a lengthy CCO is disproportionate to the gravity of the offending and Mr Boulton's reduced culpability.

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147. See [136] above.
148. For example if the offender was serving another term of imprisonment at the same time, see: *Karpinski v R* (2011) 32 VR 85.
149. Pre-sentence detention of nine months and a sentence of three months' imprisonment.

244 The judge may have thought that the eight year CCO could be imposed for treatment purposes alone, a view which we have rejected. But, whatever be the explanation, the term of the CCO was manifestly excessive, having regard to the factors described above. The conditions imposed will have a significant punitive effect on Mr Boulton, for the reasons given earlier. It follows that both the punitive and rehabilitative purposes of the order (and also the other purposes of sentencing, set out in s 5 of the Act) can be served by imposing a CCO of considerably shorter duration.

245 On charge 1, we would impose a sentence of three months' imprisonment, together with a community corrections order of three years duration. On charge 2, we would impose a CCO of two years and six months, to be served concurrently. We would impose the same conditions as were imposed by the sentencing judge. There will be the usual declaration of pre-sentence detention.

246 We have also determined to impose a judicial monitoring condition, in order to bring home to Mr Boulton the seriousness of any breach of the order and the importance of satisfying its conditions. In addition, it will afford Mr Boulton a chance of earlier discharge from the order. We will direct that he be monitored by a judge of the County Court at six-monthly intervals.

247 If Mr Boulton had not pleaded guilty, we would have sentenced him to three months' imprisonment and a four year CCO on charge 1; and a three year CCO on charge 2, to be served concurrently with the CCO imposed on charge 1.

Clements v The Queen

248 Mr Clements pleaded guilty to one charge of armed robbery and one charge of attempted armed robbery and was sentenced as follows:

Charge on Indictment	**Offence**	**Maximum**	**Sentence**	**Cumulation**
3.	Armed Robbery, [Crimes Act 1958 (Vic) s 75A]	25y	10y CCO and $3,000 fine	n/a
4.	Attempted Armed Robbery, [Crimes Act 1958 ss 75A, 321M]	20y	10y CCO, and $1,000 fine	n/a
Total Effective Sentence:		10y CCO and $4,000 fine		
Pre-sentence Detention Declared:		n/a		
6AAA Statement:		No declaration made		

Other relevant orders:
• Forensic sample order pursuant to s 464ZF(2) of the Crimes Act 1958.
• Compensation Order pursuant to s 86 of the Sentencing Act 1991.

CCO Terms and Conditions:
• Order commences on 28/06/2013 and ends on 27/06/2023.
• Must attend at Werribee Community Correctional Centre by 02/07/2013 at 4:00 pm.
• An intensive period of compliance is fixed for a period of 3 years.
• In addition to the mandatory term, the following conditions are attached:
Supervision
• Must be under the supervision of a Community Corrections Officer for a period of 10 years.
Treatment and Rehabilitation
• Must undergo assessment and treatment (including testing) for drug abuse or dependency as directed by the Regional Manager.
• Must undergo mental health assessment and treatment including (but not limited to) mental health, psychological, neuropsychological and psychiatric [sic] in a hospital or residential facility as directed by the Regional Manager.
• Must undergo programs or courses aimed at addressing factors relating to the offending as directed by the Regional Manager.
Intensive Compliance Period
• Must complete the following conditions within the first three years of the order commencing:
• Must perform 200 hours of unpaid community work over a period of three years as directed by the Regional Manager.

249 Mr Clements was born on 17 August 1994. At the time of the offending, he was 18. On 9 January 2013, he and a friend, Craig Caithness, attended at a milk bar at approximately 7.50 pm. Both of them were wearing "hoodies".

250 Mr Tien Quong Chen was working alone in the milk bar. Caithness approached the counter and began a conversation with Mr Chen while Mr Clements selected a packet of chips. Mr Clements then approached the counter where he also engaged in conversation with Mr Chen. Caithness then took an axe from his bag, waved it in front of Mr Chen and demanded money. At the same time, Mr Clements produced a baseball bat from under his clothing and said aggressively: "Give me money".

251 Mr Chen stepped back in fear from the counter and tried to grab the cash register. Mr Clements, however, seized hold of the register and ran with it from the store. It was said to contain about $500.

252 Mr Chen chased the men from the store and saw them get into a white car which was driven away by a third male. The driver of the vehicle was later identified as the appellant's older brother, Matthew Clements.

253 At approximately 2:00 the following morning, Mr Clements and Caithness entered a service station. It was attended by a single male staff member, Mr Farouk Ali. Once again, Clements and Caithness were wearing "hoodies".

254 Caithness went to the counter and engaged in conversation with Mr Ali while Clements selected a drink and then also approached the counter. Both men conversed with Mr Ali and then Caithness removed a green-handled knife from his clothing, pointed it towards Mr Ali and said: "Open the till, give me the cash". Mr Ali activated the security button and, when Clements and Caithness saw what he had done, they fled.

255 Both Clements and Caithness were arrested at their homes. Police executed search warrants and located a number of items, including weapons, clothing, the cash register and a white vehicle, which linked both men to the offending. Each man was interviewed and made full admissions. They told police that Matthew

Clements had been the getaway driver on both occasions. Each of them also entered pleas of guilty at the committal mention at the first available opportunity.

256 Matthew Clements was dealt with in the Magistrates' Court. He pleaded guilty to one charge of robbery and one charge of possessing a drug of dependence and was sentenced to a CCO for a period of 12 months.

257 In contrast, the Crown proceeded against the appellant and Caithness on indictment and they were arraigned before a judge of the County Court. The appellant pleaded guilty to one charge of armed robbery (charge 3) and one charge of attempted armed robbery (charge 4). Caithness pleaded guilty to three charges of armed robbery (charges 1, 2 and 3), one charge of attempted armed robbery (charge 4) and one summary charge of being in possession of a prohibited weapon (namely, a taser).

258 Mr Clements had no prior convictions and, as has been noted, was sentenced to a fine of $4000 and a CCO of 10 years' duration. Caithness admitted one prior court appearance and was sentenced to a total effective sentence of three years and eight months' imprisonment, with a non-parole period of 28 months.

Grounds of appeal

259 Mr Clements was granted leave to appeal against sentence on grounds that:

1. The sentence imposed is manifestly excessive.
2. The sentencing judge erred in disregarding the application of the principle of parity with the third co-offender.
3. The sentence imposed offends the principle of parity in that, when considered in light of the sentences imposed upon the co-offenders, it gives rise to a justifiable sense of grievance.
4. The sentence imposed offends the principle of equal justice, when considered in light of the sentence imposed upon the appellant's brother for his related offending.

Specific error

260 The Director of Public Prosecutions properly conceded that ground 2 was made out. The judge stated in his sentencing remarks that he thought the sentence imposed on Matthew Clements was "so inappropriate that it is simply not a matter that I take into account on parity in this matter". Authority makes clear, however, that a sentencing judge is not free to disregard the application of the parity principle in relation to a sentence imposed on a co-offender simply because the judge considers the sentence to be grossly inadequate. The judge must still take that sentence into account and give it the weight it deserves, albeit recognising that a judge is not thereby justified in imposing a sentence below the range of sentences otherwise properly available.[150]

261 In those circumstances, the sentencing discretion is re-opened and must be exercised afresh. Although it is unnecessary to consider the other grounds of appeal as such, the submissions advanced in connection with the other grounds, particularly ground 4, are pertinent to the re-exercise of the sentencing discretion.

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150. *Green v R* (2011) 244 CLR 462 at 476–7, [33]; *Farrugia v R* (2011) 32 VR 140 at 147–8, [31]; *Director of Public Prosecutions v Holder* (2014) 41 VR 467 at 473–4, [27]–[31].

Appellant's submissions

262 Counsel for Mr Clements submitted that, although a CCO was the appropriate sentencing disposition, an order of anything like 10 years in duration was far too long. He stressed that, at the time of the offending, Mr Clements was an immature adolescent of only 18 years of age and was considerably younger than his two co-offenders by whom he had been led into trouble.

263 From the time Mr Clements left school at the age of 16 until only weeks before the offending, he was gainfully employed as an apprentice motor mechanic. Unfortunately, not long before the offending, he met his co-offender, Caithness, through his brother, Matthew. As the friendship developed, so did Mr Clements' use of "ice" which had previously been only recreational. His drug use had resulted in the termination of his apprenticeship some three weeks before the offending.

264 Mr Clements had no prior criminal history. Apart from the fact that he had started taking ice some time before the time of offending — and it appears to have been instrumental in his offending — he had no known mental health, alcohol or substance abuse problems. Additionally, since his arrest, and as a result of spending three days on remand, he appeared to have realised the error of his ways and abstained from drugs of any kind.

265 Mr Clements was also strongly supported by his parents, who were in attendance at the plea. His father was described in the Youth Justice Assessment — which was before the judge — as "an active, honest and willing participant in the rehabilitation [of Mr Clements]". In summary, as it was put in the Youth Justice Centre Assessment, Mr Clements had been an immature, naïve and impressionable young man, who was now genuinely remorseful and had the capacity to engage in rehabilitative work. In those circumstances, in counsel's submission, the offending should be regarded as an aberration which was unlikely to be repeated.

266 Counsel for the appellant accepted that denunciation, general deterrence and just punishment were all relevant sentencing considerations but he stressed that the principles essayed in *R v Mills*[151] as to the punishment of young offenders applied, so as substantially to mitigate need for the kind of punishment which would otherwise have been appropriate. More specifically, since the appellant was a young offender with no prior criminal history, rehabilitation was a far more important sentencing consideration than deterrence. Counsel argued that the imposition of treatment, supervisory and rehabilitative conditions as components of the CCO would be adequate to safeguard the community's interest in rehabilitation, as well as being a significant restriction on the appellant's freedom.

267 Counsel also acknowledged that it was appropriate to punish Mr Clements by requiring him to complete 200 hours of unpaid community work and fining him a total of $4000. The imposition of fines of that order on an 18 year old youth without significant financial means was a substantial punishment, and would operate as an ongoing reminder to him of the wrongfulness of his offending as he worked his way towards paying off the fines by the due date.

151. [1998] 4 VR 235 at 241.

268 Counsel contended, however, that for the CCO to continue for a period of 10 years, or anything approaching that duration, would be plainly disproportionate to the nature and gravity of the offending. The critical personal factors which contributed to the offending — the appellant's addiction to ice and the youthful immaturity which made him subject to his brother's and his friend's bad influences — would in all likelihood be overcome in far less than a decade. An order which went much beyond that time would tend so to curtail Mr Clements's liberty as to be likely to prejudice his normal development and rehabilitation.

269 In counsel's submission, it would also go far beyond what was necessary to satisfy the requirements of just punishment. Mr Clements would be under supervision until he was nearly 30 years of age. For the whole time, he would be liable to accept visits by Corrections Victoria at both his home and workplace; bound to attend whatever courses and programs Corrections Victoria might require; and bound to undergo whatever assessment and treatment for drug abuse or dependency or mental health Corrections Victoria might consider appropriate. There was a significant danger, counsel said, that the longer the term of the order the more likely Mr Clements might commit some infraction of its terms and thus be brought back to court and subjected to further punishment. In view of the relatively low level of seriousness of the offences in question, and Mr Clements's youth and antecedents, punishment of that order was not required.

Crown submissions

270 The Director contended that a CCO of 10 years' duration was not excessive. Given the maximum penalty for armed robbery, and the emphasis which this court has repeatedly placed on the primacy of general deterrence for cases of armed robbery committed against soft targets, there was a need for substantial punishment which a CCO of anything significantly less than 10 years' duration would be inadequate to achieve. As the Director put it, no matter how onerous the conditions of a community corrections order might be, the punitive effects of such an order could not be compared to those of a gaol sentence.

271 The Director also disputed the proposition that Mr Clements would be subject to significant deprivation of liberty for the entire term of the CCO. He would be bound to complete the community work component of the order within its first three years. While he would be required to undergo treatment programs as directed by Corrections for an unspecified time, it should not be assumed that he would be required to attend such programs for anything like the full duration of the order. To the contrary, the Director said, if Mr Clements engaged with and completed the programs satisfactorily in the first couple of years of the order, there was every reason to suppose that he would not be required to attend any further programs. It could safely be assumed, too, that the Secretary's supervision requirements would be based on an assessment of the risk of Mr Clements contravening the order and reflect the level of his compliance. Thus, it might be that his contact with Corrections proved to be minimal and only required at periodic intervals.

272 According to the Director, the length of any CCO was also to be seen in light of the provisions of s 48N of the Act, allowing for cancellation or variation. If Mr Clements performed well, completed applicable treatment conditions and demonstrated that there was no longer any real need for the continuation of the order, the order would likely be shortened. It ought not be assumed that he would be required to serve anything like the full term of the order.

273 The Director accepted that the longer the order was, the greater the risk that he might commit some breach of it which could result in him being brought back to court for further sentencing. At the same time, the Director submitted, the resentencing power was discretionary. The discretion was a broad one, in the exercise of which the court must take into account the extent of an offender's compliance with the order. It did not necessarily follow, therefore, that any infraction of the order would automatically lead to the offender being resentenced on the original charges.

Analysis

274 The material before the sentencing judge, and so before this court, did not extend to an estimate of the time likely to be required to rid Mr Clements of his drug problem and otherwise achieve his rehabilitation. Doing the best we can, however, we doubt that, if his rehabilitation is capable of being achieved, it will take much more than five to six years. We also note that the judge appears to have been of the same view, in that his Honour had in mind a youth justice centre order as a possible alternative to the CCO. The duration of a youth justice centre order could not exceed three years.

275 Of course, we do not suggest that it is certain or even probable that Mr Clements will be rehabilitated within a period of five to six years. Regrettably, it is the experience of this court that young male offenders are prone to recidivism before achieving the relative maturity which tends to emerge during their twenties. Nevertheless, given the youth and particular circumstances of this offender, his positive attitude toward rehabilitation and the significant involvement of his parents in its achievement, we think it is likely to emerge within the space of five to six years whether he is going to make a success of it. If he does, there should be no need of further treatment or supervision and, if he does not, then he can be dealt with for breach in accordance with s 48M.

276 It is a more difficult question whether a fine of $4000 and a CCO of five to six years' duration would be sufficient to satisfy the requirements of denunciation, deterrence and just punishment. But, in this case, we think it would be. Although, as the Director submitted, there is potential for an order later to be made under s 48M of the Act, for the reasons earlier stated it must be assumed that Mr Clements will be required to complete the full term of the CCO. And, as counsel for Mr Clements submitted, in view of Mr Clements's age and antecedents, rehabilitation is the primary sentencing consideration, and denunciation, deterrence and punishment are of lesser concern.

277 It would be different if Mr Clements were an older or more seasoned offender. In that event, a community corrections order of 10 years' duration or possibly even more could well be appropriate. The same could also be the case for an offender whose drug dependency was more entrenched or otherwise more serious than the appellant's dependency appears to have been. As best we can say on the available evidence, his drug problem was not entrenched at the time of his arrest and since then he has avoided taking any drugs.

278 Finally, there are considerations of parity and, in particular, the fact that Mr Clements's brother was sentenced to a CCO of only 12 months' duration. Although an order of that duration would be inadequate in this case, the fact that his brother was dealt with so leniently must be taken into account and the sentence to be imposed on Mr Clements mitigated accordingly.

279 All things considered, including the requirements of parity, we have concluded that a CCO of six years' duration would be sufficient.

Conclusion

280 For these reasons, we would allow this appeal and vary the order passed below, by reducing the term of the CCO imposed below from 10 years' to six years' duration. All other terms and conditions of the order will be confirmed.

Fitzgerald v The Queen

281 The appellant, Mr Fitzgerald, pleaded guilty to two charges of common assault and was sentenced on each charge to a five year CCO. The judge made the following orders as to terms and conditions:

> **CCO Terms and Conditions**:
> - CCO commences on 23/08/2013 and ends on 22/08/2018.
> - Must attend at Carlton Community Correctional Services by 27/08/2013 at 11.00 am.
> - An intensive period of compliance is fixed for a period of 3 years.
> - In addition to the mandatory terms:
>
> Treatment and Rehabilitation
> - Must undergo mental health assessment and treatment including (but not limited to) mental health, psychological, neuropsychological and psychiatric in a hospital or residential facility as directed by the Regional Manager.
>
> Judicial Monitoring
> - Must attend for review on 22 August 2014 at 9.30 am at Melbourne County Court.
> - Thereafter reviews will be every 12 months until expiration of the CCO, with dates to be set at each review.

282 The sentencing judge also declared pre-sentence detention to be 540 days and further declared pursuant to s 6AAA of the Act that, but for Mr Fitzgerald's pleas of guilty, she would have sentenced him to three years' imprisonment with a non-paroled period of two years. The maximum penalty for assault is five years' imprisonment.

283 Mr Fitzgerald appeals on the grounds that the sentence imposed was manifestly excessive and was disproportionate to the offending. For reasons which follow, we would allow the appeal.

Circumstances of the offending

284 Mr Fitzgerald is a 69 year old man with schizophrenia. On 15 October 2009, at about 10.45 am, he punched a 74 year old woman in the face as she was looking at a screen near the ticket vending machines at Box Hill Shopping Centre. The victim suffered swelling and bleeding of the lip and consequent distress.

285 At about 2.45 pm on the same day, and at the same shopping centre, Mr Fitzgerald punched an 80 year old woman to the crown of the head with his fist. The victim was left feeling dazed and the following morning woke at approximately 3 am vomiting and feeling stressed. A victim impact statement records that the victim was left with ongoing feelings of insecurity.

286 Mr Fitzgerald was arrested on the day of the offending and bailed. He failed to appear at the Magistrates' Court on 3 December 2009. He was arrested and re-bailed but again failed to appear on 21 October 2010 and a warrant was issued.

He was re-arrested and remanded in custody on 12 May 2011. At that time, the psychiatric court liaison service at Ringwood Magistrates' Court noted he was highly agitated, dishevelled and clearly malnourished. He remained in custody until 10 August 2011 when he was bailed to the James Parker Aged Care Centre. He absconded the same day.

287 He was again arrested on 24 April 2012 and was taken to the acute assessment unit of the Melbourne Assessment Prison. Hearings at the Ringwood Magistrates' Court were adjourned pending medical assessments and on 5 July 2012 the matter was adjourned to the Melbourne Magistrates' Court for a filing hearing due to unfitness. A committal mention was held on 24 July 2012 and Mr Fitzgerald was committed to stand trial, with fitness issues noted.

288 In February 2013, a jury was empanelled for an investigation into Mr Fitzgerald's fitness to stand trial. The jury concluded that he was not then fit. He was remanded to Thomas Embling Hospital for treatment. At that time, Dr Clare McInerney, a consultant psychiatrist with the Victorian Institute of Forensic Mental Health, reported that Mr Fitzgerald had an established diagnosis of paranoid schizophrenia, dating from approximately 30 years before. His recent presentations at Thomas Embling Hospital and the Melbourne Assessment Prison were sufficiently similar to that described by his sister as typical of his longstanding illness for Dr McInerney to conclude that Mr Fitzgerald was then suffering from an active psychotic illness. His mental processes were sufficiently impaired to render him unfit to be tried but it was thought that his psychotic illness was treatable and that fitness would be restored within the next 12 months.

289 On 8 July 2013, a further report was prepared by Dr Katherine Sevar, senior psychiatry registrar at the Victorian Institute of Forensic Mental Health, stating that Mr Fitzgerald had responded well to treatment and had been able to engage in a meaningful discussion regarding the charges he faced. Dr Sevar and a co-author concluded that he was fit to stand trial but noted that he continued to suffer from paranoid schizophrenia and would need to receive ongoing treatment:

> Mr Fitzgerald suffers from paranoid schizophrenia but his delusional beliefs have now resolved and he is fit to stand trial.
>
> It is important that he continue to receive treatment for the foreseeable future and upon release from Thomas Embling Hospital will receive ongoing treatment through community area mental health services in supported accommodation.

290 The matter was then brought on for a plea hearing. On the plea, counsel for Mr Fitzgerald submitted that he had no memory of the offending but did not dispute that it had been accurately reported. It was submitted that at the time of the offending Mr Fitzgerald was acutely unwell and his conduct was directly affected by his mental illness. Mr Fitzgerald had a long history of mental illness and at the time of the County Court proceedings was still a security patient at Thomas Embling Hospital. The hospital was undertaking discharge planning, including assessment of Mr Fitzgerald's ability to live independently in the community, his suitability for aged care services and referral to mental health services. The expectation was that he would be discharged on a community treatment order and so would remain an involuntary outpatient in the community and be referred to mental health services located in an area contiguous with his accommodation.

291 According to the plea submission, there was nothing to suggest that Mr Fitzgerald was a risk to the community save for the potential for fluctuations in his mental state. The hospital's decisions to provide for his ongoing care and

treatment within the community would safeguard the community. Counsel submitted that Mr Fitzgerald should be bailed to reside at Thomas Embling Hospital until such time as it was considered by the hospital's authorised psychiatrist and/or its nominee that he might transition into the community with the supports necessary to ensure both his protection and the protection of members of the community.

292 In the course of discussion about ongoing care, her Honour observed:[152]

> Let's just talk about this for the moment and get to where this is heading. He has spent 539 days in custody, which, given his non-admitted as such priors, nevertheless dated matters involving some form of violence, would seem to me *to be more than anyone else would be sentenced to in the form of imprisonment*, but to say now — I want to know where you're going with your sentence because to just say "okay, out the door, off you go now and have a good day", it's just not going to happen. Where are you heading with your ultimate disposition?

293 In turn, after counsel had put the initial proposal for ongoing care pursuant to a community treatment order, the judge observed:

> If I wanted to keep some control over this and make sure that things don't go off the rails again, I could impose a CCO and a condition in relation to treatment and also a condition that it comes back to me for monitoring …

294 Counsel went on to submit that, if there had not already been 18 months of pre-sentence detention, he would not have conceded that Mr Fitzgerald was a man who ought to serve any time in gaol. Her Honour observed:[153]

> *Well, that's all over. We have moved on. He has been 18 months in. That's what we deal with.*

295 Counsel then submitted that a CCO was potentially an appropriate sentence. The prosecutor did not dispute that a CCO would be within the range. He also did not oppose bail on the terms sought by counsel for Mr Fitzgerald and characterised such bail as a sensible way to approach reintegration into the community. After further discussion, the matter was referred for a pre-sentence report. Her Honour foreshadowed that, at that stage, she thought the CCO should be for five years but subject to judicial monitoring.

296 The pre-sentence report recorded that Mr Fitzgerald had been assessed in relation to his risk of re-offending and was deemed to be within the low risk category:

> Furthermore, Mr Fitzgerald has been diagnosed with schizophrenia and is currently medicated. At the time of the offences, he was acutely unwell however, Mr Fitzgerald has gained insight into his mental health illness and understands the importance of engaging with area mental health. Therefore, it is recommended that the Treatment and Rehabilitation (Mental Health Assessment and Treatment) condition be imposed on his Order.

297 The report concluded:[154]

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152. Emphasis added.
153. Emphasis added.
154. Report dated 31 July 2013, prepared by Sarita Lemme, Leading Community Corrections Officer, Heidelberg Community Correctional Services, and Aneta Domazetovska, Senior Community Corrections Officer, Heidelberg Community Correctional Services.

Mr Fitzgerald is a 68 year old male with a criminal history intrinsically linked with his mental health and accommodation.

The conditions of a Community Correction Order were explained to Mr Fitzgerald. Mr Fitzgerald gave his informed consent to the making of a Community Correction Order.

It would appear that a period of community supervision could provide Mr Fitzgerald with the motivation to maintain his treatment and medication regime. This, coupled wit[h] the requirements of a Community Treatment Order, would give Mr Fitzgerald an opportunity to maintain good mental health.

In light of the above, he has been assessed as a suitable candidate for such an Order.

Should the court be considering placing Mr Fitzgerald on a Community Correction Order, the following conditions have been respectfully recommended;

48D (3) (e) Treatment and Rehabilitation condition — mental health assessment and treatment

48K Judicial Monitoring Condition

Given Mr Fitzgerald is assessed as low risk, a formal supervision condition has not been recommended. It is noted, however, that Mr Fitzgerald will be required to report to a case manager at Corrections Victoria on a regular basis to monitor his compliance and progress with all order conditions.

298 In the course of her sentencing remarks, the judge accepted that:

- although Mr Fitzgerald had had a number of prior court appearances, they had been dealt with many years earlier and were not admitted. She disregarded them for the purposes of sentencing;
- Mr Fitzgerald had pleaded guilty at the first real opportunity, given his mental health;
- the plea of guilty indicated remorse; and
- Mr Fitzgerald had been on remand for approximately 18 months, spending that time in prison, the Acute Assessment Unit and/or Thomas Embling Hospital.

299 Her Honour also accepted that Mr Fitzgerald had a longstanding history of mental illness. She accepted that the principles stated in *Verdins*[155] were applicable and that Mr Fitzgerald's moral culpability, and considerations of general and specific deterrence, should be moderated.

300 On the other hand, her Honour recorded concerns relating to Mr Fitzgerald's prospects of rehabilitation and the need for protection of members of the community. She observed that such concerns would only be allayed if Mr Fitzgerald maintained his medication and treatment regime.

301 Her Honour concluded that a CCO was appropriate. She explained the conditions which she proposed to impose, and Mr Fitzgerald consented to the making of the order.

Analysis

302 Mr Fitzgerald fell to be sentenced nearly four years after the offending. He was 68 years old and had a long history of mental illness, despite having had the intellectual capacity to obtain an honours university degree and an appointment as a teacher. He was diagnosed with paranoid schizophrenia. It was accepted that his moral culpability was very materially reduced by his mental illness at the time of the offending.

155. *R v Verdins* (2007) 16 VR 269.

303 The overwhelming probability is that the offending occurred when Mr Fitzgerald was materially affected by that illness. In turn, he could not sensibly be regarded as a suitable vehicle for general deterrence. The need for specific deterrence was also moderated to some degree. He was independently assessed as being at low risk of re-offending. Furthermore, a mechanism was available for his ongoing involuntary treatment by way of a community treatment order pursuant to s 12 of the Mental Health Act 1986.

304 As against this, the assaults to which he pleaded guilty were inflicted upon highly vulnerable members of the community and left them with ongoing fears and psychological sequelae. The offending plainly merited denunciation. Moreover, the need for specific deterrence, although moderated, persisted. Mr Fitzgerald had breached bail twice. The pre-sentence report said that a period of community supervision could provide such deterrence by way of motivating Mr Fitzgerald to maintain treatment and medication.

305 In these circumstances, in our view, the imposition of some form of custodial sentence was within the range of appropriate sentencing outcomes. The real question on the appeal, however, was whether any further penalty was appropriate, given that — as at the date of sentence — Mr Fitzgerald had, in effect, already served a custodial sentence.

306 Given Mr Fitzgerald's pleas of guilty, remorse and underlying mental illness, it seems to us — as it evidently did to the sentencing judge — that the time already spent in custody was quite sufficient to serve the purpose of just punishment and denunciation of the offending, and provided adequately for general and specific deterrence.

307 Although the sentencing judge imposed no sentence of imprisonment with respect to the period of time served (or any part of it), her Honour proceeded to impose a CCO. The question is whether it was proper to impose a CCO for the purposes of further supervision of Mr Fitzgerald in these circumstances. As we have explained above, the principle of proportionality is applicable to a CCO as to any other sentence. The sentence imposed on Mr Fitzgerald could not properly exceed that which was appropriate or proportionate to the gravity of his offending, considered in the light of its objective circumstances.

308 In the present case, in our view, the imposition of a CCO, in circumstances where Mr Fitzgerald had already served 18 months by way of pre-sentence detention, resulted in disproportionate punishment. The sentence was, in the circumstances, manifestly excessive. There was no justification for additional punishment beyond the time served.

The significance of consenting to the order

309 As noted earlier, Mr Fitzgerald consented to the imposition of the CCO. His consent was given after the judge had received submissions concerning the possibility of a CCO and had directly discussed the possible length of such an order with Mr Fitzgerald's counsel. Further, the order was made after Mr Fitzgerald's counsel had conceded that such an order might be regarded as appropriate. The consent was given after the purpose and effect of the proposed order had been explained, in accordance with s 95 of the Act.

310 Ordinarily, an offender is bound by his counsel's conduct upon the plea.[156] Consent to a particular course may support an inference that that course was reasonably open in the circumstances. In the present case, however, Mr

156. *Patel v R* (2012) 247 CLR 531 at 562, [114] per French CJ, Hayne, Kiefel and Bell JJ.

Fitzgerald and his counsel were confronted with a situation where the sentencing judge had made clear in the course of discussion that she did not regard time served to date as an adequate penalty. Rather, she viewed it as a given, which did not materially fetter her further discretion. It is also relevant that the regime of CCOs was a relatively novel one at the time of the plea. The understanding of when, and on what conditions, a CCO might properly be imposed was not the subject of established sentencing practice.

311 There is a more fundamental point, however. Once it is concluded that the sentence imposed was disproportionate to the offending, and hence outside the available range, Mr Clements could not be deprived of his right to appeal. Pursuant to s 281(1) of the Criminal Procedure Act 2009, this court must allow the appeal if Mr Clements satisfies it that —

(a) there is an error in the sentence first imposed; and

(b) a different sentence should be imposed.

312 Even in the special circumstances involved in Mr Fitzgerald's case, we would not regard the fact of informed consent as precluding a later complaint that the sentence was erroneous or excessive. Our reasons are as follows. First, the requirement of consent exists for the positive and constructive purpose of ensuring that the offender has paid careful attention to the order which is proposed and to its implications for his/her future. In this way, the consent requirement increases the likelihood of future compliance and hence the achievement of the intended benefits for the community and the offender. Conversely, insistence on informed consent should help to identify offenders for whom this kind of disposition is not in fact suitable, so that other options can be considered.

313 Secondly, there is no suggestion in the legislation that the giving of consent should be treated as a waiver of the right of appeal which s 278 of the Criminal Procedure Act 2009 confers on an offender. Obviously enough, if the CCO as pronounced by the court is infected by legal error (for example, a condition purportedly attached to the order is not authorised by the legislation), there could be no inhibition on the ability of the offender to challenge it. Nor, we think, can the consent deprive the offender of the ability to contend on appeal that the sentence imposed was manifestly excessive; that is, outside the range reasonably open to the sentencing court in the circumstances. Put simply, consent could not validate an unlawful sentence.

314 There are also considerations of fairness, as follows. Suppose that the sentencing judge informs the offender, through counsel, that the proposed sentence is a CCO of eight years' duration with certain conditions attached. Let it be further assumed that, in previous cases involving comparable offending, terms of imprisonment have usually been imposed such that the offender is clearly at risk of imprisonment if the judge decides against a CCO.

315 When it comes to the question of consent, the offender and his representatives are confronted with two difficulties. First, they will almost certainly not be in a position to make a judgment about whether the proposed CCO (with its particular mix of duration and conditions) is outside the range reasonably open. Secondly, and in any event, they will be well aware that if the offender refuses consent (on the basis that the period is too long or the conditions too onerous), the court may have no alternative but to impose a term of imprisonment.

316 It follows that, in many instances, the giving of consent cannot be regarded as indicating positive acceptance that a CCO on particular terms is the most appropriate sentencing outcome.

Resentencing

317 In our view, Mr Fitzgerald should be resentenced to a total effective sentence equivalent to the time served in pre-sentence detention. We do not accept that, if the CCO is set aside, no penalty whatsoever should be imposed. Indeed, for the reasons we have explained, the offending did raise serious issues of denunciation and specific deterrence. It is necessary that Mr Fitzgerald appreciate that, if he neglects his ongoing treatment and medication and re-offends in a similar manner, he may expect a further custodial sentence.

318 Moreover, the imposition of imprisonment equivalent to the period of pre-sentence detention falls to be considered in circumstances where the court knows that by far the greater part of Mr Fitzgerald's time in custody was in fact spent in psychiatric care and treatment, first, in the Acute Assessment Unit and then at Thomas Embling Hospital.

319 Counsel for Mr Fitzgerald submitted that the imposition of a term of imprisonment would involve an unnecessary stigma. It is difficult to see that this could be of any practical significance to a 69 year old man who is patently unemployable and has prior criminal convictions.

320 It would not, of course, be correct to impose a period of imprisonment in respect of time served in pre-sentence detention simply because it "clears the slate".[157] The penalty must itself be appropriate to the offending. Nevertheless, the actual effect of that penalty can be understood by reference to the history of the offender's experience in custody and the exercise by the sentencing court of its discretion, as informed by the nature and extent of pre-sentence detention.

321 We would allow Mr Fitzgerald's appeal and resentence him to a total effective sentence of imprisonment for the period of time served.

APPENDIX 1: COMMUNITY CORRECTION ORDERS: GUIDELINES FOR SENTENCING COURTS

NOTE: These guidelines reflect the views expressed in the guideline judgment delivered by the Court of Appeal on 22 December 2014, and should be read and understood in that context. They are intended, however, to be in a form suitable for use 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.

157. *Jopar v R* (2013) 275 FLR 454 at 460, [26]–[31]; 228 A Crim R 519 at 527 per Weinberg JA, with whom Harper JA agreed, at FLR 474, [96]; A Crim R 541 per Priest JA.

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

(c) 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 a young offender, 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.

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 of those 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 concludes that the purposes of the sentence cannot be achieved by a CCO to which specified conditions are attached.

12 The court must therefore pay careful attention to:

(a) the purposes for which sentence is to be imposed on the offender; and

(b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached.

Just punishment

13 Axiomatically, nothing is as punitive as prison. At the same time, the opportunities for rehabilitation in prison are severely limited, and imprisonment can be seriously detrimental for the offender. In practice, therefore, a conclusion that imprisonment is the only appropriate punishment is a conclusion that the retributive and deterrent purposes of punishment must take precedence.

14 A CCO is also intrinsically punitive and, depending on the length of the order and the nature and extent of the conditions imposed, is capable of being highly punitive.

15 The mandatory conditions, 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 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 to ensure compliance.

16 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 (subject to any contrary order).

17 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.

General deterrence

18 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, on account of the punitive effect described above.

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.

Specific deterrence

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).

Rehabilitation

23 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.

Serving the purposes of punishment

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

25 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

26 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.

27 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.

28 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 would ordinarily be unsuitable?

29 At this stage, it is neither necessary nor desirable to seek to define any outer limits on the suitability of a CCO as a sentencing option. Reconsideration of accepted views about imprisonment as the only option will take time and will be informed by experience.

30 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

31 A CCO is punitive in nature and will operate punitively for every day of its duration. The sentencing court can, for the purposes of punishment, impose a CCO for a duration extending beyond the period assessed as necessary to achieve the rehabilitative purposes of the order.

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, where 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 further compliance with conditions unnecessary.

35 When asked to exercise these powers, 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, however, exercise the power to impose a CCO 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 re-offending 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" (s 48D(2)(a)).

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 programs 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 of the offender's personal circumstances, including 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 for the purposes of treatment a CCO of longer duration, or with more onerous treatment and rehabilitation conditions attached, if the resulting order would be disproportionate to the gravity of the offending.

Anticipated difficulties of compliance

48 Concern about difficulties of compliance should not 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.

49 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.

50 Relapse into addiction during treatment is a common occurrence. The court should not come too quickly to a pessimistic conclusion about future compliance, however, 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.

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 condition

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.

Leave to appeal granted; appeals allowed.

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