Community correction orders in Victoria

1. Background

Community correction orders ('CCO's) were introduced as a sentencing option in Victoria in January 2012. They replaced a number of previously existing community-based sentences, including intensive correction orders ('ICOs'), community-based orders ('CBOs') and combined custody and treatment orders. Suspended sentences were gradually phased out following the introduction of CCOs in Victoria, to the point where they are no longer available at all.

The statutory purpose of the CCO in Victoria is "to provide a community-based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender".[1] The CCO is a flexible sentencing option, enabling punitive and rehabilitative purposes to be served simultaneously. In this sense, they are similar to CCOs in NSW.

CCOs were introduced in Victoria in place of sentences which were, strictly speaking, sentences of imprisonment (such as suspended sentences and ICOs), and so it was recognised that courts would need flexibility in determining both the duration of the order and the conditions to be attached.

A CCO can be imposed in Victoria with or without conviction. It is able to be imposed for any offence punishable by imprisonment or by a fine of more than 5 penalty units. The court is generally required to obtain a pre-sentence report prior to making a CCO, and it cannot make a CCO unless the offender consents to the order.

The order consists of 7 mandatory conditions and a range of optional conditions, from which courts must impose at least one.

The CCO is a non-custodial sentence in Victoria. In the hierarchy of sanctions, a CCO is an intermediate sentencing option intended for offences in the mid-range of seriousness. A CCO is more severe than a fine and less severe than a drug treatment order or a sentence of imprisonment.

2. Similarities and differences between Victorian and NSW CCOs

Although NSW and Victoria both use the term 'community correction order' to describe a form of community-based order, it is important to acknowledge that there are several and significant differences between the structure of CCOs in Victoria and those being introduced in NSW.

The main structural similarities between the CCO scheme in Victoria and in NSW are:

- They are both intermediate, non-custodial sentencing options, intended for offences in the mid-range of seriousness
- They both allow for the simultaneous rehabilitation and punishment of the offender
- They are both able to be imposed in respect of an offence which carries a sentence of imprisonment or a fine
- They can both be imposed in addition to a fine

[1] *Sentencing Act* 1991 (Vic) s 36.

- They both include mandatory conditions and other conditions (although the Victorian scheme includes 7 mandatory conditions, as compared with 2 in NSW, and requires at least one other condition to be imposed, whereas there is no such requirement in NSW)
- Conditions are imposed based on the individual circumstances of the offender and on the nature of the offence which was committed
- Courts in both jurisdictions may impose a period during which the offender must comply with particular conditions
- In both jurisdictions, it is permissible for there to be 2 or more CCOs in force at the same time in respect of multiple offences

The key differences between the two schemes are:

- A CCO in Victoria is the most severe form of punishment available other than full-time imprisonment, whereas courts in NSW also have the intensive correction order ('ICO') at their disposal
- An offender in Victoria may be sentenced to a combination of a CCO and a term of full-time imprisonment of up to 12 months,[2] whereas in NSW a CCO cannot be combined with a custodial sentence
- There are significant differences in the maximum term of a CCO in the two jurisdictions. In Victoria:
    - In the Magistrates' Court, the term of a CCO must not exceed:
        - 2 years, in respect of one offence;
        - 4 years, in respect of two offences; and
        - 5 years, in respect of three or more offences
    - In the higher courts, the period of the CCO, whether for one or more than one offence, must not exceed 5 years,[3]

  whereas in NSW, the maximum term of a CCO is 3 years, regardless of the jurisdiction or the number of offences.
- There are differences in the nature of the optional conditions that may be imposed on a CCO in Victoria and NSW; for example, electronic monitoring and judicial supervision are available as CCO conditions in Victoria but not in NSW
- A court in Victoria is generally required to obtain a pre-sentence assessment report before imposing a CCO, whereas there is no such requirement in NSW, unless the court is considering imposing a community service work condition
- There are a number of offences for which a CCO must not be imposed in Victoria (called 'Category 1' offences),[4] and a further set of offences for which a CCO must not be imposed

[2] When the CCO was first introduced in Victoria, it was able to be combined with a period of imprisonment of up to 3 months. In September 2014, the maximum term of imprisonment with which a CCO could be combined was increased to 2 years. Legislative amendments commenced on 20 March 2017 which mean that courts in Victoria are now only permitted to combine a CCO with a period of imprisonment of up to 12 months.

[3] Prior to the commencement of recent legislative amendments on 20 March 2017, higher courts in Victoria were permitted to impose a CCO for a duration up to the maximum term of imprisonment applicable to the offence. For example, a court sentencing an offender for manslaughter was previously permitted to impose a CCO for a period of up to 20 years.

[4] Category 1 offences include murder, intentionally or recklessly causing serious injury in circumstances of gross violence, rape, sexual penetration of a child under 12 and trafficking in or cultivating a large commercial quantity of a drug of dependence.

other than in specified circumstances (called 'Category 2 offences'),[5] whereas there are no such exclusionary offences for in NSW
- Contravention of a CCO in Victoria is an offence punishable by imprisonment for up to 3 months, whether or not the contravening conduct itself is criminal in nature, whereas a contravention is not a discrete offence in NSW
- The imposition of a CCO in Victoria is subject to the sentencing principle of parsimony, which provides that the court must impose the minimum sentence which reflects the objective and subjective features of the case, whereas parsimony has not been adopted as part of the sentencing law in NSW[6]
- An offender in Victoria can only be sentenced to a CCO if he/she agrees to comply with the conditions of the order, whereas in NSW a CCO can be imposed regardless of the attitude of the offender

3. Guideline judgment in *Boulton*

Background

In 2013, three sentence appeals were lodged against lengthy CCOs imposed in the County Court of Victoria; the appellants had respectively received CCOs of 10, 8 and 5 years. In the context of the appeals, the Director of Public Prosecutions (DPP) applied to the Court of Appeal for a guideline judgment to assist sentencing courts in using the CCO as a sentencing option.

The application for a guideline judgment was heard by a bench of five judges concurrently with the joint appeals against sentence. The court unanimously upheld all three appeals and concluded that it would be appropriate to deliver a guideline judgment. Interestingly, this was the first ever guideline judgment delivered in Victoria. The judgment was delivered on 22 December 2014 and is cited as *Boulton v The Queen*; *Clements v The Queen*; *Fitzgerald v The Queen* [2014] VSCA 342; 46 VR 308 ('*Boulton*').

As noted above, there are significant differences between the CCO schemes in force in Victoria and NSW. For this reason, practitioners in NSW must be cautious in relying directly upon passages from *Boulton* in the course of making sentencing submissions. They must also be careful not to mislead the court by drawing impermissible analogies between the CCO framework in Victoria and in NSW.

Nevertheless, the guideline judgment in *Boulton* contains a detailed and useful discussion of the principles relevant to the imposition of intensive community-based orders.

The following statement from the judgment in *Boulton* is arguably apposite in NSW:

> [4]… The CCO is a radical new sentencing option, with the potential to transform sentencing in this State…
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> [5]… 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

[5] Category 2 offences include manslaughter, child homicide, intentionally causing serious injury, kidnapping, arson causing death and trafficking in or cultivating a commercial quantity of a drug of dependence.
[6] *Blundell v R* (2008) 70 NSWLR 660 at [47]; *Leach v R* (2008) 183 A Crim R 1 at [9].

> require a recognition both of the limitations of imprisonment and of the unique advantages which the CCO offers.

CCO as a punitive sentencing option

The Court of Appeal in *Boulton* concluded that a CCO may be an appropriate sentence for offences which might previously have attracted a term of imprisonment prior to the introduction of CCOs as a sentencing option in Victoria.

How could that be correct? How could the purposes of sentencing possibly be satisfied by a non-custodial disposition in respect of a relatively serious offence?

According to the court, the answer lies in the fact that the CCO has the potential to be a more "robust" sentencing option than anything that was previously available in Victoria, even the Victorian form of ICO.[7] Certain features of the CCO mean that a sentencing court may more readily conclude that a term of imprisonment is not necessary in order to satisfy the various purposes of sentencing, including deterrence, community protection and rehabilitation.

Front and centre amongst the purposes of sentencing is the need to punish the offender.[8] So how can one assess the extent of the punishment which a CCO can be seen to inflict?

As the Court of Appeal noted in *Boulton*, the relative severity of a type of sentence can be assessed by reference to its impact on the rights and interests of an offender: "the more important the rights and interests intruded upon, and the more significant the intrusion", the more severe is the sentence, as a matter of logic.[9]

The court concluded that a CCO is "intrinsically punitive",[10] and has "obvious punitive elements",[11] including: (1) the mandatory conditions; (2) a contravention of any condition of a CCO is itself an offence, punishable by imprisonment for up to 3 months; and (3) the optional conditions which may be attached to a CCO. The court was of the opinion that it is the third of these categories which constitutes the most punitive aspect of a CCO (emphasis added):

> [93]… 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… 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.
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> …

[7] *Boulton* at [87].
[8] See, e.g., *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 3A(a).
[9] *Boulton* at [90].
[10] *Boulton* at [124].
[11] *Boulton* at [91].

> [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.

Although CCOs in NSW carry only two mandatory conditions, and a contravention of a CCO condition is not an offence in this jurisdiction, the observations above regarding the potential punitive effect of strict community-based conditions are equally applicable to NSW. The availability of a range of community-based conditions in NSW, as part of a CCO or an ICO, can be seen to inflict a significant degree of punishment in a particular case.

Self-evidently, a CCO or an ICO is less punitive than prison, given that an offender is not incarcerated. There is no doubt that the deprivation of liberty inherent in a prison sentence is the highest punishment known to the law. However, the challenge for defence practitioners in NSW will be to make appropriate submissions to sentencing courts regarding the utility of a CCO or an ICO in a particular case where, previously, the court might have been inclined to impose a sentence of full-time imprisonment.

In the process of making submissions, practitioners would be well advised to refer to the primary purpose of the NSW sentencing reforms, as stated by the Attorney-General in his Second Reading Speech:

> Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are more effective at this.

The Second Reading Speech clearly articulates that the primary purpose of the reforms is to promote rehabilitation and reduce reoffending by introducing a more flexible range of community-based sentences.

This ties in neatly with the Court of Appeal's discussion in *Boulton* regarding the role of CCOs in the sentencing framework in Victoria. The following passage from *Boulton* is relevant for consideration on this issue (emphasis added):

> [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.
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> …
>
> [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.
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> [114] The CCO offers the court something which no term of imprisonment can offer, 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.
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> [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.

Practitioners should be reminded that CCOs and ICOs in NSW may be appropriate for cases of relatively serious offending where the offender is at risk of being sentenced to a term of full-time imprisonment. In such cases, it is incumbent upon defence practitioners to make appropriate submissions as to whether the purposes of sentencing can be fulfilled by the imposition of a range of community-based conditions that the court is empowered to impose as part of a CCO or ICO.

Proportionality as a principle of sentencing

The Court of Appeal in *Boulton* observed that although a sentence may be imposed for the purposes of protecting society, the principle of proportionality must always be observed, particularly where the court is contemplating imposing a CCO.

The principle of proportionality requires the sentencing court to ensure that the sentence imposed "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".[12] In other words, the sentence must always be appropriate having regard to the seriousness of the offence. It is impermissible to impose a longer sentence or more onerous conditions merely for the purpose of protecting society, for instance in order to ensure that an offender addresses his or her mental health issues or drug addiction.[13]

Practitioners should assist the court by making submissions regarding the appropriate term of a CCO (or the appropriate range), and the appropriate conditions which ought be imposed, based on the evidence before the court. Specifically, practitioners should seek to ensure that the court does not impose a sentence which is impermissibly disproportionate to the gravity of the offending in a particular case. This applies equally to the imposition of a conditional release order ('CRO') as it does to a CCO or an ICO.

[12] *Hoare v The Queen* [1989] HCA 33; (1989) 167 CLR 348 at 354.
[13] *Boulton* at [72]-[75], citing with approval *Channon v The Queen* (1978) 20 ALR 1 at 9.

Guidelines

Appendix 1 to the judgment in *Boulton* contains a set of guidelines for sentencing courts to refer to when considering the imposition of a CCO in a particular instance.

The guidelines contain a brief outline of relevant considerations for the court to consider in respect of each of the following topics:

1. General principles
2. Imprisonment or CCO?
3. Determining the length of a CCO
4. Determining the conditions to be attached to a CCO

The guidelines provide that in determining whether to sentence an offender to a CCO, the court should first assess the objective seriousness of the offence and the moral culpability of the offender. The court should then consider whether the offence is so serious that nothing short of a sentence of full-time imprisonment will satisfy the requirements of just punishment, or, on the other hand, whether a CCO, either alone or in conjunction with a sentence of imprisonment, will satisfy those requirements.

Practitioners would be well-advised to read the guidelines in Appendix 1 to develop an understanding of the sorts of relevant considerations for the sentencing court when considering whether to impose a CCO (or ICO, for that matter).

Marty Bernhaut & Nicholas Ashby*
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