FOLEY'S LIST

A NEW SENTENCING LANDSCAPE FOR VICTORIA: Abolition of Suspended Sentences, *Boulton v The Queen* [2014] VSCA 342

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A New Sentencing Landscape for Victoria: Abolition of Suspended Sentences, *Boulton v The Queen* [2014] VSCA 342 and the 'Rise' of Community Correction Orders?

Part One - The Dilemmas and Difficulties of Punishment

1. The sentencing of offenders is one of the most difficult tasks in a democratic society. The difficulty of that task derives from a number of sources.

2. First, punishment involves the deliberate infliction of pain upon offenders[1]. It requires proper justification and must be parsimonious in its use. The euphemistic labels that surround the discourse and practice of punishment – 'retribution', 'just punishment', 'social rehabilitation', 'deterrence' and 'reformation' – should not obscure precisely what is involved in the punishment of offenders[2]: the imposition of deprivation – be it by means of liberty, autonomy, privacy, money or time – for the achievement of what are considered socially desirable ends[3].

3. Second, sentencing is a sensitive topic for elected governments who may desire the judiciary to implement a particular law and order program. And, thus, attempt to achieve particular sentencing outcomes that are claimed to be of benefit to the community[4]. Sentences imposed upon offenders tend to attract public interest. Governments, who ostensibly reflect the will of the 'community'[5], are keen to assuage that community that not only are those

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[1] See generally Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

[2] See generally Nils Christie, *Limits of Pain* (1981).

[3] So to say is not to suggest that the institution of punishment does not have a welfare or rehabilitative aspect. It does. But it must be remembered that there is still an element of coercion in requiring a person to perform activities relevant to their rehabilitation.

[4] An excellent text on 'law and order' and the 'limits' of what the criminal justice system can achieve – particularly the criminal courts – in reducing crime is Don Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004) Chapter 5.

[5] The notion of 'community' is contestable. What 'community' is it referring to? Is a community simply an amalgam of disparate individuals with there own version of the good or does it require a commonality of interests, activities or associations to make a community? Applying it to the issue of crime and punishment is there a unified or community view? I doubt that. There are certainly robust views but there are divisions within any community. There is no single right or

who commit criminal offences are adequately punished, but that they are appropriately rehabilitated and reintegrated into the community.

4. Third, for those responsible for the sentencing of offenders, there is the difficulty of reconciling the manifold and, sometimes, incommensurable objectives, in the choice of a particular sentence for a particular offender for a particular offence[6]. That may be described as the 'agony' of judicial choice when sentencing and where competing ends, or objectives, point in contradictory and opposing ways. The 'instinctive synthesis'[7] demands that it is so.

5. The complete abolition[8] of suspended sentences in Victoria from 1 September 2014[9] by the removal of the power of Magistrates to impose suspended sentences will mean Victoria is the only State or Territory where a suspended sentence cannot be imposed[10]. At the same time, the intermediate

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correct view about crime and punishment. If anything, there are disparate views, which is not unexpected, given what is at stake in the approach to how we deal with those break the law.

[6] A classic example is section 5 of the *Sentencing Act 1991* (Vic) which sets out – (1) (a)-(f) – the only 'purposes' for which sentences may be imposed. Those purposes, in summary, are just punishment, specific deterrence, general deterrence, rehabilitation, denunciation, protection of the community or a combination of 'two or more of those purposes'. There is no suggestion how those purposes should be combined or how they should be prioritized or weight given to a particular purpose over any other. That is the role of the 'instinctive synthesis'. Obviously having regard to the matters set out in section 5 that a court 'must' have regard to and those that it 'may' have regard to. Of course, those statutory criteria are supplemented by an array of common law principles that also form part of the reasoning process that leads to the sentence ultimately imposed.

[7] See generally A Freiberg & S Krasnostein, 'Statistics, Damn Statistics and Sentencing' (2011) 21 *Journal of Judicial Administration* 73, 74-75 and the discussion of 'individualization' in sentencing and recitation of a number of well known propositions in sentencing under Australian criminal law: (i) there is no one correct or appropriate sentence (though there might be a range of appropriate sentences); (ii) no two cases are exactly alike (though there might be recurring patterns of conduct or features); (iii) sentences are not precedents (unless some statement of principle is established by an appellate court) & (iv) inconsistency is acceptable and inevitable (though there are limits beyond which inconsistency becomes a form of injustice).

[8] From 1 September 2013 a sentence for any offence in the Supreme and County Court could not be suspended.

[9] *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) ss 2 (4), (5) & 9. Suspended sentences in place will continue to have effect. See *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) s 22 (inserting s 149D (2)).

[10] *Crimes (Sentencing) Act 2005* (ACT) s 12; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12; *Sentencing Act* (NT) s 40; *Penalties & Sentences Act 1992* (QLD) s 144; *Sentencing Act 1995* (WA) s 76; *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas) Pt 3 Div 4. For Commonwealth offences see *Crimes Act 1914* (Clth) s 20 (1) (b) where the court has the power to

sanction of a Community Correction Orders (CCO) has replaced long standing intermediate sanctions hitherto available to the judiciary: community based orders, intensive correction orders and combined custody and treatment orders[11].

7. The potential of the significant impact of CCO's was revealed in the recent Court of Appeal decision of *Boulton v The Queen; Clements v The Queen*; *Fitzgerald v The Queen* [2014] VSCA 342 (hereafter '*Boulton'*). What follows is an examination of the likely impact to the administration of criminal justice in Victoria of that decision. First, I will detail the rationale and scope of CCO's. Second, I will outline what the Court of Appeal decided in *Boulton.* Third, I will consider how the Court of Appeal has subsequently interpreted and applied *Boulton.* Fourth – and finally – I will make some observations about sentencing in Victoria in a post-*Boulton* world.

Part Two - Rationale & Scope of Community Correction Orders

8. In the debates on the *Sentencing Amendment (Community Correction Reform) Bill 2011*, several references were made to the role of CCO's in replacing suspended sentences.

9. The then Attorney-General stated that the introduction of the CCO's were part of a concerted reform of sentencing options that included the abolition of suspended sentences:

> 'The current range of community based sentences will be replaced with a single, flexible community correction order (CCO) that will strengthen community sentencing. The new order will deliver common sense sentences targeted directly at both the offender and the offence. The CCO will allow courts to impose core conditions and optional conditions including curfews and no-go zones.

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attach a wide range of conditions to the suspension of a term of imprisonment. It is called a recognizance release order.

11 The sanction of home detention has also been abolished.

> There will be new sanctions for non-compliance. In addition, courts will be given an expanded power to suspend or cancel the drivers licence or disqualify an offender found guilty of any offence.
>
> The government recognizes that the community is looking for responsive and effective community sentencing options as part of a range of measures to tackle crime.
>
> We understand the critical need for a responsive sentencing framework that builds public confidence in the justice system. We have acted expeditiously and the first stages of our reforms have already been successfully implemented. We have abolished the legal fiction of suspended sentences for a wide range of serious crimes. We also have legislation currently before Parliament that seeks to abolish home detention so that jail will mean jail.'[12]

10. In addition, the then Minister for Employment and Industrial Relations specifically noted that the use of suspended sentences were to be reduced by recourse to CCO's:

> 'Clearly the government has looked at what the impact on prisons and courts will be. In line with the recommendations of the Sentencing Advisory Council, these reforms are designed to reduce the use of suspended sentences by providing community based alternatives. In terms of supporting these reforms the government will spend $72.4 million over four years to strengthen the capacity of Corrections Victoria to monitor and supervise offenders within the community. On the advice we have, the Victorian prison system is at capacity for those who require imprisonment. For others this will provide tough community based options designed to improve rehabilitation outcomes and reduce reoffending within the community'.[13]

11. In the *Sentencing Act 1991* the purpose of the CCO is described in the following terms:

> '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'[14]

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[12] Hansard, Legislative Assembly, 25 October 2011, p 3289.
[13] Hansard, Legislative Council, 10 November 2011, p 4481.
[14] *Sentencing Act 1991* (Vic) s 36.

12. Community Correction Orders (CCO's) are provided for by Part 3A of the *Sentencing Act 1991.* They can be imposed for a period of up to 5 years in the Magistrates Court as long the order is in respect of 3 or more offences. In the Supreme and County Courts, either 2 years or the maximum term of imprisonment for the offence if it is longer[15].

13. A single order may cover several offences and, if multiple orders are imposed, they are presumed to be concurrent[16]. A CCO can be imposed in addition to a fine or imprisonment if the sum of time left to serve is 2 years or less[17].

14. If the CCO is for six months or longer, the court can set an intensive compliance period for part of the order, during which one or more of the conditions must be completed[18].

15. A breach of a CCO without reasonable excuse is punishable by 3 months imprisonment and the order may be varied or cancelled[19].

16. There are several mandatory conditions[20]. A court must also impose at least one of the numerous optional conditions[21]. There is a residual discretion to impose any other condition 'the court thinks fit'[22]. The only condition that cannot be imposed is one in relation to compensation, costs or damages[23].

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15 *Sentencing Act 1991* (Vic) s 38.
16 *Sentencing Act 1991* (Vic) ss 40-41.
17 *Sentencing Act 1991* (Vic) ss 43-44.
18 *Sentencing Act 1991* (Vic) s 39.
19 *Sentencing Act 1991* (Vic) ss 83AD, 83AS.
20 *Sentencing Act 1991* (Vic) s 45.
21 *Sentencing Act 1991* (Vic) s 47. Also see *Sentencing Act 1991* (Vic) for the range of optional conditions including not only Unpaid Community Work Condition (s48C) & Treatment and Rehabilitation Condition (s 48D) but also s 48E-LA for supervision, non-association, residence restriction, place or area exclusion, curfew, alcohol exclusion, bond and judicial monitoring conditions.
22 *Sentencing Act 1991* (Vic) s 48.
23 *Sentencing Act 1991* (Vic) s 48.

Part Three - Models of Criminal Behaviour, Sanction Selection and CCO's

17. Before considering the likely approach to the use of CCO's in a suspended sentence free criminal justice environment, it may be helpful to conceptualize sanction selection – and the legislation that provides such a selection – is based upon particular models of criminal behaviour[24]. Because any sanction is a reflection of particular ideas about what is the 'best' means to deal with criminal behavior at a particular point in time.

18. Those 'understandings' – whether expressed at the political, communal or judicial level – about what the criminal justice system should, and can achieve, are normative in nature and do change over time. They are informed by understandings of the 'cause' of criminal behavior and what are perceived to be the 'best solutions' to the insoluble dilemma as to how best to punish and reform those who breach the criminal law.

19. So at one extreme is the archetypal, rational offender who calculates the costs and benefits of committing a crime, according to some type of individual utilitarian calculus, and then freely chooses to commit a crime. The converse of that archetype is the offender who has lived a life wholly impoverished in terms of opportunities, support and has had a background that is simply miserable. Of course, they are extreme examples but they are useful in appreciating the basis of sanction selection is derived from an understanding of the 'cause' and 'solution' to criminal offending.

20. So what are perceived be the 'causes' of crime and the 'best solutions' to the same will be reflected in the type and range of sanctions available to members of the judiciary. The history of punishment – particularly in modern systems of criminal system – has broadly been between those sanctions that are more punitive in their operation and those that are focused on aspects of

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[24] See generally R Edney, 'Models of Understanding of Criminal Behaviour and the Sentencing Process: A Place for Criminological Theory?', (2006) 70 (3) *Journal of Criminal Law* 247-271.

the reform, or rehabilitation, of the offender. And one can appreciate the archetypes above in such a context.

21. Philosophically, the former is ‘backward’ looking and focuses on the harm that is caused by an offence and the need to punish the offender, while the latter is more forward looking and concentrates on the offender and their rehabilitation.

22. Of course, in practice there is often an overlap between those competing visions, or ends, of what punishment should achieve. And, indeed, the sanction of the CCO is an example of such a ‘hybrid’ approach where punitive and rehabilitative ends are sought in the one sanction.

Part Four – The Guideline Judgment in *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342

23. The guideline judgment by the Court of Appeal in *Boulton* was the first of its kind published by the Court of Appeal under sections 6AB and 6AE of the *Sentencing Act 1991* (hereafter the ‘Act’). The Director of Public Prosecutions made application for a guideline judgment. The Court agreed to make a guideline judgment because of the need to give *‘as much guidance as possible about how a CCO can serve the various purposes for which a sentence is imposed’* (*Boulton* at [4]).

24. The overarching purpose of the guideline judgment was thus to ensure, in so far as is possible under a general sentencing framework underpinned by the ‘instinctive synthesis’, consistency of approach in the imposition of CCO’s.

25. Early in the lengthy judgment, the unanimous five-member bench of the Court of Appeal described the CCO as a *‘radical new sentencing option, with the potential to transform sentencing in this State’* (*Boulton* at [4]). As will be seen later in the decisions that have followed *Boulton,* it is perhaps not overstating the impact of this decision to suggest that it has the potential to

arrest the impact of ever increasing imprisonment rates in this state. Indeed as the Court of Appeal explained:

> '…the advent of the CCO calls for a reconsideration 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' (*Boulton* at [5])

26. Immediately it is obvious that the Court of Appeal has framed the issue in terms of the desirability of CCO's as against the limitations of imprisonment. The ultimate conclusion by the Court of Appeal that CCO would be appropriate even in quite serious cases suggests the significance of the shift of perspective that is apparent in *Boulton*.

27. The Court of Appeal agreed that the 'overarching principles' that were to govern CCO's were 'proportionality and suitability' (*Boulton* at [63]). Section 48A – attaching conditions to a CCO – mandates proportionality as the key determinant in the imposition of conditions.

28. In terms of the nature of CCO's and their punitive aspects, the Court of Appeal identified – by reference to the mandatory conditions attached to any CCO pursuant to s 45 (1) of the Act – that such conditions – even in the absent of additional conditions – 'do materially impinge on an offender's liberty' (*Boulton* at [91]) and in the event of a breach of condition of a CCO is an offence as well as leading to resentencing on the original offences (*Boulton* at [92]).

29. The Court of Appeal was at pains to point out, the real 'kicker' – and that is my word – in the punitive sense of the 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' (my emphasis) (*Boulton* at [93])

30. The punitive nature of the CCO can also be supplemented by the power of a Court to fix an 'intensive compliance period' which – as the Court of Appeal observed – can 'both increase the punitive burden and seek to maximize the benefits of compliance' (*Boulton* at [94]).

31. After detailing the punitive nature of a CCO, the Court of Appeal then set about comparing a CCO with a prison sentence. The discussion – (*Boulton* at [103]-[116]) – is perhaps the most interesting and important – save for the Guideline itself – aspect of the judgment. Because found here is a radical reimagining of the desirability and utility of prison as the ultimate sanction. As the Court explained:

> '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' (*Boulton* at [104])

32. The Court of Appeal then examines at a micro level the reality of imprisonment by punishment and its practical aspects. That is novel in sentence appeals. The Court also observes the 'limits' of rehabilitation in the context of a custodial environment. Moreover, the Court even went so far as to recognize the psychic and social damage caused by a term of imprisonment to not only the offender but the community and observing that 'imprisonment is often seriously detrimental for the prisoner, and hence the community' (*Boulton* at [108]).

33. So it was in the context of recognizing the limitations of imprisonment that the Court of Appeal approached CCO's. They noted that the 'CCO dramatically changes the sentencing landscape' (*Boulton* at [113]) and allows a sentencing court to

> '…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' (*Boulton* at [113])

34. The Court of Appeal also noted that the insertion into the Act of s 5 (4C) as fortifying that conclusion. That section of the Act provides that:

> 'A court must not impose a sentence that involves the confinement of an 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 48'

35. According to the Court of Appeal that approach should 'assist in the reconceptualization of sentencing options' and any sentencing court – where imprisonment may be an appropriate option – should ask itself the following question:

> 'Given that a CCO could 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 that imprisonment, with all of its disadvantages, is the only option?' (*Boulton* at [121])

36. That then is the underpinning philosophy to CCO's as identified by the Court of Appeal. As is apparent from the reasoning of the Court, CCO's can only be understood in the context of prison as the ultimate sanction for offending and the limitations that inhere in the custodial environment.

37. That judicial approach to CCO's and the relationship of this new sanction to the 'old' sanction of imprisonment by the Court of Appeal flows through to the guideline judgment itself which is Appendix 1 to the judgment and is titled *'Community Correction Orders: Guidelines for Sentencing Courts'*.

38. There are four parts to the Guideline Judgment and they are as follows:

- Part One – General Principles
- Part Two – Imprisonment or CCO?
- Part Three – Determining the Length of a CCO
- Part Four – Determining the Conditions to be Attached to a CCO

39. Part One of the Guideline describes the nature of a CCO. It is described as a ‘new and flexible sentencing option that can be for a term of up to the maximum term of imprisonment prescribed for the offence in question’. In addition, ‘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’. In approaching the question of whether a CCO should be imposed the court has to ‘first assess the objective nature and gravity of the offence and the moral culpability of the offender’. Proportionality and suitability must then be considered. And a CCO is likely to be a ‘particularly important sentencing option in the case of a young offender’.

40. Part Two of the Guideline deals with the issue of whether a Court should impose a term of imprisonment or a CCO. A sentencing court is required only to impose a term of imprisonment unless it concludes ‘that the purposes of the sentence cannot be achieved by a CCO to which are specified conditions are attached’. It then discusses the various purposes of sentencing – just punishment, general deterrence, specific deterrence and rehabilitation – and notes that in ‘many cases, therefore, a CCO will enable all of the purposes of punishment to be served simultaneously, in a coherent and balanced way’. It notes that in the case of ‘relatively serious offences – 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 of rehabilitation’. I note some of the examples of relatively serious offences include: aggravated burglary, intentionally cause serious injury, some forms of sexual offences involving minors and some kinds of rape.

41. The Court was not prepared at this stage to articulate any particular offence that would ordinarily be unsuitable to impose a CCO. Instead they indicated that:

> ‘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’

42. Part Three of the Guideline deals with how a court is to determine the length of a CCO. The Court determined that a sentencing court ‘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’. Further, there is no correlation between the length of the CCO and length of the prison term although the Court did make the observation 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’.

43. Finally, Part 4 of the Guideline deals with the issue of a sentencing court determining what conditions to attach to a CCO. The Court notes that ‘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”’. Importantly, the Guideline imposes ‘limits’ on the treatment conditions by emphasizing the notion of proportionality and stating 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’.

Part Five - Post-*Boulton* Decisions in the Court of Appeal

44. Since the decision in *Boulton* was handed down on 22 December 2014, the Court of Appeal has heard and determined the following sentence appeals by reference to the decision in that case and – from my researches – they are in date order as follows: *Sherritt v The Queen* [2015] VSCA 1; *Ellis v The Queen* [2015] VSCA 21; *Ahmad v The Queen* [2015] VSCA 23;

Marocchini v The Queen [2015] VSCA 29; *Cole (a Pseudonym) v The Queen* [2015] VSCA 44 and *Alam v The Queen* [2015] VSCA 48.

45. These decisions are important in three ways. First, there is further statement of principle concerning the operation of CCO's in Victoria. The approach in *Boulton* is confirmed (see, in particular, *Sherritt* at [46]-[47]; *Alam* at [20]; *McAleer* at [23]-[25]). Second – in a number of cases – the appeals were successful in so far as terms of imprisonment were overturned and replaced with CCO's or significantly reduced terms of imprisonment imposed in combination with a CCO (See *McAleer*; *Marocchini; Alam; Cole*). Third, because there are different examples of offending covered by the decisions they are useful 'precedents' – with all the inherent limitations of using other cases – to guide submissions on behalf of offenders.

Part Six – Sentencing Futures in a Post-*Boulton* World

46. Before the decision in *Boulton* I presented a paper on what was to be the likely impact of the abolition of suspended sentences in Victoria and what would the role of CCO's be in a sentencing system without the sanction of a suspended sentence.

47. I said this:

If anything, the removal of suspended sentences should encourage judicial decision makers to think far more critically about what may be described as the 'custody threshold'. If anything, CCO increases that threshold by allowing a 'space' for sanctions having significantly punitive ends but that permit a degree of 'imagination' that is greater than a term of imprisonment is likely ever to be. In recent years in Victoria, there has been a hardening of the attitude by the elected government towards offenders. It is clear that the current government is of the view that offenders have not been punished severely enough. There is a suggestion that courts are out of step with the concerns of the community. That is said to result in some type of democratic deficit in the sentencing of offenders by the imposition of inadequate penalties at all levels of the court system in Victoria. The beauty of the separation of powers as our constitutional form of government is the distinct allocation of powers between different spheres of government. A key aspect of that constitutional order is an independent judiciary who are immune from the politics of the day.

48. In my view, the decision in *Boulton* is the most interesting and significant appellate sentencing decision since *Verdins.* It is likely to be extremely influential and should 'blunt' – if sentencing courts are felicitous to the Guideline in *Boulton* – the surge in imprisonment rates in Victoria by expanding the cohort of offences and offenders who are punished and rehabilitated in the community. It is a 'tonic' to the law and order emphasis in this State in recent years and the unquestioning belief that more people in prison for more time somehow protects the community. It should assuage practitioners that in the wake of abolition of suspended sentences that sentencing courts would pass more immediate prison terms created by the 'vacuum' produced by the abolition of that sentencing sanction.

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