

# Courts and Sentencing Legislation Amendment Bill 2012

## Introduction Print

### EXPLANATORY MEMORANDUM

#### General

The purpose of the Courts and Sentencing Legislation Amendment Bill 2012 is to strengthen Victoria's justice system through various improvements to court and sentencing legislation.

In respect of court legislation, the Bill will amend the **Children, Youth and Families Act 2005**, the **County Court Act 1958**, the **Magistrates' Court Act 1989**, the **Supreme Court Act 1986**, the **Judicial College of Victoria Act 2001** and the **Juries Act 2000**.

The Bill will strengthen the court system by amending the above Acts to clarify the jurisdiction of Koori Courts, improve various Children's Court processes and make other technical amendments, correct anomalies in relation to the empanelment and excusing of jurors, make judicial registrars a class of judicial officer that can be provided with judicial education by the Judicial College of Victoria, and provide immunity to assessors in the Supreme Court and the County Court.

In respect of sentencing legislation, the Bill strengthens sentencing laws. The main provisions of the **Sentencing Amendment (Community Correction Reform) Act 2011** came into effect on 16 January 2012 by replacing the combined custody and treatment order, intensive correction order and community based order with a new single community correction order. On the same day, the **Sentencing Legislation (Abolition of Home Detention) Act 2011** commenced and repealed home detention as a sentencing order under the **Sentencing Act 1991** and as an order available to the Adult Parole Board under the **Corrections Act 1986**.

The Bill supports the community correction reforms by further amending the **Sentencing Act 1991**, the **Sentencing Amendment (Community Correction Reform) Act 2011** and other Acts. The Bill improves the operation of community-based sentencing by streamlining processes for charging offenders with contravention of a sentencing order, modernising orders to convert unpaid fines into unpaid community work, clarifying how money will be held and repaid under the community correction order bond condition, and by making further technical and minor amendments.

The Bill also provides for an extension of the period for which certain offences are infringement offences. Those offences are shop theft and wilful damage.

### **PART 1—PRELIMINARY**

Clause 1 sets out the purposes of the Bill.

Clause 2 provides that Part 1, Part 4 and Division 3 of Part 10 of the Bill will commence on the day after the Act receives Royal Assent. The remaining provisions of the Bill commence on 1 November 2012, unless proclaimed earlier.

Part 1 of the Bill contains provisions about the purpose and commencement of the Bill and therefore that Part commences the day after Royal Assent.

Part 4 of the Bill makes amendments to the **Judicial College of Victoria Act 2001** to allow judicial education of judicial registrars. That Part commences the day after Royal Assent because the Judicial College of Victoria has expertise and resources currently available to provide education to judicial registrars.

Division 3 of Part 10 amends the **Justice Legislation Amendment (Infringement Offences) Act 2011** to provide that sunset provisions commence on 1 July 2014. Without this amendment, such provisions would commence on 1 July 2012.

### **PART 2—AMENDMENTS TO THE CHILDREN, YOUTH AND FAMILIES ACT 2005**

Clause 3 amends section 346(3)(b) and 346(5) of the **Children, Youth and Families Act 2005** by inserting the word "clear" to clarify how the period of 21 days referred to in those subsections is to be calculated. This amendment will allow the Children's Court to

remand a child in custody for 21 clear days and have the matter return to Court on the same day of the week, three weeks later. That is, on the 21st clear day following the day on which the order remanding the child in custody was made. This is important because in some regions the Children's Court may only sit one day per week, for example every Tuesday. For example, if the Children's Court remands a child in custody for 21 days on Tuesday 6 March, the order will expire on Tuesday 27 March.

- Clause 4 amends the **Children, Youth and Families Act 2005** by inserting the word "clear" in section 348 of that Act. This will clarify how the period of 21 days referred to in that section is to be calculated as with clause 3.
- Clause 5 Subclause (1) inserts the words "or it is otherwise impracticable for the first-mentioned magistrate to constitute the Court" into subsection 384(3)(b)(i) of the **Children, Youth and Families Act 2005**. Section 384 of that Act provides that a person who is alleged to have failed to observe any condition, or amended condition, of a probation order, must appear or be brought before the Children's Court. The amendment will allow the Court to be constituted either by the magistrate who sentenced the person or, if it is impracticable for that magistrate to constitute the court, another magistrate. The magistrate who originally sentenced the person may be unavailable due to long-term leave such as maternity leave.
- Subclause (2) repeals section 384(4) of the **Children, Youth and Families Act 2005**. The amendment made by subclause (1) expands the circumstances in which a different magistrate from the sentencing magistrate may constitute the Court. If it is impracticable for the sentencing magistrate to constitute the Court, a different magistrate may constitute the Court regardless of whether the person who is alleged to have breached probation consents. Therefore, section 384(4) becomes redundant.
- Clause 6 makes amendments which have the same effect as those made by clause 5, but with respect to a breach of a youth supervision order.
- Clause 7 makes amendments which have the same effect as those made by clause 5, but with respect to a breach of a youth attendance order.

Clause 8 amends the **Children, Youth and Families Act 2005** to expand the criminal jurisdiction of the Koori Court of the Children's Court by providing that the Koori Court can deal with a breach of a sentence imposed by another Division of the Children's Court. The jurisdiction to deal with a breach includes the ability to deal with—

- an offence constituted by a breach; and
- a variation of a sentence.

The expanded criminal jurisdiction of the Koori Court is exercised in the circumstances set out in new section 518A inserted by clause 9 of the Bill. These are the same circumstances in which the Koori Court (Criminal Division) may deal with any other proceeding for criminal offence in respect of a Koori accused.

The amendment also clarifies that the Koori Court (Criminal Division) can exercise its jurisdiction to deal with a breach of a sentence imposed by it in the same circumstances in which it can exercise its new jurisdiction to deal with a breach of a sentence imposed by another Division of the Children's Court.

Clause 9 inserts a new section 518A into the **Children, Youth and Families Act 2005**. The new section describes the circumstances in which the Koori Court (Criminal Division) can deal with a breach of sentence imposed by it or by another Division of the Children's Court.

Clause 10 inserts the words "or another member of the police force" into section 598(3) of the **Children, Youth and Families Act 2005**. The amendment will remove the requirement that the same member of the police force who executed a safe custody warrant must deliver the child to the location specified in the warrant. The amendment will allow a different member of the police force to bring that child to the location specified.

- Clause 11 inserts two transitional provisions into the **Children, Youth and Families Act 2005**. The transitional provisions provide that—
- an order made under section 346 (remanding a child in custody) or section 348 (remanding a child in custody under the **Bail Act 1977**) of the **Children, Youth and Families Act 2005** before the commencement of clauses 3 and 4 of the Bill are not affected by the amendments made by those clauses.
  - the expanded jurisdiction of the Koori Court (Criminal Division) applies to all offences or breaches of sentence, regardless of when they are alleged to have occurred and regardless of when the sentence was imposed.
- Clause 12 substitutes a new definition of *registrar* in clause 2 of Schedule 3 to the **Children, Youth and Families Act 2005**. The new definition defines *registrar* as a principal registrar or registrar, thus removing deputy registrars from the definition. The effect of this is that a deputy registrar cannot exercise the functions given to registrars in Schedule 3. Schedule 3 sets out the procedures for the enforcement of infringement penalties against children and young persons.

### **PART 3—AMENDMENTS TO THE COUNTY COURT ACT 1958**

- Clause 13 amends the **County Court Act 1958** to expand the jurisdiction of the Koori Court Division of the County Court by providing that the Koori Court Division can deal with a contravention of a sentence imposed by another Division of the County Court. The jurisdiction to deal with a contravention includes the ability to deal with—
- an offence constituted by a contravention; and
  - a variation of a sentence.

Section 3(1) of the **Sentencing Act 1991** provides that contravention, in relation to a provision of an order or a sentence includes a failure to comply with that provision.

The expanded jurisdiction can be exercised by the Koori Court Division in the circumstances set out in new section 4DA inserted by clause 15 of the Bill. These are the same circumstances in which the Koori Court (Criminal Division) may deal with any other proceeding for criminal offence in respect of a Koori accused.

The amendment also clarifies that the Koori Court Division can exercise its jurisdiction to deal with a contravention of a sentence imposed by it in the same circumstances in which it can exercise its new jurisdiction to deal with a contravention of a sentence imposed by another Division of the County Court.

This clause also replaces the word "breach" with the word "contravention", which makes section 4B consistent with the language used in the **Sentencing Act 1991**.

Clause 14 replaces the word "breach" with the word "contravention" in section 4C of the **County Court Act 1958**. This makes section 4C consistent with the language used in the **Sentencing Act 1991**.

Clause 15 inserts a new section 4DA into the **County Court Act 1958**. The new section describes the circumstances in which the Koori Court Division can deal with a contravention of sentence imposed by another Division of the County Court.

Clause 16 inserts a new section 48CA into the **County Court Act 1958**. The new section gives an immunity to an assessor called in for assistance in a proceeding under section 48A.

Assessors assist the County Court by providing independent expert assessments, similar to the roles of special referees, mediators and arbitrators.

The amendment has the effect of giving an assessor, in the performance of his or her duties in a proceeding, the same protection and immunity that a judge of the court has in the performance of his or her duties as a judge. This includes immunity from civil action in relation to acts or omissions of assessors in the course of their duties.

Clause 17 inserts a transitional provision into the **County Court Act 1958** providing that the changes made by clauses 13 and 15 of this Bill apply to all proceedings.

#### **PART 4—AMENDMENTS TO THE JUDICIAL COLLEGE OF VICTORIA ACT 2001**

- Clause 18 amends the definition of *judicial officer* in section 3 of the **Judicial College of Victoria Act 2001** so as to include judicial registrars within that definition. This will allow the Judicial College of Victoria to perform functions with respect to judicial registrars of the Supreme Court, County Court, Magistrates' Court, Children's Court and Coroners Court.

#### **PART 5—AMENDMENTS TO THE JURIES ACT 2000**

- Clause 19 inserts new words into the **Juries Act 2000** to clarify that the Juries Commissioner may cause a document to be prepared bearing a number that identifies a person called to a pool of persons attending for jury service as well as the occupation of that person. If the Juries Commissioner were to prepare this document, it would be prepared in addition to the document which must be prepared under section 29(3) of the **Juries Act 2000**. A jury may be empanelled by name or by number, and this amendment will allow the preparation of a document which will assist in the empanelment of a jury by number.
- Clause 20 removes words from section 30(4) of the **Juries Act 2000** so that it is no longer a legislative requirement to provide a list of names of the members of a jury panel to the person authorised by the trial judge to assist in the calling of the panel and the selection of the jury.
- Clause 21 inserts words into section 32(4) of the **Juries Act 2000** which clarify that unless the Court orders otherwise, a person excused from jury service under subsection 3 must return to the jury pool at the completion of the swearing in of the jury. This clarifies that (unless the Court orders otherwise) an excused person does not have to be returned to the jury pool at the very moment they are excused, but rather at the completion of the swearing in of the jury. This amendment will facilitate the escorting of groups of persons (rather than individuals) back to the jury pool by the Juries Commissioner or a pool supervisor.

## **PART 6—AMENDMENTS TO THE MAGISTRATES' COURT ACT 1989**

Clause 22 amends the **Magistrates' Court Act 1989** to expand the jurisdiction of the Koori Court Division of the Magistrates' Court by providing that the Koori Court Division can deal with a contravention of a sentence imposed by another Division of the Magistrates' Court. The jurisdiction to deal with a contravention includes the ability to deal with—

- an offence constituted by a contravention; and
- a variation of a sentence.

Section 3 of the **Sentencing Act 1991** provides that "contravention", in relation to a provision of an order or a sentence, includes a failure to comply with that provision.

The expanded jurisdiction can be exercised by the Koori Court Division in the circumstances set out in new section 4EA. These are the same circumstances in which the Koori Court Division may deal with a proceeding for an offence.

The amendment also clarifies that the Koori Court Division can exercise its jurisdiction to deal with a contravention of a sentence imposed by it in the same circumstances in which it can exercise its new jurisdiction to deal with a contravention of a sentence imposed by another Division of the Magistrates' Court.

The clause uses the word "contravention" to replace the word "breach", which makes the language used in section 4E consistent with the **Sentencing Act 1991**.

Clause 23 inserts a new section 4EA into the **Magistrates' Court Act 1989**. The new section describes the circumstances in which the Koori Court Division can deal with a contravention of sentence imposed by it or by another Division of the Magistrates' Court.

Clause 24 replaces the word "breach" with the word "contravention" which makes section 4F of the **Magistrates' Court Act 1989** consistent with the language used in the **Sentencing Act 1991**.

Clause 25 is a transitional provision which provides that the amendments made to the **Magistrates' Court Act 1989** by clauses 22 and 23 of this Bill apply to all proceedings for an offence or a contravention, regardless of when the offence or contravention is



alleged to have occurred and regardless of when the sentence was imposed.

## **PART 7—AMENDMENTS TO THE SENTENCING ACT 1991**

Clause 26 amends the purposes of the **Sentencing Act 1991** to include providing fair procedures for offenders who contravene a sentencing order.

Clause 27 amends the definitions in section 3 (1) of the **Sentencing Act 1991** to—

- insert a definition of a *community correction order*;
- repeal the definition of *contravention summons* as a consequence of amendments made to Division 2 of Part 3C of the **Sentencing Act 1991** by clause 62 of the Bill;
- expand the definition of a *fine conversion order* to include an order made under section 55(3) of the **Sentencing Act 1991**. Section 55(3) deals with the situation where an offender applies to convert a fine for an offence that is before the Magistrates' Court following the revocation of an enforcement order for an unpaid infringement fine under the **Infringements Act 2006**;
- expand the definition of a *fine default unpaid community work order* to include an order made under section 64(4) of the **Sentencing Act 1991**. Section 64 deals with the situation where an offender who has defaulted in payment of a fine has had property seized to satisfy the fine. However, upon execution of the warrant the property is not sufficient to satisfy the fine. In such cases, a court may imprison the offender or, in the alternative, make a fine default unpaid community work order, if appropriate to do so;
- update references in the definition of *instalment order* to refer to Part 3B of the **Sentencing Act 1991**;
- clarify the definition of *Regional Manager* so it is clear that the officer also administers fine conversion orders.

- Clause 28 amends section 18(1) of the **Sentencing Act 1991** to make necessary consequential amendments following the repeal of section 31 and the insertion of section 83AR by section 44 of the **Sentencing Amendment (Community Correction Reform) Act 2011**.
- Clause 29 inserts a new section 18ZT into the **Sentencing Act 1991** to clarify the status of drug treatment orders made by the Court of Appeal. The order of the Court of Appeal is taken to be made by the lower court, being the original sentencing court (ie. the Drug Court). The amendment ensures the Court of Appeal does not become the sentencing court in relation to the order and is not required to deal with subsequent hearings in relation to a contravention or variation of the order. For example, if an offender later made an application to vary the order the Drug Court would deal with the application.
- Clause 30 amends section 27 of the **Sentencing Act 1991** to substitute references to 'breach' with 'contravention' as a consequence of the creation of the offence in section 83AB which was inserted by section 44 of the Sentencing Amendment (Community **Correction Reform) Act 2011**. This clause also clarifies the status of a suspended sentence of imprisonment made by the Court of Appeal with the effect that the order is taken to be made by the lower court, being the original sentencing court. The amendment ensures the Court of Appeal does not become the sentencing court in relation to the order and is not required to deal with subsequent hearings in relation to a contravention of the suspended sentence. For example, if an offender contravened the suspended sentence the proceeding would be dealt with by the lower court (for example the County Court).
- Clause 31 substitutes section 42 of the **Sentencing Act 1991**. The new section continues the rule that the unpaid community work required to be performed under a community correction order is performed concurrently with unpaid community work under a fine conversion order or a fine default unpaid community work order, unless otherwise directed by the court.
- The existing section 42 also contained a rule about unpaid community work being performed where there is more than one fine conversion order and fine default unpaid community work order imposed. Clause 50 transfers this rule to Part 3B of the

**Sentencing Act 1991** in a new section 63AB because it is a more appropriate location.

- Clause 32 amends section 45(1) of the **Sentencing Act 1991** to insert a new term for each community correction order in a new paragraph (ba). The effect of this amendment is that all offenders on a community correction order must comply with any obligation or requirement prescribed in the regulations made under section 116. For example, regulation 17 of the Sentencing Regulations 2011 imposes obligations and requirements on offenders not to consume alcohol or use drugs of addiction or use a prohibited poison when attending at a community corrections centre or a location or during the performance of unpaid community work. If an offender contravenes new section 45(1)(ba) he or she may be charged under section 83AD of the **Sentencing Act 1991** with contravention of a community correction order.
- Clause 33 amends section 47(2)(b) of the **Sentencing Act 1991** to replace the reference to the Division under which conditions are attached to a community correction order when sentencing an intellectually disabled offender. The reference will refer to new Division 2 of new Part 3BA.
- Clause 34 amends section 48(2) of the **Sentencing Act 1991** to replace the reference to the limitations on attaching a residual condition to a community correction order. The reference will refer to new Division 2 of new Part 3BA which is about conditions imposed on a community correction order in respect of intellectually disabled offenders.
- Clause 35 amends section 48C(6) of the **Sentencing Act 1991** to correct a reference to "activity" with unpaid community work, that more accurately reflects the nature of the unpaid community work condition.
- Clause 36 amends section 48N(2) to clarify which persons need to be notified about an application to vary a community correction order. If the sentencing court was the Magistrates' Court, the informant or police prosecutor is notified of the application. If the sentencing court was the Supreme Court or County Court, the Director of Public Prosecutions is notified.

- Clause 37 substitutes section 48Q of the **Sentencing Act 1991** to clarify the status of a community correction order made by the Court of Appeal. The order of the Court of Appeal is taken to be made by the lower court, being the original sentencing court. The amendment ensures the Court of Appeal does not become the sentencing court in relation to the order and is not required to deal with subsequent hearings in relation to a contravention or variation of the order. For example, if an offender later made an application to vary the order, the lower court would deal with the application (for example the County Court).
- Clause 38 amends the heading to Part 3B of the **Sentencing Act 1991** to provide that the Part deals with fines.
- The change to the heading is part of a broader modernisation of Part 3B. The Bill continues the modernisation of these provisions first commenced by sections 22 to 27 inclusive of the **Sentencing Amendment (Community Correction Reform) Act 2011**.
- The effect of the amendment is to make the Part exclusively about fines and orders imposed by a court on an offender to satisfy unpaid fines. Orders to satisfy unpaid fines include instalment orders and unpaid community work orders (called fine conversion orders and fine default unpaid community work orders) and imprisonment.
- There are several amendments in the Bill which result from this amendment. Clauses 40 to 53 inclusive, 58, 60 and Part 10 of the Bill are consequential on the amendments made to Part 3B of the **Sentencing Act 1991**. Clause 54 creates a new Part 3BA which is about other sentencing orders previously contained in Part 3B of the **Sentencing Act 1991**.
- Clause 39 amends section 52 of the **Sentencing Act 1991** to correct a reference to section 109(3) in relation to the penalty scale.
- Clause 40 inserts a new Division heading into Part 3B of the **Sentencing Act 1991**. New Division 2 is about orders relating to payment of a fine.

- Clause 41 amends section 55 of the **Sentencing Act 1991** to provide that the Secretary may give directions in relation to a fine conversion order. Clause 65 enables the Secretary to delegate powers to certain persons who can administer fine conversion orders such as Regional Managers and community corrections officers.
- Clause 42 repeals section 57 of the **Sentencing Act 1991**. Clause 53 re-inserts the substance of the repealed provision in new section 66A. The purpose of the re-location of this provision is to modernise the structure of Part 3B of the **Sentencing Act 1991**.
- Clause 43 repeals section 58 of the **Sentencing Act 1991**. Clause 53 re-inserts the substance of the repealed provision in new section 66B. The purpose of the re-location of this provision is to modernise the structure of Part 3B of the **Sentencing Act 1991**.
- Clause 44 repeals section 59 of the **Sentencing Act 1991**. Clause 53 re-inserts the substance of the repealed provision in new section 66C. The purpose of the re-location of this provision is to modernise the structure of Part 3B of the **Sentencing Act 1991**.
- Clause 45 repeals section 60 of the **Sentencing Act 1991**. Clause 53 re-inserts the substance of the repealed provision in new section 66D. The purpose of the re-location of this provision is to modernise the structure of Part 3B of the **Sentencing Act 1991**.
- Clause 46 inserts a new Division 3 into Part 3B of the **Sentencing Act 1991** which provides that unpaid fines that are satisfied by converting the fine into unpaid community work or imprisonment. The new Division applies to fine conversion orders and fine default unpaid community work orders.

New section 61A sets out the terms of a fine conversion order. The terms impose obligations or requirements on offenders under the order, such as not to commit an offence punishable by imprisonment during the period of the order. The terms apply to each fine conversion order and last for the entire duration of the order.

- Clause 47 amends section 62 of the **Sentencing Act 1991** to provide that the Secretary may give directions in relation to a fine default unpaid community work order. Clause 65 of the Bill provides for the delegation of the Secretary's powers to certain persons who can administer fine default unpaid community work orders.
- Clause 48 amends section 62A of the **Sentencing Act 1991** to provide that the Secretary gives directions in relation to a fine default unpaid community work orders. Clause 65 of the Bill provides for the delegation of the Secretary powers to certain persons who can administer fine default unpaid community work orders.
- Clause 49 inserts a new section 62B of the **Sentencing Act 1991** which provides for the terms of fine default unpaid community work orders. The terms mirror the terms for a fine conversion order under clause 46 of the Bill. The terms apply to each fine default unpaid community work order and last for the entire duration of the order.
- Clause 50 inserts new provisions in the **Sentencing Act 1991** with respect to fine conversion orders and fine default unpaid community work orders.

New section 63AA of the **Sentencing Act 1991** is about the period of unpaid community work a court may impose for fine conversion orders and fine default unpaid community work orders. The court cannot require an offender to perform an amount of hours of unpaid community work that exceeds the periods set out in section 63AA, in particular a maximum of—

- 500 hours over 24 months;
- 20 hours in any 7 day period;
- 40 hours in a 7 day period (if the offender consents in writing to do so).

The order expires on the satisfactory completion by the offender of the hours of unpaid community work to be performed.

New section 63AB sets out a rule that unpaid community work performed under a fine conversion order or a fine default unpaid community work order are to be served cumulatively on each other, unless the court directs otherwise. This provision re-enacts some of existing section 42 of **Sentencing Act 1991** because it is

a more appropriate location for this rule. The remainder of existing section 42 is retained by clause 31 of the Bill.

New section 63AB also contains a rule that any direction about how unpaid community work is to be performed in respect of fine conversion orders or fine default unpaid community work orders must not be inconsistent with section 63AA. For example, two fine conversion orders to be served cumulatively cannot exceed 500 hours over a 2 year period.

New section 63AC provides that a court must determine the period of a fine conversion order or fine default unpaid community work order according to section 63AA. For example, a fine conversion order of 125 hours to satisfy unpaid fines must be performed over a period of 6 months or less. In addition, the order must commence within 3 months of being made.

New section 63AD empowers a court to vary a fine conversion order or a fine default unpaid community work order.

New section 63AE provides for the making of an application to vary a fine conversion order or a fine default unpaid community work order.

- Clause 51 amends section 64(4) of the **Sentencing Act 1991** to replace a reference to a community based order made in default of a fine with a fine default unpaid community work order. The amendment is a consequential amendment arising from the creation of fine default unpaid community work orders by the **Sentencing Amendment (Community Correction Reform) Act 2011**. Section 64 deals with the situation where an offender who has defaulted in payment of a fine has had property seized to satisfy the fine. However, upon execution of the warrant the property is not sufficient to satisfy the fine. In such cases, a court may imprison the offender or, in the alternative, make a fine default unpaid community work order, if appropriate to do so. Clause 27(2) of the Bill amends section 3(1) of the **Sentencing Act 1991** to insert in the definition of a *fine default unpaid community work order* an order made under section 64(4).

- Clause 52 inserts a new Division 4 of Part 3B of the **Sentencing Act 1991** dealing with miscellaneous matters.

New section 64A empowers the Secretary to suspend a fine conversion order or fine default unpaid community work order or a condition of those orders in certain circumstances.

New section 64B empowers the Secretary to direct offenders to report at another place or to another person. The powers may be delegated to certain persons under section 115B of the **Sentencing Act 1991** as amended by clause 65 of the Bill.

Clause 53 inserts new sections 66A, 66B, 66C, 66D and 66E into the **Sentencing Act 1991**.

New sections 66A, 66B, 66C and 66D are a re-enactment of the substance of sections 57, 58, 59 and 60 of the **Sentencing Act 1991**, which are repealed by clauses 42 to 45 inclusive, which are more appropriately located later in Part 3B.

New section 66E deals with the situation where the Court of Appeal imposes a fine or makes a fine conversion order or fine default unpaid community work order on appeal (including a proceeding for a contravention of a fine conversion order or fine default unpaid community work order). The order is taken to be made by the lower court, being the original sentencing court. The amendment ensures the Court of Appeal does not become the sentencing court in relation to the order. The Court of Appeal is not required to deal with subsequent hearings in relation to a contravention or variation of the order. For example, the Court of Appeal makes a fine default unpaid community work order and the offender later makes an application to vary the order, the Supreme Court or the County Court (as the case may be) would deal with the application.

Clause 54 inserts a new Part 3BA into the **Sentencing Act 1991** dealing with other sentencing orders. The new Part deals principally with adjourned undertakings to be of good behaviour and sentencing orders in respect of intellectually disabled offenders. Related consequential amendments are contained in clauses 33, 34, 56, 57 and in Part 10 of the Bill.

Clause 55 amends Part 3B of the **Sentencing Act 1991** to replace the existing reference to Division 2 with a reference to Division 1. The effect of the amendment is to create a new Division 1 of new Part 3BA dealing with dismissals, discharges and adjournments.

Clause 56 amends section 72(3) of the **Sentencing Act 1991** to update a reference to imposing a justice plan condition as part of a release on adjournment following a conviction.



- Clause 57 amends section 75(3) of the **Sentencing Act 1991** to update a reference to imposing a justice plan condition as part of a release on adjournment without conviction.
- Clause 58 substitutes the heading to Division 3 of Part 3B of the **Sentencing Act 1991** to refer to new Division 2 of new Part 3BA which deals with sentencing of intellectually disabled offenders.
- Clause 59 amends section 82AA(1)(a) of the **Sentencing Act 1991** to make clear, for the avoidance of doubt, that a reference to making a residential treatment order in relation to a serious offence means a serious offence within the meaning of section 3(1), for example the offence of rape. A residential treatment order may also be made for the offence of indecent assault under section 82AA(1)(b).
- Clause 60 substitutes the reference to Division of Part 3B of the **Sentencing Act 1991** to refer to new Division 3 of Part 3BA which is about deferral of sentencing in the Magistrates' Court or County Court.
- Clause 61 substitutes the heading to Division 2 of Part 3C of the **Sentencing Act 1991**. The amendment more accurately describes the purpose of the Division, namely to set out the procedure for criminal proceedings in relation to a contravention offence.
- Clause 62 substitutes sections 83AG to the 83AQ of the **Sentencing Act 1991** with new sections 83AG to 83AM.

The principal purpose of the amendments is to set out a more streamlined procedure regarding proceedings for contraventions of sentencing orders.

A "contravention offence" refers generally to where an offender commits an offence of contravening a sentencing order. The principal contravention offences are in sections 83AB, 83AC and 83AD of the **Sentencing Act 1991**. The offences in sections 83AE and 83AF are offences constituted by contravening a direction given by the Secretary (his or her delegates) in relation to a community correction order. Section 63A and Schedule 3 of the **Sentencing Act 1991** also contain contravention offences. Section 63A and Schedule 3 incorporate or apply Part 3C with any necessary modifications set out therein.

The general rule is that the charge for the contravention offence is filed in the Magistrates' Court and is made returnable by summons or warrant to the sentencing court, except where the offence is a summary offence against section 83AE or 83AF. In that case, the proceeding will be heard and determined by the Magistrates' Court regardless of whether it was the sentencing court.

Specific exceptions to this rule are set out in new sections 83AL and 83AM. The purpose of the exceptions is to allow the higher courts to deal with the situation where a finding of guilt for a new offence also contravenes a sentencing order.

New section 83AG requires a charge sheet for the above offences to be filed in the Magistrates' Court. The charge sheet must be filed by any of the persons specified in section 83AG(2).

New section 83AG(3) provides that the procedure which applies to these criminal proceedings is to be in accordance with the **Criminal Procedure Act 2009**, the **Bail Act 1977** and the **Magistrates' Court Act 1989** with any necessary modifications. The purpose is to adopt the procedures under those Acts for Division 2 of Part 3C of the **Sentencing Act 1991** with modifications to reflect that these proceedings are about contravention of a sentencing order. For example, the charge sheet alleging contravention of a sentencing order must be in accordance with the **Criminal Procedure Act 2009** and any regulations or rules made under that Act.

Following the filing of the charge sheet and the commencement of the proceeding in accordance with section 83AG(1), new section 83AG(4) makes clear that the prosecution may apply for a summons or warrant in accordance with section 12 of the **Criminal Procedure Act 2009**.

New section 83AH deals with the time for commencement of a proceeding for an offence against 83AB, 83AC and 83AD (and therefore also for an offence under section 63A and Schedule 3). It substantially re-enacts section 83AH previously inserted by section 43 of the **Sentencing Amendment (Community Correction Reform) Act 2011**. The time limit for commencing a proceeding for an offence against section 83AE or 83AF is within 12 months from the date of the alleged offence.

Following the filing of the charge sheet under section 83AG(1) and the making of an application for a summons or warrant under section 12 of the **Criminal Procedure Act 2009**, new section 83AI sets out that for the offences under sections 83AB, 83AC and 83AD the summons or warrant is returnable to the sentencing court. In the case of a warrant to arrest, the offender when arrested is brought before a bail justice or the sentencing court. The warrant to arrest is issued in accordance with Part 4 of the **Magistrates' Court Act 1989**.

The offences under sections 83AE and 83AF are heard and determined by the Magistrates' Court in accordance with Chapters 2 and 3 of the **Criminal Procedure Act 2009**.

New section 83AJ deals with transfer of a proceeding where it is commenced under section 83AG for an offence under section 83AB, 83AC or 83AD (and therefore also for an offence under section 63A and Schedule 3). It requires the Magistrates' Court to order the proceeding to be transferred to the appropriate venue of the sentencing court. This provision does not apply if the Magistrates' Court is the sentencing court.

For example, new sections 83AG to 83AJ would apply in the following scenario. The County Court previously made a community correction order in respect of an offence punishable by more than 5 penalty units. The offender is subsequently charged with contravening that sentencing order under section 83AD. The charge must be filed in the Magistrates' Court and is made returnable by summons or warrant to the County Court. The Magistrates' Court must then make an order that the proceeding is transferred to the appropriate venue of the County Court.

An order transferring a proceeding may be made by the court constituted by a registrar. The transfer of the proceeding to the higher court only takes effect on the filing of evidence of the service of the summons (for example, an affidavit of service). Alternatively, where an arrest warrant is issued, the transfer takes effect on the execution of the warrant on the offender (which includes filing an execution copy of the warrant).

Upon the transfer of the proceeding, the County Court or Supreme Court (as the case applies) may hear and determine the summary offence without a jury. The procedure for hearing and determining the offence is the summary procedure applicable in the Magistrates' Court under Chapter 3 of the **Criminal Procedure Act 2009**, subject to any modifications set out in the court rules.

New section 83AK deals with the situation where the proceeding is transferred to the sentencing court (i.e. the County Court or the Supreme Court) but the offender does not attend before that court. The higher court may issue a warrant to arrest the offender.

New section 83AL deals with the specific scenario where the County Court or Supreme Court (called the relevant sentencing court) finds an offender guilty of an offence that also contravenes a sentencing order previously imposed by that court. For example, an offender is before the County Court and found guilty of rape. The offence of rape was committed during the period of a community correction order previously imposed by the County Court for another offence. The provision allows the prosecution, in its discretion, to file a charge in the higher court for the section 83AD offence, rather than filing the charge in the Magistrates' Court.

The purpose of filing the charge in the higher courts is to allow the County Court or Supreme Court (as the case may be) to sentence the offender on both offences together and hence sentence according to the totality of the offending.

The procedure under new section 83AL is only available in circumstances where the offender is before the higher court for an offence that also contravenes a sentencing order previously imposed by that court. New section 83AL is an optional process where it is convenient and appropriate for the higher courts to deal with the contravention offence together with the other offence. The higher court may hear and determine the contravention offence without a jury and in accordance with Chapter 3 of the **Criminal Procedure Act 2009**.

New section 83AM deals with a scenario where the offender is before the County Court or Supreme Court and is found guilty of an offence which also contravenes a sentencing order previously imposed by the Magistrates' Court. For example, an offender is before the County Court and found guilty of culpable driving. This offence was committed during the period of a suspended sentence of imprisonment previously imposed by the Magistrates' Court for another offence (for example, drive while disqualified). The court may proceed to deal with the contravention offence as if it were an unrelated summary offence and section 243 of the **Criminal Procedure Act 2009** applies subject to any modifications set out in the court rules of the relevant sentencing court.

The purpose of new section 83AM is to allow the higher courts to sentence the offender on both offences together and hence sentence according to the totality of the offending. The County Court or Supreme Court may choose to transfer the contravention offence in accordance with section 243 of the **Criminal Procedure Act 2009**. The charge for the contravention offence is required to be filed in the Magistrates' Court. Section 243(3) provides that the higher court may hear and determine the contravention offence without a jury and in accordance with Part 3.3 of Chapter 3 of the **Criminal Procedure Act 2009** as far as practicable.

The procedure under new section 83AM is only available in circumstances where the offender is before the higher court for an offence which also contravenes a sentencing order previously imposed by the Magistrates' Court. It is an optional process for the higher court to transfer the proceeding, where the requirements of section 243 of the **Criminal Procedure Act 2009** are satisfied and in accordance with any modifications set out in the court rules.

Clause 63 repeals section 83AR(7) of the **Sentencing Act 1991**. This provision is no longer necessary because the substance of the provision is dealt with by new section 83AG(3), which, among other things, incorporates the **Criminal Procedure Act 2009**, **Bail Act 1977** and **Magistrates' Court Act 1989** for the purposes of the Division with any necessary modifications.

- Clause 64 amends section 83H of the **Sentencing Act 1991** in respect of superannuation orders due to the amendment made by clause 44 of the Bill. The clause updates a reference to the application to superannuation orders of fines, penalties or other sum of money being paid into the Consolidated Fund under new section 66C.
- Clause 65 amends section 115B(1)(a) of the **Sentencing Act 1991** to allow the Secretary to delegate powers under Part 3B to certain persons, such as any officer within the meaning of Part 5 or Part 9 of the **Corrections Act 1986**. The purpose is to allow Regional Managers, community corrections officers, and other officers at Corrections Victoria to give directions in respect of fine conversion orders and fine default unpaid community work orders on behalf of the Secretary.
- Clause 66 inserts new paragraph (ca) into section 116(1)(c) of the **Sentencing Act 1991** to provide for regulations in relation to fine conversion orders or fine default unpaid community work orders.
- Clause 67 substitutes clause 7(4)(a) of Schedule 3 to the **Sentencing Act 1991** to clarify a court's power to confirm an old combined custody and treatment order that was contravened. The amendment relates to sentencing options available to the sentencing court after it has found a person guilty of contravening an old combined custody and treatment order. The amendment makes clear that when a court confirms the order it means the remaining period and the conditions of the order are to be performed. If necessary for that purpose, the court may vary the dates and duration of the order. For example, if the contravention was committed 3 months into an old combined custody and treatment order and the court confirms order, this means that the offender must complete the remaining 9 months. The court may change the dates and duration of the order to reflect this period, irrespective of whether or not the order has expired.
- Clause 68 substitutes clause 8(4)(a) of Schedule 3 to the **Sentencing Act 1991** to clarify a court's power to confirm a pre-existing home detention order that was contravened. The amendment relates to sentencing options available to the sentencing court after it has found a person guilty of contravening pre-existing home detention order. The amendment makes clear that when a court confirms the order, it means the remaining period and the conditions of the order are to be performed. If necessary for that

purpose, the court may vary the dates and duration of the order. For example, if the contravention was committed 2 months into a 5 month pre-existing home detention order and the court confirms the order, this means the offender must complete the remaining 3 months. The court may change the dates and duration of the order to reflect this period, irrespective of whether or not the order has expired.

Clause 69 substitutes clause 9(4)(a) of Schedule 3 to the **Sentencing Act 1991** to clarify a court's power to confirm an old intensive correction order that was contravened. The amendment relates to sentencing options available to the sentencing court after it has found a person guilty of contravening an old intensive correction order. The amendment makes clear that when a court confirms the order, it means the remaining period and the conditions of the order are to be performed. If necessary for that purpose, the court may vary the dates and duration of the order. For example, if the contravention was committed 4 months into a 12 month old intensive correction order and the court confirms the order, this means the offender must complete the remaining 8 months. The court may change the dates and duration of the order to reflect this period, irrespective of whether or not the order has expired.

Clause 70 amends clause 10 of Schedule 3 to the **Sentencing Act 1991** to clarify the operation of old community based orders by—

- inserting an offence carrying a maximum fine of 10 penalty units to contravene a community based order in default of a fine order made under Division 4 of Part 3 of the **Sentencing Act 1991** before the commencement of the Bill. This type of old community based order is defined as an old community based order (fines) in clause 70(7). The offence applies prospectively, namely from the commencement of the Bill. This re-enacts the offence previously applicable for these orders under section 47 of the **Sentencing Act 1991** in force before the commencement of section 21 of the **Sentencing Amendment (Community Correction Reform) Act 2011**;

- applying Part 3C of the **Sentencing Act 1991** to the offence to contravene an old community based order (fines). The purpose is to apply the procedure under that Part to the new offence;
- applying section 63A(3) of the **Sentencing Act 1991** to the offence to contravene an old community based order (fines). The purpose is enable the court to impose a sentence of imprisonment in certain circumstances where a person is found guilty of the offence to contravene an old community based order (fines);
- providing that where a person is found guilty of the offence to contravene an old community based order (fines), the court may exercise the powers under clause 10(4) of Schedule 3 to the **Sentencing Act 1991** as amended by the Bill.

Clause 70(6) also substitutes clause 10(4)(a) of Schedule 3 to the **Sentencing Act 1991** to clarify a court's power to confirm an old community based order that was contravened. The amendment relates to sentencing options available to the sentencing court after it has found a person guilty of contravening an old community based order (including a an old community based order (fines)). The amendment makes clear that when a court confirms the order, it means the remaining period and the conditions of the order are to be performed. If necessary for that purpose, the court may vary the dates and duration of the order. For example, if the contravention was committed 6 months into an 18 month old community based order and the court confirms the order, this means the offender must complete the remaining 12 months. The court may change the dates and duration of the order to reflect this period, irrespective of whether or not the order has expired.



**PART 8—AMENDMENTS TO THE SENTENCING  
AMENDMENT (COMMUNITY CORRECTION REFORM)  
ACT 2011**

Clause 71 amends section 48JA of the **Sentencing Act 1991** as proposed to be inserted by section 58 of the **Sentencing Amendment (Community Correction Reform) Act 2011**.

Section 58 of the **Sentencing Amendment (Community Correction Order) Act 2011** proposes to create a bond condition that a court may attach to a community correction order.

A bond condition is a condition requiring an offender to pay an amount of money as a bond to the sentencing court.

The condition is attached to a community correction order for the purpose of ensuring their compliance with the order.

The sentencing court decides the amount of money to be paid and when it is to be paid to the court.

The bond condition has not yet commenced operation under the **Sentencing Act 1991**. Part 3 of the **Sentencing Amendment (Community Correction Order) Act 2011** has a default commencement date of 30 June 2013 unless proclaimed earlier.

Clause 71 creates rules and clarifies processes about payment, return or forfeiture of bond money. It also deals with circumstances where an offender is charged in a criminal proceeding with an offence that may also contravene the community correction order if the offence or offences are proven.

Clause 71(1) substitutes new section 48JA(4) to provide that the money paid by an offender under the bond condition is—

- paid to the sentencing court;
- held by the Crown in a trust account established by the Minister under section 23 of the **Financial Management Act 1994**. The trust account in practice will be the whole of security trust fund administered by or on behalf of the Department of Justice;
- held by the Crown despite any provisions to the contrary in the **Supreme Court Act 1986**, **County Court Act 1958** and the **Magistrates' Court Act 1989** do not apply.

Clause 71(2) substitutes new section 48JA(5) with new subsections (6), (7), (8) and (9).

New section 48JA(5) deals with payment of interest accrued on the bond money. The interest must be paid into the Consolidated Fund. The offender does not receive any of the interest. Any money repaid to the offender excludes the interest.

New section 48JA(6) deals with repayment of the bond money. Where repayment is ordered by the court, it must be repaid by the Crown to the offender within 7 days of the order being made unless the court orders a longer period. Repayment arises in two broad circumstances.

Firstly, it may arise in cases of contravention of the community correction order which has a bond condition attached. Under new section 83AS(4) of the **Sentencing Act 1991** (as proposed to be inserted by section 59 of the **Sentencing Amendment (Community Correction Reform) Act 2011**) the community correction order may be confirmed, varied or cancelled because the offender has contravened the order. The court decides how much bond money is forfeited and this decision forms part of the sentencing order in relation to the contravention proceeding.

Secondly, the community correction order may be varied under section 48M of the **Sentencing Act 1991**. This is where the community correction order is varied by way of an application. The offender or other authorised persons under that Act may apply to either vary the amount of the bond money, remove the bond condition from the community correction order or cancel the community correction order altogether. If the bond condition is removed from the order or the whole community correction order is cancelled, the whole bond money is repaid to the offender. If the bond condition is varied to reduce the amount of bond payable, part of the bond money is repaid to the offender.

New section 48JA(7) creates rules about the Crown repayment and holding of the bond money after the community correction order has expired. New subsection (7)(a) provides the Crown holds the bond money after a community correction order (with a bond condition attached) has expired. The Crown holds the bond money for up to 3 months after the expiry of the order. If the offender completes the order without any contravention being alleged, the money must be repaid to the offender once the 3 month period has finished.

New subsection (7)(b) deals with the situation where an offender is charged with an offence punishable by imprisonment that was committed during the period of the community correction order (which may include the offence under section 83AD, as the case applies). The Crown holds the money until the proceeding is finalised, which may be longer than 3 months after the community correction order has expired.

An example of the operation of new section 48JA(7)(b) is as follows. An offender is charged with an assault alleged to have been committed during the period of a community correction order. The offender is charged two months after the community correction order has expired. The charge is not heard and determined by a court until 12 months later. The money is held until the proceeding is finalised for the assault charge.

A finalised proceeding is defined to be finalised under new section 48JA(8) and includes circumstances where there is an acquittal, finding of guilt or conviction in relation to the charge, where the charge is withdrawn or the prosecution of the charge is discontinued. The final determination of the proceeding includes any appeals. If forfeiture under section 83AS(4) does not arise (for example, the accused is acquitted of the charge), the money must be repaid within 7 days of the proceeding being finalised.

The time period under the two rules in new section 48JA(7)(a) and (b) apply whichever is the later.

New section 48JA(9) deals with forfeiture of the bond money. This relates to new section 83AS(4) of the **Sentencing Act 1991** (as proposed to be inserted by section 59 of the **Sentencing Amendment (Community Correction Reform) Act 2011**).

The bond money is liable to forfeiture by order of the sentencing court in certain circumstances set out in new section 83AS(4).

It applies where the offender has been found guilty of contravention of a community correction order which has a bond condition attached and the court decides to confirm, vary or cancel the sentencing order. If the court decides to confirm or vary the community correction order the court may order that all or part of the bond money is forfeited. If the court decides to cancel the community correction order under section 83AS(1)(c), the court must order that all or part of the bond money is forfeited. New section 48JA(9) provides that the forfeited money must be paid into the Consolidated Fund.

## **PART 9—AMENDMENTS TO SUPREME COURT ACT 1986**

Clause 72 inserts a new section 24G into the **Supreme Court Act 1986**. The new section gives an immunity to an assessor called in for assistance in a proceeding under section 77 of the **Supreme Court Act 1986**.

Assessors assist the Supreme Court by providing independent expert assessments, similar to the roles of special referees, mediators and arbitrators.

The amendment has the effect of giving an assessor, in the performance of his or her duties in a proceeding, the same protection and immunity as a judge of the court has in the performance of his or her duties as a judge. This includes immunity from civil action in relation to acts or omissions of assessors in the course of their duties.

## **PART 10—CONSEQUENTIAL AND OTHER AMENDMENTS**

### **Division 1—Criminal Procedure Act 2009**

Clause 73 amends section 3 of the **Criminal Procedure Act 2009** to include in the definition of *sentence* a reference to these orders being made under new Part 3BA of the **Sentencing Act 1991** as a result of the amendments made by clauses 54 and 55.

Clause 74 amends section 87(2)(a) of the **Criminal Procedure Act 2009** to remove the reference to Division 1 of Part 3B of the **Sentencing Act 1991** and instead refer to whole of Part 3B. The amendment makes clearer the limitations on sentencing in the absence of an accused.

### **Division 2—Infringements Act 2006**

Clause 75 amends section 160(3)(e) of the **Infringements Act 2006** to update the reference to location of the power of the Court under the **Sentencing Act 1991** to make a fine default unpaid community work order in lieu of imprisonment in respect of an infringement offender.

### **Division 3—Justice Legislation Amendment (Infringement Offences) Act 2011**

- Clause 76 amends the commencement provision in the **Justice Legislation Amendment (Infringement Offences) Act 2011** with the effect that sunset provisions in that Act commence on 1 July 2014 instead of 1 July 2012.
- Clause 77 amends the automatic repeal date for the **Justice Legislation Amendment (Infringement Offences) Act 2011** from 1 July 2013 to 1 July 2015.

### **Division 4—Sex Offenders Registration Act 2004**

- Clause 78 amends the definition of *good behaviour bond* under section 3 of the **Sex Offenders Registration Act 2004** to reflect the new location of those orders in new Division 1 of new Part 3BA of the **Sentencing Act 1991** as a result of the amendments made by clauses 54 and 55.

### **Division 5—Summary Offences Act 1966**

- Clause 79 amends section 47 of the **Summary Offences Act 1966** as a result of the amendment made by clauses 44 and 53. This clause updates a reference to the application of fines, penalty or other sum of money being paid into the Consolidated Fund under new section 66C of the **Sentencing Act 1991** in respect of compensation including assessing the value of a homing pigeon.

### **PART 11—REPEAL OF AMENDING ACT**

- Clause 80 provides for the automatic repeal of this amending Bill on 1 November 2013. The repeal of the Bill does not affect the continuing operation of the amendments by the Bill (see section 15(1) of the **Interpretation of Legislation Act 1984**).