

**IN THE MATTER OF THE ROYAL COMMISSION
INTO FAMILY VIOLENCE**

ATTACHMENT JMS-9 TO STATEMENT OF JANICE MARGARET SHUARD

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This is the attachment marked '**JMS-9**' produced and shown to **JANICE MARGARET SHUARD** at the time of signing her Statement on 27 July 2015.

Before me:



**An Australian Legal Practitioner within
the meaning of the Legal Profession Uniform Law (Victoria)**

Attachment JMS-9

Corrections Victoria – Community Correctional Services

Breach/Contravention and Applications

Deputy
Commissioner's
Instruction

5.16

Correctional Standard No: A2 Breach/Contravention Action

This Deputy Commissioner's Instruction covers the key practices associated with the breach/contravention of supervised court and interstate Orders and applications to vary supervised court Orders.

What we must do

Breach/Contravention of an Order – Ensure that where an offender fails to comply with their Order, and there is evidence to substantiate the alleged failures, a decision about breach/contravention action is made and acted upon within the required period.

Application to vary an Order – Ensure that the offender or the Director of Public Prosecutions is provided with the necessary documentation to lodge an application to vary an Order, and that a CCS staff member attends the hearing of the application.

Application for sentencing court review or to have a CV infringement matter heard in open court - Ensure that offenders are aware of their rights to have an infringement or community work/curfew direction of an Administrative Review Hearing heard by the court under the relevant legislation, and that a CCS staff member attend the hearing.

Why we must do this

Breach/Contravention

- To maintain legislative integrity;
- To maintain credibility with the Courts and the community;
- To ensure there are consequences for non-compliance.

Application to vary

The *Sentencing Act* 1991 allows for applications to be made to vary or cancel Orders, where specific criteria are met

Sentencing court review/open court hearing of CV infringement

Legislation provides offenders who have concerns relating to a CV infringement notice or additional curfew/community work imposed to address non-compliance, with the option of seeking a formal review.

When by

Breach/Contravention action

Authorisation is to occur within **two weeks** of alleged breaching incident.

Summons/Warrant

A summons or warrant must be issued within **six weeks** of the Date of Ultimate Breaching /Contravention Incident (DUBI/DUCI).

Section 40 Notice

A Section 40 Notice must be issued within **six weeks** of notification by CV Operations Division

Who does it

A Senior Officer is responsible for authorising the **breach/contravention action**. The allocated CM is responsible for completing the **breach/contravention brief**.

Application to Vary – The offender, a prescribed person (which includes CCOs) or the Director of Public Prosecutions may apply to have an Order varied any time while the order is in force. The allocated CM is responsible for completing the **Application to Vary** report.

The offender is responsible for lodging an application for a sentencing court review with the sentencing court/application to have a CV infringement matter heard in open court with Civic Compliance Victoria. The allocated CM is responsible for preparing the brief in each case.

Contents

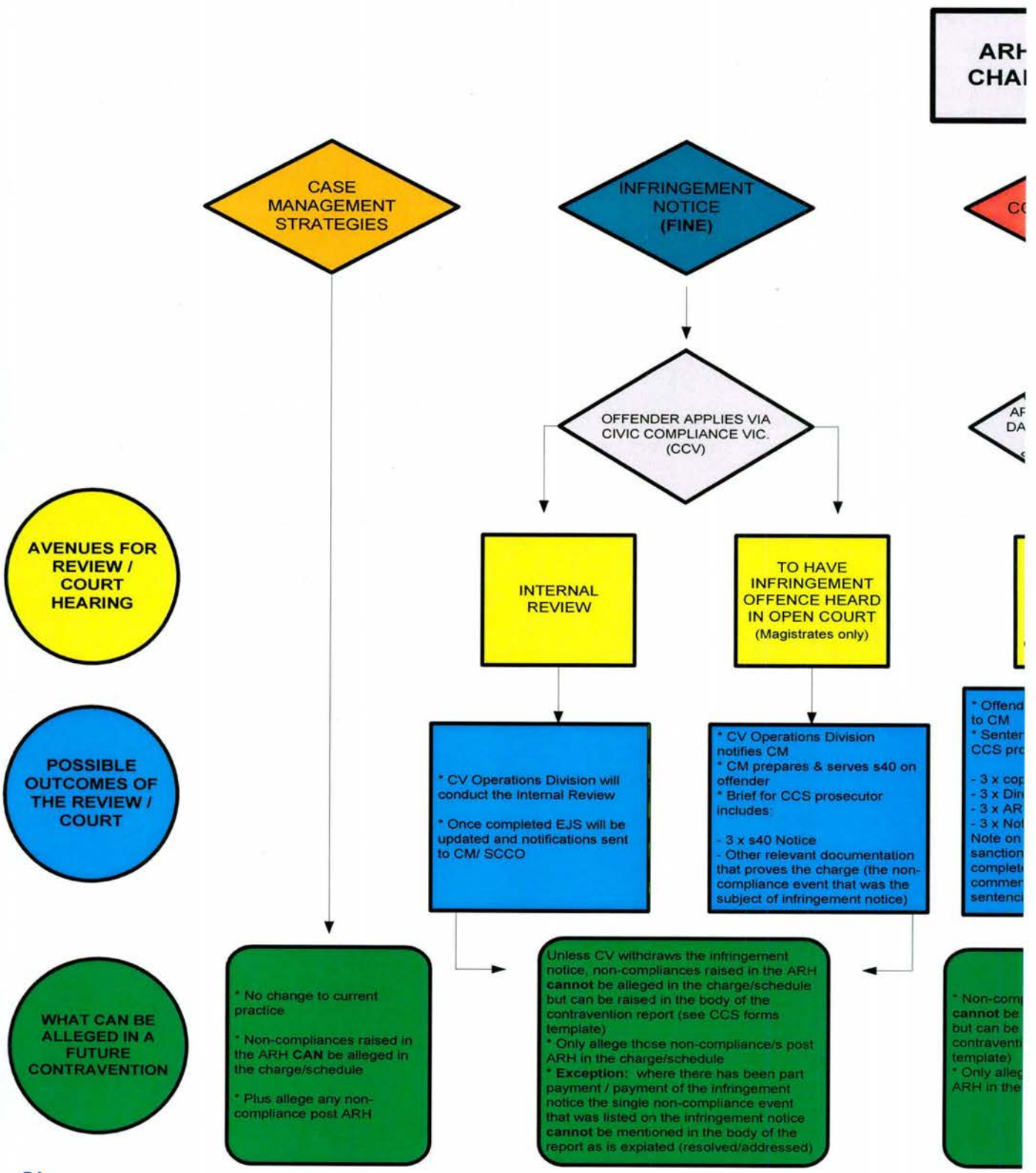
1 Breach/Contravention of Court Order	5
2 Authority to breach/initiate contravention proceedings	5
2.1 Offender has previously participated in an Administrative Review Hearing	6
2.1.1 Offender issued with a CV infringement notice	6
2.1.1 Offender issued with an additional community work/curfew hours	7
2.1.2 The ARH outcome only involved case management strategies	7
2.1.3 Multiple Orders	7
2.2 Summons/Charge/Warrant	7
2.2.1 Charge-Sheet and Summons	7
2.2.2 Charge	8
2.2.3 CCS Charge Sheets and Warrants	9
2.2.4 Summons/Warrant Issue Date	9
2.2.5 Bench Warrant	10
2.3 County Court Consolidations	11
2.4 Breach/Contravention of Commonwealth Court Orders	11
2.5 Non-Compliance with Interstate Orders	12
2.6 Breach of Suspended Sentence	12
3 Breach/Contravention Report	12
3.1 ICO – Unexpired Portion	13
3.2 Combined Custody and Treatment Orders (CCTOs)	13
4 Breach/Contravention Brief	13
5 Withdrawal of Breaches/Contraventions	15
5.1 Withdrawal of Summons	15
6 Execution of a Warrant	15
6.1 Executed Warrants Not Received by the Court	16
7 Lost Warrants	16
7.1 Withdrawing a Warrant	17
8 Breach/Contravention by further offence – Exercise of Discretion	17
8.1 Magistrates' Court	17
8.2 Higher Court	18
9 Telecourt	18
10 Applications	19
10.1 Applications to vary and Order	19
10.2 Offender elects to have their CV infringement notice matter heard in open court following Administrative Review Hearing (ARH)	20
10.4 Application for sentencing court review of ARH decision (community work/curfew decisions only)	22
11 Progress Reports	23
Supporting Information	24
Breach/Contravention of Court Orders	24
Breach/Contravention of Regulations	24
Sentencing Reform Transitional Arrangements	24
Statute of Limitations	25
Authority to breach/initiate contravention proceedings	25
Transfer Orders	25
Date of Ultimate Breaching/Contravening Incident (DUBI/DUCI)	26
Completing the Schedule	26
Alleging instances of non-compliance	26
Alleging further offences on a Charge-Sheet and Summons	27
Alleging further offences on a Charge-Sheet and Warrant	27
Completing the Breach/Contravention Report	27
Offences for which admitted to Order	27
Breach/Contravention of Order constituted by – (Allegations)	28
Breach/Contravention constituted by further offence	28
Response to Order	28
Unpaid Community Work – CBOs/CCOs	28

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

ICOs and Unexpired Portion	29
Pre-Sentence Detention (PSD) re: ICO Breaches	30
CCOs/CBOs	30
Conclusion and Recommendation	30
Use of additional reports	30
Victim Impact Statements (V.I.S)	31
Listing the Breach/Contravention	31
Prescribed Person	31
Affidavits	31
Gaol Orders	31
Bail	32
Withdrawal of warrants	32
Prosecutions	33
Files coming to Court Services Unit (CSU) for prosecution	33
Files requested by defence lawyers in the prosecution	34
Tips in prosecuting	34
Guidelines for a Progress Report	35
Consolidations	35
Disputed Breach/Contravention Contest mention	35
Contested Hearing	36
CCTO Breaches/Contraventions Whilst in Custody	36
Breach/Cancellation of a Drug Treatment Order	37
In Custody Interstate	37
Commonwealth Orders	37
State and Commonwealth Offences – Concurrent CCOs/CBOs/ICOs imposed for both	38
State and Commonwealth Offences – Warrants	38
Breach of Bonds/Recognisances	38
Ex parte Hearings	38
Awarding Costs	39
Criminal Procedure Act 2009 Section 401	39
Appeal Costs Act 1998 Section 17 (1) (Act No. 87 /1998)	39
Appeals	39
What happens if an offender abandons the appeal or an appeal is struckout?	40
Appeals against Breach/Contravention Outcome	40
Application to Vary an Order	41
Offender attendance following lodgment of an application to vary	41
Application to Vary Recommendations	42
Case Law and Precedents in Breach/Contravention Matters	42
Variation of Orders	46
Fixing non-parole periods	48
Correction of sentences	49
Appendix A	51

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

Pathways post an Administrative Review Hearing (ARH)



Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

1 Breach/Contravention of Court Order

The following outlines the various processes CCS staff are to follow when returning an Order back to Court for breach/contravention by non-compliance and/or alleged further offending:

1.	Discuss proposed breach/contravention with a senior officer and the offender where appropriate.	
2.	Order a LEAP (Pending charges since commencement of the Order) from Victoria Police if one has not already been requested to determine if the offender has come under further police notice.	
3.	If LEAP update indicates alleged further offending, investigate matter, commission date, result, future court date, pending summons with police or via Courtlink (consider any suspension periods).	
4.	If the breaching incident is by way of an alleged further offence, consider proceeding by way of consolidation where a future court date exists.	
5.	If further offences are in Magistrates' Court and the breach/contravention is in County Court, await the outcome of the Magistrates' Court further offences before obtaining a County Court mention date.	
6.	If no future court date exists, create a reminder in E Justice (EJS) to monitor the listing of the alleged further offence.	
7.	Where there are allegations being made regarding the breach/contravention of restrictive conditions liaison will need to occur with the Victoria Police Informant as to whether attendance at Court or a witness statement may be required in instances where the non-compliance is being disputed.	

If any late contraventions are discovered the CM must discuss these with their SCCO and action them as soon as possible.

2 Authority to breach/initiate contravention proceedings

Where an offender has failed without reasonable excuse to comply with some or all of the requirements of their Order the matter should be referred to a senior officer for a decision as to whether the breach/contravention should be returned to Court. All staff with the EJS access level CSUP role (SCM/SCCO/OIC/OM/GM) must ensure that the allegation of breach/contravention against an offender is legally sound prior (entered in EJS as BRP) to approving 'Authorities to Breach/Contravene' submitted by their CMs or approving their own work (if applicable). In cases where issues exist, the 'Authority to Breach' can remain in the status of 'submitted' or set back to 'Draft' pending confirmation.

1.	Prior to submitting the Authority to Breach, the CM must ensure all appointments, and absences (including restrictive conditions) are accurately reflected and resolved on EJS and all suspensions have been submitted for approval.	
2.	Prior to any breach/contravention proceedings being initiated the CM must submit an Authority to Breach to a senior officer for approval via EJS.	
3.	Determine whether the offender will be allowed to continue to comply with	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	their Order pending their Court appearance. Refer to DCI 5.15 Non-Compliance, Section 7.1 Breach/Contravention action – Permission to continue. CMs will be required to continue monitoring the offender and ensure the breach/contravention report is updated to reflect any additional non-compliance.	
4.	Determine whether a contravention of a CCO if proven, will constitute a breach of Suspended Sentence.	
5.	Activate the EJS 'BRP Active' flag during breach/contravention preparation and deactivate after the first six weeks if the offender is not continuing to comply with their Order conditions pending contravention outcome. (If offender continues with the Order pending contravention action, the 'BRP active' and 'Allow further credits box' is to remain ticked until resolution of contravention or offender ceases reporting).	
6.	Where the DUBI date is part of a pattern of non-compliance conduct which commenced before 16 January 2012 and continued after that date (ie, the non-compliance was on either side of the CCO reforms commencing) then you need to be cautious about the use of the DUBI date. The DUBI date is different depending on the purpose; ie, the DUBI is deemed to be 15 January 2012 for the purpose of completing the summons/warrant; but the 'real' DUBI is still used to calculate the unexpired portion for ICOs (refer to Supporting Information).	

2.1 Offender has previously participated in an Administrative Review Hearing

Further to the above, where the offender has previously gone through an Administrative Review Hearing (ARH) process, the following instructions must be adhered to (also refer to flow chart at Appendix A):

2.1.1 Offender issued with a CV infringement notice

Where the offender has been issued with a CV infringement notice by the ARH Chair, the CM must:

1.	Request a Justice Officer to verify the status of the CV infringement notice via Victorian Infringement Management System (VIMS). Where the fine has not been paid it will appear as 'open' in VIMS.	
2.	<p>Only where:</p> <ol style="list-style-type: none"> 1) There has been non-payment of the fine; and 2) An Enforcement Order has not been made; and 3) The commencement of this contravention action is within 12 months of the date of the non-compliance for which the fine was issued; then <p>The CM must:</p> <ul style="list-style-type: none"> • Contact CV Operations Division (via email to DOJ-CV-Infringement Notices) with the infringement details and request the withdrawal of the infringement notice, including offender notification. • Unless the ARH outcome also included a community work/curfew sanction, include all non-compliance referred to the ARH, including that listed on the withdrawn CV infringement notice, in the authority to contravene, schedule to the contravention charge and 'contravention of CCO constituted by' section of the contravention report (see CCS Forms). 	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	<ul style="list-style-type: none"> Refer to the ARH and outcome as part of non-compliance management in the body of the report, including that CV withdrew the infringement notice upon verification of non-payment. 	
3.	<p>Where VIMS shows the fine is paid or part paid:</p> <ul style="list-style-type: none"> the single non-compliance event listed on the infringement notice must not be referred to in the authority to contravene, schedule or contravention report because the fine payment expiates that non-compliance. the non-compliance events taken to the ARH process must not be included in the authority to contravene or schedule, but must be included in the dedicated ARH section of the contravention report (see CCS Forms) 	

2.1.1 Offender issued with an additional community work/curfew hours

1.	Regardless of whether the additional community work/curfew has been completed, all non-compliance events taken to the ARH process must not be included in the authority to contravene or schedule, but must be included in the dedicated ARH section of the contravention report (see CCS Forms)	
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2.1.2 The ARH outcome only involved case management strategies

Where an offender received neither a fine nor a community work/curfew sanction via the ARH, then all non-compliance events before the ARH panel **can be included** in the authority to contravene, schedule to the contravention charge and the 'contravention of CCO constituted by' section of the contravention report.

2.1.3 Multiple Orders

When an offender on multiple orders is referred to an ARH, and a fine/sanction is imposed, this is to be treated as an aggregate outcome relevant to both orders and the non-compliance events **cannot** be alleged in any future contravention charge for **either** order (but can be referenced in the dedicated ARH section of the report). If neither fine nor sanction was imposed, then treat as per Section 2.1.2.

2.2 Summons/Charge/Warrant

After the authority to breach has been authorised a senior officer must determine whether to proceed by way of Summons/Charge/Warrant.

For issuing a summons or warrant in respect of a breach constituted in whole or in part by a further offence, the six week Service Delivery Outcome (SDO) is calculated from the conviction date of the further offence.

2.2.1 Charge-Sheet and Summons

When a breach/contravention has been authorised for return to either a Magistrates' or Higher Court in respect of an offender whose whereabouts are known, a CM prepares a Charge-Sheet and Summons together with a Schedule. The schedule must contain the details of the Order and the manner in which it is alleged to have been breached/contravened.

Despite the provision of the *Criminal Procedure Act 2009, Sections 16 & 391*, a CCS summons should only be served on the accused, unless his legal representative accepts service in writing

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

on the offender's behalf. Service on the offender for CCS matters is necessary in the event of the offender's non-attendance, for the Court to issue a bench warrant.

If proceeding by way of Charge-Sheet & Summons, a SCCO or nominated officer provides a suitable date for the breach/contravention to be heard. The Informant must:

1.	Prepare a Charge-Sheet & Summons together with a Schedule, which must be issued by a Registrar of the Magistrates' Court.	
2.	For breaches/contraventions that are being returned to a Higher Court, a Transfer Order (located in CCS forms) must also be completed and attached to the charge and summons and schedule prior to it being issued.	
3.	Two copies are to be made of the Transfer Order, with one to remain attached to the copy of the Charge & Summons to be 'filed at Court after service' and the second copy to remain with the prosecutions brief.	
4.	Arrange for the personal service of the Charge-Sheet & Summons on the offender, at least 14 days before the hearing.	
5.	Staff must first attempt to have the offender attend the location to collect the Charge-Sheet & Summons, either by contacting them by telephone or by sending them a letter directing them to attend.	
6.	If the above is unsuccessful, either forward the Charge-Sheet & Summons with a covering letter for service by police, or follow procedures as outlined in Deputy Commissioner's Instruction 6.3 Safety and Security if it is appropriate for Charge-Sheet & Summons to be served by CCS staff.	
7.	After the Charge-Sheet & Summons together with a schedule have been served on the offender, the affidavit of service must be either sworn or declared by the person who served the documents on the offender. It is then filed with the court that is to hear the breach (along with a Transfer Order Form if applicable).	
8.	A copy of the affidavit of service is to be attached to the prosecutor's copy of the summons, which is also to include a copy of the signed Transfer Order and added to the contravention brief.	

Section 123C of the *Evidence Act 1958* defines how affidavits are sworn and taken in Victoria.

2.2.2 Charge

A Charge-Sheet can only be laid at the Magistrates' Court with the consent of the offender or their legal representative (preferably in writing).

If proceeding by way of Charge-Sheet the Informant must:

1.	Arrange service on the legal representative/offender the day that the further matters are listed (where consent has been given).	
2.	File the Charge-Sheet (and affidavit of service) to have it initiated on Courtlink.	
3.	If the Court refuses to initiate the charge prior to the matter coming before the Magistrate, arrange with the legal representative for the matter to be stood down upon the finding of guilt for this charge to be initiated by the Court.	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

This forms the basis of a consolidated breach/contravention (refer to Supporting Information - Consolidated Breach/Contravention).

2.2.3 CCS Charge Sheets and Warrants

When a breach/contravention has been authorised for a return to either a Magistrates' or Higher Court in respect of an offender whose whereabouts are unknown, the CM must prepare a Charge-Sheet & Warrant to Arrest together with a Schedule. It is important that all avenues for locating the offender be exhausted to the satisfaction of the Court before proceeding to issue a warrant for the offender's apprehension. The following must be considered:

- Is the offender in custody? Check known aliases;
- Verify accuracy of addresses on file, e.g. home visit, phone contact, emergency contact;
- Attempts made to locate or contact the offender are unsuccessful, e.g. letters returned, house vacant/new residents;
- Do other agencies that have been involved with the offender have any knowledge of their whereabouts?

If proceeding by way of Charge-Sheet & Warrant the Informant must:

1.	Prepare a Charge-Sheet & Warrant to arrest together with a Schedule which must be sworn by the informant before a Registrar of the Magistrates' Court.	
2.	For breaches/contraventions that are being returned to a Higher Court, a Transfer Order (located in CCS forms) must also be completed and attached to the charge and summons and schedule prior to it being issued.	
3.	Two copies are to be made of the Transfer Order, with one to remain attached to the copy of the Charge-Sheet & Warrant execution copy to be 'filed at Court after service' and the second copy to remain with the prosecutions brief.	
4.	Forward the execution copy and the offender's copy of the warrant with a covering letter, to the Central Records. The prosecutor's copy remains on file. Central Records will log the warrant and allocate to the closest police station to the offender's last known address for execution.	

2.2.4 Summons/Warrant Issue Date

Once the Authority to Breach has been approved and the Charge-Sheet & Summons or Charge-Sheet & Warrant has been issued by the Court or the Charge laid, EJS must be updated to reflect this. The CM must enter the issued date in the relevant field in the Authority to Breach screen and enter any relevant comments in the Summons/ Warrants tab, for example, any reason the Service Delivery Outcome (SDO) was not met.

Where an offender is in breach/contravention of a Commonwealth Order, CCS do not have the jurisdiction to issue a Charge-Sheet & Summons. In these instances, the date that the breach/contravention report is sent to the Commonwealth Director of Public Prosecutions (CDPP) should be entered in EJS as the date the Charge-Sheet & Summons is issued to avoid the SDO being missed through no fault of CCS.

Please note that the breach/contravention report needs to be sent to the CDPP and the date entered on EJS within six weeks of the breach incident for the SDO to be met.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

2.2.5 Bench Warrant

Where an offender fails to appear in the Magistrates' Court in answer to a summons the CCS prosecutor must apply to the Court for the charge alleging the breach/contravention to be adjourned to a date to be fixed and a bench warrant issued.

The CCS prosecutor must undertake the following:

1.	Receive the bench warrant and sign a receipt.	
2.	Ensure a separate bench warrant is issued by the Court in respect of each Order allegedly contravened.	
3.	Make final attempts to establish contact with the offender to advise that the Court has issued a bench warrant for their failure to appear.	
4.	Forward the warrant/s with a covering letter to the Central Records within 24-hours from the time bench warrant was issued. Central Records will log the warrant and allocate to the closest police station to the offender's last known address for execution.	
5.	Retain a copy of warrant/s, clearly marked ' Copy ' and a copy of the covering letter for file.	
6.	If the prosecution has been conducted on behalf of another location, best efforts should be made to forward the warrant/s to Central Records within 24-hours from the time warrant was issued. If this is not possible, forward the live bench warrant/s to that location, together with the CCS file/case with clear instructions.	

Where an offender fails to appear at a **Higher Court** and a bench warrant is issued, the Office of Public Prosecutions (OPP) will receive the bench warrant and forward it to the police for execution. Police may notify the OPP of the warrant having been executed. In this case, the OPP will arrange with the appropriate Judge's Associate for the matter to be listed. (Refer to Execution of Warrant section of this Deputy Commissioner's Instruction for further information about execution of Higher Court warrants).

It is imperative that 'Police Contact' EJS notifications are checked regularly in case a Higher Court Bench Warrant is executed without CCS being notified. This will ensure that CMs are aware of all police contact with their offenders and are required to investigate.

Ensure this is noted on the CCS file.

2.2.6 Review of Warrants:

A senior officer must ensure that the location has an annual **review of all warrants**. The review must include:

- A check that the breach/contravention brief is complete and includes a copy of the signed Transfer Order if the matter is to be heard in a Higher Court.
- A check that the location and contact details sent to the police/central warrants with the warrant are accurate. If not, a new letter is to be forwarded to central warrants to be attached to the warrant.
- A check of EJS, including the police attendance screen for any involvements.
- A check of Courtlink, including all aliases for any appearances.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

- A check that the information the police have is accurate and current and that offenders have not come to the attention of other areas of the criminal justice system without the warrant being executed.
- If the breach/contravention relates to a Commonwealth Order, contact needs to be made with the CDPP as to the status of the warrant and documented on file.
- Refer to Supporting Information of this Deputy Commissioner's Instruction in relation to criteria for withdrawal of warrants.

Each warrant file must contain proof via a file note/memo of each annual audit and relevant actions (if any).

2.3 County Court Consolidations

The following process will occur when the OPP are prosecuting an offender for offences that breach/contravene an existing Order and when the breach/contravention is to be consolidated.

1.	The OPP will contact the Projects Officer – Operations Directorate and provide details of the contravention and hearing date. ☎ Ph 8684-6600.	
2.	The Projects Officer – Operations Directorate will contact a senior officer at the CCS location managing the offender and inform them that a contravention brief, utilising the 'County Court Consolidation Report' in CCS forms must be completed and forwarded to the OPP by an agreed upon date. This information will be confirmed in an email to the senior officer with a carbon copy email to the CM.	
3.	The senior officer at the CCS location must, upon receipt of the email, contact the OPP to confirm the date and ensure that the complete contravention brief is forwarded to the OPP by the agreed upon date.	
4.	The senior officer is to ensure that a copy of the signed Transfer Order is included in the contravention brief.	

2.4 Breach/Contravention of Commonwealth Court Orders

These additional steps must be undertaken when considering the breach/contravention of a Commonwealth Order:

1.	Forward a copy of the breach/contravention report to the Legal Manager of the Commonwealth Director of Public Prosecutions (CDPP) by email (preferred) at kristie.eales@cdpp.gov.au or by fax: 9670 4295. The telephone contact for Commonwealth DPP breach is 9605 4486.	
2.	The Breach/Contravention Report recommendation should correspond with options available to the Court as outlined in Supporting Information Contravention of Commonwealth Orders.	
3.	If the CDPP agrees that breach/contravention action is appropriate, the Charge and Summary will be drafted by the CDPP. CCS will be notified in due course of the relevant Court date, and will be provided with a copy of the Commonwealth Charge and Summons or Charge and Warrant.	
4.	CCS is also required to provide a copy of the original charges; the original summary; and the original Informant's current contact details (if applicable), even if the CDPP was not the original prosecuting agency and therefore will not hold a file on the matter.	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

2.5 Non-Compliance with Interstate Orders

These steps must be undertaken when an offender fails to comply:

1.	Discuss non-compliance with a senior officer.	
2.	Contact originating interstate location and provide them with details of the offender's non-compliance. Inform the interstate location that due to the offender's non-compliance, Corrections Victoria is no longer willing to supervise the interstate Order.	
3.	A senior officer is to advise the Transfers Coordinator, via an email to DOJ-CV-CCS Interstate Transfers informing them of the above.	

Once contact has been made with the interstate authority, CCS is not required to await the outcome/decision of the interstate authority and therefore the Order must be discharged, the case set to complete and the file sent to archive CCS.

2.6 Breach of Suspended Sentence

While Victoria Police will know if there is a further offence/s, which breaches a suspended sentence and a current CCO, only CCS will be aware if the offender is at risk of breaching a CCO by not complying with their conditions.

As such, where it is determined that a contravention of a CCO if **proven**, will lead to a breach of Suspended Sentence, the following must occur:

1.	CM to advise the Prosecutor via a memorandum (to be placed in the Contravention Package with the Brief Head)	
2.	Where time permits, it may be appropriate for the prosecutor on the day of the hearing to liaise with the Vic Pol Prosecutor and Solicitor, regarding a potential breach of a Suspended Sentence.	

3 Breach/Contravention Report

In all cases where an offender is to be returned to court for breach/contravention, the CM must prepare a breach/contravention report. CMs must ensure:

- The report is factual and clearly reflects the allegations made;
- Allegations are specific and not generalisations;
- Allegations are supported by file notes, absentee reports, documented observations by agencies and providers, etc;
- It reflects the extent of compliance as well as non-compliance;
- Any non-compliance that has been the subject of internal action is described in the body of the report, along with a rationale for the discretion exercised on that occasion;
- The recommendation is definite and obvious given the facts contained in the report and does not contain any reference to the penalty options for the breach/contravention as this is a matter for the Court;
- The language and terminology is consistent with the expectations of the Court, and with sentencing options available in relation to the Order being breached/contravened;
- The report has been checked for spelling, grammar and accuracy;

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

- Reference needs to be made to compliance with previous Orders;
- The recommendation is endorsed by both the CM and senior officer; and
- The recommendations must be consistent with the appropriate legislation (Refer to Supporting Information – Transitional Arrangements).

3.1 ICO – Unexpired Portion

ICOs were abolished as of 16 January 2012, however all Orders made up until this date continue until their expiry. To determine the legislation that will apply when considering a breach/contravention for an ICO, refer to Supporting Information - Sentencing Reform Transitional Arrangements.

When calculating an unexpired portion, CMs must:

1.	Calculate the unexpired portion from the DUBI/DUCI to the expiry date of the Order. For a definition of DUBI/DUCI and its relevance to the summons/warrant issue date and calculation of unexpired portion for ICOs, refer to Supporting Information.	
2.	If there is make up time from prior to the DUBI/DUCI owing at the point of the breaching/contravening incident, this must be suspended in line with the suspension guidelines outlined in Deputy Commissioner's Instructions 5.6 Offender Management – Intensive Correction Orders.	

If the offender has been charged with further offences (that were committed during the period of the Order) but there has been no indication that the offender is pleading guilty, a note to the prosecutor must be included with the breach/contravention brief. This must indicate that should the offender plead guilty, the unexpired portion is xx days. This is calculated from the date of further offence to the expiry date of the Order. Any make up time at the point of DUBI/DUCI also needs to be suspended on EJS.

3.2 Combined Custody and Treatment Orders (CCTOs)

CCTOs were abolished as of 16 January 2012, however all Orders made up until this date continue until their expiry. To determine the legislation that will apply when considering a breach/contravention for an ICO, refer to Supporting Information - Sentencing Reform Transitional Arrangements.

4 Breach/Contravention Brief

All Orders returned to Court require a breach/contravention brief to be completed. Once the breach/contravention has been filed with the Court, a copy of the brief may be provided to the Magistrate/Judge, Prosecutor/OPP/DPP (copy for CCS file) and defence counsel.

The CM must complete a breach/contravention brief that meets the relevant breach/contravention brief checklist for senior officer's approval and complete the discharge in EJS once the breach/contravention is finalised at Court (unless the prosecutor is responsible for discharges at the location) subject to any appeal.

It is a senior officer's responsibility to:

1.	Re-allocate the file on EJS prior to placement of file in Summons/Warrant section.	
2.	Ensure the summons/warrant issued date is accurate when the breach/contravention brief is complete.	
3.	Where the matter is to be heard in a Higher Court, that there is a copy of the signed Transfer Order on file.	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

4.	Attach the Breach/Contravention Report in EJS.	
5.	Once a matter is finalised, ensure the prosecution is entered in EJS by the prosecutor or CM via the discharge comments and EJS outcome tab (CCO only) and the case is set to complete, if appropriate.	
6.	Ensure Criminal Records is notified of the outcome of the breach/contravention/application (Excluding CWPs) via DX or email: courtresultssection@police.vic.gov.au (Template available on CCS Form).	

4.1 Breach/Contravention Brief – Higher Court Order

A CCS representative must be available to attend the hearing of a breach/contravention in the Higher Court. The CM or a senior officer is to contact the Judge's Associate prior to the hearing date to negotiate any specific arrangements. Video conferencing is an efficient way of meeting the Courts' needs if the Court requests that the CM be present to discuss specific points around the breach/contravention matter.

These additional steps must be undertaken when preparing a breach/contravention brief for a higher court:

1.	Arrange a date of hearing in the Higher Court by contacting the Judge's Associate. Country locations with video link capacity should ask if the judge would allow for the author of the CCS breach/contravention report to appear at Court via video. If permission is granted, contact the County Court Video Link Coordinator with the details: videolinks@countycourt.vic.gov.au	
2.	The Office of Public Prosecutions (OPP) must be advised immediately via email, to the address: bail.breaches@opp.vic.gov.au, with the subject line containing the surname of the accused and the listed hearing date <i>i.e.</i> <i>Smith – contravention listed 16 September 2012</i> . The only exception relates to urgent notifications (<i>i.e.</i> the Court date is less than 5 days away), whereby the OPP is to be contacted on ☎ 9603 7537.	
3.	If the breach/contravention is by further offending (or alleged further offending) advise OPP if the offences were committed during the operational period of any suspended sentences.	
4.	Where the breach/contravention is by the commission of a further offence, a copy of the police summary (relating to the further offences) and Court extract must be obtained.	
5.	Prepare a Charge-Sheet & Summons and schedule which must be signed and dated by the informant and issued by the Registrar of the Magistrates' Court , which will direct the accused to appear at the Higher Court on the date arranged, with copies for the file. A copy of the signed Transfer Order must be attached and remain with the copy of the Charge-Sheet and Summons 'to be filed at Court after service'.	
6.	Ensure that the sworn/declared affidavit of service with a covering letter is filed with the appeal or presentment clerk at the Court where the breach/contravention is listed.	
7.	Forward the breach/contravention brief in accordance with 'Breach/Contravention Brief checklist – Higher Court' to the OPP ten working days prior to the breach/contravention hearing via email as noted above. A copy of the signed Transfer Order must be included in this brief. The brief can also be sent via fax on 9603 2558, but email is the preferred	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	option.	
8.	If the Charge-Sheet & Summons cannot be served, inform the OPP and the Judge's Associate as soon as possible so that either a new date can be set or consideration can be given to a warrant being issued by CCS.	

Other Correspondence with the OPP

All other correspondence that is currently being sent to the Manager, Bail and Breaches should also be sent via email: bail.breaches@opp.vic.gov.au. This will then be accessed by the legal support officer and requests for legal advice and other queries will then be referred to the Manager, Bail and Breaches as appropriate.

Contact details by position:

Manager, Bail and Breaches: ☎ 9603 7532

Legal Support Officer: ☎ 9603 7537

Bail and Breaches Email Address: bail.breaches@opp.vic.gov.au

Bail and Breaches Fax: 9603 2558

5 Withdrawal of Breaches/Contraventions

Prior to any consideration being given to withdrawing a breach/contravention proceeding, make sure that this is communicated to the defence counsel that a consideration will only be given if they undertake not to seek costs. If the defence counsel refuse to give this undertaking, contact CV Legal Services (DOJ-CV-Legal Services) who will advise on how to proceed.

5.1 Withdrawal of Summons

A Charge-Sheet & Summons can only be withdrawn in open Court. If CCS wishes to withdraw a Charge-Sheet & Summons, the CCS prosecutor must have the matter called and indicate to the Court that CCS is not proceeding with the breach/contravention at present and seek to withdraw.

6 Execution of a Warrant

When an 'Offender into Custody' Notification has been received on EJS and the file is in the Warrants drawer, immediate enquiries must be made to ascertain whether the CCS warrant has also been executed with police.

1.	If upon investigation it is determined that the offender's imprisonment has arisen from the execution of a CCS related warrant, CM must obtain evidence of the warrant execution details, such as an email or completion of the Warrant Execution Details Form.	
2.	If this is not the case and the offender is on remand for police matters, urgent enquiries as to the whereabouts of the CCS warrant must be made and, when located, arrangements made for the warrant to be executed and the matter listed at Court.	
3.	If the accused has been bailed by the police, inform the CCS prosecutions coordinator of the future hearing date to arrange for the matter to be prosecuted.	
4.	Obtain a Gaol Order if the offender is in custody and fax to Central Records or YTC records. Central Records ☎ 8684 6551.	
5.	Where possible, consolidation with police matters should occur.	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

6.	Obtain an updated criminal history from EJS and order a LEAP ('pending charges since:') from Victoria Police, particularly if the file has been in the warrants drawer for some time.	
7.	In the event that the matter is to be prosecuted by another CCS location, the receiving location must be advised as soon as possible and the contravention brief and file forwarded.	

The following additional step must be taken in relation to the execution of a warrant for a **Higher Court breach/contravention**:

1.	<p>A date of hearing in the Higher Court must be arranged by contacting the Judge's Associate, the OPP must then be notified of this date and the prosecution brief forwarded.</p> <p>Note: In cases where the accused has been bailed by a bail justice to appear at the Magistrates' Court for a higher court breach/contravention and fails to appear on the return date, CCS cannot make an application for a bench warrant even though the accused has failed to appear in accordance with their bail.</p>	
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The Magistrates' Court does not have jurisdiction to issue bench warrants when the matter has arisen from a Higher Court.

If there is sufficient time to reinitiate proceedings, (subject to the statutory limitations in the *Sentencing Act 1991*, refer to Supporting Information for these limitations), CCS must prepare and issue a new Charge/Summons/Warrant along with a Transfer Order (as appropriate) to appear in the Higher Court.

If there is insufficient time, the matter cannot proceed further. The actions taken must be file noted and the GM notified.

6.1 Executed Warrants Not Received by the Court

In circumstances where an executed warrant is lost in transit and not lodged at Court, the following must occur:

1.	A CCS staff member must gather evidence from the executing police officer about what happened to the warrant and document this in an Affidavit of Lost Warrant sworn at Court.	
2.	Submit the Affidavit of Lost Warrant to the appropriate Court to allow CCS to start the process of issuing a further summons/warrant (subject to the Statute of Limitations - refer to the Statute of Limitations section in Supporting Information – Sentencing Reform Transitional Arrangements).	
3.	Where the matter is to be heard in a Higher Court, a new Transfer Order will need to be issued.	

7 Lost Warrants

Where a CCS or bench warrant has been issued, remains unexecuted and subsequently cannot be located, the following procedures should be followed:

1.	Contact the police station to which the warrant was first forwarded (ask for	
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Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	the files officer) and confirm receipt of warrant. If the warrant was received, ascertain whether the warrant was executed or forwarded to another station or police information bureau for filing.	
2.	If enquiries prove unsuccessful, the only option is to seek a duplicate warrant from the Court that issued the original warrant, pursuant to the <i>Magistrates' Court Act 1989</i> section 59 (1) 'Duplicate warrants'. It is imperative that the duplicate warrant be clearly marked as a duplicate and that a copy of the affidavit in support of the duplicate warrant be attached to both the covering letter to the police and the offender's file. Where the matter is to be heard in a Higher Court a copy of the signed Transfer Order must be attached to the duplicate warrant.	
3.	In circumstances where an offender is again to appear before the Court and there is a warrant outstanding for breach/contravention proceedings that cannot be located, the above checks must be made.	
4.	If the warrant still cannot be located, consideration may be given to proceeding by way of a charge, subject to statute of limitations.	
5.	Where a charge is laid in these circumstances, the offender's file needs to reflect this procedure and the police information bureau is to be informed in writing.	

7.1 Withdrawing a Warrant

Prior to withdrawing a warrant, the following procedures must be undertaken:

1.	Order a LEAP ('pending charges since:') from Victoria Police (an EJS check will not suffice at this stage as this does not include ongoing investigation and charges yet to be laid).	
2.	If the LEAP is clear, all copies of the original warrant must be located and returned to CCS.	
3.	The matter must be returned to Court to be formally withdrawn. This must then be documented and placed on the offender's file.	
4.	If the warrant is withdrawn the discharge type of 'warrant withdrawn' must be entered in EJS (Excluding offender deaths).	
5.	LEAP must be notified that the warrant has been withdrawn. The file is then to be forwarded to Archive CCS.	

8 Breach/Contravention by further offence – Exercise of Discretion

When an offender breaches/contravenes an Order by committing a further offence, the Court exercises its discretion on the appropriate penalty in sentencing for the further offence and the breach/contravention.

8.1 Magistrates' Court

If the offender has otherwise complied with the Order, a decision as to whether or not to issue breach/contravention proceedings for the further offence must be made.

It is CCS policy that a decision not to issue breach/contravention proceedings for further offending may only be exercised once during the life of an Order. The following factors are to be considered in making a recommendation not to issue breach/contravention proceedings:

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

- further offence is less serious;
- disposition is less serious;
- if the disposition is a fine;
- offences and disposition are similar in nature to the current disposition;
- any stated intention of the Court;
- specific offender group considerations e.g. cognitive impairment;
- overall compliance with the Order.

A factor to be considered in making a recommendation for a discretionary breach/contravention is if the disposition is a fine.

Note: Breach/contravention of an ICO/ CCTO – An offender subject to an ICO or, CCTO, who is convicted of an offence punishable by imprisonment during the period of the Order, **must** be returned to Court regardless of the nature of the offence or the severity of the penalty.

The decision not to issue breach proceedings can only be made by the OIC/OM/GM. When this decision is made, CMs must:

1.	Document in EJS (Authority to Breach – Discretion), the recommendation, reasons and decision not to return an offender to Court. This is to be submitted by CM and approved by a senior officer.	
2.	Should the offences become known or be finalised after the expiry of the Order, a letter detailing the decision made and action taken needs to be sent to the offender. This is available in CCS Forms.	
3.	Notify Criminal Records of the outcome of discretionary breaches.	

Should an offender not comply with conditions after discretion is applied, the only sanctions (non-compliance steps) available are a Manager's Review or formal breach action.

Should there be a further offence:

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| <ul style="list-style-type: none"> ▪ The offender must be returned to Court. ▪ The breach report must reflect all non-compliance (including prior to the discretion). |
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8.2 Higher Court

When the commission of further offences constitutes the breach/contravention, CCS must await the outcome of these offences, before proceeding to take the matter back to the higher court. All Higher Court Orders breached/contravened by further offence must be bought before the Court.

If the further offences are not finalised (e.g., a bench warrant is issued) and the offender has also failed to comply with conditions – proceedings should be initiated by non-compliance. However, it should be noted on the breach/contravention brief head that there are also further police matters that if convicted, will require an amendment to the schedule. The OPP needs to be advised that CCS has commenced breach/contravention action and that these further matters remain outstanding.

9 Telecourt

Where the offender is in custody and a telecourt facility is available at the hearing Court, consideration should be given to having the matter heard via this process. To facilitate this:

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

1.	Arrangements must be made between the Court Co-ordinator, Central Prisoner Records and defence counsel.	
2.	If a telecourt hearing is suitable to all parties, a gaol order indicating that the matter will be heard via telecourt link-up must be prepared and faxed to central records.	

Please note: This process may vary between Court locations please discuss local process with a senior officer.

10 Applications

10.1 Applications to vary and Order

An application to vary can be made by the offender, a prescribed person (which includes Community Corrections Officers) or the Director of Public Prosecutions, and must be dated and filed at the Court prior to the expiry of the Order. If the application is being made by the offender, staff should provide the offender with the necessary paperwork, and may assist them to complete it, (ie; fill in the appropriate form, case number and provide a suitable Court date), and encourage them to seek legal advice. NB: Appropriate enquires must be conducted to ascertain whether there are any outstanding matters that would require a breach/contravention to be considered.

An application to vary must be initiated if an Intervention Order (IVO) is taken out after the Order commences and there is a conflict between the IVO terms and the conditions of the CCO, as the IVO takes precedence.

The relevant legislation dealing with variations depends on which Order is being changed:

- Repealed Sections 18 VA, 25, 46 of the *Sentencing Act 1991* continue to deal with applications to vary (including cancel) CCTOs ICOs and CBOs made prior to the 16 January 2012.
- Section 48N deals with the applications to vary (including cancelling) CCOs.

If the application is being made by CCS, the allocated CM must:

1.	Discuss the issues with a senior officer.	
2.	Where the application is being considered under section 48N (e) of the <i>Sentencing Act 1991</i> the permission for application to vary an Order document in CCS Forms is to be completed and submitted to the OM/GM for approval. Note: Records are to be kept of the number and reasons for applications of this nature.	
3.	If it is agreed an application is the appropriate course of action: <ul style="list-style-type: none"> • Complete the application template on CCS forms, ensuring the basis for the application as per <i>Section 18 VA, 25, 46 or 48 N</i> is stipulated, and • Arrange a suitable date for the listing of the matter (in consultation with the offender if possible). 	
4.	If CCS is making the application, it is preferable that an affidavit of service be completed and filed with the Court.	
5.	Ensure the application is listed at Court.	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

6.	Prepare an application to vary report.	
7.	Complete the Administrative Review Hearing (ARH) section of the report when the offender has attended an ARH <u>and</u> been issued with a fine or additional community work/curfew direction.	
8.	Where the ARH outcome involved a fine, ensure the single non-compliance event listed on the infringement notice is not included in the report unless CV has since withdrawn the fine.	
9.	Ensure the application is entered on EJS and the associated report attached.	
10.	If the matter is listed in a Higher Court forward the report with a Brief Head to the OPP.	
11.	If the Order originates from a Commonwealth matter, CCS cannot initiate the application process. This must be discussed with the CDP.	
12.	For ICOs, include in the conclusion and recommendations section of the report "for the information of the Court the unexpired portion of the ICO is calculated as XX days".	

Offenders must comply with all requirements of an Order until CCS receives a copy of the lodged application, unless acceptable, supportive documentation has been supplied indicating an inability to comply. Offenders with a restrictive condition must continue to comply.

All offenders who have lodged an application are expected to continue to comply with their conditions while awaiting the outcome of the application. A Senior Officer however, may determine that in certain circumstances, it is no longer appropriate for an offender to continue to comply with his/her Order/specific condition on an Order (i.e community work). File notes must be generated in these instances.

If the application to vary is struck out or not granted, the Order is to be suspended and the offender is to commence reporting immediately, unless they maintain they are unable/unwilling to comply, in which case breach/contravention action will need to be initiated.

10.2 Offender elects to have their CV infringement notice matter heard in open court following Administrative Review Hearing (ARH)

Refer to Deputy Commissioner's Instruction 5.15 - Non-compliance for further information about the ARH process.

If the offender is issued with an infringement notice at an ARH, but does not want their non-compliance dealt with in this manner, they can exercise their right to have the infringeable matter heard by the Magistrates' Court by applying via CCV, who will notify CV Operations Division.

Upon being notified of such an application by CV Operations Division, the CM will:

1.	Issue a <i>Court Hearing Notice for an Infringement Offence (Section 40 Notice; see CCS Forms)</i> and coordinate service of the notice on the offender within 14 days of the hearing date on the notice	
2.	Prepare a prosecution brief package with three copies of the following: <ul style="list-style-type: none"> a. <i>Section 40 Notice</i> b. Other relevant documentation that will assist the prosecutor to prove the charge, e.g. community work supervisor's 	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	statement, non-compliance report, community work sign-on sheet etc.	
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The Senior Officer will:

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| 1. | Ensure the brief package is placed in the Summons/Warrant section/sent to the prosecuting location, and this is appropriately recorded. | |
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Once the matter is finalised, the CCS prosecutor will:

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| 1. | Record the outcome of the hearing on the brief head | |
| 2. | Notify CCV of the outcome via CV Operations Division | |
| 3. | Ensure the prosecution is entered into EJS | |

10.3 Referral of the infringement matter to court at the internal review stage

An infringement may also be referred to the Magistrates' Court at the internal review stage. In such cases, upon receiving advice from CV Operations Division, the CM will proceed by the Section 40 process outlined above. Where the internal review has withdrawn the infringement notice because formal contravention action has been initiated, there are two options for the supervising CM and the Senior Officer, depending on whether the summons for the contravention has been issued or not, as follows:

1. Where the summons is yet to be issued for the contravention, the CM will:

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| 1. | Proceed to issue a summons and include the non-compliance event for which the infringement notice has been withdrawn upon receiving notification of the outcome of the review via EJS. | |
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2. Where the summons has been issued, the CM will:

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| 1. | Prepare a <i>Section 40 Notice</i> (CCS Forms) for the hearing date for the contravention and coordinate the consolidation of the infringement and contravention matters ¹ . | |
| 2. | Serve the Section 40 Notice on the offender within 14 days of the court date. | |
| 3. | Prepare three copies of the following for inclusion on the contravention brief package: <ul style="list-style-type: none"> a. <i>Section 40 Notice</i> b. Other relevant documentation that will assist the prosecutor to prove the charge, e.g. community work supervisor's statement, non-compliance report, community work sign-on sheet, etc. | |

¹ Note that the consolidation of the infringement matter cannot occur via CCS simply seeking to amend the charge on the day of court because the Section 40 Notice is required and constitutes laying of a new charge.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

10.4 Application for sentencing court review of ARH decision (community work/curfew decisions only)

Refer to Deputy Commissioner's Instruction 5.15 - Non-compliance for further information about the ARH process.

Where an offender indicates they intend to lodge an application for a review by the sentencing court of an ARH Chair's decision/direction that the offender complete additional community work or curfew hours, the CM will:

1.	Advise the offender that the direction will commence immediately pending provision of proof of lodgement of the application (stamped <i>Application for Review a Decision</i> or verification via Courtlink).	
2.	Provide the offender with an <i>Application to Review a Decision</i> template (CCS Forms; CCS cannot lodge this application) and advise the offender that they may wish to see legal advice.	
3.	Advise the offender to provide the court with a copy of the <i>Notice of the Outcome of the ARH</i> form at the time of lodging the application	

In preparation for the hearing, the CM must:

1.	List the case in the Prosecutions Register (if applicable contact the local court services unit)	
2.	Prepare the sentencing court review brief, including three copies of the following: <ul style="list-style-type: none"> ○ Copy of the Order ○ Direction to Attend ARH ○ ARH Summary ○ Notice of the Outcome of the ARH 	
3.	If the Application is listed in a Higher Court, coordinate attendance by the Victorian Government Solicitor's Office (VGSO)	
4.	Clearly note on the brief if any of the additional community work/curfew hours issued by the ARH Chair have been completed by the offender prior to the application being lodged, so that the prosecutor can provide a verbal summary to the court at the time of the hearing.	
5.	Reiterate the outcome with the offender, either by telephone or via an appointment scheduled to occur within three working days of the court hearing, coordinate necessary contracting and direct the offender to comply with the outcome of the application.	

The Senior Officer is responsible for:

1.	Transferring the brief on EJS prior to placement in the Summons/Warrant section.	
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Once the matter is finalised, the CCS prosecutor will:

1.	Record the outcome of the hearing on the brief head	
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Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

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| 2. | Enter the details of the outcome in EJS. This will generate a notification back to the CM. | |
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Where the Court has varied a direction to complete additional community work hours, ensure a manual credit back to the offender's remaining unpaid community work hours in EJS is actioned. No further action will be required in relation to completion of any additional curfew hours prior to the *Application for Review of the Decision* being lodged by the offender.

11 Progress Reports

Progress Reports will only be provided to Courts upon request from the Court.

Charges for offences that occur during the Order should be included in the progress report, despite the charges being not proven.

Unless charges which pre-date the Order have already been referred to in the Court, they should not be included in a progress report. They are relevant in what happens in the overall scheme of things and should be noted for the prosecutor in case they are raised later, but not in the progress report. These prior charges could be prejudicial to the offender, and not relevant to the issues in the progress report. This is also applicable to 'not guilty' pleas where there is a contest.

The following guide shows when staff should provide a progress report:

1.	Progress reports must not be provided to a Court, unless a specific request from the Court is made. If a request is made from a Court, a 2-week adjournment should be recommended (as a minimum).	
2.	Progress Reports should be faxed to the: <ul style="list-style-type: none"> • Criminal Coordinator at Melbourne Magistrates' Court; • Registrar at local Courts; or • Associate at the County Court. Marked " <i>Attached is a Progress Report on Mr X who is currently being supervised by CCS. To be presented to the Presiding Magistrate in the event of a finding of guilt.</i> "	
3.	Progress reports must only be provided to the Court, and not to the legal representatives	

To access information that will support this Deputy Commissioner's Instruction select Supporting information and/or Legislation and Acronyms

Rod Wise
Deputy Commissioner, Operations

This Deputy Commissioner's Instruction replaces the Deputy Commissioner's Instruction issued on the 26/03/2014

Supporting Information

The following information supports Deputy Commissioner's Instruction 5.16 Breach/Contravention and Applications.

Breach/Contravention of Court Orders

Offenders who are the subject to an Order and who are alleged to be in breach/contravention of the Order will be proceeded against in accordance with legislative and procedural requirements.

Breach/Contravention of Court Orders occurs when an offender is found guilty of committing a further offence punishable on conviction by imprisonment or fails without reasonable excuse to comply with the conditions of the Order.

Breach/Contravention of Regulations

A breach of the *Corrections Regulations 2009* Regulation 91 has similar obligations for offenders participating in community corrections programs, but the penalty for a breach under these regulations is five penalty units. There is no power for the Court to impose any alternative to the fine.

Accordingly, it is preferable to take breach/contravention action under the *Sentencing Act 1991* because of the range of options that are available to the Court.

Sentencing Reform Transitional Arrangements

Prior to 16 January 2012, it was an offence to breach a CCTO, ICO or CBO and the penalty for such a breach is a maximum fine of 10 penalty units. It was however not an offence to breach a suspended sentence.

From 16 January 2012, a new 'contravention' offence now carries a maximum of three months imprisonment, and is not restricted to contraventions established by the new provisions of the new CCO. It also applies to contraventions of existing suspended sentences and other sentencing Orders abolished by the new Act, however transitional arrangements are in place for these 'old' Orders (i.e. CBOs, ICOs and CCTOs) which decide how to charge the non-compliance.

The type of charge (ie, whether it is under the old law or new law) is decided by the dates of the offender's failure to comply with the conditions of their Orders (including re-offending). There are three scenarios:

- Where the dates are all prior to 16 January 2012, then the matters are to be proceeded by way of **breach** using the old offences in the sentencing legislation (section 47 for CBOs, Section 18W for CCTOs and Section 26 for ICOs).
- Where the dates are before and after 16 January 2012, then the matters are to be proceeded by way of **breach** using the old legislation.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

- Where the dates are on and after 16 January 2012, then the matters are to be proceeded by way of **contravention** using the new legislation (Section 83AD for CCOs; Section 147; Schedule 3, Clause 10(1) for CBOs, Clause 9(1) for ICOs and Clause 7(1) for CCTOs).

Statute of Limitations

Breach proceedings (where all the non-compliance was committed before 16 January 2012) must be commenced within three years of the DUBI.

Contravention proceedings must be commenced within:

- **Six months** after offender being convicted/found guilty of further offence **or two years** of the Order ceasing to be in force, whichever is the shorter;
- **One year** of Order ceasing to be in force where contravention is not related to further offending (contravention constituted by non-compliance with conditions only).

In the context of section 83AH "while the Order is in force" means while the Order is active and hence has not expired.

Authority to breach/initiate contravention proceedings

Prior to authorising a breach/contravention or arranging a prosecution date, the authorising officer must vet the breach/contravention documents to ensure that the paperwork meets certain requirements;

- There is an initial signed contract on file, in respect of all relevant terms and program conditions;
- That further CW contracts have been signed by all parties or document where a lawful direction was given to attend;
- All unacceptable non-compliances have been correctly documented, and the reasons for the unacceptability are clearly documented;
- Any medical certificates that are to be relied upon are on file, as are all relevant file notes;
- If the breach/contravention is by further offence, there is a certified extract of conviction to prove the date and relevant police summary (Higher Court matters only).

For matters to be heard in a Higher Court:

A Transfer Order must be completed and attached to the appropriate breach/contravention paperwork, namely Charge & Summons/Warrant, specifically the paperwork 'to be filed at Court after service' and the 'copy for the prosecutor'. The relevant paperwork must be filed in accordance with Sections 83AG(1), 83AI (1), 83 AJ(1) of the *Sentencing Act 1991*

Transfer Orders

All Higher Court breach/contravention proceedings need to be followed as per Sections 83AG and 83AJ in the *Courts and Sentencing Legislation Amendment Bill 2012*.

Section 83AG stipulates that all breach/contravention proceedings commence in the Magistrates' Court by way of filing a Charge-Sheet (in addition Summons/Warrant). For all Higher Court matters, Section 83AJ states if the proceeding for a breach/contravention is commenced under section 83AG for an offence under section 83AB, 83AC or 83AD, but the Magistrates' Court did not make the original Order, the Magistrates' Court must order that the proceeding be transferred to the appropriate venue of the sentencing Court and this is to occur by way of a Transfer Order.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

No date should be obtained from the Court until this information is available. Staff must be able to prove the non-compliance is 'without a reasonable excuse'. If an offender contests the allegations, it is important that documentation is available to support the allegation.

BRP Active and Allow Further Credits Box

The BRP Active box means the Order is still active while the breach/contravention brief is being prepared and/or the offender is still complying with the Order.

The senior officer approving an authority to breach must ensure the BRP Active box remains **ticked** upon approving breach/contravention action. A reminder to the CSUP user is then generated six weeks after the breach/contravention has been authorised. This prompts the CSUP user role to check the progress of the breach/contravention preparation.

If the offender elects to continue with the Order pending breach/contravention action, the BRP Active box is to remain ticked. The 'allow further credits box' will also need to be ticked to enable the continued adding of appointments and attendances.

These notifications will continue to be sent on a six weekly basis pending the expiry date of the Order.

Date of Ultimate Breaching/Contravening Incident (DUBI/DUCI)

The DUBI/DUCI is the date of the last unacceptable non-compliance or the commission date of a further offence (whichever is the earliest) that triggers the decision to commence breach/contravention proceedings.

The DUBI/DUCI must be entered into E*Justice at the time of submitting the Authority to Commence Breach/Contravention action for the following reasons:

- To generate a 6-week summons/warrant issue date for CCS to meet Service Delivery Outcomes (SDOs), and
- To calculate the unexpired portion of ICOs and CCTOs.

For ICOs, if the breach/contravention is constituted in part by the commission of further offences and CCS has been unable to confirm if the offender is pleading guilty to these, the DUBI/DUCI date for the unexpired portion calculation should be the last unacceptable non-compliance. However, a note to the prosecutor must be included to advise of the alternate DUBI/DUCI date and recalculate the unexpired portion if the further offences are proven as this may alter the unexpired portion.

Completing the Schedule

See Section 2 when offenders have attended an Administrative Review Hearing.

Alleging instances of non-compliance

All unacceptable instances of non-compliance must be alleged. Where the offender fails to report within two clear working days and attempts to locate the offender are unsuccessful, the breach/contravention allegation should be:

- 1) Failure to report to (location) Community Correctional Services specified in the Order within two clear working days after the Order coming into force.

Alternatively, where CCS receives information that the offender is no longer at their last known address:

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

- 2) Failure to notify a change of address within two clear working days.

Do not rely on any absence communicated in a letter forwarded to an address believed not to be current.

If the period allowed for the completion of community work has not expired, specific non-compliances should be alleged.

Where the period has expired, it is sufficient to allege the breach/contravention as follows:

- 3) 'Failure to perform (the required number of hours of unpaid community work) during the period specified in the Order'.

Alleging further offences on a Charge-Sheet and Summons

Staff should only be alleging further offences that are punishable by imprisonment on a summons/schedule if the charges/s have been proven and a penalty imposed.

However, schedules can be orally amended on the day of the hearing by the CCS prosecutor if the offender is found guilty of further offences.

Alleging further offences on a Charge-Sheet and Warrant

Note a schedule to Charge and Warrant **must not include alleged** further offending.

A memo to the CCS prosecutor must be included on the breach/contravention brief to advise of pending/outstanding further offences and schedules can be orally amended on the day of hearing by the CCS prosecutor if the offender is found guilty of further offences.

Completing the Breach/Contravention Report

CMs will ensure:

- The report is factual and clearly reflects the allegations made;
- Allegations are specific and not generalisations; and
- Allegations are supported by file notes, non-compliance reports, documented observations by agencies and providers, etc.

The breach/contravention report template requires information to be listed under the following headings:

Offences for which admitted to Order

All charges identified on the Order and schedule should be detailed.

1.	If the Order arises out of an appeal, the Magistrates' Court details, together with the result of the appeal, should be included. These details should also be included on the schedule to a summons or warrant.	
2.	The appeal detail should be provided first with a notation "arising out of:" followed by detail of the original court appearance	
3.	Where the Order arises out of a breach/contravention of a previous Order/s this should also be indicated. e.g. " <i>This Order arises out of a contravention of a previous CCO imposed at Melbourne Magistrates' Court on xx/xx/xxxx.</i> "	
4.	Where the Order relates to a CCTO, indicate any pre sentence detention	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	time and the offender's release date.	
5.	Where the Order has subsequently been varied this should also be indicated. e.g. <i>"It should be noted that on xx/xx/xxxx Mr X successfully applied to the Melbourne Magistrates' Court to have the outstanding community work hours (23) deleted due to ongoing health difficulties."</i>	
6.	Where a number of Orders have been breached/contravened, the same report may be used, provided the allegations are the same and the recommendation is relevant/ warranted in relation to each Order.	
7.	Any period/condition suspended needs to be documented in the report.	

Breach/Contravention of Order constituted by – (Allegations)

Instances of non-compliance should be presented in a non-compliance table with supporting narrative contained in the Response to Order section of the report. Only unacceptable non-compliances/incidents are to be documented in the table.

Date	Condition	Non-Compliance/Action

Where there is a failure to notify change of address or a breach/contravention of any terms that does not have a date this must be included in the table.

Where the offender fails to notify of a change of address precluding the possibility of further directions, CMs should detail attempts to re-establish contact with the offender.

Any non-compliance that has been the subject of internal action should be mentioned in the body of the report, and the rationale for the discretion exercised on that occasion.

Breach/Contravention constituted by further offence

Include all relevant details regarding further offending, including actual commission dates of offences.

- Where the commission date of further offences is specified as between two dates, the CM is to utilise the earliest commission date to determine the DUBI/DUCI (for ICOs only).
- Where offences have been formally alleged in previous breach/contravention proceedings, these should not be again relied upon as the offender has been dealt with, but the details should be provided in the body of the report.

Response to Order

This section requires information to be provided regarding all Order conditions. Eg. treatment and rehabilitation, curfew etc.

Unpaid Community Work – CBOs/CCOs

The hours ordered and completed should be reflected as follows:

- Hours Ordered: (state no. of hours – 200)
- Hours Completed: (state no. of hours – 50)
- Hours Outstanding: (state no. of hours – 150)

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

Where there is a recommendation to allow a CBO/CCO to continue but more time may be required to allow for the completion of unpaid community work hours, this should be indicated in the report.

ICOs and Unexpired Portion

It is preferable to separate out conditions under relevant sub-headings for ICOs, e.g. twice weekly reporting, community work, and other, if some part of the hours in excess of 8 has been utilised by other means.

The unexpired portion will be the number of days from the DUBI/DUCI, to the expiry date, after all suspensions have been approved.

Therefore, any make-up hours owing at the time of DUBI/DUCI must be suspended and reflected in an extension of the expiry date of the Order, prior to the unexpired portion being calculated. In addition, after obtaining the EJS calculation, the approving officer must ensure all suspensions (if applicable) have been entered to ensure the number of days from the DUBI/DUCI to the new expiry date equals the EJS calculation. Furthermore, if the ICO has been suspended, refer under the Order details table at the start of the report about what conditions were suspended and for what reason.

The unexpired portions should be **calculated in days, not in hours and included in the recommendation section NOT the community work section of the breach/contravention report.**

The *Sentencing Act 1991* stipulates that the unexpired portion is the period that was unexpired at the date of the offence. The offence refers to the DUBI/DUCI. This means that CCS does not have the authority to calculate an unexpired portion by simply subtracting completed community work hours from the 12 hour per week commitment.

The unexpired portion is calculated by EJS as follows: **(for information only, not to be included in the breach report)**

ICO Hours required for entire Order:	220
ICO Hours completed as at the DUBI/DUCI:	20
ICO Hours outstanding:	200

200 hours is then divided by 1 hour and 43 minutes (1.714), being the ICO requirement for one day to determine how many days are outstanding = 116 days.

The following statement is included in the Breach/Contravention Report Template. Staff are to tailor this to the individual case:

'The unexpired portion of this ICO is calculated from that date of breaching incident / date of contravening incident (enter the DUBI/DUCI here) to the expiry date of the Order (enter date here) taking into account any periods of suspension.

The date of breaching incident / date of contravening incident is the non-compliance when breach / contravention action was deemed by CCS to be appropriate or the commission date of any further offending, whichever comes first'.

Should the breach/contravention be constituted in whole or in part by the commission of further offences, the breach/contravention report must indicate that unless exceptional circumstances are found, the accused must be committed to custody for the unexpired portion and be served cumulative upon other State sentences unless otherwise directed.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

Pre-Sentence Detention (PSD) re: ICO Breaches

The Court may consider any time spent on remand to be considered as "time served". An accused can be credited with PSD if they are remanded in custody on either a) offences committed after the ICO was imposed or b) on a warrant in relation to the breach alone (NOTE: very rare that the offender would be remanded on breach alone).

For example; If an offender is remanded on further offending, PSD would be applied to the further offences only.

For example; If an offender is remanded on a warrant in relation to the breach of ICO alone, the PSD can be applied to the breach alone

CCOs/CBOs

Where there is a recommendation on a CBO/CCO breach/contravention for re-sentencing, and the matter proceeds, the report may act as a recommendation for further suitability for an Order, providing no other conditions are to be attached. Any recommendation is inappropriate on a warrant matter, and the offender should be re-assessed formally when the matters are finalised.

Where there is a recommendation on a CBO breach/contravention for re-sentencing, and the matter proceeds, the report may act as a recommendation for further suitability for an Order. Note: If the Court is considering re-sentencing for a further Order on a CBO, an assessment for a CCO must occur. Where there is a breach of a CCO and the Court is considering variation/confirmation, discretion can be applied on a case-by-case basis as to whether a re-assessment is required.

A new assessment must occur if the breach/contravention includes further offences not originally assessed for and if the Court is considering attaching additional conditions that are not currently attached to the Order.

Any recommendation is inappropriate on a warrant matter, and the offender should be re-assessed formally when the matters are finalised.

Conclusion and Recommendation

Recommendations must be consistent with the information contained in the body of the report and the legislation that applies to sentencing options.

A summary of the breach/contravention, compliance and relevant personal circumstances, where appropriate, should be included, as should a recommendation for dealing with the breach/contravention that is consistent with the appropriate legislation. It may be appropriate to include the offenders past history of non-compliance with previous CCS Orders. However, this **must not** include a recommendation as to a penalty for the breach/offence of contravention itself.

Where the accused is in custody because of further offences the earliest eligibility date for release (EED) should be specified as this may affect the court's sentencing process.

The senior officer is to review the comments and where appropriate add or delete any necessary points and co sign along with the author.

Use of additional reports

Where a CM quotes from a professional report, the CM should include details of the author's name and qualification (if known), the date of the report, and ensure that the quote is not taken out of context. The CM should ensure that a copy of the report is available should the information be questioned. The CM should ensure the author of the report is aware that their report is to be used in Court, and the purpose of this use. If it is clear that a professional does

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

not permit the use of their report in Court during breach/contravention action (from verbal advice or written instruction on the report), then the report cannot be used, and mention of this should be made in the CM's report.

Reference can be made to any reports tendered to the Court during the sentencing process for the Order.

Victim Impact Statements (V.I.S)

The Court, in re-sentencing, must have material in relation to the original offences presented, and the Magistrate may want to see the V.I.S before deciding on an appropriate penalty.

On many occasions, the Magistrate hearing the breach/contravention is not the Magistrate who imposed the Order. If the V.I.S was tendered at the original hearing this should also be tendered as part of the CCS prosecution case.

Listing the Breach/Contravention

Breach/Contravention proceedings in respect of a Court Order require that a charge is filed by a prescribed person or a member of a prescribed class of persons. The legislation relating to initiating breach/contravention action in relation to supervised Orders is contained in the *Sentencing Act 1991*.

Prescribed Person

Section 3(1) of the *Sentencing Act 1991* defines a 'prescribed person' as a person prescribed under the Act.

Regulation 31, (or 31A in relation to contravention of higher Court Orders), of the *Sentencing Regulations 2011* states that a Regional Manager or a Community Corrections Officer are prescribed persons for commencement of a contravention proceeding.

Regulation 25 of the *Sentencing Regulations 2011* states that a Regional Manager or a Community Corrections Officer are prescribed persons to apply to the court to vary a CCO.

Section 328 of the *Criminal Procedure Act* gives a party the right to appear personally (s.328(a)), which applies to an informant, or by a legal practitioner (s.328(b)), or by a prescribed person for appearances in court under for pre 16 January 2012 breaches or non-compliances .

Affidavits

An affidavit is a written statement given in place of oral evidence. The person making the statement is referred to as the deponent. A deponent must sign his or her affidavit and swear/declare the truth of its contents, either by taking an oath or making an affirmation. It is a criminal offence to make a false affidavit.

Affidavits are made by Community Correctional Officers to confirm that a summons has been served on an offender and should be made as soon as possible after service has been effected. There is provision on the rear of the copy of the summons returnable to the court for the details of service to be sworn or declared. Details relating to the service of a summons should also be included in the prosecutor's brief.

Gaol Orders

Gaol orders are prepared to bring offenders to court for listed breach/contravention proceedings. When an offender is in custody, a summons can still be served on an accused. However, the

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

CM also needs to prepare the appropriate gaol order to ensure that the authorities are aware that the offender is required to attend Court.

Where an accused is known to be in custody and has an outstanding CCS warrant to arrest, the warrant should be recalled from central warrants if applicable and returned to the Court unexecuted with a request that the breach/contravention be re-listed. A gaol order must then be obtained for the hearing date.

In no circumstance should a gaol order be issued to get an accused out to Court or the police station in order to execute a warrant. Gaol orders may only be issued if there is a matter already before the Court. Until a charge is laid and filed with the court or a matter re-listed before the court, there are no grounds to issue a gaol order.

Bail

On occasions, CCS may be required to address the Court in relation to an offender's suitability for bail. CCS advice should be based on the following considerations:

- Whether there are any outstanding police charges which, if proven, would constitute a breach/contravention of the Order and what the police attitude is to bail;
- Nature of original Order and seriousness of breach/contravention;
- Criminal history (in particular failure to appear on bail and breaches/contraventions of previous Orders);
- CCS recommendation;
- Possible outcome of breach/contravention;
- Impact of other warrants executed at the time; and
- Personal issues relating to the offender, e.g., mental and physical health, residence.

It may be appropriate to oppose bail in some circumstances, e.g., prior breaches/contraventions of bail, history of failure to appear on bail. If granted bail the prosecutions coordinator is to be informed of the hearing date to arrange for the matter to be prosecuted.

Where an offender has had a history of failing to appear at Court and/or a number of bench warrants have already been issued in respect of the breach/contravention proceedings, it is recommended that the covering letter, that is attached to the bench warrant and forwarded to the police; include for their attention an endorsement similar to the following examples:

- This offender has a history of failing to appear and therefore;
- This is the second/ third/bench warrant issued in respect of these breach/contravention proceedings and therefore; or
- Caution should be exercised when considering eligibility for bail. It may be appropriate for the issue of bail to be determined by a Magistrate.

Withdrawal of warrants

There are a number of practical implications for CCS where warrants remain unexecuted for a considerable period. These implications include:

- Evidence to support allegations of breach/contravention by conditions may no longer be available as the relevant CM is no longer employed by CCS;
- Original Court documentation and records may no longer be available and, given that re-sentencing may be required, difficulties may be encountered; or
- The awarding of costs against CCS because of the inability to provide evidence or the required documentation.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

CCS **will not** withdraw warrants in the following circumstances:

- If the Order is a CCTO, ICO, ESO or Supervision Order;
- If the Order originated in the County or Supreme Court;
- If the breach/contravention is constituted in whole or in part by the commission of a further offence (unless requested by Victoria Police and/or the warrant is in excess of 20 years). If this further offence is yet to be proven, follow up with the police informant is required to monitor the situation and ensure that the matter is still proceeding; or
- If the Order was imposed for offences which were committed during a period of Parole. (The outcome of the breach/contravention may have an effect on the Parole Order).

CCS will withdraw warrants after seven years from the expiry date of the Order, in the following circumstances:

- The Order is a CCO, CCO.CW, CBO-FD or a CBO-CW or a CBO or CWP; or
- The Order is not excluded by any of the dot points specified in the "**will not** withdraw" section above (Refer to section 6.1 for procedure).

Prosecutions

Prosecutions/Applications should be listed on Court Mention days. These are days set aside for the hearing of cases in which the accused will plead guilty. There may be occasions such as in the case of a consolidation of breach/contravention proceedings with further police matters, or a warrant being executed, that the matter will be listed on a day other than the normal mention day.

In instances where the information contained in the breach/contravention report is out of date and management comments may no longer be appropriate, the prosecuting officer must consider updating the material for the court by way of either an addendum report or an oral update.

Files coming to Court Services Unit (CSU) for prosecution

Any potential prosecutions need to be 'booked in' before sending a CCS file or a 'breach/contravention brief folder' to the Court Services Unit.

If you want to advise CSU staff members of potential prosecutions, assessments, or any concerns in relation to 'Corrections specific' matters at the Melbourne Magistrates' Court, email staff on DOJ-North Metro Region-Court Service Unit-CCS Staff or contact staff on the following numbers: ☎ 9628 7918, ☎ 9628 7956, ☎ 9628 7941, ☎ 9628 7940.

For all other Courts please see below:

DOJ-CV-CCS South Metro Prosecutions

DOJ-CV-CCS East Metro Prosecutions

DOJ-CV-CCS North Metro Prosecutions

DOJ-CV-CCS West Metro Prosecutions

DOJ-CV-CCS Grampians Prosecutions

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

DOJ-CV-CCS Loddon Mallee Prosecutions

DOJ-CV-CCS Hume Prosecutions

DOJ-CV-CCS Gippsland Prosecutions

Staff are to provide details i.e. Offender Name, Person ID, and type of Order, and liaise with a CSU staff member, who will provide a prosecution date.

Files requested by defence lawyers in the prosecution

Where an offender is being prosecuted for breaching/contravening an Order, circumstances may arise where they or their lawyers request to view the offender's CCS file. As the prosecutor, CCS has a legal obligation to provide all relevant information to the accused, confirmed by s383 of the *Criminal Procedure Act 2009*. This duty exists even in the absence of an Freedom of Information (FOI) request or a subpoena to produce the file.

Where the accused requests to see the CCS file, the following should occur:

- Clarify with the defence lawyer or offender what information is being sought from the file prior to the hard copy being provided or a copy of the file is made;
- The file must be reviewed before it is provided, as there are certain classes of document that can be reasonably withheld. These include supervisory notes between CCS staff, confidential psychological reports (unless provided by the defendant themselves) and legal advice; and
- If documents falling into these categories are removed from the file, it is important to advise the accused's lawyer what classes of document are withheld and why, and keep a copy/record of any withheld documents so that this is clear if the matter proceeds to contest.

CCS must ensure that the file is provided in a timely manner in these situations. Often it is most convenient just to give access to the file at court, but the defendant's lawyer can still insist on a copy of the file if they so wish. This will assist in reducing the likelihood of costs being sought against CCS if there are delays, which could otherwise be avoided.

CCS staff can contact the CV Legal Services (DOJ-CV-Legal Services) if clarification is sought regarding documents that can be released, however this should only occur after a CSPC representative and or the Regional General Manager has been consulted.

Tips in prosecuting

- Prepare a chronology. Some Judges/Magistrates' will want you to take them through the whole history of the matter.
- Know your Judge/Magistrate – every contravention is different and every Judge/Magistrate will approach it in a different way.
- Speak to the defence before the matter is called and identify any issues they may have and how they want to approach the matter.
- Make sure you have copies of any Acts or authorities you will be seeking to rely on.

If you are not sure, have the matter stood down and seek advice. It is better for your standing before the Court to get it right than to have to go back later and correct an Order.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

Guidelines for a Progress Report

A written Progress Report should commence with a heading "Current matters before the Court", which then lists the charges. This ensures that the court is aware of what CCS understands the charges to be and provides a context for the remainder of the report (for example, CCS may understand that the current charges relate to shop thefts, however at the last moment further more serious charges may be consolidated).

The Progress Report should detail the current Order/s, provide a brief situational assessment and summarise compliance and progress to date.

When recommendations are not required, generalised statements may be of assistance and might prevent the need for a request for an assessment. Where the current matters precede the Order, such a statement might read:

... "Mr. Jones has been compliant with the requirements of his Order to date and it is reported that he actively participates within offending behaviour programs. Mr. Jones appears to be making positive progress in utilizing learned problem solving skills and his circumstances within the community appear to be comparatively more stable. Should the Court deem it appropriate to allow Mr. Jones to remain in the community, it is believed that his involvement with community correctional programs may be of continued benefit".

Consolidations

Always consult with an offender's legal representative whenever a consolidation is to be considered. A consolidation can be considered when:

- A conditions breach/contravention has occurred and further charges that will breach/contravene the Order are to be heard. In these instances, a breach/contravention report replaces the need for a progress report;
- A legal representative requests that a breach/contravention proceed on the day that the offender is to appear before the Court in relation to further charges that will breach/contravene the Order;
- Where an offender is the subject of an Order and is being considered by the Court for a further Order in relation to offences which will breach/contravene the original Order;
- Consolidations can only be considered in the Magistrates' Court where the further charges are to be finalised in the Magistrates' Court; or
- When the OPP are prosecuting an offender for offences that will breach/contravene an existing Order. The OPP will request CCS to prepare a consolidation brief.

Should the Court wish to dispose of the matter by way of a further Order, and the Order expired some time ago, it is preferable that a further assessment be conducted as to the offenders' current suitability.

If the Order sought by the court is of a different type to that breached/contravened a further assessment is required.

Disputed Breach/Contravention Contest mention

On a mention day, if the offender wishes to plead **not guilty** to the breach/contravention, the case should always be adjourned for a "contest mention" when the substance of the contest will be examined by the Court. If the matter cannot be resolved; it is booked in for a contested hearing.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

The Magistrates' Court guidelines for the contest mention system state that a contested matter must first be listed for contest mention prior to it being listed as a contested hearing.

The following procedures apply when an offender disputes CCS breaches/contraventions:

1.	The CCS prosecutor will consult with their senior officer who co-ordinates breach/contraventions at the location to discuss further steps to be taken.	
2.	It is the expectation that, where possible, negotiation will occur between CCS and the offender's legal representative to resolve this contest. This may require the withdrawal of an allegation e.g. community work non-compliance.	
3.	In the event that further advice is required, contact the relevant area Court Services Practice Committee (CSPC) representative.	
4.	If the outstanding issues cannot be resolved, the matter is to be referred for a contest mention.	
5.	Before agreeing to a date for the contest mention, the CCS location is to ensure that an experienced officer or member of the CSPC is available and able to attend on the proposed hearing date.	

In relation to the Higher Courts, there is no formal contest mention process. If the breach/contravention is disputed, the OPP will apply to have the matter adjourned. In the first instance, a conference will occur between CCS, the OPP and the accused's legal representative. If the matter cannot be resolved, it will be listed as a contested hearing and OPP will provide CCS with further direction as to what further evidence or witnesses will be required.

Contested Hearing

If the contest mention does not satisfactorily resolve the breach/contravention, the CCS officer is to have at least two suitable adjournment dates that would enable all potential witnesses to attend the contest hearing. These dates should be at least a month from the contest mention date in order to allow sufficient time for counsel to be briefed by the CV Legal Unit.

1.	The senior officer responsible for the Court Advice / Prosecutions Portfolio at locations need to determine in consultation with originating location of the most suitable witness' that may be required	
2.	The CV Legal Unit must be advised whenever a breach/contravention is proceeding to a contest hearing. The CV Legal Unit must be given sufficient notice if counsel is to be engaged to represent CCS.	
3.	The CV Legal Unit is not always in a position to appear in contested breach/contravention hearings and may therefore brief counsel to appear on behalf of CCS. Costs incurred are borne by the relevant CCS location.	
4.	When setting dates for a contest hearing, enquiries must be made to ensure that all relevant witnesses who may be required will be available to attend the hearing for example Victoria Police informant if regarding restrictive condition	

CCTO Breaches/Contraventions Whilst in Custody

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

A breach/contravention of a CCTO can arise when a prisoner refuses to participate in treatment while in prison, and is determined to constitute non-compliance.

- Prison providers will advise the Sentence Management Unit (SMU) Drug and Alcohol; Assessors of a prisoner's non-compliance;
- The Manager of the SMU will in turn advise CCS;
- The prison provider will prepare a report and send a copy to the SMU who will forward it to the person responsible for prosecutions at the CCS location closest to the prison.

1.	It will be the responsibility of CCS to make a decision regarding returning the prisoner to Court and to instigate a breach/contravention on the basis of the information provided via the breach/contravention report.	
2.	CCS will be the informant for such breaches/contraventions.	
3.	The allocated CM should prepare a breach/contravention brief and gaol order as outlined in Section 4, page 12 of this Deputy Commissioner's Instruction.	

Breach/Cancellation of a Drug Treatment Order

If an offender fails to comply with a Drug Treatment Order, the Order can be cancelled under Section 18ZL, 18ZN or 18ZP of the *Sentencing Act 1991*. This application to cancel can be brought by either the Police or CCS. If an application is granted by the Drug Court, the offender may be ordered to serve a portion or the entire original custodial portion attached to the Drug Treatment Order.

In Custody Interstate

Where an offender has breached/contravened an Order, and is known to be in custody interstate, contact should be made with the interstate correctional agency to advise that breach/contravention action is to be taken and that a warrant is to be issued for the arrest of the offender. The offender's current circumstances and EED need to be established and recorded. If the offender indicates a willingness to have the matter resolved, the offender is to be advised to contact the relevant police station to arrange their arrest upon their return to Victoria.

Commonwealth Orders

Procedures and the sentencing options available under the Commonwealth *Crimes Act 1914* are considerably different from those relevant to state offenders. CCS cannot lay charges or issue summons/warrants in respect of breaches/contraventions of Orders made in respect of Commonwealth offences. The letter (C) identifies Commonwealth offences after the charge on the Order.

Breaches/Contraventions of Commonwealth Orders are brought before the court pursuant to sub-section 20AC (2) of the Commonwealth *Crimes Act 1914* (not the Victorian Sentencing Act 1991) and are initiated by the CDPP.

If the Court is satisfied that the accused has, without reasonable cause or excuse, failed to comply with the sentence ordered then the following sentencing options are available to the court pursuant to section 20AC (6):

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

- (a) Impose a pecuniary penalty not exceeding 10 penalty units; or
- (b) Revoke the original Order and re-sentence the offender for the original offences; or
- (c) Take no action.

Please note that unlike State breaches/contraventions an Order cannot be confirmed or extended in addition to imposing a pecuniary penalty/fine.

State and Commonwealth Offences – Concurrent CCOs/CBOs/ICOs imposed for both

When the Court has imposed a separate state CBO/CCO/ICO to run concurrently with a Commonwealth CBO/ICO and both Orders have been breached/contravened, it is usually preferable for the breach/contravention proceedings to be consolidated (together with the hearing of any further offences, if appropriate).

Magistrates often refuse to hear one matter unless the other or others are also listed. In such cases, liaison between CCS and CDPP is crucial and much time can be saved if both agencies communicate effectively from the outset. It is important that CDPP be consulted before a date for hearing is selected to ensure that a Commonwealth prosecutor is available to appear at the breach/contravention proceedings.

State and Commonwealth Offences – Warrants

In matters where both state and commonwealth CCOs/CBOs/ICOs have been breached/contravened by an offender and Warrants to Arrest are issued in relation to both because they have failed to appear on summons, it is imperative that the CDPP is notified if the State warrant is executed and the breach/contravention matter is listed for hearing. In such cases, efforts will then be made to have the Commonwealth breach matter listed for hearing on the same day.

Breach of Bonds/Recognisances

As soon as the CM becomes aware of any further offences committed by a Commonwealth offender on either a bond or recognisance, they must contact the Commonwealth Director of Public Prosecutions:

GPO Box 21A MELBOURNE VIC 3001 (postal address)
22nd Floor, 200 Queen Street MELBOURNE VIC 3000 (business address)
Telephone: (03) 9605 4333

The Commonwealth DPP will generally try to consolidate the breach with further matters.

Ex parte Hearings

In some cases, the Court has the power to hear and determine the charge in the accused's absence based on a summary given by the CCS prosecutor.

If an accused does not appear in answer to a summons to a charge for a summary offence, the Court may proceed to hear and determine the charge in the accused's absence'.

Breaches/Contraventions of CBO-FD, FCO and FD-CW are the only breaches/contraventions that may be dealt with in this manner. However, not all Magistrates' will agree to breach/contravention proceedings being dealt with ex parte (in the accused's absence). Where a

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

Court is not prepared to hear the matter *ex parte*, the prosecutor should apply for a bench warrant.

Awarding Costs

There are two scenarios where a Court might be required to consider the issue of costs, but the accused's lawyers are always ready to seek costs for adjournments, errors or oversights.

Criminal Procedure Act 2009 Section 401

In all proceedings, including breach/contravention or applications to vary an Order, the Court may consider awarding costs against either the informant or accused. Pursuant to the *Criminal Procedure Act 2009* Section 401, costs in all proceedings are awarded at the discretion of the Court – and the Court can determine by whom, to whom and to what extent costs are to be paid.

In determining costs, the Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the Court is satisfied resulted in prolonging the proceeding. (Section 401 (2))

Appeal Costs Act 1998 Section 17 (1) (Act No. 87 /1998)

- i) If the hearing of any criminal proceeding is adjourned, and
- ii) The reason for the adjournment was not attributable in any way to the act, neglect or fault of a party accused / or convicted or that party's legal practitioner; and
- iii) That party pays, or is ordered to pay any additional costs as a consequence of the adjournment – that party may apply to the Court for (and the Court may grant) an indemnity certificate in respect of that party's cost.

Defence counsel makes applications of this sort. Examples of when an application might be made are:

- Gaol order not issued and offender not before the Court, or
- Police require an adjournment in a CCS/Police consolidation.

Appeals

In cases where an offender has lodged an appeal against a **Magistrates' Court** Order, the Order is 'stayed' pending the hearing of the appeal. (*Refer Criminal Procedure Act 2009 – section 264*).

In this case, the file is allocated to a CM to monitor the outcome at the receiving location. Reviews will need to be completed during the period that the Order is in stay.

In cases where the DPP lodges an appeal against a **Magistrates' Court** Order, the Order is **NOT** stayed pending the hearing of the appeal, and continues to operate in full.

In cases where an offender has lodged an appeal against a **County or Supreme Court** Order, the Order is not stayed and continues to operate in full. The following procedures apply:

1.	Confirm that an appeal has been lodged with the appropriate Court by: <ul style="list-style-type: none"> ▪ Sighting a copy of the Notice of Appeal held by the offender, or ▪ Contacting the appropriate Court to confirm that an appeal has been lodged and whether the offender has been admitted to bail pending the hearing of the appeal. 	
2.	If the offender is in custody confirm which sentences are the subject of the appeal.	

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

3.	If some are not subject to appeal, these continue to operate as if no appeal had been lodged. Note: There may be instances where the offender appeals against the Order and is held in custody as a result of being sentenced on other matters.	
4.	Change the Order status in EJS to reflect the appeal.	

What happens if an offender abandons the appeal or an appeal is struckout?

The Order reactivates from the date the appeal is abandoned or struckout (non-appearance), as if there had been no appeal. Upon receipt of formal written advice from the County Court that the appeal has been abandoned, the start of the Order must be amended in EJS to reflect the date that the appeal was abandoned. (Also check that the length of the Order is accurately reflected).

Appeals against Breach/Contravention Outcome

Appeals against breach/contravention outcomes most often occur where an offender has been sentenced to either a term of imprisonment or YJC.

- When an offender appeals against the sentence imposed for breach/contravention of an Order made by the Magistrates' Court, CCS should receive a "Notice of Appeal" from the offender or via their legal representative within a month from when the sentence was imposed.
- If the Notice of Appeal has not been received, or has been misdirected, advice may be received directly from the Magistrates' Court, County Court Appeals Section or from the OPP (Appeals Section) of the date on which the appeal is to be heard.
- Where the Notice of Appeal is lodged on the day of the CCS prosecution, it is likely that the offender will immediately apply for bail pending the hearing of the appeal. The CCS prosecutor must advise the Court of the CCS' attitude to bail and bail conditions. If the breach/contravention proceedings have been consolidated with police matters, the police prosecutor must also be consulted.
- Where the original charges relate to non-police matters, the OPP will not act on behalf of CCS.
- If the prosecution was not undertaken by the initiating CCS location, the file will be returned to the originating location to monitor the appeal outcome and discharge accordingly.

In the event of an appeal resulting from a CCS prosecution in the Magistrates' Court, the OPP acts on behalf of CCS at the Appeal Hearing. The prosecutor must forward the breach/contravention brief and a memo to the OPP as soon as possible. It may be appropriate for CCS staff to be present at the hearing.

1.	The memo should outline specific issues that became known during the course of the prosecutions. For example, details of the submissions made by defence and prosecution in relation to the contravention or specific allegations, details about argument for and against exceptional circumstances, and/or information about any witnesses that were called by the defence and what information they provided to the Court.	
2.	The memo should always conclude by stating that the author is available to attend the appeal hearing and request direction from the OPP, whether or not attendance is necessary	

If the appeal relates to a breach of ICO or CCTO, where re-sentencing is not an option, it may be appropriate for a CCS representative to attend.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

If the appeal relates to a breach/contravention of CBO or CCO where re-sentencing is an option, a memo only may well suffice, however consultation should always occur with the OPP.

Application to Vary an Order

The *Sentencing Act* 1991 allows for applications to be made to vary or cancel Orders, where:

- (a) the circumstances of the offender have materially altered since the Order was made and as a result the offender will not be able to comply with any condition of the Order; or
- (b) the circumstances of the offender were wrongly stated or were not accurately presented to the Court or to the author of a pre-sentence report or drug and alcohol report before the Order was made; or
- (c) the offender no longer consents to the Order; or
- (d) the rehabilitation and reintegration of the offender would be advanced by the making of the decision to deal with the Order (CCO ONLY); or
- (e) the continuation of the sentence is no longer necessary in the interests of the community or the offender (CCO ONLY).

Examples include :

- If they have a genuine medical condition; or
- Their circumstances have materially altered where they can no longer comply with the Order requirements; or
- If the offender no longer consents to the Order;

In these instances offenders should be encouraged to make an application to the Court for a variation or cancellation and staff will provide offenders with the necessary paperwork, assist them to complete this and encourage them to seek legal advice.

If the offender is unwilling to make the application, a CM can apply to have the Order varied/cancelled.

An application for variation or cancellation of a CCS Order can also be made by CCS if it is determined that continuation on the Order would no longer benefit the offender or the community or if it is deemed that the offender has made positive progress on his Order in relation to rehabilitation and reintegration. The decision to make an application to the Court for a variation or cancellation on the basis of these reasons must be made by a senior officer or above.

Offender attendance following lodgment of an application to vary

After the lodgement of the variation to the Court by either CCS or the offender, a Senior Officer, may determine that, it is not appropriate for the offender to continue on the Order while awaiting the outcome of the application, e.g. the offender has accrued a significant amount of non-compliances/absences and the Senior Officer believes that the offender's ability to comply during this period is not reasonable.

Additionally, in the case of variation of an Order condition or dates, a Senior Officer may find it reasonable that an offender does not undertake the Order condition while awaiting the outcome of the application as they are unable or unwilling to attend (e.g. if the offender is adamant that they will not undertake an offence-specific program).

If the Order originated from the County Court, the sentencing Judge's Associate must be contacted to obtain a suitable date for the application.

1

The application must be made to the Court which made the Order, being

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

	any venue of the Magistrates' Court or in the case of a higher Court, the Judge who made the Order. Note: CCS has had increasing situations where the Magistrate who is hearing the application was not the sentencing magistrate and they refuse to hear it. When this occurs, the matter should be referred to the sentencing Magistrate.	
2.	Lodge a separate application for each Order.	
3.	If the sentencing Court was a Magistrates' Court, give a copy of the application to the informant (i.e. original police informant on the ICO/CBO/CCO) or the police prosecutor.	

Additionally, in the case of variation of an Order condition or dates, a Senior Officer may find it reasonable that an offender does not undertake the Order condition while awaiting the outcome of the application as they are unable or unwilling to attend (if the offender is adamant that they will not undertake an offence-specific program).

Application to Vary Recommendations

Where an application to vary is made the "I want the Order varied because" section needs to, in addition to the reason for the application, include what action is being asked of the Court, variation, e.g. dates or a condition being removed, cancellation or confirmed.

Where the circumstances are deemed to necessitate the application, the report should conclude with a recommendation that the application is not opposed. If the application is opposed, reasons for CV's opposition should be included. Where the justification for the application is not clear and it appears that it is entirely a matter for the Court, a more appropriate conclusion may be that CV is not opposed to the granting of the application should the Court believe this to be appropriate.

If the application relates to an ICO, references should be made to the portion of the Order satisfactorily completed and an indication of the unexpired portion.

Case Law and Precedents in Breach/Contravention Matters

The area where case law is relied upon is around the issue of **exceptional circumstances** as required by repealed Sections 18W (6) and 26(3B) of the *Sentencing Act*. The same test applies under S31 (5A) for Breach of Suspended Sentence and the case law is available to all sections.

Under those sections, a Court must on a breach/contravention by re-offence restore a sentence, unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances, which have arisen since the Order was made.

There are then two parts to the test.

First, the Defence must establish exceptional circumstances:

That term is not defined anywhere in the Sentencing Act or indeed in any other legislation. It is however helpful to look at relevant bail cases for a guide.

In Tang (1995) 83 A Crim R593

Beach J said "exceptional" is a word commonly used in legislation. One definition in *The New Shorter Oxford Dictionary* is "Of the nature of or forming an exception, unusual, out of the ordinary, special".

... It is the clear intention of the legislature that any person charged with an offence... bears the onus of establishing that there is some uncommon circumstance in their case.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

In *DPP v Tong* (2000) 117 A Crim R 169 McDonald J said it was inappropriate for a Court to seek to define the expression... **rather the court should examine the facts in each case** to determine whether "exceptional circumstances" exist.

It is clear that it can be a combination of factors.

In Moloney (unreported, VSC 31/10/90) Vincent J said;

(Exceptional) circumstances may exist because of the interaction of a variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional...

In Abbott (1997) 97 A Crim R 19 Gillard said...

"I do not doubt for one moment that in the end the Court must consider the totality of factors put forward and consider the question whether in all the circumstances they are exceptional".

In Beljajev v DPP (unreported) VSCA, 8/08/91

"Ultimately what factor or factors amount to exceptional circumstances will involve a balancing or synthesis of all the factors, which leads a Judge to the impression that the case falls within the exceptional category".

In summary then, exceptional circumstances can be either one factor or a number of factors that in combination satisfy the Court that in the particular case, there is something unusual or out of the ordinary which would allow it to do other than restore the original sentence.

See also

R v Steggall, Kent v Wilson, R v Maclaughlan & R v Ioannou below.

Secondly, even if exceptional circumstances are established the Order cannot be restored if it would be unjust to do so in view of all the circumstances that have arisen since the Order was made.

There are many examples of this and again it would be a matter for a Court on a case-by-case situation.

In Snip [2000] VSC 205, Hampel J held that the combination of factors namely, **delay, different nature of breaching from original offences**, person circumstances of the defendant and the **attitude of the crown**, were sufficient to find that there were exceptional circumstances and that they amounted to it being unjust to restore the original sentence.

In Sutorius [2001] VSCA 70 Phillips JA held threats of retribution either in or out of prison were not sufficient to establish exceptional circumstances and that it would not be unjust to restore the Order.

In Manjeric (unreported) VSC 10/07/98 Gillard J held

"There is no doubt that that on occasion's inordinate **delay** can constitute exceptional circumstances."

In Wu v Attorney General (Cwlth) (1997) 97 A Crim R 380 Burchett J held that in combination with other factors "a **serious medical condition** could amount to exceptional circumstances".

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

In Hoffer (unreported) VSC 9/12/91 Smith J held that a combination of delay, health problems, and the effect of incarceration on the defendant's wife equalled exceptional circumstances.

The approach adopted by the Courts clearly is not to define what is exceptional circumstances, but rather to consider whether each case possesses any feature or combination of features that could be considered exceptional and then to apply the further test of whether it would be unjust to order the offender to serve the period of imprisonment.

It is always a matter of relating the claimed exceptional circumstances back to the facts of each case and as required by the Sentencing Act **they must have arisen since the Order was made.**

There are a number of other frequently relied on cases in relation to exceptional circumstances:

R V STEGGALL [2005] VSCA 278 (Buchanan, Eames, Nettle, JJA)

In this case, the Court held that "the term means something unusual, special, out of the ordinary course".

FACTS: S was charged with various offences arising out of business activities between June 1996 and January 1997. At that time, S was involved in selling mobile phones. He wrote a number of cheques which were returned to the payee marked "insufficient funds" in the various accounts held by S. S was charged with a number of counts of OPBD and OFABD. In May 2000 he was sentenced to a TES of 25mths, wholly suspended for 3yrs. Upon conviction, S became excluded from managing a corporation for a period of 5yrs by force of s.206B of the Corporations Act. In April 2005 S was charged with 2 offences of managing a corporation and 3 offences of making a misleading statement to ASIC. In June 2004 he pleaded guilty to those 5 charges and was fined \$5000 with conviction.

Counsel for the defendant argued that:

The delay between the original offences and the institution of the breach proceedings, the rehabilitation of Steggall since the latter offences and the fact that these offences were not highly serious demonstrated exceptional circumstances

McInerney. J found no exceptional circumstances on the breach and restored the original sentence

On Appeal, the Court held:

There was no misconception; the term means something "unusual, special, out of ordinary course". The delay was regrettable; however, it was largely due to Steggall's efforts to conceal his crimes. It is not unusual for an offender to have good prospects of rehabilitation, nor can S's employment and family considerations be considered "exceptional". Disagreed that the subsequent offences were not serious, but instead held that they reflected a similar level of dishonesty to those offences for which the suspended sentence was imposed.

KENT v. WILSON [2000] VSC 98 [Hedigan J.]

"Changed or exceptional circumstances"

A CCTO (9 months imp, 3 months to be served in community) was imposed on W in the Magistrates' Court for offences including trafficking and handling. He breached the Order

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

immediately, by failing to report as required, by failing to attend for assessment and treatment on numerous occasions, and by failing to notify of his change of address. Upon the breach hearing, the breach was admitted, but exceptional circumstances pleaded. W had commenced a job and a relationship and set up an independent household, all of which were presented as exceptional circumstances, being "exceptional" progress by W, and "exceptional" when contrasted with his previous lifestyle. Magistrate accepted submissions, confirmed the CCTO (the period of which was then all but exhausted) and fined W for the breach.

The informant appealed.

Held on Appeal: (1) Meaning of "exceptional circumstances" to be decided on case by case basis (2) Not supportable to consider behaviour "exceptional" because it "not typical of offender"; (3) Parliament cannot have intended the living of a normal life to be an exceptional circumstance (4) "not permissible to label conduct as amounting to exceptional circumstances for the purposes of avoiding the return of the offender to gaol, unless they are such."

McLACHLAN, B.R. [1999] VSCA 122

"Mere compliance with conditions of Order in face of re offending is not exceptional"

(Sentenced to 12 months imprisonment by ICO for burglaries and to **1 month suspended sentence** for other matters – Complied with work requirements of ICO and completed 345 hours of community work prior to being arrested for drug trafficking which had occurred during the same period – upon pleading guilty to breach of ICO and **breach of suspended sentence**, was sentenced to the whole of the unexpired ICO period (360 days) and to the 1 months imprisonment under the suspended sentence – both such sentences permitted to be served concurrently (per s.26(4) – Sentencing Judge found that the Applicant's drug trafficking during the relevant period meant that his compliance with the work requirements of the ICO did not constitute "exceptional circumstances" under s.26(3B), and that accordingly the whole of the unserved sentence of 360 days should be imposed

On appeal, held: sentencing judge's interpretation of "exceptional circumstances" correct – entitled to impose whole of unserved sentence under ICO – performance of unpaid community work was taken into account by the sentencing judge's order that the 2 sentences for the breaches be served concurrently with each other and concurrently with another sentence then undergoing – practical effect of the concurrency order was to give Applicant credit for approximately half of the community work performed – Sentence application dismissed.)

In IOANNOU [2007] VSCA 227

Redlich JA held on appeal

The clear legislative intent implied in the use of the term 'exceptional circumstances' means they must be clearly unusual or quite special or distinctly out of the ordinary circumstances.

(**FACTS:** I PG to Ct 1 – False imprisonment; Ct 2 – Stalking; Ct 3 – RCI; Ct 4 – CL Assault; Ct 5 – Threat to kills (Cts 1 to 5 wife was victim); Ct 6 – Possess DOD. TES: 3 yrs 2.2 yrs suspended for 3 yrs. I breached the suspended sentence and was presented on Ct 1 – false imprisonment; Ct 2 – CL Assault. I's wife was the victim. DPP was informed that wife was intoxicated, distressed and would not give evidence against I re: breach offences. DPP concluded there was little prospect of securing a convictions against I and a plea-bargain was reached. I agreed to PG to breach offences thus creating exceptional

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

circumstances and DPP would submit he serve no further time in custody. He was sentenced to 1 yr wholly suspended for breach offences and proceedings re: the breach was referred to the LSJ who made the Order. LSJ determined there were no exceptional circumstances. – **UPON APPEAL:** G1: I argued LSJ erred in determining that there were no exceptional circumstances per s.31 (5A) of the Sentencing Act. HELD: The clear legislative intent implied in the use of the term 'exceptional circumstances' means there must be clearly unusual or quite special or distinctly out of the ordinary circumstances. Order made pursuant to s.31 (5) (d) that no order be made with respect to the suspended sentence. **APPEAL ALLOWED.**)

Other issues:

Variation of Orders

In Dimitrovski V Jones Vic SC 23/08/94 Mandie J held

His Honour was concerned with **whether an ICO could be confirmed on breach proceedings if it had expired by the time it came to Court.** His Honour at 17, said: "The proposition advanced on behalf of the informant, that an Order cannot be varied or confirmed once it has expired, whilst strictly logical, could lead to both absurdity and injustice. Depending upon a mere accident of timing, the court would have the power to vary or confirm the ICO as an alternative to committing to prison if the matter came to court during the currency of the ICO but no alternative but to commit the offender to prison in very nearly the same circumstances if the matter came to court after the ICO had expired. This construction manifestly would not promote the purpose or objects of the Act (see s.35 (a) of the Interpretation Act) which, as set out in s.1 of the Sentencing Act includes the following:

"...

- (a) to promote consistency of approach in sentencing offenders:
- (b) to provide fair procedure-
 - (i) for imposing sentences; and
 - (ii) for dealing with offenders who breach the terms of conditions of their sentences..."

The construction which must be preferred and adopted is that a court has power under s.26 (2) to vary or confirm an ICO, whether or not the ICO has expired or is no longer in force." --

NB; it is arguable that the same principle applies to other breach offences, i.e. that upon breach proceedings relating to a CCTO, the fact that the operational period of the CCTO had expired by the time of the breach proceedings would not permit the court to deal with the breach other than per s.18W(5).

The case is further useful for the contention that variation means vary the terms of the Order not vary its nature.

In **Aitken v Moton – Connor** unreported Smith J 9/02/95 which followed Dimitrovski there was a further discussion of the power to vary an ICO it followed Dimitrovski holding that vary did not mean impose a different form of Order, the words "commit the offender to prison" meant exactly that in other words it could not impose a suspended sentence or other.

BICE Vic CA 6-12-200 (Ormiston and Callaway JJA and Smith AJA)

[2000] VSCA 226

Upon finding a breach of a suspended sentence proven, His Honour Judge Duggan directed that the suspended sentence be restored, but served by way of an Intensive Corrections Order. His Honour declared that the term 'be served immediately' in s. 31(6) of

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

the Sentencing Act 1991 did not mean that an offender must be committed to prison immediately, but could serve a term on imprisonment by way of an ICO. – Upon order 56 to Supreme Court; director's appeal dismissed – appeal to court of appeal argued 22-11-00. – Crown appeal upheld 6-12-2000. **HELD: (1) in the absence of exceptional circumstances a judge is obliged to "restore" the original sentence of imprisonment.** (2) Provisions relating to suspended sentences do not contemplate that other Orders (e.g. ICO) may be suspended notwithstanding that for other purposes those Orders are treated as sentences of imprisonment. (3) Judge imposing suspended sentence should take into account all relevant circumstances concluding that sentence of imprisonment that s/he proposes to suspend is warranted. (4) Head sentence cannot be changed, but non-parole period may be fixed in appropriate circumstances

Obviously, the same applies to ICOs & CCTOs you cannot restore the sentence and then suspended it.

WISE (2000] VSCA 169

(Applicant placed on 2 yr CBO for attempted armed robbery, first offence, before J. Rendit October 1997. Breached CBO in December 1997, Feb 1998 and May 1999. On 5 June 2000, applicant came before a different re-sentencing Judge (as Rendit J now retired). Sentenced to 15 months prison with 6 months fixed for attempted armed robbery. Application for leave to appeal under s.47 on grounds of excessive sentence, insufficient weight to applicant's rehabilitation, and that re-sentencing judge "erred in failing to disclose the contents of the sentencing remarks of HH J. Rendit" upon which he relied.

Held: Application granted, appeal allowed, sentence quashed, and in lieu, applicant placed on a CBO for a further 12 months. **Procedural fairness requires re-sentencing judge to comply with the rules of natural justice – i.e., a judge shall not determine any question without affording counsel for each party an opportunity to see and comment upon any relevant material before the Court.)**

ZIDLICKY Vic. CA. 18-10-2001 (Brooking, Chernov & Vincent, JJ.A.)

[2001] VSCA 186

Appellant participated in armed robbery with friend upon milk bar, stealing \$300. Threats & brandishing of knife. Appellant was 18 yrs at the time, pleaded "G" & received 2 yrs CBO, 300 hrs unpaid comm. work. Appellant breached Order & fined \$200; CBO confirmed. Further breach & Order cancelled, **TES of 8 months, 4 months suspended** imposed. Appellant received bail & applied for leave to appeal. Now aged 22, Appellant failed to attend for supervision as directed & did not provide documentation to CORE. Paid employment not an acceptable excuse for non-compliance. Held: LSJ entitled to take into account the appellant failure to adhere to CBO, which rendered him unsuitable for further leniency. **No substance in claim that "full-time" employment prevented appellant from complying with CBO.** Frequency of breaches, as shown in CORE report, bordered on "contumelious disregard" for court's order. APPLICATION DISMISSED and sentence confirmed.)

STEVENS [1999] VSCA 173

(Sentence application dismissed. Applicant appealed against reimposition of 3 month term of imprisonment which had been suspended for 2 years. For breaching offences, had received an ICO. **Held compliance with the ICO did not amount to exceptional circumstances** pursuant to s. 31(5A) of the Sentencing Act 1991. **Pre existing psychiatric condition which had been diagnosed post original defences also did not amount to exceptional circumstances.)**

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

2 issues arise here mere compliance with an Order imposed on breaching Offences is not exceptional on breach of the first Order.

A pre existing medical condition, which was not previously diagnosed, is also not exceptional.

PORTELLI Vic. CA 12-12-2000

The 31-year-old female Applicant, with a dysfunctional and alcoholic background, threatened a taxi driver with a gun but later surrendered the gun to him. Pled guilty to one count of False Imprisonment and was sentenced to 12 months imprisonment to be served by way of an ICO – Upon breach of the ICO, ICO was cancelled and the Applicant was ordered to serve the outstanding 254 days. She claimed that the breach had arisen due to a misunderstanding as to reporting dates. **Upon s.582 application, Applicant produced evidence of her assistance to the police in relation to other matters – Evidence accepted as potential fresh evidence.** Sentence Leave application granted. Upon appeal, primary argument was that the sentencing judge upon the breach for the ICO had wrongly exercised the discretion at *Sentencing Act s.26 (3A)*, by cancelling the ICO and ordering imprisonment for the unexpired term, rather than varying the ICO. The Appellant's breach of the ICO was constituted by a failure to comply with work and attendance conditions, rather than by the commission of further offences. **Held: the breaching behaviour was at the low end of the scale and accordingly, the cancellation of the ICO and the imposition of unexpired imprisonment was excessive. Appropriate order is pursuant to s.26(3A)(a), namely to vary the ICO by removing from it the community work conditions, effective from the date of the breach hearing – Appeal allowed – ICO reinstated**

The OPP query this decision – how do you have an ICO without a core condition?

DEVLIN (2000) 110 A Crim R 438

(A CCTO was imposed in the Magistrates' Court, requiring six months to be served in custody and six months to be served in the community – the six months custody was served and the Defendant released into the community – further offences were then committed – thus breaching the CCTO – upon further proceedings in the Magistrates' Court for the breach, the Defendant was ordered to serve the whole of that part of the sentence previously ordered by served in the community, being six months imprisonment – the Defendant appealed to the County Court against that sentence – the Crown submitted that Sentencing Act s.18W(5)(a) empowers the Court to confirm a CCTO Order notwithstanding that the period of the original CCTO has by then expired – Judge Dixon found that as the CCTO had expired, s.18W(5) no longer applied – his Honour set aside the Magistrates' Court Orders and, purporting to exercise powers under s.105 Sentencing Act 1991, re-sentenced the Appellant to 12 imprisonment, wholly suspended for 2 years – O.56 review initiated by Director – **HELD: S.105 provides no applicable powers, HH was limited by powers set down in s.18W – s.105 merely gives a person sentenced for variation or breach of a sentencing Order, a right of appeal that person might not otherwise have possessed** – Decision of County Court quashed and matter referred back to County Court for re-hearing according to law.)

Fixing non-parole periods

There are matters where CCS will be required to make submissions on re-sentencing that may involve an immediate custodial sentence.

See Sections 11, 14 & 15 of the Sentencing Act.

HATCH (1997) 95 A. Crim. R. 46

In his reasons, Calloway J.A. held "Giving "sentenced" in S 14(1) (b) a meaning consistent with Ss. 15 and 105, the offender is ... sentenced to a further term of imprisonment in

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

respect of which the court dealing with the breach proposes to fix a non parole period. It may accordingly fix a new single non-parole period in respect of all the sentences the offender is to serve....

FIDDES M.R. [2003] VSCA 210

Applicant was cultivating a commercial qty of cannabis – 128 plants weighing 22.9kg and in a separate location 52 plants weighing 14.68kg. On search of premises 8.8kg cannabis also found (totals 37.58 kgs) – Applicant had history of heavy drug addiction. 9 prior convictions. PG to Cultivating Narcotic Plan (comm. qty) and Possession of Cannabis. **Sentenced to 2 years, 12 months suspended for 2 years for cultivation and fined \$200 for Possession.** In May 2003 applicant was dealt with in relation to the breach of a suspended sentence imposed in February 2000, which he was subject to when these offences were committed. **Original sentence was 2 yrs, wholly suspended for 3 yrs. To be reinstated and served concurrently with sentence being served for cultivation until 14-10-2003 (when that sentence will be completed) and the remainder of the restored sentence to be served cumulatively upon the sentence for cultivation. – no NPP fixed – On s582 application;** appeal against sentence for cultivation – counsel for applicant argued LSJ gave insufficient weight to prospects of rehabilitation, absence of commercial enterprise associated with cultivation, no weight to Crown submission on sent., manifestly excessive in all circumstances. Applicant sought wholly suspended sent, Crown had conceded that part of sentence could be suspended but not all. – Application refused – **Elected. – UPON APPEAL;** Argued re the restored sentence that LSJ erred in imposing a sentence on the basis that he had no power to fix a NPP. **HELD;** Error made out. – **Clear in light of ss.11 and 31(5) of the Sentencing Act 1999 and the case of Hatch that LSJ had the power to fix a NPP upon restoring a suspended sentence and was required to do so unless that course would be considered inappropriate.** Appellant to be re-sentenced in relation to breach of suspended sentence. Accepted by appellant that if appeal against reinstatement of sentence successful, no application would be made in relation to the sentence for cultivation. **APPEAL ALLOWED – Re-sentenced – 2 yr suspended sentence reinstated, NPP 9 months fixed.)**

Correction of sentences

There are times when CCS is confronted with breaches of Orders that are “prima facie” invalid.

There are two options open to the prosecution – either an application must be made under S104 of the *Sentencing Act* to the Supreme Court to correct the sentence or the breach proceedings in those circumstances must be vacated and the court invited to re-sentence the offender.

S104 may be used more appropriately while the Order is current and even more particularly before a breach is disclosed.

Which leaves you with the requirement to correct the sentence?

R v Bratoli Court of Appeal [1971] VR446

Held the sentenced passed was an invalid sentence and the signing of the triplicate by the trial judge and the registrar gave no legal validity or effect to it.

Further held that as the original sentence was a nullity the Court was merely proceeding to sentence ... as if the prisoner had never been sentenced.

In re Judge Bland ex DPP [1987] VR 225

Held the sentences imposed were a nullity.

Deputy Commissioner's Instruction No: 5.16 Breach/Contravention and Applications

Further held that since the original sentences were a nullity the Sentencing Judge was wrong in holding that he was "functus officio" and not re sentencing.

Accordingly, a court should be asked to re-sentence a defendant as if they were being sentenced for the first time.

From that, it follows that the breach cannot proceed and must be withdrawn.

The cases above are guidelines only. It is clear from the authorities that each matter must be determined on its own merits.

If defence counsel raises cases in support of their submissions, CCS must be given copies of them and a chance to read them. If further time is needed as a result of that to make appropriate submissions, seek an extension and obtain further instructions.

No doubt there are other cases that may be cited in breaches. The OPP is always available to provide follow up and advice.

Appendix A

Pathways post an Administrative Review Hearing (ARH)

