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Seeking a Guideline Judgment on

Suspended Sentences

AN INTERIM REPORT OF THE NEW SOUTH WALES SENTENCING COUNCIL

Pursuant to s100J(1)(b) and (d) of the *Crimes (Sentencing Procedure) Act 1999*

The members of the NSW Sentencing Council are:

Hon Alan R Abadee RFD QC, Chairperson
Hon J P Slattery AO QC, Deputy Chairperson
Mr Howard W Brown OAM, Victims of Crime Assistance League
Mr N R Cowdery AM QC, Director of Public Prosecutions
Mrs Jennifer Fullford, Community Representative
Ms Martha Jabour, Homicide Victims Support Group
Assistant Commissioner Chris Evans APM, NSW Police
Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement
Mr Peter Zahra SC, Senior Public Defender.

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations.

September 2005

CONTENTS

1. EXECUTIVE SUMMARY

The Attorney General has asked the Sentencing Council to consider the feasibility of a guideline judgment application for suspended sentences under section 100J(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* ("the *Act*").[1] The Sentencing Council advises that the Attorney General should not presently apply to the Court of Criminal Appeal ("CCA") for a guideline judgment on the use of suspended sentences.[2]

The Council considers that whilst there are strong arguable points on the merits supporting a guideline judgment application, imminent legislative changes for suspended sentences may mean that any present application is premature. The Council considers that it is possible that the imminent legislative changes would mean that the CCA may exercise its discretion to refuse to issue a guideline judgment, despite the merits of the application.[3]

The Council considers that there are two particular issues relating to suspended sentences, which the Court could re-emphasise in a guideline judgment:

1. The need for sentencers to adhere to the two step process in arriving at a suspended sentence in order to avoid:
    a. Sentencing escalation, and
    b. Arriving at a term of two years or less in order to suspend the sentence;
2. The need for sentencers, in the second step, to look again at *all* matters relevant to the circumstances of the offence, and caution sentencers against allowing subjective factors to obscure objective seriousness at this stage.

The Sentencing Council first became concerned about the use of suspended sentences following the release of a report by the Judicial Commission of NSW. The report suggested that the reintroduction of suspended sentences may have resulted in "sentence escalation," that is, an increasing use of sentences of imprisonment in order to take advantage of the option of a suspended sentence.[4] The issue was initially raised and discussed by the Sentencing Council at its meeting in May 2003. In preparing this advice, the Sentencing Council, in accordance with the recently approved protocol, has conferred with the Crown Advocate. The Council has taken the Crown Advocate's views into account in reaching it's own independent decisions.

The Sentencing Council's research indicates inter alia that there are two particularly compelling sources of information which suggest a guideline is needed:

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[1] Letter from the Attorney General, December 2004

[2] Section 100J(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* ("the *Act*") stipulates that the Council is to advise and consult the Attorney General in relation to matters suitable for guideline judgements. Section 100J(2) of the *Act* further provides that any advice may be given to the Attorney General without a request being made.

[3] See also section 40 of the *Act*. The Council also understands that the Attorney General prepared an application for a guideline judgment for certain sexual assault offences which was set down for hearing on 15 March 2002. Imminent relevant legislation, amongst other things, seems to have regarded overtaken the need for a guideline in the opinion of the Court. The Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill was first introduced on 30 November 2001 and received assent on 9 April 2002. The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill was introduced into Parliament on 23 October 2002.

[4] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues Number 29: Suspended sentences in NSW*", Sydney: The Judicial Commission

- There has been a large number of Crown appeals against suspended sentences, many of which have been successful. This is despite the inherent limitations in bringing Crown appeals against sentence.[5]
- A recent study by the Judicial Commission has found that for 2002-2003, almost half of all suspended sentences in the higher Courts were for a period of two years,[6] which suggests that courts are using an artificial reasoning process to arrive at a suspended sentence.

Crown appeals against decisions to impose suspended sentences mainly rest on the ground of "manifest inadequacy" and that the sentencing judge erred in suspending the sentence by failing to give proper weight to objective seriousness or giving undue weight to subjective mitigating circumstances. This lack of practical guidance is likely to give rise to inconsistency in approach and condone idiosyncratic approaches of particular judges.

At present, the discretion to suspend a prison sentence of two years or less is left at large by the legislation, and it is largely unfettered. The courts have provided some guidance on how the discretion should properly be exercised. In *Dinsdale*,[7] Kirby J noted that Parliament's failure to state expressly the criteria for suspending a term of imprisonment has led to the courts attempting to explain the considerations to which weight should be given and the approach that should be adopted.[8] The High Court in *Dinsdale* made clear that the proper approach is to assess *all* the circumstances, not only subjective mitigating factors but objective factors as well.[9] The discretion is virtually completely unfettered.[10] The Council accepts that any attempt to fetter the discretion would require legislative change, and could not be achieved through a guideline judgment.

Tensions also arise from the paradoxical nature of the reasoning process by which a court arrives at a suspended sentence. The Court must first conclude that no sentence other than imprisonment is appropriate before deciding to suspend the sentence.[11] Legislation and case law quite clearly show that these two steps must be followed. In practice, there is a considerable danger that sentencing judges will elide the two steps and arrive at a term shorter than would otherwise be imposed in order to suspend the sentence.

A guideline judgment would be useful in re-emphasising the importance of these two steps, and perhaps provide some further guidance in how to apply these two steps.

This paper also considers the prospects of success of a guideline judgment application. The Council considers that a guideline judgment is somewhat necessary to particularly re-emphasise the proper reasoning process of arriving at a suspended sentence. This paper

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[5] See Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission, See also for example *R v. Jurisic* (1998) 45 NSWLR 209 at 221 where Chief Justice Spigelman argued that guideline judgments are needed in appropriate cases because of the inherent limitations of Crown appeals.

[6] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW

[7] (2000) 202 CLR 321 at 346-347

[8] *Dinsdale* per Kirby J at paras 84 to 89

[9] *Dinsdale* per Kirby J at paras 84 to 89, and *JCE* per Fitzgerald JA at para 17.

[10] Rehabilitation, for example, is not to be treated as the primary consideration in deciding whether to suspend the sentence. See *Dinsdale* at [18]

[11] See in particular, Mirko Bagaric, 'Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22(2) *UNSWLJ* 535.

analyses factors that the court has previously found persuasive in deciding whether to promulgate a guideline judgment.[12] There are a number of factors which may possibly limit the success of a guideline judgment, and the main factor is the amendments being considered for the suspended sentences legislation.[13] Even if the amendments do not directly affect the circumstances in which a sentence can be suspended, they might influence the imposition of such a penalty. Further, it is possible that they may affect the perception of their seriousness in the penalty hierarchy. The Council considers that an application at this present stage may therefore be premature.

Other factors which may limit the success of a guideline judgment succeeding are the possible criminal case processing reforms[14] and the absence of suitable pending appeals to the CCA.[15]

2. WHAT COULD A GUIDELINE JUDGMENT ACHIEVE?

The guidance which would be useful and feasible would consolidate and clarify existing common law on the proper approach to suspending a sentence. The guideline should emphasise:

1. The need for sentencers to adhere to the "two step" approach in order to avoid:
    a. Sentencing escalation, and
    b. Arriving at a term of two years or less in order to suspend the sentence;
2. The need for sentencers, in the second step, to look again at *all* matters relevant to the circumstances of the offence, and caution sentencers against allowing subjective factors to obscure objective seriousness at this stage.

Since the statistics show that certain offences are more likely to receive suspended sentences, it may also be helpful for the Court to give particular guidance in applying the two-stage approach where such offences are concerned. The Council notes that none of the offences for which a suspended sentence is commonly imposed are covered by an offence-specific guideline judgment.

Legislative change may be ineffectual in addressing concerns about sentencers eliding the "two step" process. The legislation and case law is clear. The problem seems to be one of compliance rather than clarity.

The guidance sought could be characterised as "qualitative." In some previous guidelines, particularly those relating to a specific offence,[16] the Court has construed a hypothetical

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[12] By section 40 of the Act, there is nothing which requires the Court to promulgate a guideline judgment if it considers it inappropriate to do so.

[13] See for example *Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515; (2002) 137 A Crim R 196 at [57] – [60]. In that case, the effect, if any, of the legislative amendments on the offence in question was unclear.

[14] The Council understands that the criminal case processing (CCP) reforms will be administratively implemented, including possibly by the issuing of a practice note for the Local Court. CCP involves ensuring that the maximum utilitarian discount on sentence of 25% is available to accused persons entering a plea of guilty in the Local Court. The Court may, instead of giving the specified discount, make an order that it considers to be commensurate with the discount. For example, the Court might order that a sentence of imprisonment be suspended.

[15] The general practice of the Court has been to list applications by the Attorney for a guideline judgment with appeals to the Court which raise similar issues, although this is not necessary. See *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 at [4]

ordinary case. It would not be necessary to construe a hypothetical "ordinary case" in order to succeed in an application for a guideline for suspended sentences. Indeed it may not be possible to construe an "ordinary case" for a sentencing option which potentially applies to any offence for which imprisonment is available.

2.1 Issues to be addressed in a guideline

In general, the form of guidance which would be useful as well as feasible is one which consolidates and clarifies the existing common law on the proper approach to suspended sentences as well as distilling principles from the CCA decisions which have arisen on a case by case basis.

In particular, and at the very least, the guideline should re-emphasise:

1. the need for sentencers to properly address the first stage of the reasoning process, in isolation from the second stage, in order to avoid:
    a. sentencing escalation either by:
        - imposing a sentence of imprisonment where an alternate sentence is appropriate; or by
        - imposing a longer term than would otherwise be imposed in order to counter the apparent leniency of suspending the sentence; and
    b. arriving at a term of two years or less in order for the sentence to be suspended.
2. in the second stage of reasoning, the importance of assessing subjective mitigating factors *in light of the objective seriousness* of the offence, and cautioning sentencers against allowing subjective factors to obscure objective seriousness at this stage.

Other issues which a guideline might usefully cover are:

- What is the main rationale for suspended sentences? What is the overriding consideration in determining whether a sentence should be suspended?
- For what particular offences are "exceptional" circumstances required in order for a suspended sentence to be imposed?[17] Where, even though the instant offence is not one of the established categories, the objective seriousness in a given case is particularly high, should the court approach the issue in terms of exceptional circumstances being required before a suspended sentence should be imposed? Would it be helpful for the court to consider, at the second stage, whether the objective seriousness is so high that exceptional circumstances must be found in order to warrant a suspended sentence?
- Are there any particular factors which should be given particular weight in the second stage (ie the decision whether to suspend) as compared with the first stage (concerning whether to impose a sentence of imprisonment)? In particular, are any of the mitigating factors listed in s 21A(3) to be given particular weight in the second stage? These could include good character, absence of a recent and relevant prior record, or good prospects of rehabilitation.
- What approach should be taken, and what weight given, to the factors which the cases reveal are often regarded as significant in the decision to suspend a sentence? These could include age, mental illness, impact on family, prospects of rehabilitation.

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[16] For example, see the guidelines for dangerous driving causing death or grievous bodily harm (*Jurisic* and *Whyte*) and the guideline for driving with a high range pca.

[17] There is, however, no general requirement for finding "special" or "exceptional" circumstances before imposing a suspended sentence.

- How should the court approach the issue of a suspended sentence if the offender is assessed as suitable for periodic detention in a pre-sentence report?

The Sentencing Council also points out that the Court's guidance could include reiterating:

- That a suspended sentence is not to be imposed lightly, as it is a sentence of imprisonment;
- That is it inappropriate to suspend a sentence if the offender is likely to breach;
- The largely unfettered criteria for deciding to suspend a sentence;[18] and
- The proper process for determining the length of the suspended sentence.[19]

The Court's guidance would also clarify where a suspended sentence lies in the sentencing hierarchy.

The type of guidance sought in Guideline Judgments of wide application

In seeking a guideline judgment on the use of suspended sentences the Council considers that there is no need to construct a hypothetical "ordinary case." In some previous guideline judgments applicable to a specific offence, the Court has constructed a hypothetical "ordinary case" and considered what the sentence should be in such a case.[20] In other guidelines with wider application, the Court has not undertaken this task. Because the suspended sentence is a sentencing option which is available for any offence where a term of imprisonment may be imposed, it may be difficult and unnecessary to conceive of an "ordinary case" for which a suspended sentence is appropriate. However, it may be helpful for the Court to give particular guidance for offences which are more likely to receive a suspended sentence.

It would seem appropriate to seek a guideline judgment of the type sought in *Attorney General's application no 1 of 2002*.[21] Similar to the use of the suspended sentence, the "form 1" procedure has very wide application.

In that case, the Attorney General proposed a guideline which contained the following:

> "When sentencing for an offence or offences in proceedings where the prosecutor has filed in court a document referred to [as a form 1], the Court must ensure that appropriate weight is given to the Form 1 offences so as to reflect the overall criminality involved in both the offence in respect of which a sentence is being passed and the offences on the Form 1."

The DPP generally supported the Attorney General's application, but with some exceptions. The Senior Public Defender similarly supported certain aspects of the Attorney General's application but disagreed with others. The Senior Public Defender argued that the guideline

[18] See for example, *Dinsdale* at [18]

[19] The length of the sentence should be considered *prior to* deciding whether it should be suspended. Once a decision is made to suspend the sentence, the length should *not* be increased to counter any perceived leniency.

[20] See for example, *R v. Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252; (2002) 134 A Crim R 53. See also *Attorney General's application no 3 of 2002* (High Range PCA guideline) [2004] NSWCCA 303 at [136] onwards.

[21] *Attorney General's application under section 37 of the Crimes (Sentencing Procedure) Act 1999 no 1 of 2002* [2002] NSWCCA 518; (2002) 56 NSWLR 146; (2002) 137 A Crim R 180.

should be "limited to restating with clarity matters of principle that have been settled in earlier case law."[22]

The application for a guideline judgment was upheld in part. The guideline went a little further than the type sought by the Senior Public Defender, but not nearly as far as the Attorney General's proposed guideline. The Court sought inter alia to resolve aspects of conflicting or uncertain authority.[23]

Some aspects of the guideline sought by the Attorney General were held to be inconsistent with the statutory scheme, and to this extent were disallowed.[24] However, there was no difficulty with the absence of an "ordinary case."

In *R v. Thomson, R v. Houlton*[25] ("*Thomson and Houlton*") the Court promulgated a guideline for the discount to be given for a plea of guilty. Similar to the option of a suspended sentence, the discount for a plea of guilty applies to a very wide class of cases. The Court did not try to attempt to construe an "ordinary case", and instead focused on one particular aspect of the discount to be given, namely the utilitarian value of the plea, and then indicated a "range" of the reduction.

Similar to the present situation with suspended sentences, in *Thomson and Houlton* the Court was seeking to emphasise principles which had already been specified in legislation and case law.

The major difference with the guideline sought in *Thomson and Houlton* to the present situation with suspended sentences is that in *Thomson and Houlton* the Court promulgated guidance of a quantitative nature. Since the High Court's judgment in *R v. Wong, R v. Leung*[26] ("*Wong and Leung*") it is very unlikely that the NSW CCA would promulgate guidance of a quantitative nature. In any event, the Council, in these circumstances, does not advise the Attorney General to seek quantitative guidance for suspended sentences.

In England and Wales, the Sentencing Guidelines Council ("SGC," which performs the "guideline" role that the CCA performs in NSW) has promulgated a guideline for the reduction in sentence for a guilty plea in a similar way.[27] The Council has promulgated guidance of a quantitative nature, and indicates a staged approach when discounting for a plea. In determining the level of reduction, the SGC has produced a "sliding scale" and has indicated that the level of reduction should reflect the stage at which the offender indicated a willingness to admit guilt. A maximum discount of 1/3 will be afforded where the offender indicates a "willingness to admit guilt at the first reasonable opportunity."

The SGC has also promulgated a guideline outlining the "overarching principle" of seriousness.[28] The guidance given is qualitative, however, the SGC does not set to decide upon any "ordinary case." Instead, the SGC sets forth particular factors which can be identified, and which the Court should consider. In considering the aspect "custody

[22] At paragraph [15]
[23] at paragraph [17]
[24] See for example at paragraph [35]
[25] [2000] NSWCCA 309; (2000) 49 NSWLR 383; 115 A Crim R 104
[26] [2001] HCA 64; (2001) 207 CLR 584; (2001) 185 ALR 233; (2001) 76 ALJR 79; (2001) 22(19) Leg Rep C1;
[27] See Sentencing Guidelines Council (December 2004) "Reduction in Sentence for a Guilty Plea - Guideline"
[28] See Sentencing Guidelines Council (December 2004) "Overarching Principles: Seriousness - Guideline"

threshold", the SGC suggests that it is not possible to conceive of an "ordinary case" without considering specific offences. "Factors vary too widely between offences for this to be done."[29] The SGC instead states that it is the task of guidelines for individual offences to provide more detailed guidance. Such guidance could be qualitative in that it points to features of the offence which warrant a custodial sentence, or quantitative, in that it deals with issues such as sentence length.

The SGC's guideline on seriousness also shows that it did not feel inhibited in introducing a guideline of a very general nature. The SGC was not inhibited by the fact that it could not devise a formula or form of words that would provide a general solution. Rather it set forth a number of factors to be considered.

The option of suspending a sentence in other Australian jurisdictions is considered in **Appendix 1**. Suspended sentence in some overseas jurisdictions, including England, is considered in **Appendix 2**.

2.2 Why a guideline judgment rather than legislative change?

There are currently a number of contentious issues regarding suspended sentences. Some of these issues concern aspects of the law that are either unclear or require change.[30] These issues could be addressed by way of legislative change. Some of the discrete issues which could be dealt with by way of legislative change are addressed in **Appendix 3**.

In contrast, the Sentencing Council considers that the legislation and case law are quite clear about the process which must be followed in deciding to suspend a sentence. [31] The Court must:

1. determine that no sentence other than imprisonment is warranted[32] and set the term; then
2. if the term of imprisonment is less than 2 years, it may consider suspending the sentence.

However, there is evidence to suggest that this process is not being followed. There have been a stream of Crown appeals to the Court of Criminal appeal regarding guideline judgments, and recent studies by the Judicial Commission of NSW suggest that sentence creep and escalation are a problem.[33] Most recently the Judicial Commission has found that for 2002-2003, almost half of all suspended sentences in the higher Courts were for a period of two years.[34] This could be evidence that courts are using an artificial reasoning process to arrive at a suspended sentence. As a result, the objectives of the legislation are not being attained.[35]

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[29] at paragraph 1.37

[30] For example, the issue of whether "street time" counts towards reducing the length of the sentence. This issue was identified in *Tolley* [2004] NSWCCA 165 and later discussed in *Graham* [2004] NSWCCA 420. Now that case law has made it clear that "street time" does not count, legislative amendment may be required to avoid possible unfair consequences. For example an offender may have made significant steps towards rehabilitation but breaches the suspended sentence in the very last days of its operation, and is then required to serve the whole period in prison.

[31] See for example Howie J in *R v. Zamagias* [2002] NSWCCA 17

[32] Imprisonment is a sentence of last resort, as reflected in s 5 of the *Crimes (Sentencing Procedure) Act* 1999

[33] See Brignell and Poletti (2003) *Sentencing Trends and issues no 29: Suspended sentences in NSW* Sydney: Judicial Commission of NSW The Victorian Sentencing Advisory Council cites Victorian research which also consistently shows that suspended sentences result in penalty escalation and net widening: see Sentencing Advisory Council (March 2005) "Suspended Sentences in Victoria: A Preliminary Information Paper" at fn 62.

[34] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW

[35] The Court has previously considered this to be evidence of a need for a guideline judgment. See *R v. Thomson and Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383; (2000) 115 A Crim R 104 at [17].

A guideline judgment would be useful in re-emphasising the importance of these two steps, and perhaps provide some further guidance in how to apply them. Legislative change may be ineffectual in addressing this particular problem, considering that the issue is not one of clarity, it is one of compliance.

The Victorian Sentencing Advisory Council is currently reviewing suspended sentences in Victoria and whether their operation can be improved in any way. The Victorian SAC is considering the possibility of a guideline judgment for the use of suspended sentences, in addition to considering legislative changes.[36]

3. SUSPENDED SENTENCES – ONGOING ISSUES

Suspended sentences were reintroduced in NSW in April 2000. In terms of their prevalence, suspended sentences are the second most common sentencing option in the higher courts and the sixth most common in the Local Court.[37]

It is difficult to classify where a suspended sentence fits in to the hierarchy of penalties, however it is relevant to understand the nature of a suspended sentence. It seems to be generally accepted that a suspended sentence is less serious than periodic detention, and more severe than a community service order. However, there is evidence that lay members of the community view a suspended sentence as a very lenient option, allowing the offender to "walk free."

Legislation and case law is quite clear on the approach to be taken in considering whether to suspend a sentence. The process involves two main steps:

1. Determining that no sentence other than imprisonment is warranted,[38] then setting the term; and
2. If the term of imprisonment is less than two years, deciding to suspend the sentence.

In this process, it is perfectly acceptable to "double count" all relevant factors in both steps of the process. Indeed it is required. This can be compared to consideration of "special circumstances" under section 44, where "double counting" is not allowed as it skews the sentencing process. There is no general requirement that a sentence should only be suspended in "exceptional circumstances". This is despite the peculiar reasoning process whereby a suspended sentence can only be imposed after deciding that no sentence other than imprisonment is appropriate.

Despite case law being quite clear about the approach that should be taken when suspending a sentence, there is evidence that this approach is not being followed. There has been a steady flow of Crown appeals against sentence to the CCA which suggest that suspended sentences are being used inappropriately. In addition, remembering the limitations on the Crown in bringing sentence appeals, the number of Crown appeals probably underestimates the

[36] See para 8.36 of Sentencing Advisory Council (April 2005) "Suspended Sentences Discussion Paper" Victoria: Sentencing Advisory Council.
[37] Brignell and Poletti (2003) *Sentencing Trends and issues no 29: Suspended sentences in NSW* Sydney: Judicial Commission of NSW at figures 1 and 2.
[38] Imprisonment is a sentence of last resort, as reflected in s 5 of the *Crimes (Sentencing Procedure) Act* 1999

incidence of error. Crown appeals do not provide a satisfactory method of implementing the proper approach in all cases or promoting consistency in sentencing.

There is also research which suggests that the proper approach to suspending a sentence is not being followed, and this has resulted in net widening and penalty escalation.[39] The effects of net widening and penalty escalation are quite severe when an offender is actually called upon to serve the sentence on breach. This further emphasises the need for sentencers to be vigilant in adhering to the two stage reasoning process.

3.1 Background to suspended sentences in NSW

A suspended sentence is a sentence of imprisonment imposed on an offender, but not served immediately. Despite the "sentence of imprisonment", the offender is allowed to remain in the community on certain conditions and will only be required to actually serve the sentence in prison if the conditions are breached. The sentence is suspended unless and until triggered.

The relevant provision is s 12 of the *Act*. Section 12(1) provides that a court may suspend a sentence of imprisonment where the term of the sentence is two years or less. A sentence may only be suspended in *whole*, not in part, and may only be suspended for a period not exceeding the term of the sentence.[40] The court must also direct that the offender enter into a good behaviour bond for a term not exceeding the term of the sentence.[41] That bond must contain the conditions required by s 95 of the Act, one of which is to be of good behaviour, which prohibits committing any offence.[42]

Under s 12(2), a sentence may not be suspended where the offender is already subject to another sentence of imprisonment. This has been interpreted to mean that a sentence cannot be suspended where another sentence of imprisonment is in force, regardless of whether it is the parole or non-parole phase.[43] Unlike periodic and home detention, suspended sentences are available to all types of offenders and for all classes of offences.[44] The only major restriction is that the term imposed must not exceed two years.

The reintroduction of suspended sentences

Suspended sentences were abolished in NSW in 1974 and were not reintroduced until 2000. Prior to 1974, the court's power to suspend a sentence of imprisonment was under ss 558 – 562 of the *Crimes Act 1900*, and was removed following a *Report of the Criminal Law Committee*,[45] on the basis that the bond system was operating more effectively.[46]

In 1996, at which time suspended sentences had not been available in NSW for over 20 years, the New South Wales Law Reform Commission ("NSWLRC") recommended that suspended sentences be reintroduced. The NSWLRC stated, in its Report 79, that:[47]

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[39] Brignell and Poletti (2003) *Sentencing Trends and issues no 29: Suspended sentences in NSW* Sydney: Judicial Commission of NSW
[40] S 12(1)(a).
[41] s 12(1)(b).
[42] See *R v Remilton* [2001] NSWCCA 546 at [15] (per Hidden J).
[43] *R v Edigarov* (2001) NSWCCA 436.
[44] See Part 5, Division 2 (restriction for periodic detention orders) Part 6, Division 2 (restrictions on home detention orders). These Division refer to the *Crimes (Sentencing Procedure) Act* 1999.
[45] New South Wales. Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (September 1973)
[46] Ibid at 15. See also NSWLRC, Discussion Paper 33 *Sentencing* (1996) at 9.58-9.60
[47] NSWLRC, Report 79 *Sentencing* (1996), Recommendation 20 at 4.20

> "Suspended sentences should be reintroduced in New South Wales. Appropriate safeguards should be implemented to ensure that injustice does not arise in an individual case where an offender's sentence has been suspended."

The recommendation was made after considering the numerous submissions to the review, which had both supported and opposed the proposal.[48] Those opposed argued that suspended sentences could result in net-widening and penalty escalation.

The net-widening concern was that offenders who would not ordinarily have received a sentence of imprisonment, such as a fine or community service order, may be sentenced to imprisonment in order to take advantage of a suspended sentence. While some would view this as being more lenient in practice than alternatives to custody,[49] the flow-on effect is that, if a breach were to occur, the offender would in all likelihood spend a period of time in custody.[50]

The concern of penalty escalation was that a longer term of imprisonment tends to be imposed where the sentence is suspended.[51]

The NSWLRC acknowledged these objections but took the view that the advantages of an additional sentencing option outweighed the possible negative consequences. The major advantage is where the seriousness of the offence calls for a term of imprisonment but strong mitigating factors justify the offender's release to the community.[52] In relation to the objections raised in various submissions, the NSWLRC took the view that appropriate safeguards could counter such concerns.[53] In Discussion Paper 33 the NSWLRC stated that instances where a suspended sentence would be the preferred sentencing option are 'conceivably limited in number and scope'.[54]

As a result, suspended sentences were re-introduced as a sentencing option in NSW on 3 April 2000. The Government essentially adopted the NSWLRC's rationale for the use of suspended sentences. In the second reading speech to the *Crimes (Sentencing Procedure) Bill* 1999, the re-introduction of suspended sentences was described in the following terms:

> "The primary purpose of suspended sentences is to impute the seriousness of the offence and the consequences of re-offending, whilst at the same time providing an opportunity, by good behaviour, to avoid the consequences. Their impact on the offender is however weightier than that of a bond. Suspended sentences will only apply to sentences of not more than two years."[55]

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[48] Ibid at 4.21. See note 32 for submissions in favour; note 33 for submissions opposing.
[49] Ibid at 4.21
[50] The CCA has recently held that on revocation of the bond due to a breach, the suspended sentence takes effect as and from the date of the revocation order. That is, any "street time" spent complying with the good behaviour bond does not count. See *Tolley* [2004] NSWCCA 165 and *Graham* [2004] NSWCCA 420
[51] NSWLRC, Report 79 *Sentencing* (1996) at 9.63
[52] Ibid at 4.22, and Discussion Paper 33 at 9.62
[53] NSWLRC, Report 79 *Sentencing* (1996) at 4.23
[54] NSWLRC, Report 79 *Sentencing* (1996) at 9.62
[55] Hon. I.M Macdonald, *Hansard*, Legislative Council, 30 November 1999, p3807. See also *R v. Laws* (2000) 116 A Crim R 70 at [50] per Wood CJ at CL.

Prevalence of suspended sentences

How commonly are suspended sentences used in NSW courts? In principle, suspended sentences are available for all offences for which a term of imprisonment can be imposed, in the Local Court, District Court and Supreme Court. In general, statistics reveal that suspended sentences are more common, as a proportion of penalties imposed, in the higher courts than the Local Court. However, the actual number of suspended sentences imposed is greater in the Local Courts due to the volume of matters sentenced in that Court,[56] and the nature of its jurisdiction. The statistics reveal also that there are particular offences for which a high proportion of penalties imposed are suspended sentences. Suspended sentence are not imposed equally for all offences or in a way that is statistically probable.

In 2003, the average term of a suspended sentence in the Local Court was 9.9 months. In the higher courts it was 19.1 months.[57] The Judicial Commission has most recently found that in 2002-2003, the most common term for a suspended sentence in the higher courts was 2 years, with almost half of all suspended sentences being for this length (44.6%).[58] This could be evidence that Courts are using an artificial reasoning process to arrive at a suspended sentence.

Note, however, that the Judicial Commission statistics treat partially suspended sentences as sentences of imprisonment and thus partially suspended sentences were excluded from the statistics for "suspended sentences."[59]

The Judicial Commission of NSW[60] has analysed the distribution of sentence types for offenders sentenced in the higher courts and revealed that in 2002, 12.2% of sentences were a suspended sentence.[61] This was the second most common sentence type after full time imprisonment (69.6%). The next most common sentence type after suspended sentences was a good behaviour bond.[62]

In the Local Court, suspended sentences accounted for 4% of penalties imposed in 2002.[63] This is less than the *proportion* for higher courts, however, the *actual number* of suspended sentences imposed is considerably higher, due to the high volume of matters sentenced in the Local Court. Suspended sentences were the sixth most common of the nine sentence types available in the Local Court; only three sentencing types were less common, namely periodic and home detention and rising of the court.[64]

More recently, the Judicial Commission's trends in the use of suspended sentences notes that there are particular offences which receive a disproportionately high number of suspended

[56] The higher Courts deal with more serious matters charged on indictment, and are therefore more likely to impose a sentence of imprisonment which may then be suspended.
[57] Above n 24 at 35, 90.
[58] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW
[59] Partially suspended sentence were abolished on 8 July 2003. See *Crimes Legislation Amendment Act 2003*.
[60] Jason Keane, Patrizia Polleti and Hugh Donnelly, 'Common offences and the Use of Imprisonment in the District and Supreme Courts in 2002' (2004) 30 *Sentencing Trends and Issues* 1 at 1-2.
[61] Either under section 12 of the *Act* or section 20(1)(b) of the *Crimes Act 1914* (Cth).
[62] Imposed either under either section 9 of the *Act* or section 20(1)(a) of the *Crimes Act 1914*.
[63] Jason Keane and Patrizia Poletti, 'Common Offences in the Local Courts 2002' (2003) 28 *Sentencing Trends and Issues* 1 at 5.
[64] Ibid at 5.

sentences in each of the lower courts and higher courts. The top 5 for each level of court are set forth below in **Tables 1 and 2**.

Table 1
Top 5 offences in the Lower Courts disproportionately more likely to receive a s 12 suspended sentence.

Offence	Legislation	Percent of sentences for the offence which received s 12 sentence
Possess precursors for manufacture or production of prohibited drug	S 24A Drug Misuse and Trafficking Act 1985	31.8%
Use or possess weapon to resist arrest etc	33B(1) *Crimes Act 1900*	27.3%
Aggravated indecent assault	61M(1) *Crimes Act 1900*	23.9%
Act of indecency with/towards child <16	61N(1) *Crimes Act 1900*	23.3%
Act of indecency with/towards child <10	61N(2) *Crimes Act 1900*	21.3%

Table 2
Top 5 offences in the Higher Courts disproportionately more likely to receive a s 12 suspended sentence.

Offence	Legislation	Percent of sentences for the offence which received s 12 sentence
Indecent assault	61E(1) *Crimes Act 1900* (REP)	36.4%
Knowlingly take part/cultivate plant – Commercial qty	23(2)(a) *Drugs Misuse and Trafficking Act 1985*	29.8%
Knowlingly take part/cultivate plant –Less than Commercial qty	23(1)(a) *Drugs Misuse and Trafficking Act 1985*	28.3%
Receiving etc – Minor indictable offence	S 189 *Crimes Act 1900*	27.3%
Steal Motor Vehicle	S 154AA *Crimes Act 1900*	25%

What factors are influential in deciding to suspend a prison sentence?
The Judicial Commission has considered which factors contribute to the likelihood of a section 12 suspended sentence.[65] The Commission considered those factors which were in a form which could be numerically tested. These included objective and subjective factors including age, record of prior offending, previous terms of imprisonment, final bail status, number of counts of the principal offence and the statutory maximum penalty for the offence.

The Commission found that in all courts, final bail status was the most closely related to the type of final penalty imposed. Offenders for whom bail was refused were more likely to have received a sentence of imprisonment than a s 12 suspended sentence.[66] Offenders for whom

[65] See Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW.
[66] 89.1% of these offenders were imprisoned

bail was granted or not an issue were more likely to have received a section 12 suspended sentence than a sentence of imprisonment.[67] The Commission suggested that the correlation between bail and suspending a sentence is not surprising considering that "bail status reflects the court's initial assessment of the offender and the offence, including the risk of re-offending. Similar consideration may arise during the sentencing process."

The Commission, however concluded that even bail did not account for a large part of the decision to suspend a sentence.[68] The Commission instead suggested that the study shows that a multitude of factors account for the Court's decision to suspend a sentence. "The results seem to point to factors currently not available in numeric form exerting a greater influence on the decision…" Such factors could include the offender's ability and willingness to rehabilitate, and hardship factors. Importantly, the Commission also suggested that "the inappropriateness or lack of availability of other penalties might also impact greatly on the sentencing decision."
The Judicial Commission has recently conducted two other studies which shed light on the use of suspended sentences:

- Monograph 27: Crown Appeals Against Sentence;[69] and
- Sentencing Trends and Issues 33: Successful completion rates for supervised sentencing options.[70]

The Judicial Commission's monograph on Crown appeals analysed 293 matters. Of the 293 cases analysed, the second most common sentences for which a Crown appeal was lodged was a suspended sentence (44 cases or 15%).

In considering successful completion rates for supervised sentencing options, suspended sentences had the third highest success rate out of six types of supervised community based orders which were included in the study.[71] The successful completion rate for suspended sentences was 83.8% with 16.2% revoked. However, the Judicial Commission warns against judging success purely in terms of revocation rates, since different orders have differing levels of intensity and strictness of supervision.[72]

Where does a suspended sentence fit in the hierarchy?
It is somewhat difficult to classify suspended sentences in a sentencing hierarchy, although there is no explicit need to do so in NSW (compare, for example, Western Australia).[73] It is

[67] 60.1% of offenders on bail and 55.1% of offenders not on bail received a suspended sentence See p 18
[68] At p 20-21
[69] Brignell and Donnelly (June 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: Judicial Commission.
[70] Potas, Eyland and Munro (June 2005) "Sentencing Trends and Issues 33: Successful completion rates for supervised sentencing options" Sydney: Judicial Commission and Department of Corrective Services.
[71] The order of successful completion was: bond (88.9%), fine default order (88.0%), suspended sentence (83.8%), home detention order (82.7%), community service order (76.5%) and drug court (58.7%). See Potas, Eyland and Munro (June 2005) "Sentencing Trends and Issues 33:Successful Completion Rates for Supervised Sentencing Options" Sydney: The Judicial Commission of NSW and the NSW Department of Corrective Services, at p 5.
[72] Potas, Eyland and Munro (June 2005) "Sentencing Trends and Issues 33:Successful Completion Rates for Supervised Sentencing Options" Sydney: The Judicial Commission of NSW and the NSW Department of Corrective Services, at p 13.
[73] Western Australia's "sentencing ladder" is contained in section 39 Sentencing Act 1995, in particular, 39(3): "A court must not use a sentencing option in subs(2) unless satisfied, having regard to Division 1 of Part 2, that it is not appropriate to use any of the options listed before that option".

however relevant in terms of understanding the nature of the suspended sentence and its severity relative to other sentencing options, since these impact on whether a suspended sentence will be an appropriate sentence in any given case.

There seems to be a disjuncture between public perceptions and legal views on the severity of suspended sentences. While the Courts view suspended sentences as one of the most serious penalties, the public seem to view the offender as "walking free."[74]

Suspended sentences are listed as a "non-custodial sentencing option" under Part 2, Division 3 of the *Act*, although they are neither strictly non-custodial or custodial: an offender so sentenced may never have to serve any time in custody but will be required to serve the term in custody if a breach occurs. Brignell and Poletti, considered the place of suspended sentences in the sentencing hierarchy under the present law.[75] They state that a suspended sentence falls "between a non-custodial and a custodial sanction".[76] It is described as being less severe than a periodic detention order and as more severe than a community sentence order. Similarly, the Bureau of Crime Statistics and Research regards suspended sentences as less serious than imprisonment, home detention, juvenile detention (control order) and periodic detention.[77]

There are a number of aspects of the legislation which also suggest that a suspended sentence is less severe than home or periodic detention. On breach of a suspended sentence, the court may order that imprisonment be served by way of periodic or home detention instead of full-time imprisonment. This implies that periodic and home detention are more severe than suspended sentences, since it would be illogical to replace a suspended sentence, once breached, with a more lenient sentence.[78] The legislative provisions also contain different thresholds of availability for each of these three sentencing options.[79]

The Courts have also considered the nature and severity of suspended sentences. In *R v Zamagias*, Howie J, on behalf of the Court, stated a suspended sentence is to be viewed as a real sentence and as punishment for the offence, placing it as a more severe option than a community service order. [80] His Honour held:

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[74] See for example, Arie Freiberg, *Pathways to justice: sentencing Review 2001: Discussion Paper* (2001) 59. See also Sebba and Nathan "Further Explorations in the Scaling of Penalties" (1984) 24 *British Journal of Criminology* 221 at 231. The disjuncture between public perceptions and judicial views on the severity of suspended sentences is an issue currently being considered by the Victorian Sentencing Advisory Council.

[75] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues* Number *29: Suspended sentences in NSW*", Sydney: The Judicial Commission. This assessment may be affected by CLRD's current legislative proposals.

[76] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues* Number *29: Suspended sentences in NSW*", Sydney: The Judicial Commission at 5.

[77] BOCSAR, *2003 Criminal Court Statistics 2003*, 2004, <http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/courtstatsindex> at 137. BOCSAR considers suspended sentences to be the fifth (suspended sentence with supervision) and sixth (other suspended sentences) most serious of a hierarchy of 16 penalty types

[78] Section 99(2) of the *Crimes (Sentencing Procedure) Act 1999*. That said, breach of home or periodic detention is dealt with by the Parole Board, whereas breach of a suspended sentence is dealt with by the Court.

[79] By section 6, a sentence of three years or less may be served by way of periodic detention. By section 12, a sentence of two years or less may be suspended. By section 7, a sentence of 18 months or less may be served by way of home detention. However, there are concerns specific to home detention (eg the rights of other occupants of the home) which may explain its more restricted availability.

[80] [2002] NSWCCA 17 at 31

> "Further, a sentencing court must approach the imposition of a sentence that is suspended on the basis that it can be a sufficiently severe form of punishment to act as a deterrent to both the general public and the particular offender. Of course it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of its effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment. The question of whether any particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender. It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate."

This statement was cited with approval in *R v Hinton.*[81] In this case, a Crown appeal was allowed as the Court felt a suspended sentence was an inappropriate punishment to denounce the criminality of the respondent. The conduct in question was sixteen counts of defrauding the Commonwealth. Howie J (Wood CJ at CL and Sully J agreeing) held:

> "The leniency involved in a suspended sentence could not in this case adequately reflect the objective seriousness of the offences committed or the need for general deterrence."[82]

Both of the above statements show that suspended sentences incorporate an element of leniency, although the courts have also indicated that a suspended sentence should not be seen as a mere exercise in leniency.[83] A sentencing court must also recognise that a sentence of imprisonment is a significant punishment even where the execution of that sentence is suspended.[84] For example, in *R v Remilton.*[85] the Court stated that "the suspended sentence does have a denunciatory effect and certainly some deterrent effect."

In *R v White*[86] the Court considered a severity appeal against an 18 month sentence, suspended after 9 months in custody (that is, a partially suspended sentence, which is now no longer available). Interestingly, the Court substituted a sentence of 12months periodic detention. This may demonstrate that periodic detention is more lenient than full time imprisonment rather than suggesting that periodic detention is more lenient than a suspended sentence.

Whether such goals are achieved by a suspended sentence in a given case will depend on all the facts of the case and the application of relevant sentencing principles.

3.2. Proper approach to imposing a suspended sentence

The two stage reasoning process

The decision to suspend a sentence of imprisonment involves two main steps:

[81] [2002] NSWCCA 405
[82] Ibid, at 35
[83] See for example, *R v. Pulham* [2000] VSCA 17
[84] See for example *JCE* [2000] NSWCCA 498 at 25 and *R v Foster* [2001] NSWCCA 215
[85] [2001] NSWCCA 546 at [11] (Hidden J)
[86] (2001) NSWCCA

1. Determining that no sentence other than imprisonment is warranted[87] then setting the term; and
2. If the term of imprisonment is less than two years, deciding to suspend the sentence.

This two-stage approach has been emphasised in a number of cases, including by the High Court in the Western Australian case of *Dinsdale v the Queen.*[88] Despite the different legislative regime in Western Australia, *Dinsdale* is relevant to the use of suspended sentences in NSW.

Dinsdale has been applied by the NSW Court of Criminal Appeal. In *R v JCE*,[89] the CCA emphasised the importance of the two stage process in stating that:

> "A sentence of imprisonment which is suspended is nonetheless a sentence of imprisonment… If the court is satisfied that no penalty other than imprisonment is appropriate, it must determine what term of imprisonment is appropriate. Other questions then arise. By subs 12(1) of the Act, one of the questions to be considered when the appropriate term of imprisonment is not more than two years, is whether execution of the sentence should be suspended." [90]

There are three main dangers in eliding the two steps:

- a particular (lesser) term of imprisonment may be imposed to enable the sentencing judge to suspend the sentence, or
- a longer term of imprisonment may be imposed to counter the leniency of the sentence being suspended.
- a sentence of imprisonment will be suspended where alternatives to imprisonment would have been appropriate.

Research by the Judicial Commission of NSW suggests that the reintroduction of suspended sentences may have resulted in net widening and penalty escalation.[91] The most recent research by the Judicial Commission has found that the most common term for a suspended sentence in the higher courts is 2 years, with almost half of all suspended sentences being for this length (44.6%).[92] This could be further evidence that Courts are using an artificial reasoning process to arrive at a suspended sentence.

These concerns emphasise the need for vigilance in adhering to the two stage reasoning process.

Sentencing courts are not required to explicitly state that they have applied the two steps in imposing a suspended sentence.[93] However, the nature of the sentence imposed and the failure to record that a two-step approach has been taken may lead the CCA to examine carefully the findings made by the sentencing judge to determine whether the sentence is erroneous.[94]

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[87] Imprisonment is a sentence of last resort, as reflected in s 5 of the *Crimes (Sentencing Procedure) Act* 1999
[88] [2000] HCA 54 at 76 per Kirby J.
[89] [2000] NSWCCA 498
[90] Ibid at 15-17 per Fitzgerald JA (Whealy and Howie JJ agreeing)
[91] Judicial Commission of NSW (2003) "suspended sentences in NSW" *Sentencing Trends and issues no 23*
[92] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW
[93] *R v Foster* [2001] NSWCCA 215 at 33
[94] Ibid, at 35

The two-stage process poses a number of logical and practical difficulties and has been criticised by commentators.[95] In *Dinsdale v The Queen*,[96] Kirby J noted some such objections,[97] but held that 'suspended imprisonment is both a popular and much used sentencing option in Australia.'[98] Kirby J took the view that the criticisms merely emphasise that Court must avoid any temptation to misuse suspended sentences where a non-custodial sentence would suffice.[99] However, there is also the need to avoid misusing suspended sentences in cases where actual imprisonment is required, for example, where the offence is objectively very serious.

Bagaric also agrees that the 'absurdity associated with the reasoning process behind suspended sentences is not a persuasive reason for their abolishment.'[100] Rather, it points to the need for transparency and revision regarding the circumstances in which they can be imposed.[101]

"Double counting"

One of the major criticisms of the reasoning process in suspending a sentences is the issue of "double counting." Double counting arises due to the two-stage process in deciding to suspend a sentence of imprisonment (the decision to imprison followed by the decision to suspend). The cases establish that it is entirely appropriate to double count factors at the second stage. In *JCE*[102] the Court held that when considering whether to suspend, the same considerations that were relevant in determining whether a sentence of imprisonment was called for (and if so the length of the term) are again considered in deciding whether to suspend the sentence.

There seems to be a contradiction in deciding that an offender must serve a sentence of imprisonment and then deciding that the sentence should be suspended. In addressing this contradiction, the Court has said that the material considerations in sentencing will point in different directions, and the sentencing process requires the Court to balance those considerations.[103] The result is that the same factors may lead to a conclusion that no sentence other than imprisonment is appropriate but that the sentence should be suspended.

In *Dinsdale*, Kirby J explicitly confirmed the appropriateness of double counting:

> "the same considerations are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term… [It is] necessary to look at again at all matters relevant to the circumstances of the offence as well as those personal to the offender."

Kirby J also emphasised the need to not merely concentrate on the offender's subjective circumstances when considering whether to suspend the sentence. His Honour implied that it

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[95] M Bagaric, 'Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments' (2002) 22(2) *UNSW Law Journal* 535, at 538-540. See also, L Bartels, 'Suspended sentences in NSW' (2001) 8(9) *Criminal Law News NSW and ACT* 81

[96] [2000] HCA 54

[97] Ibid at 74-76

[98] Ibid at 76

[99] Ibid

[100] Bagaric, 'Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments' (2002) 22(2) *UNSW Law Journal* 535, at 538-540, at 540

[101] Ibid

[102] *R v JCE* [2000] NSWCCA 498 at para 17 per Fitzgerald JA.

[103] Ibid at para 18.

is important to view such matters in the context of the objective factors relating to the offence. Thus subjective factors cannot be allowed to obscure the consideration of objective seriousness.

The available case law makes clear that double counting is required, but does not offer any guidance on what could "tip the scales" in the second step of the reasoning process. Bagaric has criticised the reasoning process which leads to a suspended sentence for a number of reasons including the double counting of factors:[104]

> "If all of the factors in mitigation have been considered at the outset and an immediate custodial sentence is imposed, there is nothing left which can reduce the severity of the penalty… there are no new variables to tip the scales further in favour of a more lenient disposition."

Bagaric argues that the only basis upon which such a reasoning process might be justified is if the question of whether to suspended the sentence concentrates on the rehabilitation prospects of the offender. However, he rejects this possibility on the basis that the prospects of rehabilitation are, and should be, taken into account in the initial decision to impose a sentence of imprisonment and should not be counted twice.[105]

One consideration is that this double weighing of mitigating factors may favour white-collar and middle class offenders.[106]

The relevance of rehabilitation

The weight of authority is that the discretion to suspend a sentence is very broad. The proper approach is to look at *all* matters relevant to the offence and the offender, in deciding whether a sentence of imprisonment should be suspended. [107]

In particular, the High Court has made clear that the discretion to suspend a sentence is not confined "wholly, mainly or specially" to a consideration of the rehabilitation prospects of the offender. This is contrary to what had been suggested by some authorities.[108] An approach that treats rehabilitation as the primary consideration is erroneous.[109]

Although the sentencing judge must consider all the circumstances again at the second stage, Kirby J pointed out in *Dinsdale* that the "material considerations" at the second stage are the *objective features* of the offence and the *personal considerations* of the offender including considerations of *rehabilitation* and *mercy*.[110] Thus rehabilitation may, depending on the facts of a case, be viewed as a "material consideration" in deciding whether to suspended a sentence. However, when actual rehabilitation or prospects of rehabilitation are urged as mitigating factors, evidence should be directly produced and in a form that can be tested.[111]

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[104] Bagaric, Mirko, 'Suspended sentences and preventative sentences: illusory evils and disproportionate punishments' (1999) 22(2) *UNSWLJ* 535 at 539.
[105] Opcit at 539.
[106] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues* Number *29: Suspended sentences in NSW*", Sydney: The Judicial Commission, at note 11 citing Warner (2002). See also Bagaric, above n, at 540
[107] *Dinsdale* per Kirby J at paras 84 to 89, and *JCE* per Fitzgerald JA at para 17.
[108] *Dinsdale* per Kirby J.
[109] *Dinsdale v The Queen*[109] Kirby J (with whom Gaudron and Gummow JJ agreed)
[110] This was applied in JCE at 17 (Fitzgerald JA)
[111] See for example *R v McGourty* [2002] NSWCCA 335 at [24] (Wood CJ at CL).

Exceptional circumstances and suspended sentences

Despite the paradoxical nature of a suspended sentence, there is no general rule that a sentence may only be suspended in exceptional circumstances. Indeed, the courts have strongly resisted confining the discretion in this way. The Courts have also emphasised that a suspended sentence is capable of achieving general deterrence and adequately punishing an offender even where the crime is objectively very serious. It could not therefore be said that any principle of general application has emerged that a suspended sentence is only appropriate in exceptional circumstances.

This is despite the peculiar nature of a suspended sentence, namely that a suspended sentence can only be imposed after deciding that no sentence other than imprisonment is appropriate. It could therefore be thought that a suspended sentence is an appropriate sentencing option in only a narrow range of cases and that some unusual feature must be present warranting the suspension, since any sentence other than imprisonment has been found to be inappropriate.

In *Dinsdale*, Kirby J observed that the Western Australian parliament has not expressly stated any specific criteria for the suspension of a term of imprisonment, and that this has led to attempts by the courts to explain the considerations to which weight should be given. It is not surprising that they should seek to do so, since consistency of approach is an important aim of sentencing and to leave an important sentencing discretion at large is properly a cause for some concern. However, if the legislature intended to limit the discretion to suspend in some way, it could have done so.[112] In the same way, the NSW legislature has not confined the discretion. By contrast, the original English provision required that a sentence could only be suspended in "exceptional circumstances."[113]

Although the cases have resisted confining the discretion, the courts have established that in relation to some particular offences, a sentence other than imprisonment should only be imposed in "exceptional circumstances" In this context imprisonment includes a suspended sentence. This authority is not statute based, but founded on the principle of proportionality: some offences are so serious that imprisonment is required in all but exceptional circumstances. Notable examples of such offences are:

- commercial drug dealing;[114]
- social security fraud/defrauding the Commonwealth;[115]
- armed robbery; and
- dangerous driving occasioning death or grievous bodily harm.

Guideline judgments in NSW have entrenched the principle in relation to armed robbery and dangerous driving causing death or grievous bodily harm. Such authority is not specific to suspended sentences but it based on general sentencing principles, such as that of proportionality,[116] and the

[112] See Kirby J at [84]: "[T]here is nothing in the grant of the power, as expressed in the applicable legislation, to justify confining its availability."

[113] Section 118 of the *Powers of Criminal Courts (Sentencing) Act 2000* (now repealed). The *Halliday Report* recommended that this restriction be retained: *Making Punishments Work: Review of the Sentencing Framework for England and Wales*, July 2001 < http://www.homeoffice.gov.uk/docs/halliday.html> However, the recommendation was not followed, and no such qualification now exists in the English legislation: see sections 189-194 of the *Criminal Justice Act 2003*.

[114] See in particular *R v Boundy* [2002] NSWCCA 319. See also *R v Collins* [2004] NSWCCA 30 at [9] (Barr J). See also *R v. Cacciola* (1998) 104 A Crim R 178 at 181-182.

[115] See for example *R v Aller* [2004] NSWCCA 378.

[116] This principle requires that regard must be had to the objective gravity of the offence, and the subjective features of the case must not be allowed to produce a sentence which fails to reflect the objective seriousness of

strong need for general deterrence for certain offences. The rationale for the principle is that due to the high level objective seriousness in such offences, and the need for general deterrence, a sentence other than full time imprisonment would be inadequate in all but exceptional cases. The principle could apply to all types of offences involving an inherently high level of objective seriousness.

Similarly, the courts have held that where a particular offence involves a high level of objective seriousness, a custodial sentence should be imposed unless exceptional circumstances can be shown.For example, in *R v Howard,*[117] the Supreme Court imposed a suspended sentence for offences against the *Corporations Act* 2001. Kirby J, considered the objective factors, and held that:[118]

> "[the] offences are plainly very serious. They merit a term of imprisonment, unless the particular circumstances of Mr Howard are *truly exceptional*". [Emphasis added]

A significant degree of discretion is still retained where such offences are concerned, since "exceptional circumstances" has remained fairly open ended. Various factors may be relevant, such as:

- the offender's age;
- ill physical or mental health;
- the offender's motivation in committing the crime (eg need as opposed to greed); and
- the effect of a custodial order on the offender's family.[119]

The Courts have also emphasised that they retain their discretion to impose a sentence other than full time custody for such offences and that judges are not discouraged from taking a risk in so exercising their discretion.[120] Where such a principle applies and the sentencing judge finds that exceptional circumstances exist, the Crown in an appeal must show that a finding of exceptional circumstances was not open on the evidence in the case.[121]

Despite the observation that it may seem logical to generally restrict suspended sentence to exceptional circumstances, it is highly unlikely that such a restriction would develop at common law. As was held in relation to the factor of rehabilitation, it may similarly be held that the legislature has not chosen to restrict the discretion to exceptional circumstances, although it could have done so, and therefore to impose such a restriction at common law would invite error.[122]

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the crime.See for example, *R v Dodd* (1991) 57 A Crim R 349 at 354; cited in the Judicial Commission's "Sentencing Practice and Principles."

[117] [2003] NSWSC 1248.

[118] At para 39. In that case the Court decided to suspend the sentence, finding exceptional circumstances primarily on the basis of the extreme level of assistance given by the offender to authorities.

[119] These were taken into account in *R v Aller* [2004] NSWCCA 378 where the Court found that the finding of exceptional circumstances was open to the sentencing judge.

[120] This point was made by Gleeson CJ in the context of drug trafficking offences*: R v Lansdell,* Court of Criminal Appeal 23 May 1996 unreported.

[121] *R v Aller* [2004] NSWCCA 378.

[122] Per Kirby J at [84] with whom Gaudron and Gummow JJ agreed.

The sentencing guideline in *Henry*,[123] for the offence of armed robbery enunciated the principle that other than in the most exceptional circumstances, a substantial sentence of full-time custody should normally be imposed on armed robbery offenders.

Since a suspended sentence is non-custodial, exceptional circumstances must exist before suspending a sentence of imprisonment for armed robbery. A sentencing judge must be cautious in concluding that such exceptional circumstances exist, and must be mindful of giving sufficient weight to the principle of general deterrence.[124]

The principle that significant sentences of full time imprisonment would normally be appropriate in cases of armed robbery had earlier been recognised in a long line of cases, including *Ellis*[125]. The principle rests on the very high level of criminality (objective seriousness) involved in such an offence.

Henry was applied in *Blackman and Walters,*[126] in which case exceptional circumstances were found to exist and the suspended sentences that had been imposed for offences of armed robbery were upheld. The Court looked at the fact that there were powerful subjective circumstances, that the offenders were the junior partners in the crime and that their complicity was out of character and attributable to their immaturity. There had also been substantial rehabilitation since the offences. They had also admitted their culpability (without which their guilt could never have been established) and had provided assistance to authorities.

The reasoning in *Henry* was also followed in *R v Nair*,[127] which involved two counts of robbery in company, rather than armed robbery. Another difference was that the offender in *Nair* was an accomplice and not the principal offender. *Nair* in effect therefore extended the principle in *Henry* to a different (although very similar) offence. The Court found in *Nair* that it was an "exceptional" case and therefore that a suspended sentence was not outside the trial judge's discretion. The particular facts considered were the offender's peripheral role in the offences, his age, progress regarding rehabilitation and the likelihood he would not re-offend.

The offence of dangerous driving occasioning death/grievous bodily harm is one where the courts have held that there is a strong need for general deterrence. On that basis, a non-custodial penalty should be "exceptional."

In *Jurisic* the NSW Court of Criminal Appeal promulgated its first guideline judgment, being for the offence of "dangerous driving occasioning grievous bodily harm or death".[128] The Court noted that the legislature had increased the maximum penalty for the offence in order to act as a "strong deterrent," however sentencing practice by the Courts did not seem to reflect the increase in the maximum. The Court responded by promulgating a guideline which inter alia provided that "a non-custodial sentence for an offence against s52A should

[123] *Henry* [1999] NSWCCA 111 at para 113 – guideline for the offence of armed robbery under s 97 of the *Crimes Act* 1901.
[124] See *R v Azzi* [2003] NSWCCA 10. In this case, the offender's intellectual disability did not constitute an exceptional circumstance.
[125] (1993) 68 A Crim R 449.
[126] [2001] NSWCCA 121.
[127] [2003] NSWCCA 386
[128] contained in section 52A of the *Crimes Act 1900*

be exceptional and almost invariably confined to cases involving momentary inattention or misjudgment."[129]

The Court recognised that although strictly an alternative to full time custody, "A term of imprisonment by way of home detention is a substantially less onerous sentence than imprisonment within the confines of a prison." At first instance, Jurisic was sentenced to 18 months home detention. The Court held that the sentence imposed was inadequate in terms of *length*, but also held that "in all the circumstances the respondent should serve a period of *full time custody*."[130] Jurisic was re-sentenced to two years' full time imprisonment with a minimum term of one year.

In *R v Whyte*[131] the Court reformulated the *Jurisic* guideline.[132] The Court reiterated the views expressed in *Jurisic* that the offence of dangerous driving occasioning death or grievous bodily harm is one where there is a need for *general deterrence*, and that generally, a non-custodial penalty will be inappropriate.[133]

The Court did not directly consider whether it would be appropriate that the custodial sentence be served other than by way of full time imprisonment, although the Court did provide guidance as to the appropriate length of the custodial sentence. That guidance impacts upon the availability of options such as suspension, periodic or home detention.[134] The Court promulgated the following guideline with respect to length of custodial sentence:[135]

> "For offences against ss52A(1) and (3) for the typical case:
> Where the offender's moral culpability is high, a full time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate.
> In the case of a low level of moral culpability, a lower sentence will, of course, be appropriate.
> In the case of the aggravated version of each offence under s52A, an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required. Other factors, such as the number of victims, will also require an appropriate increment."

It is clear from the guideline in *Jurisic*, reformulated in *Whyte*, that due to the need for general deterrence, a custodial sentence will usually be appropriate, however, this cannot be extrapolated to suspended sentences generally.

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[129] at 223
[130] at 253
[131] [2002] NSWCCA 343; (2002) 55 NSWLR 252
[132] A number of things had happened in the intervening period: The High Court in *Wong and Leung* had questioned the appropriateness of guidelines, legislation in NSW had been passed and amended giving specific powers to the Supreme Court in relation to Guidelines, and changes had been made to sentencing legislation in NSW, including introduction of section 5 of the *Crimes (Sentencing Procedure) Act 1999.*
[133] *Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at 143
[134] A suspended sentence is available where the term is two years or less (s12); periodic detention is available where the term is 3 years or less (s6); and home detention is available where the term is 18 months or less (s7).
[135] at [229]-[231]

Suspended sentences and s 44 – "special circumstances"

Section 44 contains provisions for setting a non-parole period. Section 44(2) provides that the balance of the sentence must not exceed one third of the non-parole period "unless the Court decides that there are *special circumstances* for it being more."

In the case of a term of more than six months,[136] it is at the time the sentence is suspended, and not upon any subsequent revocation, that the court must either set the non-parole period or give reasons for not doing so.[137] Where applicable, the standard non-parole scheme is also considered at this stage.[138] The setting of the term and the non-parole period is considered *before* examining alternatives to full-time imprisonment such as suspending the sentence.[139]

There does not appear to be any particular relationship between the finding of "special circumstances" under section 44, and the suspending of a sentence. "Special circumstances" within the meaning of section 44 are considered as part of the first step in deciding the length of imprisonment. As outlined above, this happens *before* deciding whether or not to suspend (which in any event is only available if the sentence is under 2 years). The process is still only one of two steps, as there is ample authority to show that section 44 does not require any staged process where the non-parole period is considered and then the total term considered. These relevant steps may be taken simultaneously.

In any event, the process undertaken in deciding whether there are "special circumstances" to justify varying the statutory ratio is very different to exercising the discretion in deciding whether a sentence of two years or less should be suspended. In the former, care must be taken not to "double count" certain factors,[140] where as in the latter, "double counting" is accepted, or even required.[141]

The rationale for this difference seems to be that in the case of "special circumstances" under section 44, care needs to be taken to ensure that an element does not qualify as a "special circumstance" where it has already been taken into account in considering what the term of the sentence should be. That is, it should not normally be used to reduce the non-parole period even further, if it has already been taken into account.[142] A double counting of the circumstances which are favourable to the offender in reducing the non-parole period would skew the sentencing process.

In contrast, the decision of whether to suspend a sentence involves a "double weight to *all of the factors relevant both to the offence and the offender – whether aggravating or mitigating* – which may influence the decision whether to suspend the term of imprisonment." (emphasis added.)[143] In this circumstance, the double counting of *all* factors, whether aggravating or mitigating would not result in a skew of the sentencing process. However, in practice, it

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[136] By section 46 of the *Crimes (Sentencing Procedure) Act 1999*, "a court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less."

[137] *R v Whelan* [2004] NSWCCA 379 at [28]; *R v Tolley* [2004] NSWCCA 65 at [24].

[138] *R v Tolley* [2004] NSWCCA 65 at [24]. See also *R v Graham* [2004] NSWCCA 420

[139] See *R v. Meyer* [2002] NSWCCA 451 per Bell J at [12] – [13] with whom Wood CJ at CL and Dowd J agreed. However, see Sully J in dissent in *Gamgee*[2001] NSWCCA 251 at [11]

[140] See for example R v. Way [2004] NSWCCA 131 at [111]

[141] Per Kirby J in *Dinsdale* at [85]: "the same considerations are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term."

[142] See for example, R v. Badanjak [2004] NSWCCA 395 at [29], *R v. Fidow* [2004] NSWCCA 172 at [18] and *Simpson* (2001) 53 NSWLR 704 at [47]

[143] Dinsdale per Kirby J at [85]

would seem that a number of Crown appeals have resulted from situations where the subjective factors have been allowed to obscure the objective seriousness of the offence.

Section 44(1) was substituted at the time that the standard non-parole sentencing scheme was introduced,[144] and the consequence is that NSW has returned to a "bottom up" system of sentencing,[145] that is, when the Court is sentencing a person to imprisonment, the Court is "*first required to set a non-parole period for the sentence*".

Section 44(2) has been considered in the context of "bottom up" sentencing[146] and it is settled that it is *not* necessary to "first determine a minimum term, which [is] thereafter immutable, notwithstanding a subsequent finding of special circumstances."[147]

Indeed, it has been held to be erroneous to determine the non-parole period first and then increase the balance of the term to take account of a finding of special circumstances.[148] Although increasing the head sentence to take into account special circumstances may seem correct under a literal reading of 44, that approach is incorrect.[149] What section 44 permits is a reduction of the non-parole period, but *in the context of the appropriate total term*. The process does not require a two-step or sequential process, and the relevant steps may be taken simultaneously.[150]

The term "special circumstances" in section 44 has been interpreted very broadly, arguably even too broadly.[151] In 2002, "special circumstances" were found in t up to 87.1% of matters where the higher courts imposed a sentence of imprisonment. The Courts have stressed that it is necessary that the circumstances be sufficiently special to justify a variation.[152]

The meaning of a similar term, "special reasons", was recently considered by the High Court, albeit in a different context.[153]

Interaction of suspended sentences with the standard non-parole scheme

Although the standard non-parole scheme has been in operation for over two years, very few cases have been decided under the scheme. As at September 2005, there had been less than

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[144] See *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* Assented to 22 November 2002, commenced 1 February 2003.

[145] This is a return to the situation which previously existed under section 5 of the now repealed *Sentencing Act 1989*.

[146] See *R v. Way* [2004] NSWCCA 131 at [111] and also *R v. Tobar and Jan* [2004] NSWCCA 391

[147] *Way* at [111]

[148] *R v. Tobar and Jan* [2004] NSWCCA 391 per Simpson J at [39] See also *R v. Moffitt* (1990) 20 NSWLR 114 which considered the situation under the now repealed section 5 of the *Sentencing Act 1989*.

[149] , *R v. P* [2004] NSWCCA 218 per Hulme J (with whom Ipp JA and Hislop J agreed).

[150] See *R v. Way* [2004] NSWCCA 131, where it was held that the case law which arose in relation to repealed section 5 of the *Sentencing Act 1989* will provide guidance to the way section 44 should be applied. See R v. GDR (1994) 35 NSWLR 376 at 381-382, *R v. Hampton* (1998) 44 NSWLR 729 and *R v. Moffitt* (1990) 20 NSWLR 114.

[151] *R v Fidow* [2004] NSWCCA 172 at [20]

[152] See *Simpson* (2001) 53 NSWLR 704 at [68]

[153] *Baker v. The Queen* [2004] HCA 45; (2004) 210 ALR 1 The High Court considered legislation which permitted the Court to exercise certain powers once it was satisfied that "special reasons" existed. The majority accepted that it would be extremely difficult and rare to satisfy the requirement of "special conditions" in that legislation. This reflects the views of Spigelman CJ in *Simpson* that the words "special circumstances" are used in numerous legislative provisions and "...are words of indeterminate reference and *will always take their colour from their surroundings.*"

30 cases in which a suspended sentence (with or without supervision) had been imposed by the District Court for an offence covered by the standard non-parole scheme.[154]

The scheme covers a number of serious offences where they are dealt with on indictment.[155] The "standard non parole period" represents the non parole period for an offence in the middle of the range of objective seriousness. Non-custodial sentences may be imposed for such offences provided that reasons are given.[156] In *Way,*[157] the Court held that the proper approach to the scheme is for a court to ask whether there are reasons for not imposing the standard non parole period, either because the offence is not in the "middle of the range of objective seriousness" or due to the presence of aggravating or mitigating factors relating to the subjective circumstances. When there are reasons for not imposing the standard non parole period, the court must still treat it as a guide in sentencing. The scheme does not mandate a mathematical approach to sentencing and the ultimate aim remains one of imposing a sentence that is appropriate in all the circumstances.

Unless the court finds that there are *no* reasons for *not* imposing the relevant standard non-parole period, there is nothing to prevent a court suspending a sentence of imprisonment for an offence covered by the scheme. The court would:

- First consider whether a sentence of imprisonment was appropriate.
- Where answered in the affirmative, would then consider whether there were reasons for not imposing the standard non parole period.

If no such reasons were found, the standard non parole period would be imposed and it would not be possible for the court to suspend the sentence, since the standard non parole periods are all in excess of two years imprisonment (and the total term being again higher than the standard non-parole period). In other cases, providing that the term of sentence arrived at - using the standard non parole period as a guide - is two years or less, the court may suspend the sentence.

The CCA has dismissed a Crown appeal against a sentence of two years with a non-parole period of six months. The standard non parole period for the offence was ten years.[158] The case illustrates that in practice, the scheme does not prevent sentences below two years (and which may therefore be suspended) from being imposed, even where the standard non parole period is considerably higher. There was, however, no discussion of suspended sentences in the Court's judgment.

In *R v. Dickinson*, the Court considered the effect of the scheme on imposing alternatives to full time imprisonment.[159] The Crown submitted that the sentencing judge did not consider the standard non-parole period as a guide once he found that the offence fell below the middle of the range of objective seriousness.[160] However, that submission seemed only to apply to the length of the sentence itself, not the decision to suspend it. The Crown's real

[154] Judicial Commission's *JIRS statistics*. The majority of these were for aggravated break, enter and commit indictable offence.
[155] See Part 4, Division 1A of the *Act*.
[156] S 54C of the *Act*.
[157] *R v Way* [2004] NSWCCA 131.
[158] *R v Hopkins* [2004] NSWCCA 105.
[159] [2004] NSWCCA 457
[160] The Court has previously made clear that a decision that an offence falls below the mid-range of seriousness does not render the standard non-parole period irrelevant: *R v Way* [2004] NSWCCA 131 at [122]; *R v Davies* [2004] NSWCCA 319.

attack on the sentence was simply that the sentencing judge failed to give proper weight to the objective seriousness of the matter, and on that basis was manifestly inadequate. The CCA held that a sentence of full-time imprisonment should have been imposed, however, the lowest reasonable sentence that ought to be imposed was one of two years and two months to be served by way of periodic detention.

3.3 Crown appeals against suspended sentences

There have been a number of Crown appeals against suspended sentences since their reintroduction. Bearing in mind the restraints on the Court in considering Crown appeals against sentence and considering the provisions of the prosecution guidelines, the number of Crown appeals to the Court of Criminal Appeal is considerable and even then is likely to largely underestimate the incidence of error.[161] The limitations of Crown appeals mean that they are an inadequate tool in achieving consistency in sentencing. Thus a guideline judgment may be needed for suspended sentences because of the inherent limitations of Crown appeals.

An analysis of appeals to the CCA against suspended sentences provides some indication of when a suspended sentence will be regarded as appropriate, the types of factors which are common to decisions to impose a suspended sentence and how those factors should be treated when deciding whether or not to suspend the sentence. Summaries of Crown appeals against suspended sentences are in **Appendix 4**.

Crown appeals generally

The Crown may appeal to the CCA against sentence under s 5D of the *Criminal Appeal Act 1912*. Error must be found before the appellate Court can interfere on sentence.[162] Although the same principles apply generally in relation to a Crown appeal as they do when an offender appeals under section 5(1) and 6 of the *Criminal Appeal Act 1912* additional principles apply before the Court will interfere. Thus, Crown appeals are considered to be a limited tool for achieving consistency in sentencing.

In determining Crown appeals, the Court will exercise considerable restraint in a number of respects. These principles must be remembered when considering the number and outcomes of Crown appeals against suspended sentences. First, in considering whether or not the sentencing judge has erred in the exercise of his or her discretion, the Court normally insists on the Crown establishing "very clearly the error of which it complains."[163] Thus where the appeal is based on the ground of manifest inadequacy, even a very lenient sentence may not be regarded as an appealable error.

Where the Court does find error, it may nevertheless exercise its discretion not to intervene, due for example to the hardship that would be caused to the offender by returning him or her to custody. If it does intervene, the Court should generally impose the least sentence that

[161] See Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission, at page 3
[162] See most recently, *Markarian v. The Queen* [2005] HCA 25 at [25]
[163] *Dinsdale*, per Kirby J at [62].

could properly be imposed.[164] The substituted sentence therefore tends not to reflect the full extent of the sentencing judge's error.

The Court will be more likely to exercise its discretion not to intervene despite error where a successful Crown appeal would see the offender moving from the community into custody. The Courts have held that in such a situation, there is a public interest in not interfering with the demonstrated rehabilitation of the offender.[165]

These restrictions on Crown appeals also affect the Crown's decision as to whether or not to lodge an appeal in the first place, and these restrictions are referred to in the DPP's prosecution guidelines. For example, even where the DPP may be of the view that the sentencing judge's discretion miscarried in imposing a suspended sentence, an appeal would not normally be lodged where it was considered likely that although the Court would find error, it would exercise its discretion not to intervene. It is therefore likely that the number of Crown appeals made to the CCA understates the incidence of error in imposing suspended sentences in the District Court.

These limitations on Crown appeals against sentence also show that they are a "blunt device to correct inadequate sentences and to achieve consistency in imposing sentences."[166] In *R v. Jurisic*, Chief Justice Spigelman argued that guideline judgments are needed in appropriate cases because of the inherent limitations of Crown appeals.[167]

Numbers and outcomes of Crown appeals

Since suspended sentences were reintroduced, the CCA has heard 41 Crown appeals concerning suspended sentences. Four of the 41 Crown appeals involved partially suspended sentences.[168] The highest number of Crown appeals was in 2002, when the Court heard twelve such appeals. The number of appeals in other years is as follows:

- ten in 2004;
- six in 2003;
- nine in 2001;
- four in 2000.

In 20 of these appeals, the Court found error in the sentencing judge's decision. These cases can be broadly categorised as "successful" Crown appeals. A number of cases where the CCA held that the sentence narrowly avoided being manifestly inadequate were *not* included as "successful" Crown appeals. These matters did not constitute appealable error but attracted the Court's criticism.[169]

In all but six of the cases in which error was found, the Court intervened and re-sentenced the offender. The offender was re-sentenced to periodic detention in six cases, and to full time

[164] See *Jurisic* (1998) 45 NSWLR 209 at 232, citing *R v Rose* (Court of Criminal Appeal, 23 May 1996, unreported)
[165] See for example, *R v. Ramos* [2000] NSWCCA 189 at [14]
[166] Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission, at page 3.
[167] *R v. Jurisic* (1998) 45 NSWLR 209 at 221
[168] Partially suspended sentences are no longer available in NSW. See *Crimes Legislation Amendment Act 2003*.
[169] See for example *R v Hunt* [2002] NSWCCA 266; *R v Montesinos* [2002] NSWCCA 470. See also *R v Calderoni* [2000] NSWCCA 511 (where the sentence was described as "very lenient" but not impermissible).

imprisonment in seven cases. In the remaining case, the matter was remitting to the District Court for re-sentencing.[170]

Viewed either from the perspective of the number of cases where error was found, or the number in which the Court decided to intervene, around half of the Crown appeals were successful. This would appear to be a significant proportion, bearing in mind the restrictive approach of the Court to Crown appeals, and could be thought to indicate a high incidence of error amongst sentencing judges in the imposition of suspended sentences.

Suspended sentences are potentially available for any offence and it is relevant to consider whether successful Crown appeals relate disproportionately to particular offences. This would indicate error in sentencing those particular offences rather than problems with the approach to suspended sentences generally. Analysis of CCA judgments relating to Crown appeals however reveals that the issue is not confined to specific offences, and indeed, such appeals have related to a wide range of offences, including kidnapping, assault, sexual offences and drug offences.

Guideline judgments have been made in relation to armed robbery and dangerous driving causing death If a significant number of Crown appeals concerned such offences, it might be thought that sufficient guidance was already provided in the form of such guideline judgments. However, this is not the case: only seven Crown appeals have related to such offences. It would be inaccurate to consider problems with suspended sentences as largely confined to those offences, or any other, rather than being a broader problem.

In some of the cases in which a suspended sentence was imposed at first instance, the term was varied on appeal so that a suspended sentence would not be available (ie a term exceeding 2 years).[171] This indicates that the sentencing judge imposed an unduly lenient term, and that the decision to suspend should not have even been properly available to him or her. This raises an issue as to whether the sentencing judge in such cases arrived at a term of 2 years or less in order to impose a suspended sentence, thereby eliding the two stages of the reasoning. This view is supported by the Judicial Commission's finding that for 2002-2003, almost half of all suspended sentences in the higher Courts were for a period of two years.[172] This could be evidence that courts are using an artificial reasoning process to arrive at a suspended sentence.

Unsuccessful Crown appeals and successful severity appeals

In Crown appeals where the Court has found no error, the Court has generally emphasised that a suspended sentence was within the sentencing judge's discretion because the objective seriousness of the offence was relatively low and/or because certain subjective mitigating factors were present. This is also true of successful severity appeals where the Court has found error and has "reduced" the sentence imposed to one of a suspended sentence.

The Court has emphasised the relatively low objective seriousness and therefore confirmed the appropriateness of a suspended sentence in a number of cases:

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[170] *R v Pamplin* [2001] NSWCCA 327

[171] See for example*; R v Boundy* (2002) 132 A Crim R 482; [2002] NSWCCA 319*; R v McGourty* [2002] NSWCCA 335.

[172] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW

- *R v Y*[173] (where there had been no abandonment of responsibility regarding an offence of dangerous driving causing death)
- *R v Kalpaxis*[174] (supply prohibited drug where the offender never had the intention or ability to supply).

The Court has also emphasised the low objective seriousness in a number of successful severity appeals:
- *R v Mallott*[175] (minor assault resulting in no long term injuries);
- *R v Clark*[176] (momentary misjudgement in dangerous driving causing grievous bodily harm);
- *R v Giddy*[177] (indecent assault involving touching breasts over clothing).

However it is usually the case that the court decides that a suspended sentence is appropriate by placing emphasis on certain subjective mitigating factors. This applies both to successful severity appeals and unsuccessful Crown appeals. Factors commonly identified as being important in reaching such a decision are:

- The offender's mental illness, in terms of its effect on both the offending and purposes of sentencing (see for example the successful Crown appeals in *R v Fell*,[178] *R v Montesinos*[179] *and R v Israil*[180]*)*;
- Evidence of excellent rehabilitation (see for example the successful Crown appeals in *R v Israil*[181] and *R v Blackman*[182]); and
- The exceptional degree of hardship that a custodial sentence would have on the offender's family or dependents (see for example *R v Puskas*[183]).

Provided that the hardship is exceptional, the effect on the offender's family may also be taken into account as a basis for imposing a suspended sentence. In *R v Clark*[184] the Court allowed a severity appeal against a periodic detention order and substituted a suspended sentence, where the offender was the primary carer of his adult daughter who suffered from Down's Syndrome.

Other subjective factors which may be important but are not likely to be decisive are:

- That the offender is elderly (see for example the successful severity appeals in *R v Cottrell* and *R v Giddy)*; and
- The offender's youth (see for example the unsuccessful Crown appeal in *R v Main*[185]*).*

[173] (2002) 36 MVR 328; [2002] NSWCCA 191.
[174] (2001) 122 A Crim R 320; [2001] NSWCCA 119.
[175] [2001] NSWCCA 453.
[176] [2003] NSWCCA 288.
[177] [2003] NSWCCA 46.
[178] [2004] NSWCCA 235
[179] (2002) 135 A Crim R 417; [2002] NSWCCA 470.
[180] [2002] NSWCCA 255.
[181] [2002] NSWCCA 255.
[182] [2001] NSWCCA 121.
[183] [2001] NSWCCA 43.
[184] [2003] NSWCCA 288.
[185] [2003] NSWCCA 268

Successful Crown appeals

In general, where the CCA finds error on a Crown appeal against a suspended sentence, the error tends to be caused by the sentencing judge's failure to properly assess the objective seriousness of the offence with the consequence that certain subjective circumstances are given undue weight. Although it is of course appropriate for a sentencing judge to take subjective matters into account, the courts have emphasised that they must be kept in perspective and must not be allowed to result in a sentence which does not properly reflect the objectives of sentencing.

The CCA has found error on a Crown appeal against suspended sentence in a number of cases. The error is usually that subjective circumstances have not been kept in perspective and have been given too much weight. The result is that objective criminality is either inappropriately assessed or even overlooked in the decision to suspend.

Such Crown appeals include cases where the offending is towards the top end of the scale for the particular offence and/or where the subjective circumstances relied upon are far from compelling. For example, in *R v McGourty*[186] the CCA held that the sentencing judge had "allowed himself to form an unduly favourable assessment of the respondent's criminality and also to be inappropriately swayed by her subjective circumstances".[187] The Court held that, regardless of whether it was suspended, the sentence involved error. However even if two years had been appropriate, the personal circumstances of the offender did not justify suspension.

Some subjective factors are particularly likely to be used as a basis for unduly leniency, and the court must take care to view these factors in perspective. One such example is the impact on the offender's family. The established principle is that hardship to family likely to be caused by a sentence of imprisonment should only be taken into consideration in sentencing where the circumstances are "highly exceptional" and where it would be "inhuman" not to take the particular hardship into account.[188]

The result of Crown appeals show that there have been at least some instances where the sentencing judge has too readily assumed that the hardship was highly exceptional. See for example *R v X*[189] where the Court held that "The respondent was entitled to have these very exigent subjective circumstances brought properly to account in connection with her sentencing. She was not entitled to have them given *a weight that virtually overwhelmed the relevant objective facts and circumstances*." [emphasis added].

Other cases where the Court found that the sentencing judge gave undue weight to the impact on the offender's family, include *R v Hinton*[190] *and R v Zamagias.*[191]

Although the offender's youth is a relevant subjective circumstance, the court must take care not to treat youth as a decisive factor in suspending a sentence. First, there are cases in which any sentence other than a full-time custodial sentence will be manifestly inadequate. In such cases, a suspended sentence will be unduly lenient, even where the offender is youthful and

[186] [2002] NSWCCA 335.
[187] at [32] (Wood CJ at CL, for the Court).
[188] *R v. Wirth* (1976) 14 SASR 291 at 295–296.
[189] [2004] NSWCCA 93 per Sully J at [12].
[190] (2002) 134 A Crim R 286; [2002] NSWCCA 405.
[191] [2002] NSWCCA 17.

there is evidence of rehabilitation. In *R v Sparos*[192] the Court accepted that a sentence involving immediate custody might damage the offender's progress in rehabilitation. However, since the offence was objectively serious, exceptional circumstances were required to avoid a non-custodial sentence.[193]

Parity between co-offenders

In some cases an issue of parity has been argued by the defendant on appeal where he or she received a sentence of imprisonment to be served immediately but a co-offender received a suspended sentence. The principle of parity recognises that sentences between co-offenders should not involve such disparity as to give rise to a justifiable sense of grievance, viewed objectively, on the part of the offender who received the heavier sentence.[194] The courts have emphasised that a sentencing judge must be careful not to inappropriately reduce a sentence in order to avoid apparent disparity. It must insist that there would be a legitimate grievance, which would not be present where the circumstances relating to the offenders or their commission of the offence/s differ in a relevant way. Further, the court must not reduce a sentence, due to an apparent disparity with the sentence of a co-offender, to a level which would make it an inadequate and erroneous sentence.[195]

In *R v Canino*[196] the sentencing judge had imposed a suspended sentence mainly on the basis of a parity argument, since a co-offender had received a suspended sentence. On appeal, the CCA emphasised the need to carefully consider both the role of the instant offender in the commission of the crime, in comparison with that of the co-offender, and to also compare the relevant subjective factors relating to the offenders, in order to determine whether parity is required. The Court held that the sentencing judge had erred in suspending the sentence of the respondent in order to achieve parity, since the respondent's role was far more significant and less favourable subjective circumstances were present.

In *R v Lelei*,[197] the applicant appealed against a sentence of 16 months imprisonment primarily on the basis of parity. Several co-offenders had received suspended sentences either in the District Court or on appeal to the CCA. The sentence of one co-offender in particular, who had received roughly the same amount in total as the applicant, was re-sentenced to imprisonment of 18 months, suspended, after an initial sentence of 2 years.

The CCA rejected the applicant's argument that there was a justifiable sense of grievance. The Court emphasised that the applicant had in fact been given the shortest term when compared with co-offenders, and therefore that the only argument could be that the failure to suspend the sentence gave rise to the justifiable sense of grievance. The Court found that such an argument "paid insufficient attention to the real punitive nature of a suspended

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[192] [2002] NSWCCA 52.

[193] In this context the Court cited with approval the statement of Hunt J that "[A]chievement of rehabilitation, however exceptional that fact itself may be, would not without more amount to an exceptional circumstance warranting other than a custodial order. Where, for example, there is medical evidence that there is a serious risk that the rehabilitation so far achieved would be destroyed by a custodial sentence, that additional fact could in the particular case constitute that rehabilitation an exceptional circumstance. Everything will depend upon the particular case involved". *R v. Thompson* Unreported, NSWCCA, 4 April 1991 at 8.

[194] *Lowe v The Queen* (1984) 154 CLR 606. The test as to whether the grievance is legitimate is an objective one: *Ilbay*, NSWCCA, unreported 21 June 2000.

[195] See for example *R v Tisalandis* (1982) 2 NWLR 430.

[196] [2002] NSWCCA 76

[197] [2001] NSWCCA 229.

sentence."[198] The Court noted that, as established in *Dinsdale*, although the court must consider all the circumstances relevant to the offence and the offender in deciding whether to suspend a sentence, that "Nevertheless, *in most cases it is the circumstances individual to the offender which will carry the most weight in determining whether a sentence should be suspended*.".[199]

Thus where significant differences exist between the situation of the instant defendant and a co-offender, the sentencing judge might reasonably conclude that a different approach is justified.

To conclude, where a co-offender has received a suspended sentence, the court should be cautious in concluding that a justifiable sense of grievance would arise if the instant offender was not also given a suspended sentence. The circumstances surrounding the offender may present significant differences, justifying a different approach.

4. GUIDELINE JUDGMENT: THE PROSPECTS FOR SUCCESS?

An analysis of factors previously relied on in guideline judgment applications indicates that it would be likely, indeed somewhat necessary, that the Court would promulgate a guideline judgment on suspended sentences. However what may limit its possible success would be some amendments considered for suspended sentences legislation.[200] An application at this present stage may be premature. Even if the amendments do not directly affect the circumstances in which a sentence can be suspended, they will impact on the operation of suspended sentences and therefore it is likely that they may impact upon the perception of seriousness of a suspended sentence in the penalty hierarchy. Suspended sentences have been described as having a "sting in the tail." Amendments dealing with proceedings upon breach may remove some of this "sting."

4.1 Factors the Court will consider

Section 37 of the *Act* grants the Attorney General the power to apply for a guideline judgment. If an application was made, the Senior Public Defender and the Director of Public Prosecutions have the right to intervene.[201] The Court retains the discretion not to make a guideline judgment.[202] The Court will usually list applications by the Attorney for a guideline judgment with appeals to the Court which raise similar issues, although this is not always necessary.[203]

To determine whether a guideline judgment is necessary, the CCA will consider certain factors. These factors were established in *Ponfield*,[204] and include:

- Perceptions of the prevalence of the offence;

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[198] At [18].
[199] At [21].
[200] See Sentencing Council's "Report to the Attorney General under section 100J(1)(d) of the *Crimes (Sentencing Procedure) Act 1999*, on proposed amendments to suspended sentences legislation" dated 10 May 2005.
[201] Sections 38 and 39(1) of the *Act*.

[202] Section 40 of the Act.
[203] See for example, Attorney General's Application Under s37 of the *Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 at [4]
[204] See *Attorney General's Application (No 1), R v Ponfield & Ors* [1999] NSWCCA 435, per Grove J at [10]

- Inconsistency (eg in court's approach, or by geographic distribution);
- Emergent patterns of sentence which are either manifestly inadequate or excessive (in respect to which Crown appeals are relevant);
- The need for general deterrence.

Other factors that affect the Court's decision include:

- Lack of authoritative guidance;[205]
- The need to highlight or distil relevant sentencing principles;[206]
- The experience of the Court with the issue in question;[207] and
- The context of current events, such as legislative changes or recent CCA authority which may make the application premature or redundant.[208]

The Court may also take into account broader factors such as: whether the objectives of sentencing are being met; and whether there is a lack of authoritative guidance in the area. The Court may decline to promulgate a guideline where there is a lack of direct experience of the Court in the area.[209]

The offence-specific guideline judgments established a number of the above factors and their relevance can be applied, by analogy, to a sentencing option such as suspended sentences. The two broader guideline judgments (on Form 1 procedures and guilty pleas) provide particular guidance on the application of the above factors.

Perceptions of the prevalence of the offence

Suspended sentences are a commonly used sentencing option. They are more common, as a proportion of penalties imposed, in the higher courts than the Local Court. However, the actual number of suspended sentences imposed is greater in the Local Courts due to the volume of matters sentenced in that Court.

The prevalence of an offence, or use of a procedure or sentencing option, is established when there are *high numbers* or *increasing numbers* occurring.[210] To date, prevalence has been determined by reference to statistics provided by the Judicial Commission and BOCSAR. In the Form 1 guideline, statistics were used to show the prevalence of the use of the Form 1 procedure generally and then in respect of certain offences. It is not necessary to show that there is an *increasing* prevalence in the use of suspended sentences.[211]

Inconsistency in sentence quantification

Inconsistency in sentencing is difficult to prove. Past guideline judgments have analysed the proportion of lenient sentences imposed in their consideration of the issue. For example in *Henry*, the large proportion of lenient sentences was considered suggestive of inconsistency

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[205] See the guideline judgment on the use of the form 1 procedure: *Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 at [17]
[206] See *Jurisic* (1998) 45 NSWLR 209 at [53]
[207] See application for a guideline judgment for *Assault Police*: *Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515 at [53]
[208] For example, the case of *AEM* [2002] NSWCCA 58 overtook the need for a guideline judgment for the offence of sexual assault.
[209] *High Range PCA* [2004] NSWCCA 303 at [87] per Howie J.
[210] *R v Henry & Ors* [1999] NSWCCA 111 at [87] – [88] per Spigelman CJ
[211] See "High Range PCA guideline judgment" [2004] NSWCCA 303

in sentencing.[212] The question, in respect of suspended sentences, becomes whether the pattern of sentencing reveals inconsistency, especially in the form of leniency.

A suspended sentence should not be viewed as a lenient sentencing option and in principle must be accepted as capable of adequately punishing an offender and achieving general deterrence. However, suspended sentences are a less serious penalty option than full-time imprisonment served immediately, and generally considered less severe than periodic and home detention. Are then, suspended sentences being imposed in situations where full-time imprisonment served immediately or periodic or home detention would be more appropriate? The number of Crown appeals against suspended sentences would suggest that this is the case. Further, are sentencers imposing lesser terms in order to take advantage of a suspended sentence, which is only available if the term does not exceed two years? The high proportion of suspended sentences in the higher courts which are for a period of exactly two years suggests that some judicial officers are using an incorrect reasoning process.

As with the Form 1 procedure, the need for consistency is a reason for promulgating a guideline in relation to suspended sentences. The discretion to impose a suspended sentence is left at large, and since the decision whether or not to suspend has a fundamental impact on the liberty of the accused, it is desirable that the discretion be exercised in a reasonably consistent and predictable way.

Emerging patterns of sentence which are either manifestly inadequate or excessive
To determine whether manifestly inadequate or excessive patterns of sentence are emerging, this paper considers:

- whether a sufficiently significant number of sentences have been imposed;
- whether a pattern of successful Crown appeals is present;
- whether increased penalties are reflected in sentencing.

Since their reintroduction, thousands of suspended sentences have been imposed at all levels of the court hierarchy. Such numbers provide sufficient basis for a guideline judgment.

The number of Crown appeals are relevant because they indicate: firstly, a perception that sentences imposed by the Local Court are routinely and unduly lenient; and secondly, that this leniency is repeated by the District Court on appeal.[213] In evaluating the number of Crown appeals, the practical constraints placed on the DPP's power and discretion to appeal should be considered.[214]

In respect of suspended sentences relatively few cases are subject to severity appeals, providing an argument for the Senior Public Defender that there is insufficient evidence that suspended sentences are inappropriately given.

The need for general deterrence
Where there are high numbers of an offence recurring and potential for serious impact on the public, a special need for deterrence may warrant a guideline judgment.[215] Guideline

[212] [1999] NSWCCA 111 at [109]
[213] *High Range PCA* [2004] NSWCCA 303 at [87] per Howie J.
[214] *High Range PCA* [2004] NSWCCA 303 at [95] per Howie J.
[215] See *High Range PCA* [2004] NSWCCA 303*; Henry* [1999] NSWCCA 111 *and R v Whyte* [2002] NSWCCA 343.

judgments are well placed to convey deterrence because of their ability to highlight and clarify sentencing principles.[216]

Where a guideline judgment is sought on a non-offence matter, the question is whether current practice promotes the general objectives of sentencing. For example, in the Form 1 guideline judgment the pursuit of consistency was one of the objectives sought by sentencing judges. A guideline judgement was needed because this objective was perverted due to a lack of authoritative guidance on the correct application of Form 1 procedures.[217]

Whilst in principle a suspended sentence should be accepted as capable of achieving general deterrence,[218] it is generally treated by the courts as being less effective at achieving this aim than other sentencing options.[219] This becomes relevant in relation to offences where general deterrence is an important consideration. Such offences include dangerous driving, drug offences, armed robbery and fraud offences.[220] There seems to be a high proportion of suspended sentences inappropriately imposed for offences where general deterrence is a major consideration and this suggests that a need for a guideline judgment.[221]

General deterrence only works to the extent to which knowledge of the Court's sentencing practices is transmitted to potential offenders.[222] Guideline judgments play an important role in this respect.

Objectives not being attained

In *Thomson and Houlton*[223] all parties to the matter argued that the objective of encouraging early pleas was not being attained. Greater guidance and transparency in the sentencing process was advocated as a solution. A guideline judgment was promulgated to provide the necessary guidance.

A fundamental issue at hand is what are the objective(s) of suspended sentences? What are their purpose(s) and therefore the circumstances in which they are appropriate? Very little guidance exists either in legislation or case law to assist on this point making it virtually impossible to assess whether suspended sentences are at present achieving their objectives.

Approaching the question more generally, it is clear that suspended sentences are at times being used in a way which does not meet the objectives or purposes of sentencing. It seems that the subjective features of a matter are at times being allowed to outweigh the objective seriousness.[224] In addition, there is evidence to suggest that the proper reasoning process in arriving at a suspended sentence is often not being followed.[225]

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[216] *Wilson (Glen Leslie)* [2001] NSWCCA 399 per Wood CJ at CL at [55].
[217] *Form 1* [2002] NSWCCA 518 at [17]
[218] See *R v. Zamagias* [2002] NSWCCA 17 at [32]
[219] See *R v. Dutton* [2005] NSWCCA 248 at [24]
[220] See for example Potas (2001) "Sentencing Manual" at p6, table 1.1 which sets forth some offences where general deterrence has held to be of major importance.
[221] Appendix 4 of this paper shows that many Crown appeals against suspended sentences involve offences such as dangerous driving, fraud, armed robbery and drug offences.
[222] See Spigelman CJ in *Wong and Leung* (1999) 48 NSWLR 340; [1999] NSWCCA 420at [128]
[223] [2000] NSWCCA 309
[224] See analysis of Crown appeals in appendix 4
[225] See Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW. The study found that for 2002-2003, almost half of all suspended sentences in the higher Courts were for a period of two years.

Lack of authoritative guidance

The lack of authoritative guidance on the application of Form 1 procedures was the primary basis for the promulgation of a guideline judgment in that matter.[226] Whilst authoritative guidance on some aspects of suspended sentences does exist, the guidance is extremely general in nature. For example the discretion to suspend a sentence is not specially restricted to considerations of rehabilitation however there is little guidance on how the discretion should be exercised in a particular case.

Unlike the Form 1 situation, the limited guidance on suspended sentences is not challenged. Whilst there is no conflicting guidance in theory, different approaches may be taken in practice. For example it is possible that certain factors are given more weight by some sentencers than others. This could lead to idiosyncratic leniency, disparity in sentencing, and a lack of uniformity in approach. Clearly such differences are more difficult to identify than if differing approaches had explicitly arisen amongst judgments of the Court.

Need to highlight relevant sentencing principles

Guideline judgments are in a position to educate and highlight relevant sentencing principles and practices. As highlighted in *Jurisic*, guideline judgments can be particularly useful in circumstances where sentencing principles have been lost amongst the high volume of matters that pass through the courts.[227]

Although it is relatively clear what sentencing principles have been established in relation to suspended sentences, it would still be worthwhile to highlight and consolidate such principles in the form of a guideline. In particular, there appears to be a need to reiterate the importance of keeping in mind objective seriousness when considering subjective factors in deciding whether or not to suspend. Other principles which may be reaffirmed include:

- the proper approach to factors such as the impact of imprisonment on the family;
- the term of the sentence is not to be increased because of the perceived leniency of suspended sentences; and
- anticipation of the possibility of breach and consequences of the sentence reverting to a full time sentence properly considered.

It would also be desirable for the Court to address the approach to suspended sentences for particular offences where a non-custodial sentence should be rare or exceptional. Although the principle is firmly established in relation to particular offences, it would be helpful to highlight this point and reiterate exactly how it affects the discretion to suspend a sentence where such offences are concerned.

Direct experience of the Court

The Court refused to promulgate a guideline judgment on the offence of assault police on the grounds that it lacked direct experience in the area.[228] In contrast, the Court promulgated a guideline judgment for driving with a high range PCA. Although the Court did not have

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[226] See the guideline judgment on the use of the form 1 procedure: *Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 at [17]

[227] (1998) 45 NSWLR 209 at 233.

[228] See application for a guideline judgment for *Assault Police*: *Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515 at [53]

direct experience with the offence, the Court drew on its experience in sentencing for dangerous driving offences.[229]

In respect of suspended sentences there is no real scope for argument that the Court lacks adequate direct experience with the use of suspended sentences to be sufficiently able to deliver a guideline judgment. The flow of appeals to the Court from both the prosecution and defence provide the Court with continual exposure to the use of suspended sentences.

Current events which may make application premature or redundant

The Council considers that despite the strong arguable points on the merits supporting a guideline judgment application, imminent legislative changes for suspended sentences may mean that any present application is premature. The CCA may exercise its discretion to refuse to issue a guideline judgment, despite the merits of the application.[230]

The Sentencing Council is concerned that imminent legislative changes might mean that the CCA may exercise its discretion to refuse to issue a guideline judgment, despite the merits of the application. The Council understands that the Attorney General prepared an application for a guideline judgment for certain sexual assault offences which was set down for hearing on 15 March 2002. In the Court's opinion, imminent relevant legislation,[231] as well as recent and relevant decisions by the CCA,[232] overtook the need for a guideline judgment in that situation.[233]

The Council considers that it may be prudent towait the passage of amendments being considered by the Criminal Law Review Division,[234] and possibly also be delayed until sufficient case law emerges on those amendments. The proposed amendments deal with proceedings upon breach of a suspended sentence and aim to:

- provide more flexibility to the Court in dealing with a breached suspended sentence; and
- address the problems identified in *Tolley*[235] and *Graham*.[236] This includes clarifying whether the period of imprisonment to be served on breach decreases over time.

The Council considers that the legislative changes in question are neither as imminent nor as directly relevant as the legislative changes which inter alia impacted upon the application for sexual offences from proceeding. However, although these amendments do not seem to directly affect the circumstances in which a sentence can be suspended, it is foreseeable that they could impact on the operation of suspended sentences and therefore their seriousness in

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[229] *Attorney General's Application no 3 of 2002 (High Range PCA Guideline)* [2004] NSWCCA 303; (2004) 41 MVR 346; (2004) 147 A Crim R 546 at [90] – [91]

[230] See section 40 of the *Act*.

[231] The *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill* was first introduced on 30 November 2001 and received assent on 9 April 2002. The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* was introduced into Parliament on 23 October 2002.

[232] See *R v. AEM (Snr), KEM and MM* [2002] NSWCCA 58

[233] The Court retains a discretion to refuse to promulgate a guideline judgment if the Court considers that it would be inappropriate to do so: see section 40 of the *Act*.

[234] See Sentencing Council's "Report to the Attorney General under section 100J(1)(d) of the *Crimes (Sentencing Procedure) Act 1999*, on proposed amendments to suspended sentences legislation" dated 10 May 2005.

[235] [2004] NSWCCA 165

[236] [2004] NSWCCA 420

the penalty hierarchy. Suspended sentences have been described as having a "sting in the tail." Amendments dealing with proceedings upon breach may remove some of this "sting."

In July 2005 the Government proposed introducing a Bill into Parliament dealing with Criminal Case Processing ("CCP"). The CCP Reforms aim to reduce late pleas of guilty and no-bills on the eve of a trial. The reforms would achieve this by inter alia ensuring that the maximum utilitarian discount on sentence of 25% is available to accused persons entering a plea of guilty in the Local Court. The legislation is no longer imminent. Instead, the NSW Police, the ODPP and Legal Aid will administratively implementing the scheme with the Local Court expected to issue a practice note in the near future.

The scheme however may affect the prevalence of the use of suspended sentences. Instead of making a discount for a plea, the Court may make a commensurate allowance, for example, by ordering that the sentence be suspended. The scheme may possibly impact upon the "hierarchy" of sentencing options. The Council therefore considers that the scheme could impact upon the prospects of this guideline application succeeding.

The Office of the DPP advises the Sentencing Council that there are currently no Crown sentence appeals on foot. Although it is usual to hear a guideline judgment application with a Crown appeal against sentence, it is not necessary, and is not always the case.[237] The Sentencing Council also acknowledges the questionable power to appeal to the High Court from the CCA's decision whether or not to promulgate a guideline judgment, or the content of the guideline. This may be influenced by whether the guideline application is heard along with a relevant matter and whether it is independently a matter which can be appealed.[238]

[237] See for example, *Attorney General's Application no 3 of 2002 (High Range PCA Guideline)* [2004] NSWCCA 303; (2004) 41 MVR 346; (2004) 147 A Crim R 546. There was no Crown appeal dealt with as part of the guideline, and there was no doubt as to the Court's jurisdiction to make a guideline as sought by the Attorney General.

[238] See *Wong and Leung v. The Queen* [2001] HCA 64, (2001) 207 CLR 584, per Gaudron Gummow and Hayne JJ at [39]. Their Honours observed that the "guideline judgment" was not directly subject to the High Court's review as no party to the proceedings could appeal against anything but the CCA's *order* disposing of the proceeding. Legislation has since been passed in NSW giving specific guidelines powers to the CCA.

Appendix 1: Other Australian jurisdictions

As with NSW, the legislation in other Australian jurisdictions generally gives little or no guidance as to when a suspended sentence will be appropriate, other than providing certain general restrictions on its availability. Where the legislation does provide guidance on where a suspended sentence is appropriate, it is in very general language. In Victoria and Queensland, the legislation directs that a sentence may be suspended where it is "desirable to do so in the circumstances", and in the Northern Territory, where it is "desirable to do so in all the circumstances". In South Australia, a suspended sentence may be imposed where "good reason exists for doing so". These restrictions on the use of suspended sentence seem to provide limited guidance.

NSW is the only jurisdiction in which the legislation explicitly provides that the period of suspension and the period of the good behaviour bond must not exceed the term of the sentence. Courts in other jurisdictions have interpreted the lack of such a provision as allowing the court to impose a period of suspension and a good behaviour bond exceeding the term of the sentence that has been suspended. Conversely, it appears that in WA, although a suspended sentence is available for a term of imprisonment up to 5 years, the period of suspension cannot exceed 2 years.

In most jurisdictions, whole or part of a sentence of imprisonment may be suspended. WA and NSW are the exceptions, where only the whole of the sentence may be suspended.

In a number of jurisdictions, although not all, a limit is placed on the term of imprisonment for which a suspended sentence is available. This ranges from 3 months (in SA) to 5 years (in the ACT).

In Victoria, the Sentencing Advisory Council has been asked by the Victorian Attorney General to review the use of suspended sentences in Victoria and provide advice on whether the operation of suspended sentences can be improved in any way.

Table 1: Availability of suspended sentences in Australian jurisdictions

Jurisdiction	Act, sections	Availability, prohibitions and conditions
NSW	*Crimes (Sentencing Procedure) Act 1999*, s 12	• Sentence of imprisonment must not exceed 2 years • Whole only • The period of suspension must not exceed the term of the sentence • Condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence • Not available if offender subject to a term of imprisonment which is not the subject of the order
Cth	*Crimes Act 1914* (Cth), s 20(1)(b)	• Whole or part • Give security
ACT	*Crimes Act 1900*, s 403(1)(a) and (b)	• Whole or part • Give security

	(NB consolidating Act on sentencing to commence soon)	• Enter into good behaviour bond; comply with conditions (if any) in order
NT	*Sentencing Act*, s 40	• Sentenced to imprisonment for not more than 5 yrs • "desirable to do so in all the circumstances" • whole or part • such conditions "as court thinks fit"
WA	*Sentencing Act 1995*, s 76	• Sentenced to imprisonment for 5 years or less • Not more than 24 months • Whole of any term only • Not available if offender subject to early release order (a parole order, HD order, work release order or re-entry release order) • Not available if offender serving or yet to serve term of imprisonment not suspended (i.e. if serving another sentence of imprisonment that is suspended, is available)
Tas	*Sentencing Act 1997*, ss 7, 24	• Whole or part • May be made subject to such conditions as court considers necessary or expedient
SA	*Criminal Law (Sentencing) Act 1998*, s 38	• May suspend where court things "good reason exists for doing so" • Not if to be served cumulatively or concurrently with another term of imprisonment being served or about to be served • To be of good behaviour and comply with conditions (if any) of bond • In certain circumstances, court may include a condition of home detention (where sentence suspended on grounds that offender's ill health, disability or frailty would mean unduly harsh) • If period of imprisonment (cumulative or concurrent) is between 3 months and 1 year, court may direct to serve period not less than 1 month imprisonment and suspend remainder on condition of entering into good behaviour bond for period not exceeding period of suspended imprisonment
Vic	*Sentencing Act 1991*, s 27	• Whole or part • "desirable to do so in the circumstances" • period of imprisonment must not exceed 3 years (Supreme Court of County Court) or 2 years (Magistrate's court)
Qld	*Penalties and Sentences Act*, s 143-	• available where term of imprisonment imposed 5 years or less

	151A 1992	• "only if the court is satisfied that it is appropriate to do so in the circumstances" • whole or part • court must state an operational period during which the offender must not commit another offence punishable by imprisonment; period must not be longer than 5 years and must not be less than the term of imprisonment imposed (i.e. period may be longer than term of imprisonment imposed)

The proportion of suspended sentences imposed by each state and territory varies. For the Higher Courts in 2003/2004, NSW suspended the second lowest proportion of prison sentences (9%). South Australia suspended the highest proportion of prison sentences at 38%.[239]

[239] Unpublished data, Australian Bureau of Statistics, *Criminal Courts Australia, 2003-2004* (cat. No. 4513.0) cited in Victorian Sentencing Advisory Council, *Suspended Sentences in Victoria – Preliminary Issues Paper* March 2005 at 6.

Appendix 2: Overseas jurisdictions

England

Prior to recent amendments, legislation in England only permitted suspended sentences in "exceptional" circumstances, under section 118 of the *Powers of Criminal Courts (Sentencing) Act 2000* (now repealed). The *Halliday Report,*[240] recommended that this restriction be retained:

> Some have argued that this restriction be removed. The review has not found strong reasons for doing so. If an offence, and previous convictions, means that a prison sentence has to be passed, because no other sentence would be adequate, a decision not to impose it in practice, so that – provided no further offence is committed while the sentence is in force – the offender entirely escapes punishment, does need to be reserved for *exceptional circumstances. Otherwise, the force of a custodial sentence will be lost, possibly along with the importance of reserving it for cases where no other sentence will do. If a court is as confident as it can be that the offender has a low risk of re-offending, but needs a tough punishment because of the seriousness of the offence,* it can use its judgement to find the right balance. [Emphasis added]

However, the recommendation was not followed, and no such qualification now exists in the legislation regarding the imposition of suspended sentences in England. The relevant provisions are now found in sections 189-194 of the *Criminal Justice Act 2003*. These suspended sentence provisions were termed "custody minus" in the *Halliday Report*. Under the "custody minus" scheme for suspended sentences,[241] a sentence of between 28 and 51 weeks may be suspended, and the offender instead undergoes a period of supervision of between 6 months and 2 years. The supervision period contains activities such as unpaid work, behaviour programs and drug treatment. Any breach of the supervision period sees the sentence of imprisonment take effect.

In addition, recommendations in the *Halliday Report* also saw the introduction of "custody plus". "Custody plus" may be considered analogous to a partially suspended prison sentence, although the supervision period is tailored to the needs of the particular offender. Under the system of "custody plus" offenders who are sentenced to a short term of imprisonment spend a period of time in custody along with a period of time supervised in the community. The terms of the supervision period are tailored to the needs of the individual offender.

The English Sentencing Guidelines Council has taken a proactive approach to the issuing of sentencing guidelines indicating that it will provide guidelines in relation to new offences and new sentences even before the Courts start to use them. For example the Sentencing Guidelines Council has promulgated a guideline to apply inter alia to suspended sentences even before the relevant suspended sentence and "custody plus" legislation commenced.[242]

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[240] John Halliday, *Making Punishments Work: Review of the Sentencing Framework for England and Wales,* July 2001 < http://www.homeoffice.gov.uk/docs/halliday.html>

[241] Sections 189 to 194. This scheme of suspended sentences was termed "custody minus in the recent paper (2002) "Justice For All"

[242] Sentencing Guidelines Council (16 Dec 2004) *Final guideline - New Sentences: Criminal Justice Act 2003.* Further, the SGC must consider whether to frame a sentencing guideline when it receives a proposal from the

New Zealand

In New Zealand, suspended sentences were abolished in 2002,[243] as it was thought that they had "failed to achieve their intended purpose." The Third Reading Speech for the *Sentencing Act 2002* outlines the New Zealand Government's reasons for abolishing suspended sentences:[244]

> [Suspended] sentences have failed to achieve their intended purposes. They do not act as a greater deterrent than either prison or community-based sanctions. Where offenders require immediate custody, whether by way of prison or home detention, that is what they should get. The Government recognises that it is not always in the public interest that offenders who currently receive suspended sentences are given immediate custody. For example, they may be undertaking a rehabilitation programme, or fulfilling an agreement reached with the victim through a restorative justice process. The Bill makes adequate provision for a range of alternatives in those cases, such as the adjournment of sentence, and it is intended that the Courts use those alternatives.

Interestingly, the above extract contemplates that with the removal of suspended sentences, some relevant offenders could be dealt with by way of alternatives to custody.[245] This can be contrasted with NSW, where legislation and case law has made it clear that a suspended sentence should not be contemplated until it is decided, "no sentence other than imprisonment is appropriate" and the length of such prison sentence decided.

Canada

The Canadian Criminal Code provides for suspended sentences (termed "conditional sentences of imprisonment").[246] The Canadian Code provides that a suspended sentence may be ordered where the sentence is less than two years, where it would not endanger the safety of the community, and where it is in keeping with the statutory purposes and principles of sentencing. Suspended sentences are not available for particular offences involving firearm type weapons and where the offence also involves violence against a person.

At first blush, it seems that there are numerous constraints on the use of suspended sentences in Canada, but on closer examination it would seem that many of the constraints on their use would apply in NSW, arising from common law. There is, however, no equivalent in NSW for the restriction relating to certain firearms offences involving violence against a person.

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secretary of state, and may do so when it receives a proposal from the Sentencing Advisory Panel: Section 170 of the *Criminal Justice Act 2003*

[243] Suspended sentences were not included as a sentencing option with the introduction of the *Sentencing Act 2002* (commenced on 30 June 2002). The *Sentencing Act 2002* represented a comprehensive overhaul of sentencing law in that jurisdiction.

[244] As quoted in Robertson (Ed). "Adams on Criminal Law" (looseleaf service) Wellington (NZ): Brooker & Friend at Chapter 3, paragraph [SAIntro.02]

[245] Ibid. These "alternatives to custody" include community based sentences, adjournment of sentence for inquiries as to suitable punishment as provided for by section 25, and "orders to come up for sentence if called on" as provided by section 110. See paragraph [SAIntro.02].

[246] Sentencing is dealt with in Part XXIII of the Canadian Criminal Code, and section 742 provides for "conditional sentences of imprisonment".

The relevant section of the Canadian Criminal Code provides as follows:

742: Conditional Sentence of Imprisonment

742.1 *Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court*
*(*a*) imposes a sentence of imprisonment of less than two years, and*
*(*b*) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,*
the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

742.2 *(1) Before imposing a conditional sentence under section 742.1, the court shall consider whether section 109 or 110 is applicable.*

*(2) For greater certainty, a condition of a conditional sentence order referred to in paragraph 742.3(2)(*b*) does not affect the operation of section 109 or 110"*

Section 742.3 details compulsory and other optional conditions of the conditional sentence. Section 742.6 deals with the procedures for breach of a condition.

The "principles of sentencing" referred to in section 742 provide that the "fundamental principle of sentencing" is that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

Section 718.2 further provides a number of "other" sentencing principles, and provides that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. The provision then sets forth a non-exhaustive list of aggravating and mitigating factors.

Sections 109 and 110 deal with offences involving firearm type weapons and where the offence also involves violence against a person.

Appendix 3: Discrete issues which could be dealt with by legislative amendment

From the above, it can be seen that a guideline judgment would be sought to clarify the existing common law on the proper approach to deciding whether to suspend a sentence of imprisonment. This could include restating existing authority and/or distilling relevant principles from appeals in order to promote consistency in the use of suspended sentences, and minimise the possibility of idiosyncratic approaches.

In addition to these broad issues which are sought to be addressed by a guideline judgment, there are a number of discrete issues regarding suspended sentences which, either recently have or possibly will be, the subject of consequential legislative amendment. Such issues include:

- Recent removal of partially suspended sentences
- Clarification as to whether on breach, a suspended sentence runs from the date imposed or the date the bond is revoked (whether "clean street time" counts), and
- Whether there should be a wider discretion to the court in dealing with a breach.

These discrete issues have previously been raised by the Sentencing Council with the Attorney General,[247] and have also been raised in other forums.

These discrete issues would unlikely be the main focus of any guideline judgment, but must be borne in mind for contextual reasons, and may affect the content of any guideline which the Court decides to promulgate.

Abolition of partially suspended sentences

The removal of the option of a partially suspended sentence may be relevant to the seeking of a guideline for suspended sentences for several reasons. In particular, the removal of the option may have impact upon the prevalence of the use of suspended sentences. Also, there is authority to suggest that there are, or may be different considerations that may be relevant to partial suspension.[248]

When suspended sentences were initially reintroduced in NSW in April 2000, the legislation did not explicitly require that the execution of the whole of the term of the sentence be suspended. In *Gamgee,*[249] the Court of Criminal Appeal held that there was no reason for the words in section 12(1)(a) to be restricted to exclude the power to suspend part of the sentence. The section permitted a partially suspended sentence in the form of suspending the execution of either the initial or latter portion of the term of imprisonment.

In response to this common law development, section 12 was amended in July 2003 to provide that only the execution of "the *whole* of the sentence" could be suspended, thus excluding the option of partially suspended sentences. The Second Reading Speech gives the

[247] See for example, "Annual Report on Sentencing Trends and Practices 2003-2004" at part 9.2; Report on "Abolishing prison sentences of six months or less" at part 5.5, and "summary of recommendations".
[248] See English case of *R Clarke* (1982) 4 Cr App Rep (S) 197 (Court of Criminal Appeal).
[249] *R v Gamgee* (2001) 51 NSWLR 707.

reason for their removal as being that they were considered difficult to administer, and that partial suspension of the initial portion of the sentence may cause hardship to the offender.[250]

It remains the case however that in some other Australian jurisdictions, sentences may be suspended in whole or part.

Section 20 of the *Crimes Act 1914* (Cth) provides for conditional release of offenders after conviction i.e. order release of a person without passing sentence after conviction. Section 20(1)(b) provides that:

> *(1) Where a person is convicted of a federal offence or federal offences, the court before which he is convicted may, if it thinks fit:*
> …
> *(b) sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in paragraph (a) either forthwith* ***or after he or she has served a specified period of imprisonmen****t in respect of that offence or those offences that is calculated in accordance with subsection 19AF(1).* [Emphasis added.]

The position varies from state to state:

- In Victoria, on sentencing an offender to a term of imprisonment a Court may make an order suspending for a period specified by the Court, the "*whole or part* of the sentence if it is satisfied that it is desirable to do so in the circumstances."[251]

- In Western Australia, section 76 of the *Sentencing Act 1995* permits the Court to order that the suspension of the *whole* of the term of imprisonment.

- In South Australia, section 38 of the *Criminal Law (Sentencing) Act 1988* provides that the Court may, if it thinks that there are good reasons for doing so, may "*suspend the sentence*" on condition that the defendant enters into a bond.

- In Tasmania, section 24 of the *Sentencing Act 1997* provides that a court may suspend "the *whole or part* of a sentence of imprisonment."

- In the ACT, provision is made for the conditional release of offenders.

- In the Northern Territory, section 40 of the *Sentencing Act* provides for suspension of the *whole or part* of the sentence of imprisonment.

- In Queensland, the Court may order the suspension of the *whole or part* of the term of imprisonment (5 years or less). The Court must not suspend a term of imprisonment if it is satisfied, having regard to the provisions of the Act, that it would be appropriate in the circumstances that the offender be imprisoned for the term imposed.

[250] The Hon. John Hatzistergos MLC, *Hansard*, 25 June 2003. See also *Crimes Legislation Amendment Act 2003*, assented to on 8 July 2003, Schedule 6 commenced on the same day.
[251] Section 27, *Sentencing Act 1991* (Vic)

In *R v Kent*[252] Davies JA observed, "the applicant would be entitled to have that sentence wholly or partially suspended where:

> The applicant would be entitled to have that sentence wholly suspended instead of after three months only if his circumstances were so special as to take the case out of the ordinary. By ordinary, I mean those cases in which this Court has held that a period of actual custody must be served for offences of this kind.

In England, it was, by section 39 to 41 of the *Criminal Justice Act 1967*, that suspended sentences were first introduced into the criminal justice system.

In *R v Clarke*[253] the Court referred to the amending provisions of section 47 of the *Criminal Law Act 1977* which provided that where a Court passes on an adult a sentence of imprisonment of a term of not less than 6 months and no more than 2 years, it may order that after he has served part of the sentence in prison, the remainder of it shall be held in suspense. The Court discussed principles relating to questions to be asked before the Court imposes a partially suspended sentence and identified considerations relevant to when a partially suspended sentence (as opposed to a very short sentence or wholly suspended sentence) should be imposed the Court held that:

> If imprisonment is necessary, and if a very short sentence is not enough, and if it is not appropriate to suspend the sentence altogether, then partial suspension should be considered. Great care must be taken to ensure that the power is not used in a way which may serve to increase the length of sentence.[254]

The Court also echoed the observations of the Advisory Council on the Penal System in stating that a partially suspended sentence is distinct from both a short sentence of imprisonment and a fully suspended sentence, and should not be used as a substitute for those sentencing options. Instead, the partially suspended sentence should be seen as a sentencing option in its own right which is particularly applicable to a certain class of offenders, namely those first time offenders (or offenders whose last term of imprisonment was a considerable time ago) but whose offence would require that they are bound to serve some time in prison, but who may well be effectively deterred by serving a small part of the minimum sentence appropriate to the offence.

Clarke suggests that there are, or may be different considerations that may be relevant to partial suspension.

On breach: does it run from date imposed or date revoked?

There is recent case law on the issue of whether, on breach, a suspended sentence is taken to have been running from the date imposed, or whether it starts running on the date the bond is revoked. There is also the possibility of a legislative amendment to clarify this aspect. Clarification may be relevant to the content of any guideline judgment sought, and the way this question is resolved, "will reveal whether a suspended sentence in this State is a sword or a butter knife."[255]

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[252] [2004] QCA 83; Qld CCA 23 March 2004
[253] *R Clarke* (1982) 4 Cr App Rep (S) 197 (Court of Criminal Appeal).
[254] at 201
[255] See Howie J in *R v. Tolley* [2004] NSWCCA 165 at [43]

Although acknowledging that it is unclear in the legislation, the judgment in *Tolley* appears to suggest a preferred view that the sentence of imprisonment should commence on the date of revocation of the bond. This preferred view was followed in the recent judgment of *R v Graham* [256] where it was held that on breach, a suspended sentence of imprisonment commences from the date the bond is revoked.

Whether there should be wider discretion to the court in dealing with a breach

Section 99 of the Act applies when a good behaviour bond (attached to a suspended sentence) is breached – generally, the court must revoke the bond.

The Sentencing Council has recommended to the Attorney General that there should be a wider discretion to a Court in addressing a breach of a suspended sentence.[257] Although there has been no indication that this specific recommendation will be acted upon, if there were to be a legislative amendment to enact this recommendation, it would be relevant to the content of the guideline.

[256] [2004] NSWCCA 420

[257] See NSW Sentencing Council Report on "Abolishing prison sentences of six months or less" under "summary of recommendations".

Appendix 4: Crown appeals regarding suspended sentences

The following is a list of Crown appeals to the NSW Court of Criminal Appeal where manifest inadequacy was a ground of appeal and a suspended sentence had been imposed by the sentencing judge. A brief overview of the facts and outcome is provided as well as reasons for the CCA's decision or important facts influencing the decision.

2005

***R v. Dutton* [2005] NSWCCA 248**

Crown appealed against a suspended sentence of two years with a non-parole period of 18 months for an offence of dangerous driving causing grievous bodily harm. Crown appeal allowed, sentence quashed and offender re-sentenced to 2 years imprisonment with a non-parole period of 15 months to be served by way of periodic detention.

The Court held that a suspended sentence could not reflect the seriousness of the offence committed by the respondent and the need for general deterrence, notwithstanding the comments made in *Zamagias* that a suspended sentence couldn't be viewed as being no punishment at all. The Court also referred to the guideline judgment in *Whyte*.

***R v Killen* [2005] NSWCCA 17**

The offender received a 21 month suspended sentence for dishonestly claiming social security benefits of an amount of $102 321.86 over a 9 year period. The sentencing judge did not doubt the seriousness of the offence and the need for deterrence, accepting that the applicant had to establish "very special or exceptional circumstances" to avoid a full-time custodial sentence.

In terms of "exceptional circumstances" and the question of "need", the offender's alcoholism was quite relevant, particularly the fact that it began when she was young, when her ability to exercise appropriate judgment or choice was incomplete, and that the alcoholism was a symptom of prior abuse. The Crown appeal was dismissed.

***R v O'Connell* [2005] NSWCCA 265**

The offender was charged with numerous offences: nine charges of stealing from a dwelling, eight charges of larceny, two charges of receiving stolen goods, and one charge of possessing an unregistered firearm. In addition there were taken into account six cases of being unlawfully in possession of property, and ten further cases of receiving stolen property, recorded on Forms 1. The sentencing Judge imposed the following: on one of the charges of stealing from a dwelling, a sentence of twenty three and a half months imprisonment, with a non-parole period of eighteen months, suspended pursuant s 12; and on one of the charges of receiving stolen property, an identical sentence, to be served concurrently with the first sentence mentioned; in relation to the firearms offence, a s 9 bond to be of good behaviour for a period of twelve months; and in respect of the remaining charges a bond to be of good behaviour for the period of five years.

Amongst other things the Crown appealed on the grounds that the sentencing Judge erred by tailoring the sentences so they could be suspended and good behaviour bonds imposed. In their submissions they relied upon a particular comment by the sentencing judge, 'What you do ultimately depends on your assessment of the overall criminality, it seems to me.' On an analysis of the Judge's remarks on sentence the CCA could not see any error on the part of the sentencing judge. The CCA noted that the sentencing Judge began with a term of 3 years

and then applied the discounts which took the sentence down to the term of 23 and a half months. The Crown appeal was dismissed.

***R v Baker-Turley* [2005] NSWCCA 201**
The offender received a 9 months suspended sentence for deemed supply of ecstasy. The applicant was a passenger in a car stopped by police for a random breath test. When asked by police whether the occupants of the car had drugs the applicant admitted that she did. She removed a quantity of pills from her clothing, which turned out to be ecstasy weighing a little less than 18 grams.

The applicant argued that the sentencing Judge failed to make proper allowances given her assistance to authorities and early guilty plea. The applicant also argued that her considerable steps to rehabilitate herself had also not been considered rendering the imposition of a custodial sentence, even a suspended one, outside the sentencing range open to the sentencing Judge. The CCA disagreed and dismissed the appeal. The positive steps to rehabilitation were already taken into consideration in the decision to impose a suspended sentence and the proper allowances were given to the applicant's assistance and guilty plea.

2004

***R v Aller* [2004] NSWCCA 378**
Received $146,706.56 in social security benefits using a false identity. The trial Judge found that the offenders' primary motivation was to obtain money to support her seriously disabled son. Crown appealed against sentence of 2 years imprisonment suspended to immediate recognisance for 5 years (that is, a suspended sentence imposed under the *Crimes Act 1914* (Cth)). The CCA acknowledged that cases involving fraud upon the social security system, a custodial sentence is to be imposed unless there exists very special circumstances justifying some lesser order. In the present case the offender was an elderly lady with ill health and sole care of a seriously disable child. Crown appeal dismissed.

R v Dickinson [2004] NSWCCA 457
In the District Court the respondent received a 2 year suspended sentence (non-parole period of 12 months) for malicious wounding with intent to do grievous bodily harm, to which he had pleaded guilty. On appeal, the Crown argued that the sentence imposed was inadequate to reflect the objective seriousness of the offence, and in particular, that the DCJ had erred in not treating the use of a knife as an aggravating factor rather than an element of the offence and also in not treating the relevant standard non-parole period as a guide, but rather disregarding it altogether.

On appeal the CCA stated that although the subjective case was correctly characterised as strong too little weight was given to objective seriousness of criminality and too much was given to the favourable subjective case. No sentence less than full-time custody would have been appropriate. The sentence was quashed and substituted to a fixed term of 2 years, 2 months imprisonment served by way of periodic detention.

Note: the term imposed by the CCA signifies beyond question that a term beyond the 2-year maximum for a suspended sentence should have been imposed by the DCJ, i.e. a suspended sentence should not even have been available. The DCJ's major error therefore was in determining the length of the sentence.

The DCJ erred in not treating the knife as an aggravating factor. The Crown's submission as to the relevance of the standard non-parole scheme could only go to the length of the sentence and not to the decision whether to suspend. The term of the sentence was inadequate. The crime was not committed on the spur of the moment, but after a telephone threat and 15-20 minute drive to the victim's house. The respondent did not believe and had no reason to believe that the victim had actually harmed his daughter.

R v Fell **[2004] NSWCCA 235**
The respondent had pleaded guilty to 14 counts of obtaining money by deception, totalling over $300,000, and 70 similar offences, totalling over $200,00, were taken into account on a Form 1. The maximum sentence for such offences was 5 yrs. The sentencing judge imposed a sentence of 16 months imprisonment (for offences 1-13) and 22 months (count 14, plus the Form 1 offences), all suspended. The offences were committed against the respondent's employer over a period of 14 months.

Relying on psychiatric evidence, it was found that commission of the offences was directly attributable to the respondent's psychiatric condition and the condition was treatable and treatment would reduce the risk of re-offending. The offender had confessed out of remorse knew what he was doing was wrong and tried to stop himself. The DCJ found the offence was in the middle range of seriousness for this type of offence, which would normally result in full time imprisonment, but for the early plea and psychiatric evidence, evidence of rehabilitation and that the condition was under control. The offender also had no prior criminal record. Due to the causal relationship between his condition and the offending behaviour, the need for specific and general deterrence was reduced.

The Crown argued on appeal that the sentences were manifestly inadequate and did not reflect the totality of the criminality, which included breach of trust, planned, persistent and systematic dishonesty involving a large amount of money and extended over a 14-month period. The Crown also argued that the respondent psychiatric condition did not preclude knowledge of the gravity of his actions and did not lessen the need for general deterrence.

The Crown appeal was dismissed. The subjective circumstances meant that the sentence was within discretion, notwithstanding the seriousness of the offence. Although the respondent may have realised the gravity of his conduct, the need for general deterrence was still reduced. The DCJ was entitled to regard, as she did, the expert evidence on the causation relationship between the condition and the offending. The Crown's submission that the sentence did not reflect the gravity of the crime would be true were it not for the psychiatric condition and its role in the offending. The condition affected all five principal factors relevant to sentencing.

R v Nguyen **[2004] NSWCCA 332**
The respondent, a police officer, was sentenced to a 22 months suspended sentence for perverting the course of justice. The offender procured a person to plead guilty to a charge of goods in custody even though he knew the person was not guilty. The maximum sentence was 14 yrs.

The DCJ found that although a case involving police corruption by a police officer in the course of his duties, coupled with being an offence motivated by personal gain, would call for a sentence of full time imprisonment, this case was found not to fall within either category. Criminality was assessed as low to mid range. There were no applicable aggravating features

but there were several mitigating features, for example, no prior criminal record, good character, unlikely to re-offend, good prospects of rehabilitation, remorse and prepared to make reparation, utilitarian value of plea assessed at top of range. His Honour did conclude that no penalty other than imprisonment would be appropriate, in view of the range of sentencing objectives that need to be served, including punishment and specific and general deterrence. He also noted the risk to the respondent if he was sentenced to PD due to his background as a police officer. His Honour also found that imprisonment would be harsher due to his need for strict protective custody.

On appeal, the Crown argued that any sentence other than full time custody was inappropriate in the circumstances. The offence was carried out in a calculated manner, there was special legal error in not treating the fact that he was a police officer as an aggravating factor, and his honour erred in characterising the seriousness as low to medium.

The CCA allowed the Crown appeal and the respondent was sentenced to18 months imprisonment to be served by way of periodic detention. The CCA stated that, aside from the decision to suspend, the total length of sentence (22 months) imposed by the DCJ could well be regarded as inadequate, but because the Crown made no submissions on this the appeal was only addressed to the issue of the decision to suspend. It was held that the DCJ erred in treating the fact he was a police officer as irrelevant.

The respondent's motivation for committing the offence was also erroneously characterised and viewed as less serious than it should have been. His motivation was not only to protect his wife/relationship but also to protect himself in view of his earlier conduct, which involved producing false documents for an illegal purpose (this was not part of the offence itself however).

The end result was that no time to be served in custody was manifestly inadequate in the relevant sense. Although the subjective circumstances were entitled to considerable weight, to impose "the considerable leniency of a suspended sentence" was outside the bounds of discretion.[258]

***R v Silcock* [2004] NSWCCA 442**

The respondent pleaded guilty to five charges of indecent assault and was sentenced to 2 years imprisonment for each, to be served concurrently, and the sentences were suspended.

The offences were committed in the early 1980's against a boy aged 10-14 at time, who was the child of a family friend. These were not the first child sexual offences for which the respondent had been sentenced. He had been sentenced on three other occasions for numerous indecent assault and aggravated indecent assault offences. He had received 5-year good behaviour bonds for each of the first two sets of offences (both of which involved a number of indecent assault offences) and community service and a 3-year good behaviour bond for the first set of offences (nine offences of aggravated indecent assault). On the second occasion, he had breached a good behaviour bond in committing the offences, but the court directed that no action be taken.

At the time of sentencing, the offender was aged 67 and had a number of very serious health problems. The sentencing judge commented that had it not been apart from previous

[258] at [57].

sentencing decisions regarding the particular offender, where he had received very lenient sentences for similar offences, his Honour would have imposed a lengthy sentence of immediate imprisonment. His Honour noted there had been no previous Crown appeal against sentence and that the present offence was not aggravated by a breach of recognisance. A term of imprisonment was however necessary to mark the seriousness of the offences, but was suspended for the above reasons. His Honour regarded the state of the offender's health as not being beyond the capacity of corrections health service to treat and the kind of treatment needed was not outside their expertise.

The Crown argued on appeal that the sentencing judge erred by allowing himself to be persuaded virtually solely by previous sentencing decisions, and that the absence of Crown appeals did not necessarily mean the decisions were not manifestly inadequate and could be due to constraints on Crown appeals.

The CCA dismissed the appeal. In the end the sentence itself was not manifestly inadequate but there was error involved in the manner in which the result was reached. In particular, the DCJ erred by allowing the sentencing decision to be controlled to the extent it was by previous decisions, and also erred by not giving due weight to the effect of the respondent's health problems and risk of a life threatening infection if he was incarcerated. Evidence was given to this effect and no counter veiling evidence was adduced, and there was no good reason to reject the evidence. *Note: this appeal is regarded as successful in that error in the sentencing judge's reasoning for imposing a suspended sentence was shown.*

***R v Tolley* [2004] NSWCCA 165**
The respondent was sentenced to a 2 year suspended sentence for knowingly taking part in the manufacture of a prohibited drug. The maximum penalty is 15 yrs imprisonment. Matters taken into account on a form 1 were knowingly taking part in the manufacture of a prohibited drug and possession of two unregistered firearms.

On appeal the CCA identified a number of errors. These included that the DCJ erroneously had regard to a parity argument, where in fact no justifiable grievance could have arisen. They could only be regarded as co-offenders in a narrow, technical sense, since they were sentenced for different offences and on different factual bases. The DCJ also failed to have proper regard to the firearms offences on the Form 1.

In re-sentencing, the Court emphasised that the offender was on bail at the time for similar offences. As to why the Court decided to intervene, it was stated:[259]

> "On its face the outcome is so inadequate that it must be redressed even at the cost of returning the respondent to custody. It is distasteful in the extreme for any court to return a person to custody where that person justifiably believed that he had served the custodial part of his sentence subject to him being of good behaviour. But there is a public expectation that persons who commit serious offences such as the offender did and while on conditional liberty should be appropriately punished. That expectation was not fulfilled in the present case because of a serious miscarriage of a court's sentencing discretion."

[259] At [66].

The least sentence that could now be imposed was a total term of 2 yrs imprisonment, which signifies that the DCJ should probably have set a term in excess of 2 years and for which suspension would therefore not have even been available.

***R v. Whelan* [2004] NSWCCA 379**
Crown and sentence appeal. The Offender was sentenced to a 2 year suspended sentence for dangerous driving causing grievous bodily harm. Offender was riding a motorcycle carrying a passenger. Offender braked when approaching an intersection to avoid a turning car. The motorcycle fell and both the offender and passenger were seriously injured.

The CCA did find that the sentencing Judge was in error in the approach taken to suspend the sentence. The Judge did not recognise the distinct two-step process. The CCA however dismissed the Crown appeal, as the incorrect approach taken by the sentencing Judge did not mean that the sentence was manifestly inadequate. Sentence appeal was allowed and the sentence was reduced to 12 months, suspended.

***R v X* [2004] NSWCCA 93**
The respondent had received a two year suspended sentence for conspiring to supply heroin of a commercial quantity, to which she had pleaded guilty. The offence carried a maximum penalty of 20 yrs. The respondent was the head of a heroin distribution network. Several co-offenders with lesser roles were also sentenced.

The respondent had five children. She had endured a life of violence and abuse and suffered from depression. The DCJ also accepted that she was remorseful and wanted to change her way of life, and in sentencing he had particular regard to the effect a prison sentence would have on her children.

The Crown appeal was allowed and a head sentence of 2 years, six months was imposed, to be served by way of periodic detention. Although there were "very exigent subjective circumstances" that needed to be taken into account, the weight given to those factors by the DCJ "virtually overwhelmed the relevant objective facts and circumstances".[260] For the effect of full time imprisonment on family to be given weight in sentencing, it must be exceptional in the sense discussed by Wells J in *R v Wirth*.[261] In the circumstances, there was manifest error in treating the family circumstances as highly exceptional and to use it as a basis for discrete and substantial leniency. The respondent knew what she was doing was highly illegal, and must be taken to have known that if she was caught the consequences would be dire.

The 2-year term that the DCJ arrived at cannot possibly be supported and therefore suspending the sentence should not have been an option. Regard must also be had to the sentences imposed on co-offenders, some of whom received sentences of imprisonment for their lesser roles. Even though powerful mitigating factors applied to her case, 'it seems to me that no intelligent, reasonable and properly informed member of the general public would accept such a stark contrast in outcomes as being fair."[262]

2003

[260] at [12].
[261] (1976) 14 SASR 291 at 295-296.
[262] at [38].

***R v Anforth* [2003] NSWCCA 222**
The respondent received a two year suspended sentence for two counts of aggravated kidnapping. The maximum penalty for such an offence is 20 years. The extent to which the respondent was involved in comparison to two co-offenders was unclear. The respondent knew the victims and the victims were handcuffed together. The respondent used a baseball bat to ensure their co-operation.

The sentencing judge acknowledged the assistance the respondent was willing to give the Crown in their prosecution of one of the co-offenders. The judge also acknowledged the respondents prospects for successful rehabilitation and previous good character.

The appeal was allowed and the respondent was re-sentenced to imprisonment for two years with a non-parole period of ten months.

***R v Azzi* [2003] NSWCCA 10**
The respondent received a two year suspended sentence for robbery whilst armed with an offensive weapon. A co-offender was earlier given the same sentence. The Judge acknowledged the guideline judgment in *Henry*. He acknowledged that according to *Henry*, only in exceptional circumstances would a non-custodial sentence be appropriate. However despite *Henry*, the Judge held that due to the co-offender receiving a suspended sentence the respondent should not be given a more onerous sentence. The respondent also submitted a report outlining intellectual deficiencies, which made him unsuitable for any period of incarceration. The CCA dismissed the appeal.

***R v Cotter; Russell; Iremonger; Eter* [2003] NSWCCA 273**
Cotter and Eter received custodial sentences for the offence of robbery in company. Russell and Iremonger each received a two-year suspended sentence.

The CCA held that the sentences for each offender were manifestly inadequate. The Court argued that being a joint enterprise each offender was equally liable for the extent of the criminal acts. However due to issues of parity, the CCA exercising its residual discretion dismissed the Crown appeals.

***R v Dopson* (2003) 141 A Crim R 32**
Offender was sentenced to a 2 year suspended sentence for cultivating a commercial quantity of cannabis. Crown argued the sentence was manifestly inadequate, as it did not give adequate consideration for the need for general deterrence. CCA dismissed the appeal.

***R v Main; Turner* [2003] NSWCCA 268**
Both offenders received an 18 month suspended sentence for malicious wounding in company. The Crown argued that suspending the sentences made them manifestly inadequate. The Crown argued that the judge's remarks were brief and the approach taken was not careful. It was argued that once the sentencing judge found that the crime was particularly serious, it was then improper for the judge to impose a suspended sentence.

The CCA dismissed the Crown appeal stating that it was open to the sentencing judge to suspend the sentences in the particular circumstances of this case. Whilst the acts were violent and serious the offenders were young and showed good prosects for rehabilitation.

***R v Nair* [2003] NSWCCA 368**
The offender was sentenced to a 12 month suspended sentence for robbery in company. The role of the offender in the robbery was limited. The CCA held that the sentence was lenient but not manifestly inadequate given the limited role the offender took in the criminal enterprise.

2002

***R v Boundy* (2002) 132 A Crim R 482**
The respondent received a 12 month suspended sentence for the cultivation and supply of cannabis. The Crown appealed the inadequacy of the sentence. At issue at the trial was the amount of saleable cannabis as compared to commercially useless plant stem. The CCA allowed the appeal despite finding considerable subjective factors and good prospects of rehabilitation. The sentence was manifestly inadequate due to the quantity of saleable cannabis leaf determined by the CCA. It attracted a custodial sentence unless exceptional circumstances could be found and in this case there were no such circumstances. The sentence was increased to 2 years 6 months to be served by way of periodic detention with a fixed non-parole period of 18 months.

***R v Canino* [2002] NSWCCA 76**
The respondent and a co-offender were convicted of knowingly taking part in the supply of a prohibited drug. The maximum penalty for such an offence is ten years imprisonment or a fine of 2000 penalty units or both. The respondent and co-offender were both given a two year suspended sentence. At trial the role each offender played in the criminal offence was in issue. The Sentencing Judge held that the respondent and the co-offender's role in the criminal enterprise were similar. The Crown appeal was successful and the respondent was sentenced to imprisonment for 2 years with a non-parole period of 9 months.

In its reasons for allowing the appeal the Court acknowledged the principles of parity however concluded that the roles of each of the respondent in the criminal enterprise were different. The co-offender was a mere courier whilst the respondent was the mastermind behind the offence. The court also argued that the subjective circumstances of the co-offender outweighed those of the respondent.

***R v. Capar* [2002] NSWCCA 285; (2002) 132 A Crim R 160**
Offender was sentenced to a two year suspended sentence for threatening to inflict actual bodily harm by means of an offensive weapon with intent to have sexual intercourse. By majority the Crown appeal was dismissed (Mason P dissenting). The Crown argued that not enough attention was given to the objective seriousness of the offence by the sentencing judge and an inference could be made that his Honour was determined to impose a suspended sentence so adjusted the term of sentence accordingly. CCA acknowledged that the offence was very serious and on the face of it would warrant a custodial sentence. However in what was a difficult sentencing exercise they held that the sentencing Judge did not apply an artificial reasoning process in order to impose a suspended sentence and due to the psychiatric illness of the offender the term of sentence was not manifestly inadequate.

***R v Guivarra* [2002] NSWCCA 69**
Offender was sentenced to a two year suspended sentence for malicious wounding. The Crown did not appeal the length of the sentence, only the decision to suspend the sentence. The Crown argued there was something "special, exceptional or unusual" about this case, which required a custodial sentence. The seriousness of the wound (stabbing in the stomach)

was argued as indicating the need for a custodial sentence. The CCA disagreed and dismissed the appeal. They held that whilst the sentence may have been lenient, it was not manifestly inadequate given the subjective features of the case (the offender had progressed through rehabilitation and had removed himself from the same State as the victim).

***R v Hinton* (2002) 134 A Crim R 286**
Offender was sentenced to a two and a half year suspended sentence for a Commonwealth offence of fraud. Offender used sixteen identities to gain Centrelink benefits totalling $78 593.77 over a period of 9 months. At the trial it was submitted that imprisonment would impact heavily on the offender's 4-year-old daughter who had behavioural problems. Crown argued that the sentence did not adequately reflect the general deterrence required and the sentencing Judge did not give enough consideration to the appropriateness of periodic detention as a sentencing option. The CCA held that the dependence of the daughter on the offender was not an exceptional circumstance warranting a suspended sentence. A suspended sentence was inappropriate punishment to denounce the criminality of the respondent particularly in light of the period over which the offences were committed and the breach of trust involved.

***R v Israil* [2002] NSWCCA 255**
The offender was sentenced to a two-year suspended sentence for robbery armed with an offensive weapon (blood-filled syringe). When suspending the sentence the sentencing Judge acknowledged the seriousness of the offence and the *Henry* guideline. Her Honour however indicated the severe mental illness of the offender, prospects for effective rehabilitation provided and the unavailability of home detention as factors indicating a suspended sentence was appropriate in this case. The Crown submitted that the sentence was manifestly inadequate. They agreed her Honour was entitled to reduce the sentence due to the mental illness of the offender, however not by the amount that she did given the starting point highlighted in *Henry*.
The CCA dismissed the appeal holding that it was within the sentencing Judge's discretion to impose the sentence that she did. A custodial sentence would have impacted heavily upon the offender in question.

***R v McGourty* [2002] NSWCCA 335**
The offender was sentenced to a two year suspended sentence for kidnapping. The offender was the driver in an enterprise that involved kidnapping a security guard. The Crown appealed the suspended sentence on the grounds that the sentencing judge applied an incorrect approach to deciding to suspend the sentence. The CCA agreed with this submission. The sentencing Judge had chosen a starting point that did not reflect the objective seriousness of the offence and did not take into account prior offences on a Form 1. The CCA held this was not an offence where a suspended sentence was appropriate. From remarks of the sentencing Judge the CCA argued that just because home or periodic detention were not available options for the offender, the sentence should not be artificially reduced in order to bring it into a range where it could be suspended. Sentence was increased to three years imprisonment with a non-parole period of two years.

***R v Montesinos* (2002) 135 A Crim R 417**
The offender received a two year suspended sentence for fraud offences. On sentencing, the Judge did not explain reasons as to why periodic or home detention was not an option however the CCA did not state this as an error. The Crown relied on comparable cases to indicate that the suspended sentence was manifestly inadequate. The CCA argued that the

pattern of cases does indicate that the sentence in this case was lenient given the size of the fraud ($119,643.13). However the CCA acknowledged that it is not its role to substitute sentences simply on a difference of opinion. It was within the sentencing Judges' discretion to impose the sentence that his Honour did and, given the offender's mental condition, gave less weight to deterrence than would usually be appropriate. Crown appeal dismissed.

***R v Sparos* [2002] NSWCCA 52**
The offender received a 12 month suspended sentence for cultivating cannabis. The remarks on sentence indicated that the sentencing Judge suspended the sentence due to the possibility that full-time or part-time custody might undo the successful rehabilitation that had been achieved. The CCA allowed the Crown appeal holding that the sentence was manifestly inadequate, as it did not adequately consider the fact the offender was subject to a recognisance at the time of the offence and the additional Form 1 matters. Sentence was altered to a fixed one-year term.

***R v Y* (2002) 36 MVR 328**
The offender received a two year suspended sentence for dangerous driving occasioning death. The Crown argued the sentencing Judge erred by: making an erroneous assessment of the objective seriousness of the offence; eliding the two steps required when imposing a suspended sentence; and giving too much weight to the subjective circumstances of the offender. The CCA dismissed the appeal. The Court did not agree with the submission of the Crown regarding the sentencing Judges' approach to suspending the sentence however did mention that it would have been clearer if his Honour had said that he chose a two year term of imprisonment independently of the criteria for suspension. The sentence imposed at first instance was within the permissible range due to the youth of the offender and the guilty plea entered at the earliest opportunity.

***R v Zamagias* [2002] NSWCCA 17**
The offender was sentenced to a two year suspended sentence for malicious wounding with intent to do grievous bodily harm. Offender used a piece of broken glass to inflict a severe gash to the neck of the victim during a fight at a hotel. Victim underwent emergency surgery and sustained substantial scarring and further injuries. The CCA held that despite the youth of the offender and his character, the sentence was manifestly inadequate. The two-year term in itself was inadequate, then suspension on top of that added to the inadequacy. The objective seriousness of the offence was not adequately regarded. Sentencing judge erred by eliding the two-step process involved in suspending a sentence. Crown appeal allowed and sentence increased to imprisonment for three years with a non-parole period of 2 years and 3 months.

2001

***R v Best* [2001] NSWCCA 401; (2001) 125 A Crim R 284**
Crown appeal against suspended control order of two years' allowed. Substance of the appeal seemed to be that the respondent should have been dealt with according to law. The Court remitted the matter to the District Court for re-sentencing according to law, partly because the respondent did not appear at the appeal, and was not represented before the Court.

***R v Blackman; Walters* [2001] NSWCCA 121**
Both offenders received a two year suspended sentence for robbery armed with a dangerous weapon (handguns, baseball bat and cricket bat). Whilst acknowledged as a serious offence, both the offenders had no prior criminal record and had very suitable prospects for rehabilitation. It was considered by the CCA that to send them to gaol would have been more

detrimental than to maintain the degree of rehabilitation which each had achieved. Suspending the sentence was thus held to be appropriate.

***R v Edigarov* (2001) 125 A Crim R 551**
The offender received an 18 month suspended sentence for assaulting a police officer in the execution of their duties. The Crown submitted one of the grounds of appeal being that the sentencing judge incorrectly imposed a suspended sentence in breach of s 12(2) of the *Act*, since the order for suspension was made in circumstances where the respondent was subject to another sentence of imprisonment which had not itself been suspended. The CCA found the sentencing Judge in error on this point and allowed the appeal. The sentence was altered to a fixed term of 6 months imprisonment.

***R v Foster* (2001) 33 MVR 565**
The offender received a 22 month suspended sentence for dangerous driving causing death. The victim was a loved one of the offender in which the offender showed considerable remorse for his actions. The CCA dismissed the appeal holding that it was entirely proper given the offender's prior good record, conclusion that the offender was not likely to commit such a crime in the future and the public interest in re-establishing the offender's lifestyle up to the date of the accident, that the sentence of imprisonment be suspended.

***R v Gamgee* (2001) 51 NSWLR 707**
The offender received a fixed two-year sentence, which was partially suspended. After 6 months of imprisonment the remaining 18 months, the offender would have to comply with a good behaviour bond. The Crown submitted the sentence was contrary to law, as the legislation does not permit partial suspension of a suspended sentence. The majority held (Sully J dissenting) that section 12(1)(a) of the *Act* expressly contemplates that execution of a sentence may be suspended for any specified period that does not exceed the term of the sentence imposed. There is no reason why these words should be restricted to exclude the power to suspend part of the sentence.

***R v Pamplin* [2001] NSWCCA 327**
The offender received a 1 year 2 months suspended sentence for robbery with an offensive weapon. Crown and counsel for the offender conceded there was an error in the approach taken by the sentencing judge in imposing a suspended sentence. That error was not discussed. Crown appeal allowed, sentence quashed and the matter was remitted for re-sentence to the District Court.

***R v Remilton* [2001] NSWCCA 546**
This was a Crown appeal against sentences imposed on a man for maliciously inflicting grievous bodily harm and common assault of his eight-week-old daughter. The respondent had been sentenced to a 3-year good behaviour bond for the first charge and a 2 year suspended sentence for the second. The conditions upon which the sentence was suspended were various and included that he commit no further offences of violence and no criminal offences for which the maximum penalty is imprisonment exceeding 12 months.

The Court found error in the stipulated conditions attached to the suspended sentence. The majority however found no error in the *term* of the sentence or the decision to suspend it:

> The combination of the suspended sentence and the s9 bond was such as to mark the seriousness of the crimes whilst promoting the rehabilitation of this respondent.[263]

Howie J's view was that the sentence was either very narrowly within the allowable range of discretion or that error was present but the Court should decline to intervene due to considerations of double jeopardy and the need for discretion. His Honour tended towards the latter view. Only if periodic detention and home detention could be considered lower in the sentencing hierarchy than a suspended sentence, would his honour accept that a suspended sentence was within the permissible range.

One of the arguments advanced by the Crown was that the sentences did not contain an effective general deterrent component. The Crown however did concede that a community service order or a periodic detention order would have contained an element of general deterrence in the circumstances. The difficulty with this argument was that a community service order is clearly regarded by the *Act* as less serious than a suspended sentence, in which case it could not logically be argued that a community service order would have been more appropriate but that a suspended sentence was in effect too lenient, when the Crown urged for a sentence of imprisonment to be imposed and that a non-custodial sentence was not appropriate. Howie J also appeared to take the view that the *Act* envisages that a suspended sentence is a more serious sentence than both periodic detention and home detention.

2000

***R v JCE (2000)* 120 A Crim R 18**

The offender received a two year suspended sentence for 2 counts of aggravated sexual intercourse with person under 16. The main argument submitted by the Crown was that the offences committed by the offender were so serious, and general deterrence of such offences was so important, that a suspended sentence is less than the minimum sentence, which the sentencing judge should reasonably have imposed. The CCA held that the respondent should have received a heavier sentence however given the circumstances of the case the CCA used their discretion not to intervene.

***R v Taylor* [2000] NSWCCA 442**

The offender received a two-year fixed suspended sentence for robbery. The Crown argued this was a serious offence and the sentence was manifestly inadequate. The conduct involved pushing a lady down stairs in order to steal her handbag. It was a traumatic experience for the victim who suffered injuries as a result of the offence. Subjective features of the respondent noted by the sentencing judge and the CCA included the youth of the offender, drug dependant and there was one prior conviction but not of a violent nature. The CCA was of the view that the sentence was manifestly inadequate. However, exercising its discretion not to intervene the appeal was dismissed.

[263] Hidden J at [13].