



**Sentencing
Council**
Justice & Attorney General

**SUSPENDED SENTENCES
CONSULTATION PAPER
JUNE 2011**

Suspended sentences –Consultation Paper

This consultation paper is issued in preparation for the drafting of a report by the NSW Sentencing Council (“the Council”) pursuant to section 100J(1)(c) of the Crimes (Sentencing Procedure) Act 1999.

The views expressed in this paper do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council – Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).

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This consultation paper is issued in response to the Terms of Reference, which have been given to the Sentencing Council. It outlines some of the background concerning the use of suspended sentences, and identifies some of the issues that arise.

The issues are not intended to be exhaustive, but rather are a guide to facilitate submissions and consultations. The Council welcomes comments on any other issues that respondents consider might be appropriate for exploration.

The Council intends to use the results of any submissions and consultations in preparing its Report to the Attorney General in response to the Terms of Reference. Unless otherwise requested by respondents, all submissions received will be treated as public documents and may be published on the Council's website. If a submission discloses personal information concerning a third party, please indicate clearly whether or not consent is given by that person to the publication of that information.

Closing date for submissions: 29 July 2011

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Terms of Reference

The New South Wales Sentencing Council has been asked to examine the use of suspended sentences under s12 of the *Crimes (Sentencing Procedure) Act 1999* in accordance with the following terms of reference:

1. An analysis of whether the use of suspended sentences has had any direct effect on the use of other sentencing options, including custodial and non-custodial options.
2. An examination of the extent to which the imposition of suspended sentences has exposed persons to the risk of imprisonment who would not otherwise have been sentenced to imprisonment.
3. An analysis of the primary reasons behind judicial decisions to impose suspended sentences in preference to other sentencing options, including:
 - (a) judicial attitudes to alternative sentences;
 - (b) availability of other options; and
 - (c) increased maximum penalties.
4. The identification of current community attitudes and expectations in relation to the use of suspended sentences.
5. An examination of recorded breaches; including the nature of the breach and the response.
6. An examination of whether the issues identified in relation to the above matters require reform.
7. An exploration of any options for reform.
8. Any other relevant matter.

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ANNEXURE A: *'Trends in the Use of Suspended Sentences in NSW'*, McInnis L. and Jones C., NSW Bureau of Crime Statistics and Research, Issue paper no. 47, May 2010.

ANNEXURE B: Table 1, Availability of suspended sentences in Australian jurisdictions

1. BACKGROUND

1.1 In 2010 the Bureau of Crime Statistics and Research (“BOCSAR”) released a paper ‘*Trends in the Use of Suspended Sentences in NSW*’ (attached at **Annexure A**)¹ that constituted a study in relation to the extent to which suspended sentences have replaced custodial and non-custodial penalties between 1994-2008. The study found that the use of suspended sentences in both the local and higher criminal courts in NSW increased immediately following their introduction. In the Local Court, this increase gradually stabilised following the first year of introduction. However, in the higher courts, the use of suspended sentences continued to gradually increase.² The study also showed that the use of suspended sentences in both local and higher courts led to a correlative decrease in custodial sentences, and to a more substantial correlative decrease in the use of non-custodial penalties, mainly Community Service Orders (“CSOs”) in Local and Higher Courts, and good behaviour bonds in Higher Courts.³

1.2 As highlighted by BOCSAR, as the risk of imprisonment is higher for breaching the conditions of a suspended sentence than it is for breaching a good behaviour bond or a CSO, this raises questions, firstly in relation to whether or not suspended sentences are being used appropriately, and secondly in relation to the implications for imprisonment rates over the longer term, and in particular whether a greater number of offenders may be drawn into the prison population.⁴

1.3 As a result of the issues raised in BOCSAR’s paper, the NSW Sentencing Council has been asked to undertake a review of the use of suspended sentences in NSW courts. Broadly, the key issues for consideration in this review include:

1. Whether suspended sentences in their current form are being used appropriately as a sentencing option; and
2. if they are not, what should be done to improve their imposition in appropriate cases.

In this latter respect it is intended that consideration be given to whether measures are available that could lead to an increase in public confidence in their use; and whether one or other of the options for reform later identified should be recommended, for example, by allowing for partially suspended sentences, or by widening the range of available conditions for the support of offenders during any period of suspension.

2. SUSPENDED SENTENCES IN NSW

2.1 A suspended sentence is a sentence of imprisonment imposed on an offender, that does not require immediate detention. Despite being a “sentence of imprisonment”, the offender is allowed to remain in the community, on certain conditions, and the detention is suspended unless and until triggered by a breach of one or more of the conditions.

2.2 Section 12(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“CSPA”) 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 only for a period not exceeding the term of the sentence.⁵ The court must direct that the offender enter into a good behaviour bond (and not commit any offence) for a term not

¹ McInnis L and Jones C, *Trends in the Use of Suspended Sentences*, Issue paper no. 47, May 2010.

² Ibid 2, 3, 4.

³ Ibid 2, 3.

⁴ Ibid, 4.

⁵ S 12(1)(a).

exceeding the term of the sentence.⁶ The court may also specify other conditions in the order pursuant to which the bond is imposed⁷. For example, a court may order that the offender be supervised by the Parole Authority.

2.3 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, both during the parole or non-parole phase.⁸ Unlike home detention, suspended sentences are available for all types of offenders and for all classes of offences.⁹

2.4 The decision to suspend a sentence of imprisonment involves two steps: firstly determining that no sentence other than imprisonment for the relevant term is warranted and secondly deciding whether to suspend the execution of the sentence if its term is less than two years. This two-stage process has been emphasised in a number of cases, including by the High Court in *Dinsdale v the Queen*.¹⁰ *Dinsdale* has been applied by the NSW Court of Criminal Appeal in *R v JCE*,¹¹ where the CCA emphasised the importance of the two stage process.¹²

2.5 Sentencing courts are not required to explicitly state that they have followed the two steps in imposing a suspended sentence.¹³ 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, in order to determine whether the sentence is erroneous.¹⁴

2.6 There have been concerns raised¹⁵ in relation to the fact that, in practice, there is a considerable danger that the two steps can be elided, resulting in:

- a lesser term of imprisonment being imposed than is warranted, so as to enable the sentencing judge to suspend the sentence; or
- a longer term of imprisonment being imposed so as to counter the leniency of the sentence being suspended; or
- a sentence of imprisonment being imposed and then, suspended where alternatives to imprisonment would have been appropriate.

2.7 The two-stage process poses a number of logical and practical difficulties and has been criticised by commentators.¹⁶ In *Dinsdale v The Queen*,¹⁷ Kirby J noted some such objections,¹⁸ but held that 'suspended imprisonment is both a popular and much used

⁶ S 12(1)(b), s 95; *R v Remilton* [2001] NSWCCA 546 at [15] (per Hidden J).

⁷ *Crimes (Sentencing Procedure) Act 1999*, s 95 (c).

⁸ *R v Edigarov* (2001) NSWCCA 436.

⁹ Part 5, Division 2 (restriction for periodic detention orders) Part 6, Division 2 (restrictions on home detention orders). These Divisions refer to the *Crimes (Sentencing Procedure) Act 1999*.

¹⁰ [2000] HCA 54 at 76 per Kirby J.

¹¹ [2000] NSWCCA 498.

¹² *Ibid* at 15-17 per Fitzgerald JA (Whealy and Howie JJ agreeing)

¹³ *R v Foster* [2001] NSWCCA 215, 33.

¹⁴ *Ibid*, 35.

¹⁵ For example see: NSW Sentencing Council, '*Seeking a guideline judgment on suspended sentences*', June 2006, 5.

¹⁶ Bagaric, M., '*Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments*' (2002) 22(2) *UNSW Law Journal* 535, at 538-540. See also, Bartels, L., '*Suspended sentences in NSW*' (2001) 8(9) *Criminal Law News NSW and ACT* 81.

¹⁷ [2000] HCA 54.

¹⁸ *Ibid*, 74-76.

sentencing option in Australia.¹⁹ Kirby J took the view that the criticisms merely emphasise that Courts must avoid any temptation to misuse suspended sentences where a non-custodial sentence would suffice.²⁰ On the other hand, there is also a need to avoid misusing suspended sentences in cases where actual imprisonment is required, for example, where the offence is objectively very serious. What has been emphasised is the need for transparency and revision regarding the circumstances in which sentences can be suspended.²¹

3. POLICY BACKGROUND: THE ABOLITION AND REINTRODUCTION OF SUSPENDED SENTENCES

3.1 Suspended sentences were abolished in NSW in 1974 and were reintroduced in 2000. Prior to 1974, the court's power to suspend a sentence of imprisonment arose under ss 558 –562 of the *Crimes Act 1900*. It was removed following a report of the Criminal Law Committee,²² on the basis that the bond system was operating more effectively.²³ In 1996, by which time suspended sentences had not been available in NSW for over 20 years, the New South Wales Law Reform Commission ("NSWLRC") recommended their reintroduction. The NSWLRC noted the objections that had been identified but advised,²⁴

*"in our view, the advantages of adding suspended sentences to the range of available sentencing options outweigh these objections. Suspended sentences have been said to be a very useful sentencing option in situations where the seriousness of an offence requires the imposition of a custodial sentence, but where there are strong mitigating circumstances to justify the offender's conditional release. In these situations, it has been argued that other forms of conditional release are not appropriate, because they do not allow for proper denunciation of the offence through the imposition of a custodial sentence".*²⁵

3.2 As a result, suspended sentences were reintroduced 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*, it was observed:

*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.*²⁶

3.3 Some concern emerged in relation to the reintroduction of suspended sentences as early as 2003, following the release of a report by the Judicial Commission, '*Sentencing Trends and Issues Number 29: Suspended sentences in NSW*', which suggested that their reintroduction may have resulted in sentence escalation, that is, in a suspended sentence being imposed in individual cases in place of less serious options such as CSOs or bonds.

¹⁹ Ibid, 76.

²⁰ Ibid.

²¹ Ibid.

²² New South Wales Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (September 1973).

²³ *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 at [4]. See also NSWLRC, Discussion Paper 33 *Sentencing* (1996), 9.58-9.60

²⁴ Report 79 *Sentencing* (1996)

²⁵ Ibid, 4.22

²⁶ 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.

The commission noted however that more research was required to determine whether or not suspended sentences were actually leading to sentence escalation.²⁷ Following that Report, the then Attorney General asked the Sentencing Council to consider the feasibility of applying for a guideline judgment under section 100J(1)(b) of the CSPA. The Sentencing Council advised that the Attorney General should not apply for a guideline judgment at that time, on the basis that, whilst there were arguable points in favour of application, legislative changes that were imminent meant that any such application would be premature.²⁸

4. USE OF SUSPENDED SENTENCES

4.1 Despite legislation and case law indicating that prison sentences should be suspended only when incarceration is clearly warranted, the evidence in NSW, as in all other jurisdictions where such sentences have been available, is that suspended sentences are also used as substitutes for non-custodial options. This is typically referred to as 'net-widening' or 'penalty escalation'.²⁹

4.2 As indicated above, BOCSAR's paper '*Trends in the use of suspended sentences in NSW*' found that since their re-introduction in 2000, the proportion of people receiving suspended sentences has significantly increased – from 1.7% of all people convicted in 2000 to 5.1% in 2008, and from 6.9% to 16.8% in the higher courts during the same period.³⁰

4.3 While the decrease in the proportion of people receiving a full-time prison sentence was small, (from 23.5% to 20.2% in the Local Court and from 77.1% to 74.9% in the higher courts), the decrease in the proportion of people receiving CSOs and Good Behaviour bonds was more significant. In 1999, 20.4% of people convicted of an offence in the NSW Local Court received a CSO compared to only 11.5% in 2008. Similarly, in the higher courts in 1999, 9.1% of people receiving penalties more serious than a fine, received a CSO and 13.9% received a good behaviour bond. In contrast in 2008 only 1% received a CSO and 7.1% received a good behaviour bond.³¹ This drift away from non-custodial options could represent part of a longer-term trend towards increased punitiveness, which might have occurred without the re-introduction of suspended sentences. An alternative reading of this trend is that the availability of suspended sentences prevented a growth in the prison population that might otherwise have occurred. The data we currently have does not permit us to say which of these two readings is correct.

4.4 It is worth noting that overall, in 2003-2004, 83.8 per cent of suspended sentences were completed successfully while 16.2 per cent were revoked.³² Further research by BOCSAR subsequent to this study indicates that, the rate of people who are imprisoned (i.e. full-time custody) following a breach of suspended sentence has not changed during the

²⁷ Brignell and Poletti (2003) *Sentencing Trends and issues no 29: Suspended sentences in NSW* Sydney: Judicial Commission of NSW.

²⁸ See '*Seeking A Guideline Judgment on Suspended Sentences*', September 2005, 39; the Council at that time noted the proposed passage of amendments dealing with proceedings upon breach of a suspended sentence which aimed to provide more flexibility to the Court in dealing with a breached suspended sentence and address the problems identified in *R v Tolley [2004] NSWCCA 165* and *R v Graham [2004] NSWCCA 420* which included clarifying whether the period of imprisonment to be served on breach decreases over time.

²⁹ See for example, Brignell and Poletti (2003) *Sentencing Trends and issues no 29: Suspended sentences in NSW* Sydney: Judicial Commission of NSW.

³⁰ NSW Bureau of Crime Statistics and Research, *Trends in the use of suspended sentences in NSW*, May 2010, 1.

³¹ *Ibid*, 3.

³² Judicial Commission of New South Wales, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues, Number 33, June 2005, 5.

period 2000-2010 (fluctuating from 70-75% each year)³³. Further research is being carried out by the Council to estimate the extent to which the use of suspended sentences contributes to a 'deferred blow-out' of the prison population, that is, the extent to which offenders who are unlikely to have received a prison sentence in the first place, do so later, on breach of a suspended sentence. It is possible that there is no net increase in the prison population, with some lower-level offenders ending up in prison on breach of suspended sentences, while some higher-level offenders are diverted from prison through suspended sentences, which they successfully complete³⁴.

4.5 In 2010, 2794 supervised suspended sentences and 2491 unsupervised suspended sentences were imposed in the NSW Local Courts. 108 supervised suspended sentences and 61 unsupervised suspended sentences were imposed in the NSW Higher Courts. A concern has been raised in relation to whether offenders in regional or remote areas were more likely to be sentenced to full-time custody, than other offenders, because of the lack of supervision or community based options that are available in metropolitan areas, and that can be imposed under s 95, as a condition of a suspended sentence. It is worth noting, however, that the January 2008 BOCSAR study, '*Does a lack of alternatives to custody increase the risk of a prison sentence?*'³⁵ found that, when considering all sentences of imprisonment (whether suspended or not), "offenders in regional and remote areas are less likely to be imprisoned compared with offenders in inner metropolitan areas when other factors are held constant"³⁶.

5. RATIONALE BEHIND SUSPENDED SENTENCES

5.1 It is important to bear in mind the principles underpinning the availability of suspended sentences in order to consider whether or not, in their current form, they are meeting these objectives and being imposed in appropriate cases. These principles are summarised below:

Denunciation

5.2 When the NSW LRC recommended the reintroduction of suspended sentences, it was of the view that suspended sentences are a useful sentencing option where the seriousness of an offence requires the imposition of a custodial sentence, but where there are strong mitigating circumstances to justify the offender's conditional release.³⁷ In these situations, it has been argued that other forms of conditional release are not appropriate, because, unlike a suspended sentence, they do not allow for proper denunciation of the offence through the imposition of a custodial sentence.³⁸

³³ Data provided to the Sentencing Council by the NSW Bureau of Crime Statistics and Research, derived from the NSW Criminal Court Statistics (available at <http://www.bocsar.nsw.gov.au/>), 2000 - 2010.

³⁴ See Tait, D., '*The Invisible Sanction: Suspended Sentences in Victoria 1985-1991*' (1995) 28 Australian and New Zealand Journal of Criminology 143. See also, Sparks, R.F., '*The Use of Suspended Sentences*' (1971) Criminal Law Review, 384.

³⁵ Snowball, L. '*Does a lack of alternatives to custody increase the risk of a prison sentence?*' Contemporary Issues in Crime and Justice, Number 111, January 2008.

³⁶ Bureau of Crime Statistics and Research, '*Does a lack of alternatives to custody increase the risk of a prison sentence?*' Crime and justice bulletin: contemporary issues in crime and justice, January 2008 at 3. Odds ratios: Inner regional vs. Inner Metropolitan – 0.732; Outer regional vs. Inner Metropolitan: 0.716; Remote or very remote vs. Inner Metropolitan: 0.644.

³⁷ NSW Law Reform Commission, Report 79 *Sentencing* (1996) at 4.22, and Discussion Paper 33 at 9.62

³⁸ *Ibid*, 4.22.

Rehabilitation

5.3 Rehabilitation of the offender is said to be the primary consideration in imposing a suspended sentence.³⁹ Suspended sentences allow the offender to remain within the community and to have access to a wide range of rehabilitative programs. In order to ensure that rehabilitation is achieved, it may be advantageous to attach conditions to the suspended sentence requiring the offender to complete a relevant program. Such conditions, which are currently not compulsory or universally imposed, can help to ensure that suspended sentences are used effectively.

An effective deterrent

5.4 The threat of prison, that is attached to a suspended sentence, is said to work as an effective deterrent, which assists in preventing reoffending. Additionally, a finding in accordance with the sentencing legislation, that the offence warrants a term of imprisonment, is in itself thought to serve as a deterrent, as it is a warning both to the offender, and to others in the community, that the crime is of a nature which attracts a jail term.

Symbolic effect

5.5 In the process of imposing a suspended sentence, judges denounce and condemn the offence. This denunciation has a valuable symbolic effect. However, this effect is only achieved if it is accepted that suspended sentences are the second most serious penalty, ranking after an immediate custodial sentence.⁴⁰ As discussed below, however, community perceptions of suspended sentences as involving a lenient outcome may hinder their symbolic effect.

Avoiding short prison sentences

5.6 A suspended sentence allows an offender to avoid a short prison term and, in turn, to avoid exposure to the 'corrupting influences' that can exist within the prison environment.⁴¹ Enabling the offender to avoid full-time custody is also expected to have a protective effect, in terms of reducing the risk of reoffending, as it allows the offender to remain integrated within the community and provides minimum disruptions to the offender's family life, accommodation and employment.⁴²

Reducing the prison population

5.7 As a result of avoiding short prison sentences, suspended sentences also reduce the prison population, which not only contributes to reducing the risk of reoffending by not exposing offenders to the invidious prison culture but also by removing the costs involved in sending an offender to prison.⁴³

5.8 However, in considering whether or not suspended sentences in their current form are meeting these objectives, it is also necessary to consider the following issues that have

³⁹ Ibid, 4.

⁴⁰ Ibid, 13, 14.

⁴¹ Bartels L, *Sword or Feather? The use and utility of suspended sentences in Tasmania*, University of Tasmania June 2008, 18.

⁴² Ibid.

⁴³ Ibid, 19.

been raised in relation to suspended sentences, and that may detract from the denunciation, the deterrent value and symbolic effects mentioned above:

Theoretical difficulties in imposing suspended sentences

5.9 There is an inherent paradox in the reasoning that is required in order to determine that a suspended sentence is appropriate for a particular offence. The sentencing judge must first determine that no sentence other than imprisonment is appropriate and then decide to suspend the sentence. In completing these two steps the court is considering the same set of factors. This process has been described as “farcical” because the court decides that all other sentences have been deemed too mild, but then considers that a suspended sentence is appropriate, ‘when there are no new variables to tip the scales further in favour of a more lenient option’.⁴⁴

Public’s perceptions

5.10 A suspended sentence has been described as the ‘Sword of Damocles’⁴⁵, which will fall and activate the sentence should the offender fail to observe its conditions. This description, however, does not reflect widely held views concerning the leniency of suspended sentences. Some within the wider community seem to view suspended sentences as a lenient option, despite comments by the courts that emphasise that a suspended sentence is a sentence of imprisonment.⁴⁶ This stems from the fact that the offender walks out of court ostensibly in an identical position to that of the rest of the community, that is, they only risk jail if they commit a subsequent offence or breach of a condition.

Offenders’ perceptions

5.11 There seems to be a general belief that offenders who receive a suspended sentence consider themselves lucky and tend not to appeal their sentence.⁴⁷

Net widening

5.12 In contrast to the arguments above in relation to reducing prison population, there is, however, a concern that offenders who would not ordinarily have received a sentence of imprisonment, for example offenders who would ordinarily have received a fine or community service order, may receive a suspended sentence and ultimately spend a period of time in custody because of a subsequent breach. Some support for the occurrence of net widening was observed by Brignell and Poletti in 2003⁴⁸ although it is clear that there may have been other reasons for that outcome.

Violation of the proportionality principle

5.13 The proportionality principle requires sentences to reflect the gravity of the offence.⁴⁹ If an offence warrants imprisonment, then it has been suggested that the suspension of the

⁴⁴ Ibid, 40.

⁴⁵ Ibid, 4.

⁴⁶ Ibid, 6.

⁴⁷ Ibid, 38. See also for example, *R v Graham* (2004) 62 NSWLR 252, [29] where the NSWCCA noted that it ‘would not be unusual for an accused person, the subject of a suspended sentence...not to appeal. The full implication of such a sentence might not have come home to such a person until faced with the reality of gaol’.

⁴⁸ Brignell G and Poletti P, *Suspended Sentences in New South Wales*, Judicial Commission of New South Wales, *Sentencing Trends and Issues*, Number 29- November 2003, 12.

⁴⁹ *R v Scott* [2005] NSWCCA 152, [15]

sentence of imprisonment renders the sentence no longer proportionate to the offence⁵⁰. However, this may be resolved by the imposition of conditions to be attached to the suspended sentence.⁵¹ On the other hand, imposing a prison sentence for the breach of a suspended sentence, when such offence may be a minor one, may result in a disproportionately harsh response to the breach.⁵²

6. OTHER JURISDICTIONS - AUSTRALIA

Other Australian jurisdictions generally

6.1 The table at Annexure B summarises the availability of suspended sentences in all Australian jurisdictions. As is noted in that table, while some states place a limit on the term of a sentence of imprisonment that may be suspended, for example two years in New South Wales, not all of the Australian jurisdictions have followed that course.

6.2 As with New South Wales, legislation providing for suspended sentences 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 as to the circumstances in which a suspended sentence is appropriate, it is in very general language. In 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”.⁵³

6.3 New South Wales 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, that will exceed the term of the sentence that has been suspended. This is explicitly provided for in the Australian Capital Territory. Conversely, it appears that in Western Australia, although a suspended sentence is available for a term of imprisonment up to 5 years, the period of suspension cannot exceed 2 years.⁵⁴

6.4 The Victorian Sentencing Advisory Council, in its consideration of various options for reform of suspended sentences, noted that different jurisdictions have adopted different operational periods during which a suspended sentence order must not be breached. As mentioned above, in New South Wales, a suspended sentence can be suspended for a period not exceeding the term of the sentence (which must be less than two years)⁵⁵ with the consequence that the breach must occur within that period. In Victoria, the maximum operational period which can be ordered similarly corresponds to the maximum sentence that may be suspended; 2 years in the Magistrates’ Court and 3 years in the higher courts. In Western Australia on the other hand, sentences of up to five years may be suspended for

⁵⁰ See *R v Groom* [1999] 2 VR 159, where the Victorian Court of Appeal held by majority that the principle of proportionality is normally applied to restrain excessive severity in sentencing, and not to refuse leniency, and that under s 27(1), the sole criterion for deciding whether to suspend a sentence in whole or part is satisfaction as to its desirability in the circumstances. It was also said however that it would have been unexceptional to rely on the principle of proportionality in granting an order of suspension: [37]-[38] (Batt JA, Buchanan JA agreeing, Tadgell JA dissenting).

⁵¹ *Ibid.*, 44.

⁵² *Ibid.*

⁵³ See Table 1 at Annexure B.

⁵⁴ See Table 1 at Annexure B.

⁵⁵ *Crimes (Sentencing Procedure) Act 1999*, s 12(1).

a period of up to two years. In South Australia, while there is no limit on the term of imprisonment that may be suspended, the maximum term of the bond that attaches to a suspended sentences order is three years.⁵⁶

6.5 In most jurisdictions, other than New South Wales, a sentence of imprisonment may be suspended in part.

Victoria

6.6 The position with respect to suspended sentences as a sentencing option in Victoria is of particular interest for this review. In August 2004, the Victorian Attorney-General asked the Victorian Sentencing Advisory Council (Vic SAC) to advise on the use of suspended sentences in that State. As a result Vic SAC undertook a comprehensive review of suspended sentences, as well as, of the broader sentencing framework, in that State.

6.7 In its interim report Vic SAC proposed the abolition of suspended sentences. As noted later, its views in this respect were modified in its later report.⁵⁷

6.8 In its final report, Vic SAC found that, historically, suspended sentences had been an important option for diverting offenders from prisons because the courts had limited intermediate sentencing options, that is, sentencing options that fall between full-time imprisonment and dismissals, discharges and adjournments.⁵⁸ However, while a number of intermediate sentences were introduced in more recent years, they did not result in a decreased use of suspended sentences. Rather, until 2004, Vic SAC found that Victorian courts were increasingly using suspended sentences,⁵⁹ and that suspended sentences led to the imposition of prison sentences on offenders who might have otherwise have received a non-custodial sentence.⁶⁰ These findings led Vic SAC to conclude that suspended sentences had been over-used and were conceptually flawed, noting that “the community, quite legitimately in our view, questions the logic of a decision that a prison sentence is, and then is not, appropriate”.⁶¹

Options Considered in the Victorian Review

6.9 In its review, as an alternative to the option of abolishing suspended sentences, Vic SAC considered a number of other reform options⁶², including:

- **Making the purpose of suspended sentences explicit in a legislative purpose statement.**

It was suggested that such a statement would set out the principal considerations for a court when deciding whether to make a suspended sentence order. Such a statement, it suggested, could also more explicitly set out the steps a court should go through when

⁵⁶ *Criminal Law (Sentencing) Act 1988*, s 38.

⁵⁷ See paragraph 6.10 below.

⁵⁸ Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 2 Summary*, April 2008, 1.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, 2. Part 1 of the final report notes: “The community, quite legitimately in our view, questions the logic of a decision that a prison sentence is, and then is not, appropriate” (at xvi) and “Many in the broader community have difficulty reconciling the legal classification of a wholly suspended sentence as a custodial sentence that is more severe than other conditional orders, when its practical consequence is that the offender is permitted to remain in the community under the sole restriction that he or she refrain from committing further offences during the period of the order (at vx).

⁶² Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 1*, Chapter 4.

considering whether to make a suspended sentence order.⁶³ The guidance provided in the legislation then in place, it observed, was minimal, merely requiring a court, in addition to ordinary sentencing principles, to take into account whether it was “desirable...in the circumstances,” to impose a suspended sentence.⁶⁴

- **Limiting the circumstances in which a suspended sentence order can be made.**

It was initially considered that this could be achieved either by restricting the use of suspended sentence orders to exceptional circumstances, or by limiting the offences for which a prison sentence could be suspended.⁶⁵ Following the review, this option was adopted to the extent that the imposition of suspended sentences was restricted for certain serious offences, to those where exceptional circumstances were present.⁶⁶

- **Attaching conditions to suspended sentences.**

Prior to the Review, suspended sentences in Victoria were not subject to conditions. The sole requirement of a suspended sentence was that the offender should not commit another offence punishable by imprisonment during the operational period.⁶⁷ Vic SAC considered whether conditional suspended sentences should be introduced in Victoria, and noted that, while suspended sentence orders could not be combined with any other sentencing order on a single charge, Victorian judicial officers effectively imposed conditional suspended sentences in cases where an offender was convicted of more than one offence. Vic SAC cited a number of arguments against introducing conditional suspended sentences, including a recommendation by the Sentencing Guidelines Council⁶⁸ in the UK that:

‘Because of the very clear deterrent threat involved in a suspended sentence, requirements imposed as part of that sentence should generally be less onerous than those imposed as part of a community sentence. A court wishing to impose onerous or intensive requirements on an offender should reconsider its decision to suspend sentence and consider whether a community sentence might be more appropriate.’⁶⁹

It noted the importance of considering the relationship that any new form of conditional suspended sentence would have with other sentencing orders and when such an order would be appropriate instead of other community based orders.

- **Reducing or increasing the term of imprisonment that may be suspended.⁷⁰**

Both options were considered. It was suggested that restricting the availability of suspended sentences to sentences of 18 months and under or to sentences of 12 months and under, might exclude their use in cases involving more serious offences such as rape, sexual assault and manslaughter, thereby excluding many of the more

⁶³ Victorian Sentencing Advisory, *Suspended Sentences Discussion Paper*, April 2005, at 128.

⁶⁴ Ibid.

⁶⁵ Ibid, 130-133.

⁶⁶ See paragraph 6.12 below.

⁶⁷ Op. Cit., 133.

⁶⁸ Under section 172 of the *Criminal Justice Act 2003* (UK), a court in sentencing an offender is required to have regard to any relevant guidelines if the Sentencing Guidelines Council. The Sentencing Guidelines Council was established under s 167 of the *Criminal Justice Act 2003* (UK) and consists of the Lord Chief Justice, seven judicial members, and four non-judicial members.

⁶⁹ Sentencing guidelines Council, *New Sentences: Criminal Justice Act 2003 Guideline* (2004), [2.2.14].

⁷⁰ In Victoria the maximum term of imprisonment that could be ordered, either wholly or partially, was three years in the higher courts and 2 years in the Magistrates’ Court.

controversial cases.⁷¹ Various arguments to the contrary were raised; including that limiting suspended sentences further would undermine the nature of the sanction and unduly limit the judicial sentencing discretion.⁷² On the other hand, it was suggested that imposing a minimum term for suspended sentences might prevent 'net-widening' as it may discourage courts from imposing a suspended sentence where a non-custodial sentence might have been appropriate. It was nevertheless recognised that this could compound net-widening if courts imposed longer sentences in order to qualify for their suspension⁷³. An alternative approach noted was to include, in legislation, a provision that makes it clear that a court must not impose a term of imprisonment that is longer than the term of imprisonment to which the person would have been sentenced, had the sentence not been suspended.⁷⁴

- **Changes to the operational period.**

As indicated at page 16 above, suspended sentence orders were not, at the time of publication of the discussion paper, subject to conditions and as such, it considered that a longer operational period might be appropriate in order to increase the punitive value of a suspended sentence order. However it also noted that, where conditions are attached to a suspended sentence order, the risk of more offenders serving the suspended period of imprisonment in jail is increased, thereby defeating the potential benefits of suspended sentences in terms of diverting offenders from prison⁷⁵.

- **Changes to breach provisions.**

Vic SAC gave consideration to making available a broader range of options for re-sentencing offenders on breach on the basis that the presumption that a sentence of imprisonment must be restored was seen as having a number of negative consequences, including an increase in the prison population and a decrease in the use of suspended sentences.⁷⁶ In NSW, while breach of suspended sentence is not a separate offence, breach of the good behaviour bond attached to the suspended sentence would similarly lead to a presumption that the sentence of imprisonment must be restored in accordance with s 99 of the CSPA, however that sentence can be ordered to be served by way of an Intensive Corrections Order or Home Detention.

- **The abolition of partially suspended sentences.**

The Vic SAC took into account the abolition of partially suspended sentences in New South Wales in 2003 and the fact that the NSW Sentencing Council, in its review '*Abolishing prison sentences of six months or less*',⁷⁷ had recommended that the power to order partially suspended sentences should be restored in New South Wales. It noted that, a key benefit of partially suspended sentences is that it allows for a period of unsupervised release during which the offender is under some form of control by the State. However, whether or not this is useful, it observed, may also depend on whether

⁷¹ Victorian Sentencing Advisory, *Suspended Sentences Discussion Paper*, April 2005, 139.

⁷² It was also argued that since suspended sentences are intended to be a serious alternative to imprisonment, their availability should be extended to those cases which justify imposing a term of imprisonment of more than three years, for example because of the serious nature of the offence, but in which there are particular extenuating circumstances justifying a merciful response.

⁷³ Victorian Sentencing Advisory, *Suspended Sentences Discussion Paper*, April 2005, 140.

⁷⁴ Ibid.

⁷⁵ Ibid, 142.

⁷⁶ Ibid, 143.

⁷⁷ NSW Sentencing Council, *Abolishing prison sentences of 6 months or less, a report of the NSW Sentencing Council*, August 2004.

there are other mechanisms available for conditional release that would better fulfil this function⁷⁸.

Recommendations made in the Victorian Review

6.10 Vic SAC in its final report made a number of recommendations. The recommendations in Part 1 of that report relate to the operation of suspended sentences; while the recommendations in Part 2 relate to alternative intermediate sentencing orders. Some of the key recommendations made in Part 1 in relation to the operation of suspended sentences include⁷⁹:

- Suspended sentences should be phased out in Victoria by December 2009⁸⁰; however the final decision concerning the removal of the power to suspend should be deferred until the reforms to other intermediate sentencing orders recommended in Part 2 of the Final Report have been made and fully tested.⁸¹
- The Council should monitor and report on the use of suspended sentences and other orders over the three-year transitional period⁸².
- The *Sentencing Act 1991* (Vic) should be amended to provide a non-exhaustive list of factors to which a court should have regard when deciding whether suspension of a prison sentence is 'desirable in the circumstances'⁸³.
- The current limits on the maximum term of imprisonment that can be suspended (3 years in the higher courts, and 2 years in the Magistrates' Court) should be retained.
- The *Sentencing Act 1991* should be amended to create a presumption against suspension of a prison sentence for certain 'serious offences'⁸⁴.
- The *Sentencing Act 1991* should be amended to clarify that a court must not impose a term of imprisonment that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended.
- A power to attach conditions to suspended sentence orders should not be introduced.⁸⁵
- Where the offender breaches a suspended sentence by committing a further offence punishable by imprisonment during the operational period, the requirement that the suspended jail term must be activated in the absence of exceptional circumstances should be retained.⁸⁶
- Wherever possible, breach hearings should be listed before the same judge or magistrate who imposed the original sentence.⁸⁷

⁷⁸ Victorian Sentencing Advisory, *Suspended Sentences Discussion Paper*, April 2005, 148.

⁷⁹ Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 1*, xxv.

⁸⁰ Ibid.

⁸¹ Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 2*, xxiii.

⁸² Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 1*, xxv.

⁸³ Ibid. Factors listed as relevant to the decision to suspend should include: the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence; whether the full or partial suspension of the imprisonment term would be so disproportionate to the seriousness of the offence that it would fail to properly denounce the type of conduct in which the offender engaged or to deter the offender or other persons from committing offences of the same or a similar character; the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders; whether the offence has been committed during the operational period of a suspended sentence order; and the risk of the offender reoffending.

⁸⁴ Ibid. Offences are outlined in s 3 of the *Sentencing Act 1991* (Vic).

⁸⁵ Ibid, xxvi. The Victorian Sentencing Advisory Council reached the view that conditions should not be introduced because the new forms of orders recommended in the Interim Report, once operational, will perform substantially the same function as a conditional suspended sentence order, while minimising risks of sentence inflation and providing some flexibility to courts dealing with breaches.

⁸⁶ Ibid.

⁸⁷ Ibid.

- Breaches of a suspended sentence order should not constitute a separate offence.⁸⁸

6.11 The Council observed that “the ultimate goal of the [proposed] model was to move to a range of intermediate sanctions that were transparent, conceptually coherent and understandable to victims, offenders and the broader community”⁸⁹. It noted that its recommendations

*were not, as many interpreted them, a call for more punitive sentencing. Rather, we sought to find a more creative solution to the problems our consultations uncovered, and to provide a new range of orders that would perform substantially the same function as a suspended sentence and other substitutional sanctions, but that would do so in a different form.*⁹⁰

6.12 Following the recommendations made in Part 1 of the Final Report, the *Sentencing (Suspended Sentences) Act 2006* (Vic) made a number of amendments to the *Sentencing Act 1991* (Vic). The *Sentencing Amendment Act 2010* and *Sentencing Further Amendment Act 2011* made additional changes following the release of Part 2 of the Final Report. The key changes to suspended sentences, introduced by the *Sentencing (Suspended Sentences) Act 2006* include:⁹¹

- removing the offence of breach of a suspended sentence order;
- restricting the use of suspended sentences for ‘serious offences’ (including murder, manslaughter, intentionally causing serious injury, rape, sexual penetration of a child under 16 years and armed robbery) to cases in which there are ‘exceptional circumstances’ and in which it is in the ‘interests of justice’ to do so; and
- requiring a court to take into account the range of factors recommended by Vic SAC in deciding whether or not to suspend a sentence of imprisonment, namely:
 - the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence;
 - whether the full or partial suspension of the imprisonment term would be so disproportionate to the seriousness of the offence that it would fail to properly denounce the type of conduct in which the offender engaged or to deter the offender or other persons from committing offences of the same or a similar character;
 - the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders;
 - whether the offence has been committed during the operational period of a suspended sentence order; and the risk of the offender reoffending.

An additional recent change to the operation of suspended sentences in Victoria was introduced by the *Sentencing Further Amendment Act 2011* which further restricted the use of suspended sentences, not only for serious offences but also for certain other ‘significant offences’.⁹²

⁸⁸ Ibid.

⁸⁹ Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 1*, xvi.

⁹⁰ Ibid.

⁹¹ Sentencing Advisory Council, *Suspended Sentences Final Report Part 2 Summary*, April 2008, 2.

⁹² See *Sentencing Act 1991* (Vic), s 3. Offences listed as serious offences include: Recklessly causing serious injury (unless heard and determined summarily); Aggravated burglary (unless heard and determined summarily); Arson (unless heard and determined summarily); Arson causing death; Trafficking in large commercial quantities of drugs; Trafficking in commercial quantities of drugs.

6.13 Part 2 of Vic SAC's final report was released in April 2008. While Vic SAC in Part 1 of its final report recommended that suspended sentences should be phased out in Victoria by December 2009, following a detailed examination of Victoria's intermediate sentencing orders in Part 2 of its final report, Vic SAC considered that the timeline set in Part 1 was no longer appropriate. In Part 2 of its final report, Vic SAC recommended that any final decision in relation to whether or not to abolish suspended sentences should be deferred until any reforms recommended in both parts of the final report which are adopted, have been implemented, and sufficient time has elapsed to evaluate their impact.⁹³

6.14 Vic SAC made a number of detailed recommendations in Part 2 of its report. Briefly, among the key recommendations were:

- that both home detention and ICOs be recast as sentences in their own right, rather than as ways of serving sentences of imprisonment, and that those sentences be amended in a number of ways to reflect their new status⁹⁴;
- that a separate form of community-based order specifically targeted at offenders between 18 – 25 years of age be introduced, which would be similar to the existing CBO sentencing option however it would have a greater focus on dealing with those factors linked to developmental needs such as education and employment-related needs⁹⁵;
- that various reforms be introduced in relation to compliance and breach of intermediate sentencing orders, to recognise the wide range of conditions that can apply to intermediate orders, and as a consequence, the wide variation in gravity of breaches that can occur⁹⁶;
- that a community corrections board be established to respond to technical breaches of orders and to apply administrative sanctions in relation to such breaches⁹⁷;
- that courts be granted greater powers in relation to varying ICOs and CBOs, and in relation to terminating orders early, to reward offender progress⁹⁸; and
- that the power to defer sentence should be extended to the County Court, and to offenders of any age (currently the power is limited to the Magistrates' Court alone and can only be exercised in respect of offenders under the age of 25 years), and that the maximum period of deferral should be increased to 12 months⁹⁹.

Following the release of Part 2 of the Final Report, the *Sentencing Amendment Act 2010* adopted a number of Vic SAC's recommendations, some of which commenced on 1 May 2011 and the remainder of which are expected to commence on or before 1 January 2012.

7. OTHER JURISDICTIONS - INTERNATIONAL

England

7.1 Prior to recent amendments, legislation in England and Wales only permitted suspended sentences in "exceptional" circumstances, under section 118 of the *Powers of*

⁹³ Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders, Suspended Sentences Final Report Part 2 Summary*, April 2008.

⁹⁴ Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part 2*, see Chapter 6 and Chapter 9.

⁹⁵ *Ibid.*, 223.

⁹⁶ *Ibid.*, 255.

⁹⁷ *Ibid.*, 241-244.

⁹⁸ *Ibid.*, 244-246.

⁹⁹ *Ibid.*, 274.

Criminal Courts (Sentencing) Act 2000 (now repealed). The *Halliday Report*,¹⁰⁰ 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]

7.2 However, the recommendation was not followed, and no such qualification now exists. The relevant current provisions are found in sections 189-194 of the *Criminal Justice Act 2003*. The suspended sentence provisions were referred to as “custody minus” sentences in the *Halliday Report*. Under the “custody minus” scheme for suspended sentences,¹⁰¹ a sentence of between 28 and 51 weeks may be suspended, and the offender instead is required to undergo a period of supervision of between 6 months and 2 years. Courts are required to attach at least one condition, with which the offender must comply during what is referred to as ‘the supervision period’, Conditions include unpaid community work, supervision, activity requirements, program requirements, curfew requirements, residence requirements, mental health treatment requirements, and drug and alcohol treatment.¹⁰² Any breach of the supervision period will result in the original sentence of imprisonment taking effect; although the court may order a lesser term to take effect, or amend the order by imposing more onerous conditions, or extend the supervision or operational period.¹⁰³

7.3 In addition, recommendations in the *Halliday Report* also saw the introduction of “custody plus” sentences. A “Custody plus” sentence can be considered analogous to a partially suspended prison sentence, although the supervision period is tailored to the needs of the particular offender. Under the “custody plus” system 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.

7.4 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 promulgated a guideline to apply inter alia to suspended sentences even before the relevant suspended sentence and “custody plus” legislation commenced.¹⁰⁴

¹⁰⁰ John Halliday, *Making Punishments Work: Review of the Sentencing Framework for England and Wales*, July 2001 < <http://webarchive.nationalarchives.gov.uk/+http://www.homeoffice.gov.uk/documents/halliday-report-sppu/> >, accessed 4 May 2011.

¹⁰¹ Sections 189 to 194. This scheme of suspended sentences was termed “custody minus in the recent paper (2002) “Justice For All”.

¹⁰² Sentencing Advisory Council, *Suspended Sentences Final Report Part 1*, May 2006, 15.

¹⁰³ *Criminal Justice Act 2003* (UK), Schedule 12, s 8(2).

¹⁰⁴ Sentencing Guidelines Council (16 Dec 2004) *Final guideline - New Sentences: Criminal Justice Act 2003*.

New Zealand

7.5 The *Criminal Justice Amendment Act 1993* (NZ), introduced suspended sentences in New Zealand. However, suspended sentences were abolished in 2002,¹⁰⁵ 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:¹⁰⁶

[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.

7.6 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.¹⁰⁷ 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 that “no sentence other than imprisonment is appropriate”.

Canada

7.7 The Canadian Criminal Code provides for “conditional sentences of imprisonment”.¹⁰⁸ The Canadian Code provides that such sentences 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. The Court may order optional conditions requiring the offender to abstain from alcohol or drugs, owning or carrying a weapon; providing for the support or care of dependants; performing community service; attending a treatment program; or complying with other reasonable conditions which the court ‘considers desirable for securing good conduct and preventing reoffending’.¹⁰⁹ On breach, the court may activate the unexpired portion of the sentence in whole or part, vary the optional conditions or take no action.¹¹⁰

7.8 Conditional sentences are not available for particular offences involving firearm type weapons and where the offence also involves violence against a person. They are also not available for terrorism offences; offences for the benefit of, at the direction of, or in

¹⁰⁵ 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.

¹⁰⁶ As quoted in Robertson (Ed), “Adams on Criminal Law” (loose leaf service) Wellington (NZ): Brooker & Friend at Chapter 3, paragraph [SAIntro.02]

¹⁰⁷ 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].

¹⁰⁸ Sentencing is dealt with in Part XXIII of the Canadian Criminal Code, and section 742 provides for “conditional sentences of imprisonment”.

¹⁰⁹ Bartels, L., *Sword or Feather? The use and utility of suspended sentences in Tasmania*, University of Tasmania, June 2008, 85.

¹¹⁰ Ibid.

association with a criminal organisation; and serious personal injury offences punishable by a maximum sentence of 10 years or more and prosecuted by indictment.¹¹¹

7.9 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 New South Wales, arising from common law. There is, however, no statutory equivalent in New South Wales for the restriction relating to certain firearms offences involving violence against a person.

8. OPTIONS FOR REFORM

8.1 In parts 1-7 above we have discussed the use and operation of suspended sentences in NSW and noted, in a summary way, the availability of suspended sentences in a number of other jurisdictions, in particular in Victoria, which may inform options for reform in New South Wales. We now briefly outline by way of summary, some of the options for reform in New South Wales. Once again, these options are not intended to be exhaustive but rather are intended to inform consultations.

- **Option 1: Introducing partially suspended sentences.**

8.2 When suspended sentences were initially reintroduced in New South Wales in April 2000, the legislation did not explicitly require that the execution of the whole of the term of the sentence be suspended. In *R v Gamgee*,¹¹² 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.

8.3 In response to this decision, 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 explained that this was done because they were considered difficult to administer and because the partial suspension of the initial portion of the sentence may cause hardship to the offender.¹¹³

8.4 The Sentencing Council in its report ‘*Abolishing prison sentences of 6 months or less*’¹¹⁴ recommended the reintroduction of partially suspended sentences. That report noted that partial suspension of the latter half of the sentence would not cause considerable hardship to the offender, and would bring New South Wales into line with Federal sentencing law¹¹⁵. On the other hand, a question arises as to whether this adds anything that is not achieved by the availability of a period of potential release on parole, which will occur where the NSW Parole Authority orders release of an offender on parole.

¹¹¹ Ibid.

¹¹² *R v Gamgee* (2001) 51 NSWLR 707.

¹¹³ 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.

¹¹⁴ NSW Sentencing Council, *Abolishing prison sentences of 6 months or less, a report of the NSW Sentencing Council*, August 2004, 4.

¹¹⁵ Ibid, 27.

- **Option 2: Attaching conditions such as community service or the completion of a rehabilitation program to assist in changing the public's perception of suspended sentences as lenient.**

8.5 As mentioned above, in New South Wales conditions may be imposed on suspended sentence orders in accordance with section 95 of the CSPA. Section 95 provides that the good behaviour bond, which is imposed as a standard condition where the sentence is imposed,

“(c) may contain such other conditions as are specified in the order by which the bond is imposed, other than conditions requiring the person under bond:

(i) to perform community service work, or

(ii) to make any payment, whether in the nature of a fine, compensation or otherwise.”

8.6 Accordingly, the discretion as to the conditions that may be attached to a s 9 bond is broad. Such conditions may include, for example, supervision by the Parole Authority, which may require the offender to report as long as it is deemed necessary by the supervising officer¹¹⁶, or to participate in a rehabilitation program, such as drug or alcohol abuse counselling.¹¹⁷

8.7 Consideration may need to be given to whether the current provisions allowing conditions to be attached to a suspended sentence are too restrictive, either legally (for example, by not allowing a requirement to perform community service to be attached as a condition) or practically (for example, due to a lack of rehabilitative options).

- **Option 3: Increasing or decreasing either the term of imprisonment which may be suspended, or the operational period for suspended sentences**

8.8 As indicated above, these options were considered in Victoria. It has been suggested that a decrease in the length of eligible sentences, for example to 12-month sentences and under, might exclude the use of suspended sentences in cases involving more serious offences. However, limiting the availability of suspended sentences any further may also undermine the nature of the sanction and unduly limit the judicial sentencing discretion.

8.9 Specifying a minimum eligible term for suspended sentences could prevent the ‘net-widening’ effect discussed above, as it may discourage courts from imposing a suspended sentence where a non-custodial sentence might have been appropriate. However, it is possible that this might actually compound net-widening if courts begin to impose longer sentences, in order to bring them within the lower limit of sentences that are able to be suspended.

- **Option 4: Revising the desirability of applying for a guideline judgment**

8.10 In NSW, the feasibility of a guideline judgment application for suspended sentences under section 100J(1)(b) of the CSPA was considered in the Sentencing Council's report ‘*Seeking a guideline judgment on suspended sentences*’.¹¹⁸ At the time of that report, the Council considered that whilst there were strong arguments in support of a guideline judgment application, it concluded that an application would have been premature. The

¹¹⁶ Judicial Commission of NSW, Sentencing Bench Book, s 9 Good Behaviour Bonds, 4-740.

¹¹⁷ Ibid.

¹¹⁸ NSW Sentencing Council, *Seeking a guideline judgment on suspended sentences*, June 2006.

Council noted that there were 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 to caution sentencers against allowing subjective factors to obscure the objective seriousness of the offence .

For potential consideration in this review is the question whether it is now appropriate for an application for a guideline judgment to be made, having regard to sentencing experience since the issue of the Council's previous report.

- **Option 5: Providing legislative guidance to courts on the factors that may make a case inappropriate for suspension.**

8.11 This could be done in a number of ways, for example: by limiting the offences for which a sentence can be suspended, such as was done in Victoria,¹¹⁹ by restricting the use of suspended sentence orders to those where "exceptional circumstances" exist; or by amending the CSPA to incorporate a more detailed set of factors that a court must consider before imposing a suspended sentence. A consideration for this review is whether legislative guidance on the factors that make a case inappropriate for suspension is required.

- **Option 6: Changes to breach provisions.**

8.12 The Sentencing Council has previously recommended to the Attorney General that there should be a wider discretion reserved to a Court when addressing a breach of a suspended sentence.¹²⁰ While a breach of suspended sentence is not a separate offence, a breach of the good behaviour bond attached to the suspended sentence leads to a presumption that the sentence of imprisonment must be restored in accordance with s 99 of the CSPA, although that sentence can also be ordered to be served by way of an Intensive Corrections Order or Home Detention. A consideration for this review is whether the current breach provisions are too rigid or require reform.

- **Option 7: Abolition of suspended sentences.**

8.13 As mentioned above, a similar review in Victoria lead Vic SAC to recommend that suspended sentences should be phased out, dependent on the introduction and successful use of a range of reforms to intermediate sentencing orders. A consideration for this review is whether a similar approach should be taken in NSW.

- **Option 8: Strengthening intermediate sentencing orders to limit the use of suspended sentences.**

8.14 The Sentencing Council has made a number of recommendations in relation to the desirability of expanding the availability of intermediate sentencing orders and of ensuring that they are available consistently at all courts throughout New South Wales.¹²¹ Recently,

¹¹⁹ See paragraph 6.12 above.

¹²⁰ See NSW Sentencing Council Report, *Abolishing prison sentences of six months or less*, Summary of recommendations, 4.

¹²¹ For example, see NSW Sentencing Council, *Abolishing prison sentences of 6 months or less, a report of the NSW Sentencing Council*, August 2004, 4, 12 and 23.

such recommendations have been given effect through the introduction of Intensive Correction Orders, and the abolition of Periodic Detention as a sentencing option. However, it is worth considering, in the context of this review, whether further reforms are required to ensure that current sentencing options, including suspended sentences, are used appropriately. As discussed above, a similar review was undertaken by Vic SAC, whose recommendations in Part 2 substantially relate to improving the broader sentencing framework.

- **Option 9: Reviewing and possibly increasing the number of rehabilitative programs available across NSW to offenders whose sentences have been suspended.**

8.15 The Sentencing Council has made a number of recommendations in relation to the need to ensure that sentencing orders, including conditions relating to participation in rehabilitative programs, are available consistently in all courts throughout New South Wales. The Council is interested to learn whether there remains a disparity between courts in relation to the availability of, and confidence, in intermediate sentencing options.

9. SUMMARY OF ISSUES FOR CONSIDERATION

Submissions are invited in relation to the following issues:

1. a) Should partially suspended sentences be reintroduced as a sentencing option in NSW?

If yes:
 - b) Should such a sentencing option be limited to apply only to the latter portion of the term of imprisonment or should judges be given the discretion to suspend any portion of the sentence?
 - c) What benefit would the reintroduction of partially suspended sentences provide over and above current sentencing options, in particular, the option to release an offender for a period on parole?
2. a) Is reform required in relation to the nature of the conditions that may be attached to a suspended sentence?

b) If yes, how are the current conditions restrictive or inadequate and what are the nature of the reforms you consider would be appropriate?
3. Should the term of imprisonment that may be suspended (currently a maximum of 2 years), be either increased or decreased? If yes, please indicate your reasons.
4. Should the operational period, or the period for which a term of imprisonment may be suspended (currently also a maximum of 2 years), be either increased or decreased? If yes, please indicate your reasons.
5. Should an application for a guideline judgment be made? Please indicate your reasons.
6. Is further legislative guidance required in relation to the factors that make a case inappropriate for suspension? If yes, what form should such legislative guidance take?
7. Do the current provisions relating to breaches of suspended sentences require reform? If yes, how? Should the discretion available to a court when addressing a breach of a suspended sentence be widened?
8. Is there a disparity between courts in relation to the availability of, and confidence in, intermediate sentencing options? If yes, please indicate:
 - a) the nature of the disparity; and
 - b) the nature of the reforms that you consider would address this disparity.
9. Are reforms required to intermediate sentencing orders? If yes, how should intermediate sentencing orders be reformed?
10. Should NSW adopt a similar approach to Victoria in relation to strengthening available intermediate sentencing orders and gradually phasing out suspended sentences? Please indicate your reasons.
11. Do you have any other comments in relation to the issues raised by the Terms of Reference (outlined at page 5)?

ANNEXURE A

TRENDS IN THE USE OF SUSPENDED SENTENCES IN NSW

Lia McInnis¹ & Craig Jones

Since they were re-introduced to NSW in April 2000, the use of suspended prison sentences has tripled in NSW Local Courts and more than doubled in NSW District and Supreme Courts. The aim of the current study was to assess the extent to which suspended sentences have replaced custodial and non-custodial penalties. In Local Courts, the proportional use of full time and periodic custody sanctions decreased after the introduction of suspended sentences but so did the use of Community Service Orders (CSOs). In the Higher (District and Supreme) Criminal Courts, there appears to have been a small reduction in full-time imprisonment and the use of period detention. The introduction of suspended sentences, however, has also resulted in significant reductions in the use of bonds and CSOs.

INTRODUCTION

A suspended prison sentence is a term of imprisonment that has been imposed by the court but suspended for the length of the sentence. Offenders who are supervised by way of suspended sentences are permitted to remain in the community on the condition that they enter into an agreement to be of good behaviour and follow the conditions set down by the court (Brignell & Poletti, 2003). They have been used extensively as alternatives to full-time custody in many jurisdictions since their origins in France in the late 19th century (Lulham, Weatherburn & Bartels, 2009). In New South Wales, suspended sentences have been introduced, phased out and then re-introduced as successive governments have attempted to find the best mix of sentencing alternatives. Following a recommendation by the NSW Law Reform Commission (2006), suspended sentences were re-introduced in their current form in April 2000.

The operation of suspended sentences in NSW is set out under s12 of the *Crimes (Sentencing Procedure) Act 1999*. The decision to impose a suspended sentence involves three stages. Initially, the judge or magistrate must decide whether the crime warrants a sentence of imprisonment. Section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* requires that, in order to pass down a term of imprisonment, the court must be satisfied that no other penalty is appropriate. Second, if imprisonment is deemed to be appropriate, the length of the term of imprisonment must be determined. Thirdly, depending on the length of the sentence to be passed down, a determination must be made as to how the sentence should be served. A judge or magistrate can decide to impose a full-time custodial

sanction, a periodic custodial term, detention to be served in the home, or to suspend the prison term.

In his Second Reading Speech to the *Crimes (Sentencing Procedure) Bill 1999* (New South Wales Parliamentary Debates, Hansard, Legislative Assembly, 28/10/99, p 2326), the Honourable Mr Debus MP said:

"The primary purpose of suspended sentences is to denote the seriousness of the offence and the consequences of re-offending, whilst at the same time providing [offenders] an opportunity, by good behaviour, to avoid the consequences. Their impact on the offender is, however, weightier than that of a bond."

In other words, the intention of suspended sentences was to demonstrate that the offence is sufficiently serious to warrant a prison term but allows judges and magistrates to suspend the term of imprisonment where they see no useful purpose in incarcerating the offender. The threat of the prison sentence for infractions of the good behaviour bond is assumed to have a strong specific deterrent effect on future offending. Recent research, however, has found that suspended sentences exert no greater deterrent effect than supervised bonds (Weatherburn & Bartels, 2008).

Since their re-introduction, the proportion of people receiving suspended sentences has tripled in NSW Local Courts (from 1.7% of all people convicted in 2000 to 5.1% in 2008) and more than doubled in the Higher Courts (from 6.9% to 16.8%; NSW Bureau of Crime Statistics and Research, 2001; 2009). This increase raises the question of whether suspended sentences

are substituting for full time custody (as one would expect if they were being applied as intended), or whether they are being imposed in lieu of non-custodial penalties. The issue is important because breach of a suspended sentence is more likely to result in a sentence of imprisonment than breach of a non-custodial order, such as a bond. The use of suspended sentences in cases where a non-custodial penalty might have been imposed therefore has the potential to increase rather than reduce the overall rate of imprisonment.

The simplest way of assessing whether suspended sentences have offset prison sentences is to observe whether the proportion of people being sentenced to imprisonment decreased after suspended sentences were re-introduced. Conversely, the easiest way to determine whether suspended sentences are substituting for less serious penalties is to see whether the proportion of people receiving non-custodial penalties decreased following the introduction of suspended sentences. In the next section, we describe the data sources employed to assess trends in the use of suspended sentences. We then present and discuss the results of the analysis.

METHOD

Data source

The data were extracted from the Bureau's Higher and Local Criminal Court databases. Monthly counts of the number of people convicted for one or more offences between 1994 and 2008 were generated by the penalty they received for their principal (most serious) offence. If people were convicted more than once over this time period, they were counted multiple times. Penalties were grouped into the following categories:

- Full-time imprisonment (including detention in a juvenile institution);
- Home detention;
- Periodic detention;
- Suspended sentences (with and without supervision);
- Community Service Orders (CSOs);
- Good behaviour bonds (with and without supervision); and
- All other sanctions deemed to be more serious than a fine according to the Bureau's penalty hierarchy (see, NSW Bureau of Crime Statistics and Research, 2009, p.139).²

Fines and less serious penalties were excluded for the purposes of this analysis because fines make up around half of all penalties in the Local Courts. Their high volume would obscure subtle changes in imprisonment and other sanctions over time. We would also not expect the proportion of people receiving fines to be affected by the introduction of suspended sentences.

Analysis

The analyses were descriptive. The proportion of people convicted in the Local and Higher Courts who received each penalty was plotted by the year in which the matter was finalised. No formal statistical tests were undertaken because it quickly became clear which penalties were being offset by the increase in suspended sentences.

RESULTS

Local Courts

Figure 1 shows the proportion of penalties more serious than a fine that were custodial, suspended custodial or non-custodial penalties in NSW Local Courts between 1994 and 2008. It is clear from Figure 1 that the use of suspended prison sentences increased in the years immediately after their introduction and stabilised thereafter. In the first full year of operation (2001), 11.1 per cent of people received a suspended prison sentence. This increased to a high of 15.3 per cent in 2003 and stayed at around that level thereafter. It is also apparent from Figure 1 that the proportion of custodial sentences decreased slightly following the introduction of suspended sentences. However, the largest decrease is apparent with non-custodial penalties, which decreased substantially following the introduction of suspended sentences.

Figure 2 gives a more fine-grained analysis of the specific custodial and non-custodial penalties that decreased following the introduction of suspended sentences. While it is clear that the proportion of people receiving a full-time prison sentence decreased following the introduction of suspended sentences (from 23.5% in 1999 to 20.2% in 2008), the most salient change is the large reduction in use of CSOs. Whereas 20.4 per cent of people received a CSO in 1999, this had decreased to 11.5 per cent by 2008. The proportion of people receiving periodic detention also decreased markedly in the Local Courts following the introduction of suspended sentences (from 5.4% of penalties more serious than a fine in 1999 to 2.4% in 2008).

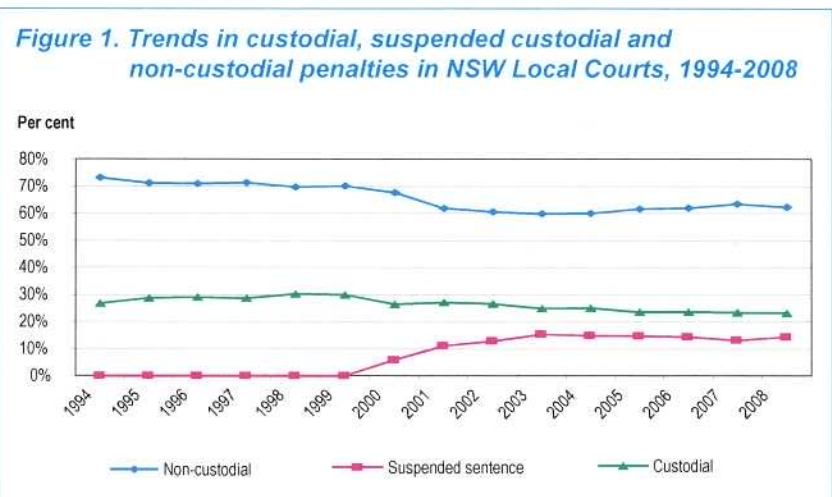
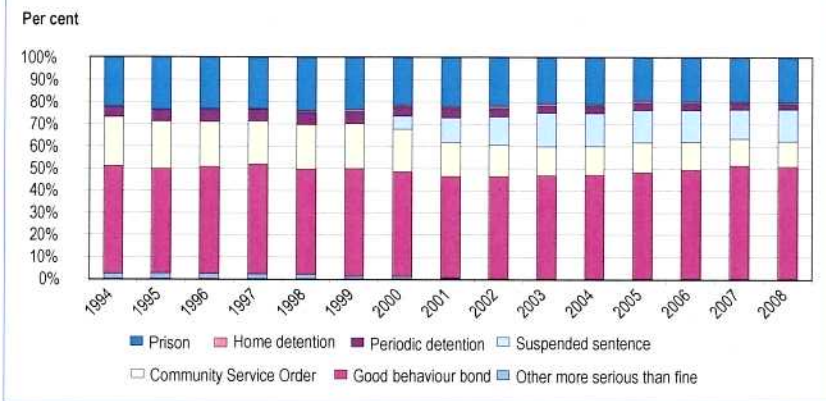


Figure 2. Trends in non-fine penalties in the NSW Local Courts (1994 to 2008)



Higher Courts

Figure 3 shows the proportion of penalties more serious than a fine that were custodial, suspended custodial or non-custodial penalties in NSW Higher Courts between 1994 and 2008. Unlike the trend in the Local Courts, the use of suspended prison sentences has gradually increased since they were introduced, without stabilising. In 2001, 12 per cent of people receiving penalties more serious than fines received a suspended prison sentence. By 2008 this had increased to 17.1 per cent. While the proportion of penalties that were custodial increased in the years prior to the introduction of suspended sentences, this increase appears to have been attenuated from 2001 onward. There was a gradual decline in the proportion of non-custodial penalties in the years prior to the introduction of suspended sentences and this decline appears to accelerate from 2001 onward.

Figure 4 gives a more fine-grained analysis of changes in specific penalties in NSW District and Supreme Courts following the introduction of suspended sentences. In the years prior to the introduction of suspended sentences, custodial penalties were gradually increasing as a proportion of all penalties. In 1994, for example, 63.1 per cent of people were given custodial penalties of some kind (full-time, home detention or periodic detention). By 1999, this had increased to 77.1 per cent. This increase was driven mainly by increases in full-time custody. The introduction of suspended sentences in 2000 appears to

have attenuated that increase. By 2008, 74.9 per cent of people received a custodial sanction other than a suspended sentence. Like the trend in the Local Courts, this finding suggests that the introduction of suspended sentences has reduced the use of custody to some extent.

However, as with the trend seen in the Local Courts, the most significant change in Figure 4 is the reduction in use of CSOs. In the year prior to the introduction of suspended sentences, 9.1 per cent of people receiving penalties more serious than a fine received a CSO. By 2008, the use of CSOs in the Higher Courts had all but disappeared (1% of people receiving a penalty more serious than a fine received a CSO). The proportion of people receiving a good behaviour bond also decreased, from 13.9 per cent in 1999 to 7.1 per cent in 2008.

Figure 3. Trends in custodial, suspended custodial and non-custodial penalties in NSW Higher Courts, 1994-2008

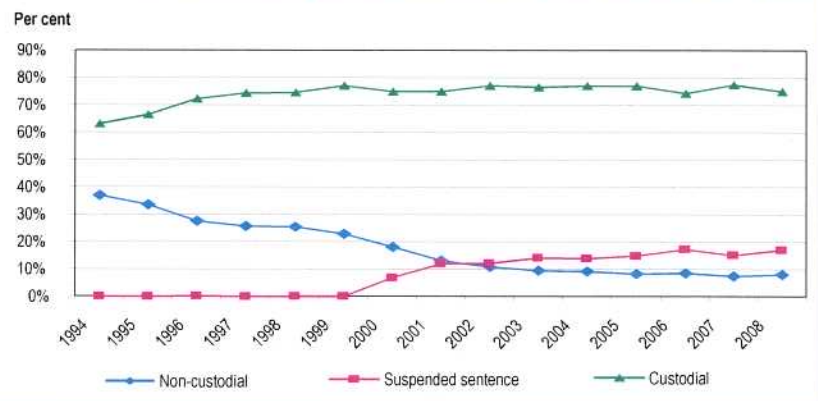
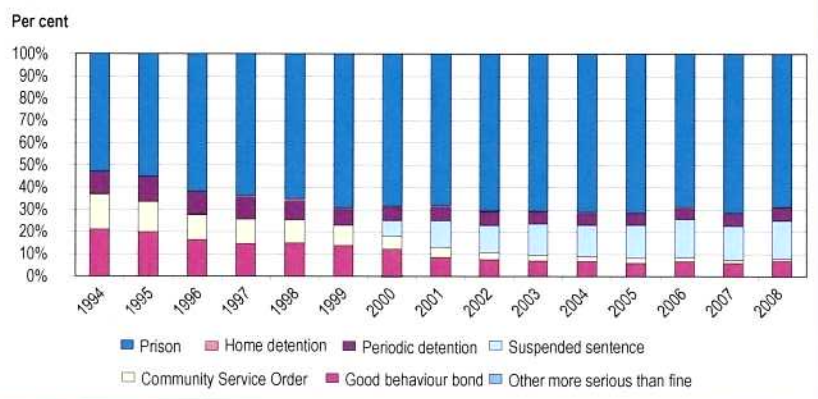


Figure 4. Proportional representation of penalties more serious than a fine in NSW Higher Courts, 1994 to 2008



DISCUSSION

The current study clearly shows that the use of suspended sentences has grown in the Local and Higher Criminal Courts in NSW. In the first full year of their implementation (2001), suspended sentences represented 11.1 per cent and 12.0 per cent of all sanctions more serious than fines in the Local and Higher Courts, respectively. By 2008, this had increased to 15.3 per cent and 17.2, respectively. This increase has replaced custodial sanctions to some extent but it is equally clear that suspended sentences have been used where non-custodial sanctions would otherwise have been employed. This is particularly true for CSOs in both court jurisdictions, but also for good behaviour bonds in the Higher Criminal Courts.

The increase in use of suspended sentences in lieu of custodial sanctions is not surprising. This is what we would expect if suspended sentences have been used appropriately. After all, the legislation requires that judges and magistrates first make a determination that a custodial sentence is appropriate and then make the decision to suspend the term of the imprisonment. What is surprising is that in a significant proportion of cases, judges and magistrates appear to have imposed a suspended sentence where they would not have imposed a prison sentence in the absence of this sentencing alternative. Use of CSOs has declined in the Local Courts and all but disappeared as a sentencing alternative in the Higher Criminal Courts. The use of good behaviour bonds has decreased in the Higher Criminal Courts.

This imposition of suspended custodial sanctions on offenders who would otherwise have received a non-custodial sanction has potentially serious implications for imprisonment rates over the longer term. The risk of imprisonment is probably higher for breaching the conditions of a suspended sentence than it is for breaching a good behaviour bond or a CSO. One unintentional consequence of increasing the use of suspended sentences is that a greater number of offenders may be drawn into the prison population. There is evidence that this occurred following the introduction of suspended sentences in New Zealand (Spier, 1998). Uncovering the extent to which this has occurred in NSW would require more fine-grained research than is possible in the current paper. It is clear, however, that the use of suspended sentences is increasing, not at the expense of custodial sanctions, but at the expense of other non-custodial sanctions.

REFERENCES

- Brignell, G., & Poletti, p. (2003). *Suspended Sentences in New South Wales*. Sentencing Trends and Issues no. 29. Sydney: NSW Judicial Commission.
- Lulham, R., Weatherburn, D., & Bartels, L. (2009). *The recidivism of offenders given suspended sentences: a comparison with full-time imprisonment*. Crime & Justice Bulletin no. 136. Sydney: NSW Bureau of Crime Statistics and Research.
- NSW Bureau of Crime Statistics and Research (2001). *Criminal court statistics 2000*. Sydney: NSW Bureau of Crime Statistics and Research.
- NSW Bureau of Crime Statistics and Research (2009). *Criminal court statistics 2009*. Sydney: NSW Bureau of Crime Statistics and Research.
- NSW Law Reform Commission 1996. *Sentencing*. Report no. 79. Sydney: NSWLRC.
- Spier, P. (1998). *Conviction and sentencing of offenders in New Zealand: 1989 to 1997*. Wellington: NZ Ministry of Justice.
- Weatherburn, D., & Bartels, L. (2008). The recidivism of offenders given suspended sentences in New South Wales, Australia. *British Journal of Criminology*, 48(5), 667-681.

NOTES

1. School of Psychology, University of NSW.
2. These penalties include suspended (juvenile) control orders, s.554 bonds in the Local Court, and Care and Treatment Orders in the District and Supreme Courts.

ANNEXURE B

Table 1: Availability of suspended sentences in Australian jurisdictions

Jurisdiction	Act, sections	Availability, prohibitions and conditions
NSW	<i>Crimes (Sentencing Procedure) Act 1999, s 12</i>	<ul style="list-style-type: none"> • 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	<i>Crimes Act 1914 (Cth), s 20(1)(b)</i>	<ul style="list-style-type: none"> • Whole or part • Give security
ACT	<i>Crimes (Sentencing) Act 2005 - S 12</i>	<ul style="list-style-type: none"> • Whole or part • Give security • Enter into good behaviour bond which could exceed the term of the sentence
NT	<i>Sentencing Act, s 40</i>	<ul style="list-style-type: none"> • Sentenced to imprisonment for not more than 5 yrs • "desirable to do so in the circumstances" • whole or part • such conditions "as court thinks fit"
WA	<i>Sentencing Act 1995, s 76</i>	<ul style="list-style-type: none"> • 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	<i>Sentencing Act 1997, ss 7, 24</i>	<ul style="list-style-type: none"> • Whole or part • The offender may not commit another offence punishable by imprisonment during the period of the suspended sentence order. • The suspended sentence order may be subject to conditions including community service and rehabilitation.
SA	<i>Criminal Law (Sentencing) Act 1988, s 38</i>	<ul style="list-style-type: none"> • May suspend where court thinks "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

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Jurisdiction	Act, sections	Availability, prohibitions and conditions
		<p>suspended on grounds that offender's ill health, disability or frailty would mean unduly harsh)</p> <ul style="list-style-type: none"> • 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	<i>Sentencing Act 1991, s 27</i>	<ul style="list-style-type: none"> • 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) • In making the order the Court must consider a number of factors including deterrence of offenders, denunciation of the offence and reflecting the gravity of the offence. • Not available for serious offences unless there are exceptional circumstances and in which it is in the interest of justice to do so. • Take into account a number a range of factors in deciding whether or not to suspend a sentence of imprisonment.
Qld	<i>Penalties and Sentences Act, s 143-151A 1992</i>	<ul style="list-style-type: none"> • available where term of imprisonment imposed 5 years or less • "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)