



The Chief Magistrate of the Local Court

29 July 2011

The Hon Jerrold Cripps QC
Chairperson
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

Dear Chairperson

Re: Suspended Sentences Consultation Paper

Thank you for your invitation to provide my comments in respect of the above consultation paper.

I am of the view that reform of the use and operation of suspended sentences in New South Wales is highly desirable for the reasons outlined further below. Of the options for reform posed in the Consultation Paper, I favour the adoption of a similar approach to Victoria in phasing out suspended sentences. However, I suggest that this should occur in the context of a holistic assessment of current sentencing options, as there are a number of anomalies in the availability and use of other sentencing options that would also benefit from resolution.

Current difficulties in the use of suspended sentences

Some of the primary difficulties arising from the availability and use of suspended sentences observed in the Local Court are as follows:

1. Process for suspending a sentence and perceptions of suspended sentences

The Consultation Paper refers to the “inherent paradox” of a suspended sentence in firstly requiring a finding that there is no appropriate sentence other than imprisonment but then requiring a decision to suspend the sentence. In my observation the resultant effect of this process is that a suspended sentence is widely perceived, not only by the public but also by legal practitioners, as a more lenient outcome than a non-custodial option such as a community service order (CSO). This may be because an offender who receives a suspended sentence is perceived as avoiding punishment by simply being of good behaviour like any other member of the community, whereas an offender subject to a CSO is punished by being required to do something further in performing the community service.

The difficulty in this reasoning is that the offender who receives a suspended sentence in a sense risks more than another member of the community in the event that they commit a further offence. However, it is also true that provided the offender remains of good behaviour a suspended sentence will be less onerous than a CSO, notwithstanding that only in the former case has an assessment been made that the offence is of such seriousness that no sentence other than imprisonment is appropriate.

Consequently, there is no question that a mentality operates amongst some appearing before the Local Court to the effect that a suspended sentence is a better result than a non-custodial option such as a CSO.

Magistrates report receiving submissions on sentence from legal practitioners proposing that a suspended sentence is appropriate in circumstances where the objective seriousness of the offending is such that a custodial sentence is not within contemplation. Such an approach is usually abandoned should the magistrate ask the practitioner whether he or she is submitting to the Court that it should make a finding that no sentence other than one of imprisonment is appropriate. However, it does suggest that the reasoning process for arriving at a decision to suspend a sentence is confusing or poorly understood by some.

2. Net widening

It is of considerable concern that 2010 research by BOCSAR¹ highlights that with the re-introduction of suspended sentences there has been a significant reduction in the imposition of community service orders, particularly in the higher courts. As the authors of that research note, this appears to indicate that judicial officers have been "impos[ing] a suspended sentence where they would not have imposed a prison sentence in the absence of this sentencing alternative" and has "potentially serious implications for imprisonment rates over the longer term"² due to breaches amongst a portion of those subject to suspended sentences. It would also appear to indicate that on some occasions due regard is not being given to s 5 of the *Crimes (Sentencing Procedure) Act 1999*.

Another area in which net widening can occur is where the length of a sentence is increased to apparently "compensate" for the fact it is to be suspended, rather than imposing a shorter sentence that the offender is required to serve in custody. For example, I am aware of an instance where an offender was sentenced to full-time imprisonment in the Local Court for a period of three months. The offender appealed to the District Court, and received a sentence of imprisonment for a period of six months that was then suspended. I would be curious to know whether on appeal the offender was given a direction in accordance with *Parker v DPP*.³ This type of approach by the District Court on appeal is not uncommon.

It may be that the possible motivation underpinning such an approach, which disregards the process for imposing a custodial sentence enunciated in *R v*

¹ L McInnes & C Jones, 'Trends in the use of suspended sentences in NSW', Issues paper no 47 (May 2010), NSW Bureau of Crime Statistics and Research

² Note 1 at 4

³ (1992) 28 NSWLR 282

Zamagias,⁴ is an attempt to increase the deterrent effect of the sentence. However, this erroneous approach also fails to recognise the potentially dire consequences for an offender in the event of a subsequent breach, who may end up spending a longer period in custody than if he or she had originally been required to serve the full-time sentence.

3. Breaches

Section 98(3) of the *Crimes (Sentencing Procedure) Act* 1999 requires that, in the proceedings for breach of a section 12 good behaviour bond, the court must revoke the bond unless it is satisfied that (a) the offender's failure to comply with the conditions of the bond was trivial in nature, or (b) that there are good reasons for excusing the offender's failure to comply with the conditions of the bond.

In *DPP (NSW) v Cooke* (2007) 168 A Crim R 379, the Court of Appeal commented that "good reasons" may include "extenuating circumstances of sufficient importance to explain the behaviour giving rise to the breach".⁵ However, the Court went on to note that "the determination under s 98(3)(b) should be made bearing firmly in mind that generally a breach of the conditions of the bond will result in the offender serving the sentence that was suspended", and further, that "there is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison".⁶

Notwithstanding the clarity of those statements, it must be observed that there are occasions where it appears that breaches of suspended sentences are not being dealt with according to law. For example, I am aware of an instance in which an offender who received a suspended sentence in the Local Court was brought before the District Court in relation to a fresh offence. In dealing with the breach of suspended sentence, a direction was sent to the Local Court registry to send a letter to the offender cautioning him against any further breaches.

4. Further issues

I have previously written to the former Attorney General in relation to:

- The fact that in the event of an appeal against sentence to the District Court, the duration of a good behaviour bond under section 12 may in effect be reduced in some cases, due to the operation of provisions in the *Crimes (Appeal and Review) Act* 2001 relating to the stay of execution of sentencing pending determination of appeals. A copy of my correspondence setting out the issue in more detail is enclosed for your reference.
- The difficulties arising in cases where an offender is to be sentenced in the Local Court for a summary or Table offence, in circumstances where the commission of that offence amounted to a breach of a s 12 bond imposed in the District Court.

⁴ [2002] NSWCCA 17 at [26]-[30]

⁵ At [16]

⁶ At [21], [23]

Section 98 of the *Crimes (Sentencing Procedure) Act 1999* does not allow the Local Court to deal with such a breach and the practical consequence in such instances is that the Local Court has to defer sentencing until the District Court deals with the breach. I understand a copy of my correspondence on this issue has previously been provided to the Sentencing Council.

Possible phasing out of suspended sentences

As foreshadowed above, and in view of the difficulties with suspended sentences that have been experienced in the Local Court, I am of the opinion reform to phase out suspended sentences in New South Wales is desirable, provided that sufficient other custodial and non-custodial options are available and able to be utilised effectively.

Overall, the interaction of current custodial sentencing options would benefit from review and rationalisation. Even if the option of phasing out suspended sentences is not ultimately preferred, it would nonetheless be desirable for such a process to be undertaken. The course to be followed when imposing a sentence of imprisonment other than full-time custody varies depending on the alternative being considered. The enclosed table, which appears in the Local Court Bench Book, sets out some of the differences that currently exist.

In addition, ongoing observation would be needed to assess the efficacy of the newly introduced intensive correction order (ICO). As the next sentencing option following the suspended sentence in the hierarchy of seriousness of custodial sentencing options, the ICO could reasonably be expected to be more frequently considered for use in the event of the phasing out of suspended sentences.

Since their introduction in October 2010, the Local Court has experienced some difficulties with ICOs, both when considered within the framework of custodial sentencing options and in practice. These include:

1. A lack of consistency between the various alternative sentences of imprisonment

Current anomalies between various custodial sentencing options can cause uncertainty amongst offenders and their legal representatives as to the process that the Court will follow when imposing a sentence of imprisonment. In particular, I note:

- **Maximum length:** The maximum length of a home detention order is 18 months, whereas the maximum length of an ICO is 2 years. This is despite home detention being higher in the hierarchy of severity of custodial sentences.
- **Eligibility criteria:** There is a lack of consistency between the categories of offences for which an offender will be ineligible to serve a sentence by way of home detention or ICO. This is notwithstanding that an ICO may involve a home detention component, that is, the imposition of a curfew.

- Fixing of non-parole period: The court is required to fix a non-parole period for sentences of imprisonment to be served by way of home detention or full-time custody, but is not to do so in respect of ICOs (or suspended sentences).
- Time of fixing sentence: When referring an offender for assessment of suitability for serving a sentence by way of ICO, the Court does not impose a sentence of imprisonment. However, it is to be satisfied that no sentence other than imprisonment is appropriate and the sentence is likely to be 2 years or less.

2. Operational issues

Various operational issues have arisen since the introduction of ICOs in October 2010. Of particular concern are those that may have resulted in an offender who would otherwise appear suitable for an ICO being assessed as unsuitable for reasons such as:

- No work being available in a particular region that the offender could complete in satisfaction of the compulsory work requirement under an ICO; and
- The lack of availability of rehabilitation programs for an offender with an unresolved drug or alcohol problem, notwithstanding that ICOs were “designed to reduce an offender’s risk of re-offending through the provision of intensive rehabilitation and supervision in the community”⁷

However, should these difficulties be resolved such that the ICO becomes a viable sentencing alternative, there would in my view be no need to retain the suspended sentence as a sentencing option.

I would be pleased to discuss these issues or any of the above comments further with representatives of the Sentencing Council should you wish. Please do not hesitate to contact my office if I can be of further assistance.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate

⁷ The Hon J Hatzistergos MLC, Attorney General, Second Reading, *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010*, 22/6/10



The Chief Magistrate of the Local Court

25 February 2008

The Honourable John Hatzistergos MLC
Attorney General
Level 31, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney,

Suspended sentences – stay on appeal

I am writing in relation to the stay of execution of sentence pending determination of appeals under the *Crimes (Appeal and Review) Act* 2001 and the effect this has in relation to good behaviour bonds imposed by the Local Court under section 12 of the *Crimes (Sentencing Procedure) Act* 1999 (**suspended sentence**).

Where a person is sentenced in the Local Court but subsequently appeals against either the conviction or the severity of the sentence imposed, section 63 of the *Crimes (Appeal and Review) Act* automatically stays the sentence (assuming the appeal is within time).

If the sentence of the Local Court is confirmed on appeal, unless a specific order is made by the District Court, section 69 of the *Crimes (Appeal and Review) Act* provides that "the original sentence continues to have effect according to its terms, except to the extent to which the appeal court otherwise directs *and despite any stay of execution that has been in force in respect of the sentence.*"

A similar situation arises where an appeal is withdrawn. Section 67 provides that where an appeal is withdrawn, "the appeal court *may* make such orders as are necessary to place the appellant as nearly as practicable in the same position as if the appeal or application had not been made."

Both section 67 and 69 therefore contain some element of discretion in the making of specific orders that would "restart" a bond. Therefore, unless the District Court makes a specific order reimposing the original sentence, the effect of lodging an appeal is to neutralise a very substantial period of the suspended sentence.

A view has been expressed by a number of Magistrates that it is not common for these specific orders to be made.

As you would be aware, whilst an order is "stayed" it cannot be breached. The effect of the bond therefore, (i.e. the requirement to be of "good behaviour") is nullified for the period it is stayed between lodging an appeal and confirmation of sentence.

For example, it would not be uncommon for six months to pass between the imposition of the suspended sentence in the Local Court (appeals are generally lodged immediately following sentence) and the confirmation of that sentence in the District Court. This reduces the length of the suspended sentence by a very substantial period. Arguably, it may also encourage appeals as a matter of course for the purpose of avoiding the effect of, or consequences of breaching, a good behaviour bond.

It may be appropriate to deal with the issue by way of legislative amendment. If you agree, I would be happy to discuss the issue further with you or alternatively you may consider it appropriate to refer the issue to your Criminal Law Review Division.

Yours sincerely



Graeme Henson
Chief Magistrate

CUSTODIAL SENTENCES

Subject to availability for the particular offence. All section references are to the *Crimes (Sentencing Procedure) Act 1999*

Type of Custody	Maximum Length	Fix non-parole period?	Accumulation of consecutive sentences?	Part-heard upon referral for assessment?	Who deals with the breach?	Length of time for assessment	Consequence of breach
s12	2 yrs	No	No	No	Court	PSR is optional- it takes 4 wks if in custody, 6 wks if at liberty.	If revoked: ICO, home detention or full-time custody
ICO	2 yrs	No (and don't fix term of sentence prior to referral for assessment: s 7(2)).	Yes, up to 2 yrs	Yes	Commissioner for Corrective Services/ Parole Board	Assessment is required- it takes 4 wks if in custody, 6 wks if at liberty. Note: the court cannot simultaneously seek an assessment of suitability for a HDO. An offender who is referred for assessment for an ICO is not to be referred for assessment for an HDO for the same sentence unless the court has determined it will not impose an ICO: s 80(1A)	If revoked: full-time custody
Home Detention	18 mths	Yes, if appropriate and total term is longer than 6 months. Sentence is to be fixed prior to assessment.	Yes, up to 18 mths	No, but if found to be unsuitable, may be referred to sentencing magistrate to consider a suspended sentence: s 12(4)	Parole Board	Assessment is required- it takes 6 weeks. Note: the court cannot simultaneously seek an assessment of suitability for an ICO. An offender who is referred for assessment for an ICO is not to be referred for assessment for an HDO for the same sentence unless the court has determined it will not impose an ICO: s 80(1A)	If revoked: full-time custody
Full-time Custody	Cumulative maximum of 5 yrs	Yes, if appropriate and total term is longer than 6 months.	Yes, up to 5 yrs	No	Parole Board	PSR is optional, it takes 4 wks if in custody, 6 wks if at liberty.	If parole is revoked: full-time custody

Type of Custody	Commencement of sentence	Ineligibility
s 12	Date of imposition of sentence	Ineligible if accused is subject to a sentence of imprisonment: s 12(2), that is - full-time custody, home detention, ICO or parole
ICO	Between 7 to 21 days after the imposition of sentence unless it is to be served consecutively or partly consecutively.	<ul style="list-style-type: none"> · Ineligible for certain sexual offences: s 66 · Not to be made unless: <ul style="list-style-type: none"> - the court satisfied offender is at least 18 yrs old, - offender is assessed as suitable, - offender has signed undertaking to comply with obligations under the ICO, and - it is appropriate in all the circumstances for the sentence to be served by ICO: s 67
Home Detention	The sentence commences on the date on which the Court imposes the sentence by way of home detention, or the sentence can be backdated to reflect pre-sentence custody, or the sentence can be forward-dated if it is to be served consecutively or partly consecutively.	<ul style="list-style-type: none"> · Not available for certain offences specified in s 76 or for offenders with certain history as specified in s 77 · Not to be made unless: <ul style="list-style-type: none"> - offender is assessed as suitable, - appropriate in all the circumstances for sentence to be served by HDO, - persons with whom offender would reside consent in writing, and - offender has signed undertaking to comply with obligations under the HDO: s 78 · Not to be made where the HDO would be served concurrently or consecutively (in whole or in part) with another HDO and the new sentence will end more than 18 months after the date of imposition: s 79
Full-time Custody	The sentence commences on the date on which the Court imposes the sentence, or the sentence can be backdated to reflect pre-sentence custody, or the sentence can be forward-dated if it is to be served consecutively or partly consecutively.	N/A