

The Shopfront

YOUTH LEGAL CENTRE

The Chairperson
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

3 August 2011

Suspended Sentences - submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to the NSW Sentencing Council in relation to suspended sentences.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront assists young people with a range of legal issues, but our main area of expertise is in criminal law. Our solicitors appear for clients in the Local, Children's and District Courts on a daily basis. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

In this submission we will focus on a few key issues that have had a significant impact on our client group.

We note that juvenile offenders are not referred to in either the terms of reference or the consultation paper. However, we are not certain that juveniles were intended to be excluded from this discussion, so we will be making some comments about the use of suspended sentences in the Children's Court.

Our primary recommendations are:

- 1 That suspended sentences be abolished as a sentencing option in the *Children (Criminal Proceedings) Act*;
- 2 That, if suspended sentences are to be retained for adults, changes should be made to the breach and revocation provisions to provide for more flexibility when dealing with a breach. These changes may include broadening the definition of "good reasons to excuse the breach"; allowing the court to extend the term of the bond as an alternative to revocation; and allowing credit for "street time" when imposing sentence following revocation.

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Use of suspended sentences and net-widening

Our resources do not permit us to carefully analyse the statistics on the use of suspended sentences. However, the statistics cited in your consultation paper suggest that suspended sentences may have had a net-widening effect, at least in the Local Court.

It appears that a significant number of offenders who might otherwise have received section 9 bonds or community service orders have instead received suspended sentences.

Our experience is consistent with this picture. A significant number of our clients have received suspended sentences in circumstances where, in our view, a custodial sentence would not otherwise have been imposed. Based on our experience of sentencing patterns before the re-introduction of suspended sentences, we are of the view that, had a suspended sentence been unavailable, many of these offenders would have received a bond or a community service order.

We acknowledge that the decrease in CSOs may be due to factors independent of the net-widening effect of suspended sentences. Over the years we have observed that the suitability criteria for CSOs, as assessed by the Probation and Parole service, have significantly tightened. For our clients, CSOs are now exceptionally rare. While a significant proportion of our client group has always been outside the CSO suitability criteria (for example, they are homeless or have mental health or substance abuse issues which make them too unreliable), in the past a reasonable number of our clients have been sentenced to, and have successfully completed, CSOs. We also observed a similar trend in relation to suitability for periodic detention, prior to the abolition of this sentencing option last year. We are yet to have a client assessed as suitable for an intensive correction order.

Of course there are many matters where a suspended sentence is imposed as a genuine alternative to full-time imprisonment. However, in our experience the court often seems to lengthen the duration of the sentence, perhaps to compensate for the fact that it is being suspended. If the suspended sentence is later revoked, this results in the offender spending a longer period in custody than is warranted by the offence.

There are practical problems with appealing against suspended sentences, at least as far as young and disadvantaged people are concerned. Young people (including young adults as well as juveniles) do not usually wish to appeal against suspended sentences, even if advised by their solicitors that the sentence appears to be excessive.

Typically a young person (especially if they have a mental illness or cognitive impairment, or a history of homelessness) is relieved that their court proceedings have been finalised and that they are not in custody. They often over-estimate their capacity to comply with a suspended sentence and are confident they will not breach it. Sadly, the reality is often different and they end up facing breach proceedings after the time to appeal the original sentence has expired.

A relatively small number of our clients have appealed against the imposition of suspended sentences. Some of these appeals have met with comments from the bench along the lines of "Why is your client appealing this? Is she saying she is going to breach it?". We respectfully suggest that this is not an appropriate manner in which to approach an appeal of this type.

Breach and revocation of suspended sentences

In our view, the court does not have sufficient flexibility when dealing with a breach of a suspended sentence.

We acknowledge that, if suspended sentences are to be retained as a sentencing option, their integrity must be maintained by ensuring that a breach has real consequences. If the court were given a very broad discretion in dealing with a breach, it would be little different to a section 9 bond. However, we are of the view that the court's discretion ought to be broader than it currently is.

Limited discretion available to court when dealing with a breach

Currently the court must revoke a suspended sentence and impose a term of imprisonment (which could include an ICO or home detention) unless satisfied that the breach is trivial or there are good reasons to excuse the breach (*Crimes (Sentencing Procedure) Act* sections 98, 99).

As a consequence of the judgement of Howie JA in the Court of Appeal decision in *Director of Public Prosecutions v Cooke & Anor* [2007] NSWCA 2 at 22, "good reasons to excuse the breach" is interpreted in a restrictive way. The court has little room to consider the extent of the offender's compliance with the bond or the fact that the consequences of revocation may greatly outweigh the severity of the breach. For example, a person who re-offends a few days before the expiry of their suspended sentence will have the suspended sentence revoked unless the offence is extremely trivial (e.g. offensive conduct) or there are compelling reasons to explain the fresh offence (e.g. a sudden onset of mental illness).

We note that section 24 of the *Crimes (Sentencing Procedure) Act* requires a court when dealing with a breach of bond to take into account anything done by the offender in compliance with the offender's obligations under the bond.

Although this section ostensibly applies to re-sentencing following the breach of a section 12 bond, there is little room for its operation in practice. If the duration of the suspended sentence is more than 6 months, it can be (and often is) taken into account when setting the length of the non-parole period. However, for sentences of 6 months or less (which are not uncommon, especially in the Local and Children's Courts), there is no ability to set a non-parole period.

Limited sentencing options following revocation

While an intensive correction order or home detention is theoretically available following revocation of a suspended sentence, in practice these sentencing options are not widely available. Firstly, there are offence-based exclusions (e.g. *Crimes (Sentencing Procedure) Act* section 76 lists a number of offences, including assault occasioning actual bodily harm, which render an offender ineligible for home detention). Secondly, the availability of these options (especially home detention) in rural, regional and remote areas is limited. Thirdly, the suitability assessment process is very rigorous and generally excludes people with serious mental health problems, unresolved substance abuse problems, or unstable housing. Ironically, these are the people who could most benefit from an ICO and who should be kept out of custody wherever possible.

The situation is even worse for juveniles, for whom home detention and ICOs are not available. See our discussion below regarding juveniles and suspended sentences.

Credit for "street time"

A possible way of addressing these problems, and alleviating some of the unfairness that currently exists, would be to give the offender credit for "street time" when dealing with a breach.

In other words, a suspended sentence would operate in a similar way to a parole order (or a sentence of periodic detention or an ICO). In the event of a breach, the offender would only be required to serve the unexpired portion of the sentence. Of course, if the breach was constituted by a fresh offence, the court would still have the option of imposing a further custodial sentence for the fresh offence.

A suspended sentence has often been likened to a "sword of Damocles" hanging over the offender's head. To quote from Fraser CJ and Cote J of the Alberta Court of Appeal in *R v Brady* (1998) ABCA 7 (quoted by Howie J in *R v Tolley* [2004] NSWCCA 165 at 22), credit for "street time" would mean that:

"[W]ith each passing day of the sentence, the 'sword' shrinks until it finally becomes a butter knife".

In our view, this is as it should be. All other things being equal, a breach of a suspended sentence soon after it is imposed is qualitatively different from a breach towards the very end of the good behaviour bond period. Further, even a "butter knife" can hurt: deprivation of liberty in the form of a custodial sentence, even if shorter because of street time, is a significant penalty.

We note that the NSW Law Reform Commission, in its report on Sentencing (which recommended the re-introduction of suspended sentences), recommended:

"Where the bond is revoked, there should be provision for the court to reduce the term of the sentence of imprisonment to take account of the time spent in the community and any time spent in custody pending determination of the breach proceedings, as well as any other matters which the court considers to be relevant."¹

Lengthening or varying bond as a sanction for breach

There are other options for reform which may be worth exploring. For example, the NSW Law Reform Commission suggested that a possible sanction for breach could be the extension of the term of the good behaviour bond or a variation of its terms². (NSWLRC Report 79, *Sentencing*, para 4.23 at page 93).

In our view this suggestion merits serious consideration. For example, when dealing with a breach that is not completely excusable, but is not of such a high order as to warrant the revocation of the suspended sentence, it would be useful if the court had the option of making the offender subject to a further period of good behaviour. Presumably there would have to be some limits on the number and length of any such extensions.

The impact of suspended sentences on children

As you are aware, suspended sentences for adults were reintroduced with enactment of the *Crimes (Sentencing Procedure) Act 1999*.

Suspended sentences for children were introduced in 2000, with the insertion of parallel provisions into the *Children (Criminal Proceedings) Act*³.

We note that the reintroduction of suspended sentences for adults was recommended by the NSW Law Reform Commission in its reference on sentencing. However, this reference, and its recommendations, did not encompass the sentencing of juveniles.

The sentencing of juveniles was the subject of a separate reference on "Young offenders" which reported in 2005. As far as we are aware, the report of this reference did not recommend the introduction of suspended sentences for juveniles.

The replication of the adult provisions into the *Children (Criminal Proceedings) Act* without any modification has caused serious problems for juvenile offenders.

Case study – Troy

Troy is a young man who has been involved with the juvenile justice system since the age of 13. He has grown up in a dysfunctional household with inconsistent parenting, family conflict and, at times, physical violence.

Over the years Troy has been charged with numerous offences such as shoplifting, breaking into cars, common assault and minor property damage. These offences were relatively minor and, for a juvenile, would rarely attract a custodial sentence. After a while, police stopped considering diverting Troy under the *Young Offenders Act*, as he has "used up all his cautions" and was thought to have too long a criminal history for youth justice conferencing to be appropriate.

¹ NSWLRC Report 79, *Sentencing*, para 4.23 at pp93-94.

² Ibid, para 4.23 at p93

³ Crimes Legislation Amendment Act 2000

At age 16, Troy was charged with “use telecommunications service to menace/harass/offend”, a Commonwealth offence with a maximum penalty of 3 years’ imprisonment. He had sent an offensive Facebook message to a police officer who had arrested him (and according to Troy, seriously mistreated him) a few weeks previously.

Troy pleaded guilty and was sentenced to a 6-month suspended sentence under section 33(1B) of the *Children (Criminal Proceedings) Act*. Troy did not wish to appeal against the suspended sentence (and, given his criminal history, it was questionable whether an appeal would have been successful).

Troy responded well to Juvenile Justice supervision and did not re-offend for almost 6 months – by far the longest break in his offending history since he first came to the notice of the juvenile justice system.

Two days before the expiry of the suspended sentence, Troy was charged with shoplifting after he tried to steal some soft drink. This was an impulsive act motivated by thirst and the fact that he had no income at the time.

Troy pleaded guilty to shoplifting. His solicitor argued that the suspended sentence should not be revoked as there were good reasons to excuse the breach or, alternatively, the breach was trivial (as it involved an impulsive and unsuccessful attempt to steal a very small amount of property).

Troy’s solicitor submitted that “good reasons to excuse the breach” included the fact that the breach was committed only two days before the expiry of the suspended sentence, and that the consequences of revocation (a 6-month full-time custodial sentence) greatly outweighed the severity of the breach.

Troy’s solicitor noted that, for children, there is no intermediate option of periodic or home detention; a revocation of a suspended sentence automatically results in a full time custodial sentence. On this basis she submitted that the *Cooke’s* case should be distinguished, as *Howie J’s* decision partly turned on the fact that periodic detention and home detention were available as alternatives to full-time custody following the revocation of a suspended sentence.

Although this sort of submission has been accepted by some Children’s Court magistrates, the magistrate on this occasion was not persuaded, and Troy served a full 6 months in juvenile detention.

It is trite to say that children are different to adults and that there are good reasons why they should be treated differently in the criminal justice system. The principles set out in section 6 of the *Children (Criminal Proceedings) Act* reflect this.

There are good reasons why suspended sentences are inappropriate for children. Their relative lack of maturity means that children cannot always comprehend the potential consequences of breaching a suspended sentence. A young person may understand when told by the magistrate “If you breach this order, I will have to send you to detention for 6 months”, but it is another thing for a child to be able to apply this in practice. Immaturity, impulsivity and a lack of agency over their lives make children more vulnerable than adults to breaching a suspended sentence, either by re-offending or by failing to comply with conditions.

The lack of flexibility following a breach of a suspended sentence is an even greater problem for children than it is for adults. During the developmental phase of adolescence, a young person’s circumstances can change quite significantly in a short period of time. When dealing with juvenile offenders, a court at all times needs to have flexibility in its choice of sentencing options.

We submit that the available range of children’s sentencing options, combined with diversionary options under the *Young Offenders Act*, is sufficient without the need for suspended sentences.

Conclusion

We would be happy to be involved in further discussions or consultations on this issue. In this regard please do not hesitate to contact me.

Yours sincerely



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