



POLICE ASSOCIATION OF NEW SOUTH WALES

A.B.N. 86 047 021 267

P.O. BOX A1097, SYDNEY SOUTH, N.S.W 1232

PHONE: (02) 9265 6777

FAX: (02) 9265 6789

EAGLENET 57071

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New South Wales Sentencing Council
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam

We refer to the current review of the use of suspended sentences under Section 12 of the Crimes (Sentencing Procedure) Act 1999.

In order for the Police Association to adequately contribute to this review, feedback was sought from the general membership and, in particular, from the Police Prosecutions branch.

We have provided some limited comments on the issues for consideration in areas of particular interest to our membership. We acknowledge that we have not addressed all of the issues for consideration.

By way of general comment, the Police Association is of the view that the proper administration of justice requires that the judiciary have a broad range of sentencing options available. The ability to suspend a full-time custodial sentence and place conditions on an individual is, in appropriate circumstances, a beneficial sentencing outcome. It can provide significant benefits for the individual by providing an opportunity for rehabilitation and the ability to demonstrate a change in behaviour, as well as a benefit for the community with offenders rehabilitating and ceasing to commit offences. Affective rehabilitation should result in significant cost savings associated with the reduction of the prison population and the provision of policing services through a reduction in crime.

However, we do not believe that the use of suspended sentences is useful in the case of recidivist offenders, or where rehabilitation is not a likely outcome, nor is it appropriate for serious offences.

In relation to the issues raised in the consultation paper, we provide the following comments:

Partially Suspended Sentences

We believe that consideration should be given to permitting the partial suspension of sentences. In our opinion, it could assist as a general and specific deterrent. It could also provide a real incentive for offenders to rehabilitate.

As previously stated, this sentencing option should not be used for recidivist or hardened criminals. The main purpose of suspending a sentence is to encourage reform of the offender. It is designed for those offenders the court is satisfied have reasonable prospects of rehabilitation. In this context, a period of incarceration, coupled with a period of suspended sentence, may provide a powerful incentive to fully engage in rehabilitation. The ability to apply a partially suspended sentence also provides the court with a further sentencing option.

Nature of the Conditions

Currently the court has a broad scope to apply conditions that fit the particular circumstances. The imposition of mandatory conditions removes some of the discretion from the judicial officer and may lead to conditions that are not effective.

If the court is satisfied that the offender would benefit from increased supervision and conditions, and it is appropriate to do so, then the court should have the power to make that determination, unfettered and free from interference. This power would then also extend to the court being given the discretion to suspend any portion of the sentence should the use of partially suspended sentences be reintroduced in NSW, as discussed above.

Time Limits

Some members have expressed concern with (in their view) an apparent inadequacy surrounding the restrictions on the length of time that a sentence can be suspended. One police prosecutor found that through experience:

“I have come across a number of occasions where magistrates have indicated that they wished that they were able to impose sentence that is suspended for a greater period than the term of imprisonment that is suspended e.g. the defendant is sentenced to 3 months imprisonment, suspended for 2 years. I believe this would be a useful and beneficial amendment”.

This view was shared by another police prosecutor:

“I think the length of time of required good behaviour is often inadequate. For instance, if a court deems that a jail term of four months is required, but then for reasons suspends it, the defendant need only be of good behaviour for four months, which really is hardly a deterrent for them.

It seems inadequate that a crime is deemed to require four months custody (remembering that the court must first decide that full time custody is appropriate before turning their minds to s12) and then by suspending that, it turns into an adequate four month good behaviour bond. I think it would be better served, for example, by imposing a four month sentence and then that sentence being suspended on the basis of good behaviour for perhaps twelve months”.

Currently in NSW, the maximum term of imprisonment in relation to suspended sentencing is limited whilst the operational period is set to a timeframe 'not exceeding the term of the sentence'. We believe that this restriction is unnecessary and may hinder the effectiveness of the sentence. It limits the ability of the court to supervise an offender and also limits the offender's opportunities to engage in rehabilitation and demonstrate a change of behaviour. This sentencing option is on the higher end of the sentencing scale and arbitrarily limiting the time of supervision is not appropriate. Particularly in regards to short suspended sentences, extending the term of the bond would provide for the possibility of increasing the period of supervision and would, therefore, improve the prospects of rehabilitation and community protection.

Of particular concern is the impact that the limitation has upon the community perception of the sentence, being a lenient option. Allowing for extended periods of supervision could address those community perceptions.

Also of concern is that there is a risk that the court may inflate a sentence period in order to allow for an appropriate period of supervision.

We appreciate that not limiting the period of suspension may raise concerns that it would result in disproportionately long sentences, however this has not occurred in Tasmania, where the maximum period to be suspended is not specified.

We believe that consideration should be given to the removal of the restriction that prevents the court imposing a period of suspension and a good behaviour bond beyond the term of the sentence.

Sentencing Guidelines and Legislative Guidance

We believe the development of comprehensive sentencing guidelines would assist the court and also help address community concerns. Guidelines, coupled with legislative guidance, serve to promote consistency and eliminate any confusion that may arise when determining whether a case is appropriate for suspension.

Legislative guidance modelled on s27(1A) of the amended Sentencing Act 1991 (Vic) may be of benefit. Listing factors which must be considered when determining whether it is desirable to suspend a sentence can be very beneficial. Factors such as: taking into consideration the nature of the offence and its impact on the victim and any injury or damage resulting directly from the offence; ensuring that the sentence adequately manifests the denunciation by the court of the type of conduct in which the offender engaged; adequately deters the offender or other persons from committing offences of the same or a similar character; and reflects the gravity of the offence.

Listing these limits the risk of the sentencing option being misapplied and provides clarity to offenders and the community.

The Victorian guideline also requires that additional factors be taken into consideration, including whether any previous suspended sentences were imposed on the offender (and whether the order was breached), and the risk of the offender committing another offence punishable by imprisonment if the sentence was to be suspended.

We support restricting the use of suspended sentences for recidivist offenders through such legislative framework.

Serious Offences

We suggest that consideration also be given to restricting the use of suspended sentences for objectively serious offences. This type of restriction can also be seen in the Victorian legislation. A 'serious offence' is defined in *Sentencing Act 1991 (VIC)* s3 and includes murder, manslaughter, intentionally causing serious injury, rape, incest and sexual penetration of a child under the age of 16. The Victorian Government enacted legislation to provide that a court may not impose a wholly suspended sentence for a serious offence unless satisfied that doing so is "*appropriate because of the existence of exceptional circumstances in the interest of justice*"¹.

The assent of the Sentencing Further Amendment Act 2011 saw the Victorian Government extend the types of offences for which suspended sentences will no longer be an available sentencing alternative to include those offences termed 'significant offences'. These offences include recklessly causing serious injury, arson, aggravated burglary and commercial drug trafficking.

This type of limitation does not prevent the use of this option, however, it demands of the court that in these most serious offences the court can only utilise this option in the most exceptional circumstances and where the interests of justice are served.

Again, we believe that incorporating a similar provision in New South Wales will assist the community perception and also ensure that the sentencing option is only used in appropriate circumstances.

Recidivist Offenders

Research tends to support the fact that the prospect of rehabilitation is the primary rationale behind judicial decisions to impose suspended sentences in preference to other sentencing options.

However, whilst our membership acknowledges the importance of rehabilitation, we remain concerned that recidivist or hardened criminals will take advantage of this sentencing option, particularly when there is little hope that rehabilitation will be achieved. We also believe that some crimes are so serious that a period of incarceration is the only appropriate sentence. The community's need for protection should be paramount.

Ultimately, it is the view of the Police Association that suspended sentences are not an appropriate sentencing avenue in circumstances where hardened or recidivist offenders come before the court, nor is it appropriate for objectively serious offences.

Do current provisions relating to breaches of suspended sentences require reform? If yes, how?

As the policy currently stands, if an offender reoffends during the suspended sentence, the court has the power to send the offender to full-time custody.

We believe that, in order to make this sentencing option more effective, and to reflect the level of seriousness of the sentence, Section 98(3) of the *Crimes (Sentencing Procedure) Act 1999* needs to be redrafted in a manner which mandates the imposition of the custodial sentence for breaches in all but the most exceptional circumstances.

¹ *Sentencing (Suspended Sentences) Act 2006 (Vic)* s4(2)

What constitutes 'exceptional circumstances' should also be clearly articulated within the legislation.

Under the current s98(3)(b) of the Act, in deciding whether or not to take action on the breach of the s12 bond, the court must consider whether there were good reasons to excuse the failure to comply with the conditions of the bond in circumstances where the failure is not trivial in nature.

It must be stressed that the way non-custodial sentences, including the use of suspended sentences, are monitored and enforced has a strong impact on the extent to which the courts and the community have confidence in such sentences.² In one case, a District Court Judge elected not to take action on the breach of the s12 bond. The matter was referred to the Court of Appeal which, in their decision, provided a damning critic of the approach used by the District Court Judge:

"...if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightfully deserves..."³.

In their judgment, the Court Of Appeal went on to state:

"The suspended sentence is not an alternative to a bond and should not be treated as such. The suspension of the sentence of imprisonment was an act of mercy designed to assist the offender's rehabilitation or for some other purpose to benefit the offender on the understanding that, if the offender did not fulfil the conditions of the bond, the sentence would be imposed. Therefore, generally speaking, there can be no unfairness in requiring the offender to serve the sentence when the obligations under the bond have been breached".⁴

Many of our members are of the shared view that the current provisions relating to breaches of suspended sentences require reform. The Police Association raises issues with the terms '*trivial*' and '*good reasons*' as they appear in the Act. Both terms are too broad and in this context do not provide adequate guidance.

Community attitude and expectation

The Police Association acknowledges that perception amongst the community is that the use of suspended sentences is a 'soft' or lenient option when compared to other possible sentencing options. Particularly when the offence is perceived as serious, where the suspended sentence is only imposed for a short period of time with little or no conditions, or where the offence is committed by a recidivist offender.

² Sentencing Advisory Council; *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report Part 2 Summary*, 2008, p6

³ *R v Cooke; Cooke v R* [2007] NSWCCA184 , paragraph 23

⁴ Ibid

One of the most compelling arguments against the use of suspended sentences is that they do not amount to real punishment at law and are regarded as a 'let-off' or 'a slap on the wrist' by both the public and the offenders. This is obviously a view shared by the Victorian Attorney General, the Hon Robert Clarke, who stated the following in the opening line of his second reading speech:

“Suspended sentences are a fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community”.

There is a perception out in the community that the use of Section 12 (whether they are aware of the affect of the Section or not) deprives the community of its perceived right to retribution for offending. If rehabilitation is unlikely, as in the case of recidivist offenders, and the period of suspension short and without condition, it is easy to see how this perception of a "soft" option has taken hold within our membership and the community.

However, suspended sentencing used properly can be a powerful option and this perception can be addressed restricting the use of suspended sentences for serious offences and also for recidivist offenders.

Does the use of suspended sentences have any direct affect on the use of other sentencing options, including custodial and non-custodial options?

In relation to the issue of whether the use of suspended sentences has any direct affect on the use of other sentencing options, the Police Association acknowledges that the availability of various alternative sentencing options may have an effect on the use of other alternatives. We note that the reintroduction of the ability to suspend a sentence has resulted in a decrease in the use of other options, such as Community Service Orders and Good Behaviour Bonds. However, we argue that this in itself is not evidence of misuse or misapplication of the sentencing options.

There is a high rate of successful completion of suspended sentences and low revocation rates. The effectiveness of suspended sentences needs, in our view, to be measured not only against successful completion but also looked at from the perspective of reoffending post completion. We note a recent study (see Bartels, 2009) involving offenders in Tasmania being followed up for two years from the date of sentence. This study compared the reoffending rate between offenders who had received differing custodial sentences. Suspended sentences had the lowest reconviction rates: 42% of offenders on a wholly suspended sentence and 44% of those on a partly suspended sentence were reconvicted, compared to 52% of offenders on a non-custodial sentence and 62% of those in receipt of an unsuspended sentence⁵.

We also note a small decrease in the prison population following the reintroduction of suspended sentences. While these facts in isolation do not necessarily correlate that the benefits of the sentencing strategy are being achieved, they do provide some positive indications. Clearly, the level of use by the courts demonstrates that the reintroduction of the provisions has a direct, real and actual affect on the court's discretion not to exercise its powers to send an accused into full-time or part-time custody.

We believe that monitoring and research is critical and should continue to be a conducted to ensure that the use of this sentencing option is appropriately applied and that outcomes are analysed and measured against broader public policy goals.

⁵ Ibid, p4

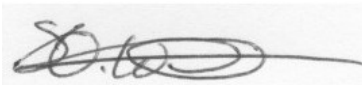
Recommendations:

In summary we make the following recommendations:

- That the use of suspended sentences continues to be maintained as a sentencing option in New South Wales;
- That comprehensive sentencing guidelines be developed to assist the court when determining if a suspended sentence is appropriate;
- That consideration be given to restricting the use of suspended sentences for serious offences and/or recidivist offenders;
- That the courts be granted the power to attach conditions to a suspended sentence that are unfettered and free from interference, including the removal of the restriction that prevents the court imposing a period of suspension and a good behaviour bond beyond the term of sentence;
- That Section 98(3) of the Crimes (Sentencing Procedure) Act 1999 be reformed to mandate the imposition of the custodial sentence for breaches in all but the most exceptional circumstances. What constitutes 'exceptional circumstances' should also be clearly articulated in the Act;
- That monitoring and research continue to be applied to ensure that the use of this sentencing option is appropriately applied and that the anticipated benefits are being delivered.

Thank you for allowing the opportunity to comment. We look forward to your report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Weber', written over a light grey rectangular background.

SCOTT WEBER
President