



12 August 2011

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

Dear Justice Cripps

Re: Suspended Sentences Consultation Paper June 2011

The Australian Lawyers Alliance (ALA) appreciates the opportunity to submit its views on the issue of s12 Suspended Sentences.

The ALA is of the view that the option of a suspended sentence should remain and works well.

In relation to the 11 questions raised in relation to the use and potential reform of the legislative provisions we submit as follows:-

1. Should partially suspended sentences be reintroduced as sentencing options in NSW?

No. The ALA is of the opinion that suspended sentencing is used in cases where it is inappropriate to punish an offender with a custodial sentence. This involves a balancing act between the culpability of the offender, the ability to be rehabilitated without custodial sentencing and the saving of public funds. In circumstances where the punishment of an offender may warrant custodial sentencing judicial discretion allows for the decrease in a custodial sentence by way of a non-parole period, which allows for appropriate supervision upon release.

To introduce partial suspended sentences would complicate the existing system and may serve to discourage the use of community-based orders, which the ALA believes would be detrimental to the current sentencing scheme and contrary to the public interest.

2. Is reform required in relation to the nature of the conditions that may be attached to a suspended sentence?

Yes. Introduction of conditions such as community service orders may enhance the deterrent effect. This is particularly appropriate when sentencing young offenders who would better serve the community and would be more likely to be rehabilitated if kept out of the custodial system. It is the ALA's submission that greater emphasis needs to be placed on the use of community service based orders pursuant to the *Crimes (Sentencing and Procedure) Act 1999* (NSW) section 9 and used in conjunction with suspended sentencing under section 12 when considering punishment for young offenders. The ALA believes that the current provisions in respect of community based orders are appropriate in that they cannot exceed 500 hours where the maximum term of imprisonment exceeds 1 year – *Crimes (Sentencing Procedure) Regulation 2010* (NSW) Clause 23.

3. Should the term of imprisonment that may be suspended (currently a maximum of 2 years) be either increased or decreased?

No.

4. Should the operational period, or the period for which a term of imprisonment may be suspended be either increased or decreased?

No.

5. Should an application of a guideline judgment be made?

No. However, greater guidance and direction should be considered in relation to the guideline judgment that already exists for high range PCA charges (*Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) A Crim R 546.) there is reference to the inappropriateness of applying sections 9 and 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in circumstances of High Range PCA. It does not offer any guidance in regards to Section 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), specifically, whether or not a suspended sentence should be applied as an alternative.

Given the increasing occurrence of High Range PCA, and circumstances where offenders may be committing a first offence, with no previous driving/ criminal record the ALA submits that more guidance is needed as to the application of Section 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) so as to encourage greater consistency in the use of judicial discretion in applying suspended sentencing in cases of High Range PCA.

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?

No. A suspended sentence option allows judicial officers the discretion to treat each case on its own individual merits and ensures that vulnerable individuals are kept out of the prison system. It allows the judicial officer to decide, if the offender should or should not face full time custody.

7. Do the current provisions relating to breaches of suspended sentences require reform?

No. Suspended sentences represent a well-established and effective intermediate sentencing option. This option is a valuable additional sentencing alternative to a full time custodial sentence. If the good behaviour bond is breached then the suspended sentence will be revoked and a custodial sentence ordered for the remainder of the period imposed by the court.

However, a defence to any breach is available pursuant to s98 (3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). That is, if the offender's failure to comply with the terms of the suspended sentence was 'trivial in nature' or there are good reasons for the offender's failure to comply then the suspended sentence may remain in place. As currently worded the provision allows the appropriate scope for a judicial officer to consider it broadly with regard to the circumstances of each breach. Therefore, it is the belief of the ALA that the exceptions for the failure to comply with the terms of a suspended sentence are appropriate and may be safely applied in the interests of justice.

8. Is there a disparity between courts in relation to the availability of, and confidence in, intermediate sentencing options.

Not that ALA is aware of. However, the ALA adopts the judicial stance in the decision of *R v Morris* (unrep, 14/7/95, NSWCCA), Kirby ACJ, Badgery-Parker and Bruce JJ:

"It is therefore extremely important that breaches of non-custodial sentencing orders be brought promptly to the notice of the sentencing court and there be dealt with swiftly and, generally speaking, in a manner which will demonstrate how seriously such breaches are regarded and must be regarded in the community interest."

9. Are reforms required to intermediate sentencing orders?

No. The ALA believes that the operation of good behaviour bonds and community service orders are appropriate intermediate sentencing options.

10. Should NSW adopt a similar approach to Victoria in relation to strengthening available intermediate sentencing orders and gradually phasing out suspended sentencing?

No. Suspended sentences remain appropriate as it allows greater flexibility in judicial discretion in the consideration of mitigating and aggravating factors relevant to sentencing.

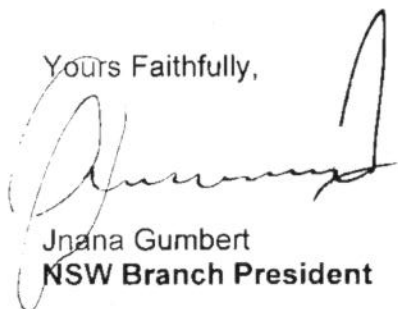
11. Do you have any other comments?

For some offenders, such as homeless offenders, sentencing options such as community service orders, home detention and the like are not available, a suspended sentence, allows the judicial officer to penalise the offender appropriately but without full time custody. Each criminal offence will not only turn on its facts but also the personal circumstances, including mitigating and aggravating factors, of each offender. It is on this basis that the ALA believes that suspended sentencing remains a valid and appropriate method of punishment in a variety of circumstances and enriches the application of judicial discretion.

We thank you for the opportunity to provide our submissions in this regard.

If we can be of any further assistance please do not hesitate to contact us.

Yours Faithfully,

A handwritten signature in black ink, appearing to read 'Jnana Gumbert', written over the typed name and title.

Jnana Gumbert
NSW Branch President