

OUR REFERENCE

**DIRECTOR'S CHAMBERS**

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YOUR REFERENCE



DATE

11 August, 2011

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

Dear Mr Cripps

**Suspended Sentences**

Thank you for the invitation to make submissions on this reference and allowing us until 12 August 2011 to respond.

Enclosed is a submission prepared by senior lawyers in the Office of the Director of Public Prosecutions.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Lloyd Babb'.

**Lloyd Babb SC**  
**Director of Public Prosecutions**

**New South Wales Sentencing Council  
Suspended Sentences- Consultation Paper  
July 2011  
Submission of the Office of the Director of Public  
Prosecutions (ODPP)**

The ODPP is in support of the courts having a wide range of sentencing options. We endorse the comments of the NSW Law Reform Commission in its report on Sentencing (which recommended the re-introduction of suspended sentences), that suspended sentences are 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'<sup>1</sup>.

In our experience suspended sentences serve this purpose. Statistical information<sup>2</sup> indicating that there is an increase in the use of suspended sentences and they are being imposed in circumstances where previously a non custodial sentence would have been imposed, needs to be considered in the wider context of sentencing patterns over the last 10 years, where there has been a campaign to toughen up on sentencing, which has included for instance the introduction of standard non parole period and guideline judgements.

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

No, the same result may be achieved by parole periods.

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

No.

We note that because of the consequence of breaching a condition of the suspended sentence is likely to result in full time custody, there is an understandable reluctance by sentencers to impose additional conditions, so as not to set the offender up to fail. Amendment to the type of conditions, particularly increasing the number of conditions, would need to consider the consequences of a breach of a certain condition; that is should breach of any condition incur revocation or should there be different classes of conditions with different consequences on breach?

3. Should the term of imprisonment that may be suspended be either increased or decreased?

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<sup>1</sup> NSWLRC Report 79 (1996), *Sentencing*, para 4.22.

<sup>2</sup> NSW Bureau of Crime Statistics and Research Issue Papers no 47 May 2010 and no 63 June 2011,

We are generally content with the 2 year term however there may be a case to increase the period to 3 years, based on the general trend for increased sentences mentioned in the introduction to this submission. This increase would only apply in the District and Supreme Courts as the Local Court would continue to be bound by a jurisdictional limit of 2 years.

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

No, but see above answer.

5. Should an application for a guideline judgement be made?

No, the need for a guideline judgment is not demonstrated.

In 2003 when the ODPP considered this issue views were divided in the Office as to the merits in applying for a guideline judgement. At that time suspended sentences had only recently been reintroduced in NSW, and there was not a settled body of law, also amendments to be made to the Crimes (Sentencing Procedure) Act were in train. Those in the ODPP in favour of a guideline judgement felt it would be appropriate to settle the circumstances where suspension is legally and factually justified. Those against it thought the Court would see the need for a judgment and it would be too hard to formulate.

Considering this question in the present environment is quite different as the law about the operation of suspended sentences is settled. Examination of recent Crown appeals to the CCA does not indicate that the superior courts are being overly lenient in the application of suspended sentence. Between July 2010 and June 2011 the ODPP lodged 63 Crown appeals, of those only 8 involved the imposition of a suspended sentence. Attached for your reference is a schedule briefly describing the offences and outcomes in those matters.

An examination of requests made by the Police to the ODPP to appeal against leniency of the sentences imposed in the Local Court, similarly do not indicate any particular trend or highlight any issue with suspended sentences. In 2010, 53 requests were received from the Police, 34 appeals were lodged, of those appealed 5 involved suspended sentences.

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 ?

If further legislative guidance is considered appropriate then it could be along similar lines to s10(3) Crimes (Sentencing Procedure) Act. We do not support a check list approach but it may improve the public perception of suspended sentences to require the sentencer to outline what they have considered and why.

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?

The consequences of breaching a section 12 bond need to remain rigid otherwise it undermines the integrity of the sentencing process. However, anecdotally section 98(3) (a) in providing that conduct may be excused if it is "trivial in nature" is not being applied equitably; as trivial is a subjective term, meaning different things to different people and in different contexts. We understand that for instance a low range PCA offence may be considered "trivial" by some judicial officers and serious by an equal number of others. A possible improvement could be to remove sub section (a) and in subsection (b) elaborate on to prescribe what "good reasons" are, and include the seriousness of the conduct constituting the breach.

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

The only disparities we are aware of are between metropolitan courts and many country areas in relation to the availability of ICO's and home detention. We are aware of some anecdotal evidence to suggest in rural areas suspended sentences are being imposed, because home detention or ICO's/periodic detention is not available.

9. Are reforms required to intermediate sentencing orders? If yes, how should intermediate sentencing orders be reformed?

Not that we are aware of, however we note ICO's are still in their early days and that home detention is not imposed very often.

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

We note the reforms in Victoria were driven at least initially by reported community concerns with the use of suspended sentences. We are not aware of similar concerns in NSW, suspended sentences are supported by the ODPP and as far as we are aware the legal profession. There does not appear to be any demonstrable need to phase out suspended sentences in NSW.

11. Further comments on terms of reference.

### **Suspended Sentences in the Childrens Court**

One issue that does arise in our experience of prosecuting appeals to the District Court is the inappropriate use of suspended sentences for young people. The problem lies in the failure of the young person to appeal against the imposition of the sentence within the 3 month period allowed by the

*Crimes (Appeal and Review) Act*, because presumably they have not fully appreciated the differences between a suspended sentence and another type of bond. We have seen a number of cases where suspended sentences were inappropriately imposed by the Childrens Court (e.g. 12 year of child for larceny of key to a caravan) and then committed a further relatively minor offence in breach and were unable to appeal. We suggest that the need for suspended sentences in the Children Court jurisdiction is reviewed.

In **Pulitano v R** [2010]NSWCCA 45 the question of how pre sentence custody should be taken into account by the court was considered by the Court of Criminal Appeal. The CCA did not resolve the issue. Attached is a copy of the crown submissions outlining the arguments. We merely raise this issue as something that as a matter of transparency in the sentencing process should be resolved.

**Office of the Director of Public Prosecutions**  
**11 August 2011**

**Office of the Director of Public Prosecutions (ODPP)**

Crown Appeals 2010/11

8 out of 63 Crown Appeals filed in the period July 2010 to June 2011 related to suspended sentences.

<b>Cases number</b>	<b>Name</b>	<b>Offence</b>	<b>Judgment</b>
200924239 (2 appeals re 2 offenders where suspended sentence imposed.)	B.R&OR	Aggravated sexual intercourse child under 16 (s66C(2))	No (not available but appeal dismissed at hearing 12.7.11).
200825765	CHOI.A	Knowingly take part in supply ecstasy	Yes – appeal allowed sentence increased.
201012222	JOHN WILSON	Break, enter and intentionally or recklessly damage property (s112(1)(a)) Threaten with intent for person to fear damage to property (s199(1)(a)) Use carriage service in a way that is menacing, harassing /offensive (s474.17(1) CTH code)	No
201011045	K.N	Agg indecent assault child under (s61M(2)) and use child under 14 for pornographic purposes (s91G(1)(a)).	Yes – appeal dismissed.
200923865	MEZZADRI.A	Agg unauthorised possess firearms (s51D(2) Firearms Act 1996). Form 1 for related offences.	Yes – appeal dismissed.
200920564	MUMBERSON.D	Recklessly inflict grievous bodily harm (s35(2))	Yes – appeal allowed.

200913649	PICKETT.P	Ongoing supply of a prohibited drug, namely cocaine, contrary to s 25A of the <i>Drug Misuse and Trafficking Act 1985</i> (DMT Act).	Yes – appeal dismissed.
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