Suspended Sentences: Discussion Paper Summary

# Contents

[Background to This Review 3](#_Toc428958093)

[What Is a Suspended Sentence? 3](#_Toc428958094)

[What Was Their Original Purpose? 4](#_Toc428958095)

[When Can a Suspended Sentence Be Made? 4](#_Toc428958096)

[What Is Their Maximum Length? 5](#_Toc428958097)

[What Are the Conditions of a Suspended Sentence Order? 5](#_Toc428958098)

[What Happens If an Offender Breaches a Suspended Sentence? 6](#_Toc428958099)

[How Common Are Suspended Sentences in the Higher Courts? 6](#_Toc428958100)

[How Common Are Suspended Sentences in the Magistrates’ Court? 7](#_Toc428958101)

[How Often Are Suspended Sentences Breached and Restored? 8](#_Toc428958102)

[What Factors Influence the Making of an Order To Suspend? 8](#_Toc428958103)

[Issues 9](#_Toc428958104)

[Options 11](#_Toc428958105)

[Discussion Questions 19](#_Toc428958106)

# Have Your Say

## Tell the Council what you think about suspended sentences

The Sentencing Advisory Council has been asked by the Attorney-General, the Honourable Rob Hulls, MP to report on the current operation of suspended sentences and to recommend possible options for reform.

It is important that any changes the Council recommends are informed by community views on sentencing. There are lots of ways you can get involved and let the Council know what you think.

### Make a Submission

The Council is now inviting submissions on the Discussion Paper. Submissions can be made in writing by mail, email or fax, or orally by phone or in person.

If your submission is in writing, there is no need to follow a particular format. You may choose to address each question raised in the paper, respond to only some questions or discuss other options for reform not raised. If you prefer, you can also make a general comment concerning suspended sentences.

You can send your written submissions by post, or by email to <contact@sentencingcouncil.vic.gov.au>. Written submissions may also be uploaded to the Council’s website at <http://www.sentencingcouncil.vic.gov.au>. If you would prefer to make a submission by phone or in person, please contact the Council.

If you need any assistance in preparing a submission and/or need access to an interpreter, please contact the Council.

**SUBMISSIONS DUE DATE: 3 JUNE 2005**

### Participate in Consultations

The Council is holding a number of community consultations over May–early June 2005 and would like to invite you to get involved. Consultations will provide you with an opportunity to find out more about how suspended sentences work in practice, other sentencing options available in Victoria and to let the Council know what you think about possible options for reform.

Details of upcoming consultations will be posted on a regular basis on the Council’s website at <http://www.sentencingcouncil.vic.gov.au>. To find out more, contact the Council by email at <contact@sentencingcouncil.vic.gov.au> or by phone on (03) 9603-9033 or 1300 363 196 (within Victoria).

# Background to This Review

The Attorney-General has requested the Council’s advice on the current use of suspended sentences and whether the operation of suspended sentences can be improved in any way including:

* whether suspended sentences should be available in relation to all offences; and/or
* should be subject to conditions.

The Attorney expressed particular interest in the views of the community, including victims of crime.

# What Is a Suspended Sentence?

(Chapters 1, 3 and 4)

A suspended sentence is a sentence of imprisonment imposed on an offender which is not activated. A suspended sentence involves the court:

* imposing a term of imprisonment on an offender; and
* ordering that all or part of the gaol term be held in suspense for a set period (‘the operational period’).

The imprisonment sentence may be either **wholly** **suspended**, in which case the offender does not serve any additional time in gaol and is released into the community, or **partially** **suspended**, in which case the offender serves part of the sentence in prison and is then released into the community.

**EXAMPLE 1 — Wholly Suspended Sentence**

Offender J is convicted of two charges of trafficking in cannabis. J is sentenced to three months' imprisonment on each of the two counts, to be served concurrently (i.e. a total of three months) and an order is made wholly suspending the sentence for 24 months. The offender is under sentence for 24 months (the operational period) and risks three months in prison if he or she commits another offence during that time. Unless the order is breached, the offender will not serve any time in prison.

**EXAMPLE 2 —Partially Suspended Sentence**

Offender K is convicted of several offences, including recklessly causing injury. K is sentenced to a total period of two years in prison, with 20 months of that two-year sentence suspended for a period of two years. K will spend four months in prison, and will then be released into the community and risks having the 20-month term of imprisonment restored if he or she commits an offence during the two-year period.

# What Was Their Original Purpose?

(Chapter 2)

The original purpose of suspended sentences was to provide for a more serious punishment than a fine for first-time offenders who were not considered a danger to the community and which would avoid the negative effects of imprisonment.

# When Can a Suspended Sentence Be Made?

(Chapters 1, 3 and 4)

An order to suspend a sentence of imprisonment may only be made where a sentence of imprisonment is first determined to be appropriate.[[1]](#footnote-1) Under the Sentencing Act 1991 a court must not impose a sentence that is more severe than is necessary to achieve the purposes of the sentence.[[2]](#footnote-2) This means that before a prison sentence is imposed the court should be satisfied that other orders, such as a fine or a community-based order, would not be appropriate in the circumstances.

Once a sentencer decides that a prison sentence is warranted, he or she has the option to decide if it should be wholly or partly suspended. In deciding whether to suspend a prison sentence, the court must be satisfied that ‘it is desirable to do so in the circumstances’.[[3]](#footnote-3) The High Court has determined that in making an order to suspend, circumstances personal to the offender and the objective features of the offence need to be taken into account.[[4]](#footnote-4)

# What Is Their Maximum Length?

In the higher courts (which deal with more serious offences) a court can suspend a sentence of imprisonment of three years or less, while in the Magistrates’ Court the limit is two years.[[5]](#footnote-5) The operational period can be the same length as the term of imprisonment imposed, or another period (not exceeding 3 years, or 2 years in the case of the Magistrates’ Court).[[6]](#footnote-6)

# What Are the Conditions of a Suspended Sentence Order?

(Chapters 1 and 3)

The only condition of a suspended sentence order is that the offender does not commit another offence which is punishable by imprisonment during the operational period of the order. The offence does not need to be the same type of offence that the offender received the suspended sentence for. Offenders may be prosecuted for breach up to three years after the offence has occurred (even if the operational period has expired). In some jurisdictions (but not in Victoria) courts can attach additional conditions to suspended sentence orders.

# What Happens If an Offender Breaches a Suspended Sentence?

(Chapters 1, 3 and 4)

Under the Sentencing Act 1991 (Vic), if an offender breaches a suspended sentence order by committing another offence, then the court must order the offender to serve the whole or part prison term held in suspense unless the court is of the opinion that it would be ‘unjust to do so in view of any exceptional circumstances which have arisen since the order suspending the sentence was made’.[[7]](#footnote-7) This means that even if the offender breaches the order by committing another offence a few months before the operational term of the order expires, he or she can be ordered to serve the whole prison term that was suspended in addition to any penalty imposed for the subsequent offence.

If an offender breaches a suspended sentence by committing another offence, this in itself is an offence which is punishable by a fine of up to $1,022.50.[[8]](#footnote-8) Other options the court has on breach include extending the operational period by up to 12 months and making no order.[[9]](#footnote-9)

# How Common Are Suspended Sentences in the Higher Courts?

(Chapters 5 and 6)

In 2003-04, the higher courts wholly suspended the gaol terms of 530 defendants, representing 24 per cent of sentencing outcomes.[[10]](#footnote-10) Imprisonment terms were partially suspended for 146 defendants, or 7 per cent of the total number of defendants found guilty. A sentence of immediate imprisonment was the most common outcome for defendants in the higher courts (46 per cent).

Between 1999–2000 and 2003–04, there was a 34 per cent increase in the number of suspended sentences (up from 515 to 688), compared to a 25 per cent increase in the number of defendants proved guilty (up from 1,770 to 2,220).

Twenty offences accounted for 76 per cent of all suspended sentences in 2003-04. Suspended sentences were most commonly handed down for ‘trafficking in a drug of dependence’ (10 per cent) and ‘aggravated burglary’ (10 per cent).

# How Common Are Suspended Sentences in the Magistrates’ Court?

(Chapters 5 and 6)

In 2003-04, the Magistrates’ Court wholly suspended the gaol terms of 7 per cent of all defendants proven guilty.[[11]](#footnote-11) A sentence of immediate imprisonment was the least common outcome for defendants in the Magistrates’ Court (6 per cent) and fines were the most common (57 per cent). Most gaol terms suspended by the Magistrates’ Court were suspended in full (88 per cent).[[12]](#footnote-12)

Between 1999–2000 and 2003–04, there was a 46 per cent increase in the number of defendants sentenced to a suspended gaol term for their major conviction (up from 2,279 to 3,316),[[13]](#footnote-13) compared to a two per cent increase in the number of guilty defendants (up from 71,167 to 72,878).

Twenty offences accounted for 77 per cent of all suspended sentences in 2003–04. Suspended sentences were most commonly handed down for ‘driving while disqualified’ (14 per cent), and ‘driving while authorisation suspended’ (11 per cent). It is suspected that the high proportion of suspended sentences for these two offences is a direct result of a mandatory requirement in the Road Safety Act 1986 to impose a minimum period of imprisonment of at least one month for second and subsequent offences.[[14]](#footnote-14)

# How Often Are Suspended Sentences Breached and Restored?

(Chapter 4)

Of the 486 defendants who had their imprisonment term suspended by the higher courts in 1998–99, 36 per cent (175 defendants) subsequently breached their sentence. Of the 175 suspended sentences breached, 76 per cent of gaol terms (133) were restored by the higher courts.

Of the 4,867 defendants who had their imprisonment term suspended by the Magistrates’ Court in 2000–01, 31 per cent (1,519 defendants) subsequently breached their sentence. Of the 1,519 suspended gaol terms breached, 64 per cent of gaol terms (969) were restored by the Magistrates’ Court.

# What Factors Influence the Making of an Order To Suspend?

(Chapter 6)

There are a number of factors that may cause a judge or magistrate to decide that a suspended sentence is desirable. These include factors such as an offender’s good prospects of rehabilitation and the offender’s personal circumstances, such as the possible adverse effects of an immediate sentence of imprisonment on the offender’s family and others. The factors leading to a decision to suspend will vary depending on the nature of the offence committed, and the individual circumstances of the offender.

Chapter 6 of the Discussion Paper presents a number of case studies which illustrate how suspended sentences are used in practice, as well as some of the factors that can influence a sentencer in making an order to wholly or partially suspend a prison sentence in a particular case.

# Issues

(Chapter 7)

Chapter 7 discusses issues and past criticisms of suspended sentences. In considering these, it is important to keep in mind that suspended sentences have been a popular sentencing option, both in Victoria and in other jurisdictions. Some jurisdictions, including NSW and Victoria, have abolished them, only to later reintroduce them on the basis that they occupy an important place in the sentencing hierarchy.

## Perceptions of Suspended Sentences

While the law and judicial officers may regard a wholly suspended sentence as a significant penalty, there is evidence that the public regard an offender given such a sentence as ‘getting off’, ‘walking free’, or as having received a ‘slap on the wrist.’

Offenders who have their terms of imprisonment suspended have a conviction recorded against their names and face having the suspended prison term reinstated if they commit another offence during the operational period. The offender may have also spent time on remand in a correctional centre prior to sentencing. However, provided the offender does not commit an offence during the operational period, there are no restrictions placed on his or her time or resources after sentencing. For this reason while a suspended sentence is treated at law as a harsher punishment than non-custodial orders, such as community-based orders and fines, a suspended sentence may be seen as less punitive.

## Suspended Sentences and Proportionality

A related criticism is that suspended sentences violate the principle that punishment should be proportional to the seriousness of the offence and the degree of responsibility of the offender. An offender who receives a suspended sentence is often seen as having escaped the punishment that he or she deserves for committing the offence, and as being treated much more leniently than others convicted of similar offences but ordered to immediately serve their sentence in prison. However it could be argued that in some cases providing for an offender’s rehabilitation and discouraging him or her from committing further offences may be more important considerations than making the punishment fit the gravity of the offence.

## Deterrence

One of the purposes of a sentence may be to deter the offender from committing further offences (‘special deterrence’) and to discourage other members of the community from committing offences of the same or a similar nature (‘general deterrence’).[[15]](#footnote-15) One of the perceived advantages of a suspended sentence is its potential for special deterrence because the consequences of committing another offence are known and certain. The value of suspended sentences in terms of general deterrence, however, has been questioned.

## Appropriateness of Suspended Sentences for Some Offences and Offenders

While suspended sentences might be seen as appropriate in certain cases, some might argue that the suspension of a prison sentence should not be permitted in the case of serious crimes of violence, such as sexual assault, or intentionally causing serious injury. In these cases, it could be argued that denouncing the offender’s conduct, punishing the offender and deterring others from committing similar offences are more important considerations than, for example, providing for an offender’s rehabilitation.

Suspended sentences may also be seen as inappropriate for some types of offenders: such as those who may require some form of additional supervision or support, and for whom the deterrent effect of a suspended sentence may be limited (for example, offenders with a mental illness and young offenders).

## The Illogical Nature of Suspended Sentences

Before a court may make an order that a sentence of imprisonment should be suspended, it must first be satisfied that a term of imprisonment is the only appropriate sanction in the circumstances.[[16]](#footnote-16) The court must then be satisfied that, due to the particular circumstances of the case, the offender should serve his or her sentence in the community. The same factors that are taken into consideration in determining whether a term of imprisonment should be suspended—such as the offender’s previous good character, employment status and the likelihood of rehabilitation—are taken into account in determining whether a term of imprisonment should be imposed at all.[[17]](#footnote-17) It could be argued that this process of reasoning is flawed.

## Net-widening and Sentence Inflation

In theory the use of suspended sentences should prevent offenders otherwise destined for prison from being imprisoned. However, research has consistently shown that although suspended sentences achieve this, they also lead to net-widening and sentence inflation.

Net-widening and sentence inflation occur when offenders who previously would have been sentenced to a sentence other than imprisonment (e.g. a community-based order) receive a suspended prison sentence. Sentence inflation may also occur when an offender receives a longer sentence of imprisonment than otherwise would have been imposed had the sentence of imprisonment not been suspended.

Net-widening and sentence inflation may limit the potential of suspended sentences to divert offenders from prison, and result in offenders receiving more serious penalties for future offences because they will already have a prison sentence on their criminal record.

# Options

(Chapter 8)

There are a number of options that might address some of the issues outlined above. Options discussed in the Council’s Discussion Paper suggest just some of the possible options for reform. The Council welcomes views on whether there are other options not covered in the Discussion Paper which you think should be considered. The Council’s aim is to determine whether suspended sentences should be retained, abolished or modified.

## (1) Retain or Abolish Suspended Sentences?

(Chapter 8, [8.4]–[8.29])

### Arguments in Favour of Retention

Suspended sentences allow the court to recognise the seriousness of the offence and denounce the offender’s behaviour by imposing a prison term, yet enable the court to respond to the individual circumstances of the offender and show mercy. Suspended sentences are therefore seen as having an important place in the sentencing hierarchy—for example, for first-time offenders who have committed serious offences, but who do not require a program intervention and who have already shown themselves to be rehabilitated. By diverting offenders from prison, the negative effects of being gaoled (for example, loss of employment and ties to the community) also may be avoided.[[18]](#footnote-18)

Abolishing the power to suspend prison sentences would limit the options available to courts and potentially leave a significant ‘gap’ in the sentencing hierarchy. This is because in cases where the only appropriate sentence is a term of imprisonment of 12 months or more, the court would be restricted to ordering the offender to serve it. While some might consider this entirely appropriate, an increase in the number of offenders sentenced to immediate imprisonment would have significant implications for the prison population and correctional costs.

Abolishing suspended sentences might also result in more defendants electing to go to trial, increasing overall costs and risking lower rates of conviction. The possibility of receiving a suspended sentence—no matter how remote—is likely to provide a genuine incentive to some offenders to plead guilty.

### Arguments in Favour of Abolition

The ambiguous and confusing nature of suspended sentences, the apparent lack of a punitive element and the potential of suspended sentences for net- widening and sentence inflation might all be seen as arguments supporting the abolition of suspended sentences. Given the range of flexible sentencing orders now available in Victoria, including community- based orders (CBOs), home detention orders, intensive correction orders (ICOs) and combined custody and treatment orders (CCTOs), the continued need for suspended sentences could be questioned.

## (2) Modify Suspended Sentences?

(Chapter 8, [8.4]–[8.29])

### A. Making the Purposes of a Suspended Sentence Explicit

Given the apparent confusion surrounding suspended sentence orders and what they are intended to achieve, there might be some benefit in more clearly articulating the purposes of a suspended sentence order. However, defining the purposes of a suspended sentence order in advance may be difficult as the purposes may vary depending on the type of offence and the circumstances of the offender.

### B. Limiting the Circumstances in Which a Suspended Sentences Order Can be Made

Because a suspended sentence may only be ordered where no other sentence but imprisonment is appropriate, suspended sentences could be seen as best reserved for exceptional cases.

The seriousness of some offences (such as crimes involving violence against the person, including sexual assaults) might also be seen as justifying offenders convicted of these offences serving an immediate term of imprisonment in all cases, or in all but those involving exceptional circumstances.

The Discussion Paper considers three options:

1. Restricting the use of the power to suspend a sentence of imprisonment to cases in which exceptional circumstances can be shown.
2. Preventing the use of suspended sentences for defined categories of offences.
3. Limiting the use of suspended sentences for defined categories of offences to those where exceptional circumstances can be shown.

Arguments against introducing a general restriction on the circumstances in which a prison sentence can be suspended include the potential consequences for the prison population and increase in correctional costs. Introducing restrictions of this kind could also be criticised as unnecessarily fettering the discretion of the courts and risking injustice in individual cases.[[19]](#footnote-19)

The Court of Appeal in a number of recent cases has expressed a view that crimes of serious violence, including rape and sexual assault, should generally result in an offender serving an immediate custodial sentence.[[20]](#footnote-20) The need to amend the legislation to restrict the power to suspend being exercised in these cases might therefore be seen as unnecessary. On the other hand, including a statement in the legislation could resolve any residual uncertainty among sentencers about the principles that should apply in these cases.

### C. Introducing a Power to Attach Conditions

Providing courts with the power to attach conditions to a suspended sentence order might increase the punitive value of the order and also allow the court to better tailor suspended sentence orders to the circumstances of an individual offender.

Conditions might be similar to those attached to intensive correction orders and community-based orders, such as requirements that an offender:

* report to, or receive visits from, a community corrections officer;
* attend educational or other programs;
* undergo treatment for alcohol or drug addiction and submit to medical, psychological or psychiatric treatment;
* notify community corrections of any changes of address or employment; and
* remain within Victoria except with permission.[[21]](#footnote-21)

If conditions were attached, a suspended sentence would be breached not only by an offender committing another offence, but also by a failure to comply with the conditions of the order.

There are already a number of conditional orders which exist in Victoria, including ICOs (a prison sentence served in the community) and CBOs. Therefore, the introduction of conditional suspended sentences could be seen as unnecessary and likely to cause confusion between for example, when a CBO is appropriate, and when a conditional suspended sentence order should be made. Additional costs would also be incurred in supervising offenders and in providing treatment services and making other programs available to a greater number of offenders.

### D. Introducing a Conditional Suspended Sentence for Offenders with Drug and Alcohol Problems

Victoria had a form of conditional suspended sentence for drug-addicted offenders until 1997 under section 28 of the Sentencing Act 1991 (Vic). The repeal of section 28 coincided with the introduction of the new combined custody and treatment order (CCTO). The making of a CCTO is limited to circumstances where the court is considering sentencing an offender to a term of imprisonment of up to 12 months.[[22]](#footnote-22)

A new form of order for less serious types of offending—the drug treatment order—was also introduced in Victoria in 2002. This order may only be made by the new Drug Court Division of the Magistrates’ Court.

The Sentencing Review recently recommended the introduction of a conditional suspended sentence for more serious drug-related offences, which would be available for sentences of imprisonment of five years or less.[[23]](#footnote-23) This would fill the gap left by the abolition of the old section 28 order and would be available for more serious offences where a drug treatment order would not be appropriate.

### E. Increasing, or Reducing the Prison Term that Can be Suspended

Many community concerns about suspended sentences appear to relate to their use in cases involving serious crimes against the person, which generally attract longer sentences of imprisonment. One option to prevent suspended sentences being used in such cases would be to restrict the power to suspend a prison sentence to sentences of 12 months, or 18 months and under.

However, if suspended sentences are intended to be a serious alternative to imprisonment, it could be argued that rather than being restricted in this way, their availability should be extended to those cases which justify a term of imprisonment of over three years being imposed, due, for example, to the serious nature of the offence—but where there are particular extenuating circumstances justifying a merciful response.

### F. Placing a Lower Limit on Prison Sentences that can be Suspended

To address the problem of net-widening, a lower limit could be set on the prison sentence which can be partially or wholly suspended. In doing so, a possible danger is that sentencers would not only impose a sentence of imprisonment where a non-custodial order might have been appropriate, but might artificially inflate the sentence of imprisonment imposed in order to permit the prison sentence to be suspended.

### G. Increasing or Reducing the Maximum Term of the Operational Period

In the absence of a power to attach conditions to suspended sentences, the length of the operational period could be increased to strengthen the punitive value of the order. This would mean that the offender would have the prison sentence hanging over his or her head for a longer period of time, and would also suffer the consequences of being under sentence for an extended period of time.

A risk is that the rates of breach might increase— particularly in the case of the higher courts, where there appears to be a positive relationship between the length of the operational period and breach rates. Depending on how much flexibility the court has when dealing with breaches, this could result in more offenders serving the suspended period of imprisonment in gaol, thereby defeating the potential benefits of suspended sentences in terms of diverting offenders from prison and avoiding the possible negative effects of prison both on offenders and the broader community.

### H. Making Changes to the Handling of Breaches

Currently the powers of courts on breach are quite limited. For example, there is no power to order that the term of imprisonment activated be served by way of home detention, an intensive correction order or, if the offender is under 21, in a youth training centre rather than an adult prison. In the absence of exceptional circumstances, the court must activate the whole or part sentence held in suspense and order that the offender serve it in prison.

Some people might consider that this limited discretion is appropriate given that the prison term was suspended to give the offender ‘one last chance’ to get their life on track. Limiting the options available also may preserve the deterrent effect of suspended sentences in discouraging offenders from further offending.

The majority of offenders have their sentences activated on breach. However, the proportion of cases in which ‘exceptional circumstances’ are found (around 24% in the higher courts, and 36% in the Magistrates’ Court) could possibly support an argument for less discretion, or for some form of guidelines to be provided to sentencers on the criteria which should be applied in finding exceptional circumstances.

On the other hand, there are a number of arguments for increasing the flexibility of the order a court may make on breach including that:

* the circumstances of the offender may have changed significantly since the original sentence was imposed, making a sentence of imprisonment no longer suitable;
* a longer term of imprisonment may have been imposed than would otherwise have been the case if it was assumed that the sentence would not be served; and
* the offence which constitutes the breach may be a relatively minor offence.[[24]](#footnote-24)

The recent Sentencing Review found strong support for making a broader range of options available to courts when dealing with offenders for breaches of suspended sentences. It also recommends that the current presumption of cumulative sentences on breach of a suspended sentence be removed.

### I. Changes to the Availability of Suspended Sentences for Young Offenders

There is no power to suspend custodial orders available for young people, such as Youth Training Centre orders. Young offenders who are sentenced in the Magistrates’ Court and higher courts may, however, receive a suspended sentence. Because of the way the breach provisions currently operate, this means if the young person commits another offence, he or she has to serve the prison sentence activated on breach in an adult prison.

Because young offenders are considered less likely to think through the consequences of their actions, it could be argued that suspended sentences are generally an inappropriate order for young offenders. In the absence of a power to attach conditions, which provide for supervision and support, the use of this sanction could also be seen as setting many young offenders up for failure. On this basis it could be argued that the power to suspend custodial sentences should be restricted to offenders aged 21 years or over.

On the other hand, there may be cases in which the power to suspend a sentence of imprisonment, or even a YTC order, might be seen as appropriate. For example, where a young person has committed a serious offence, but is now under the care of a parent or guardian or is otherwise in a stable and supportive environment, the court may consider that a lenient sentence is called for given the particular circumstances of the case. If a form of conditional suspended sentence were to be introduced, it might also provide for appropriate supervision where necessary.

### J. Removing the Power to Partially Suspend a Sentence of Imprisonment or Introducing a New Form of Order

Partially suspended sentences represent only a small proportion of all suspended sentence orders made by the courts. In 2003–2004, the Victorian higher courts suspended a total of 688 imprisonment terms, of which 21 per cent (146) were partially suspended. For the same period in the Magistrates’ Court 3,316 defendants received a suspended term of imprisonment, of which only 404 (12%) were partially suspended.

Because partially suspended sentences operate (like parole) as a form of release while remaining under sentence, it could be argued that there is no need to retain partially suspended sentences in addition to the power for a court to set a non-parole period.

The Sentencing Review initially suggested that rather than abolishing partially suspended sentences, they should be retained in the form of a new order—an ‘imprisonment release order’ (IRO).[[25]](#footnote-25) Like a partially suspended sentence order, this new order would allow a court to impose a short term of imprisonment followed by a period of unsupervised release.[[26]](#footnote-26)

# Discussion Questions

1. Should suspended sentences be retained or abolished as a sentencing option in Victoria?
2. If suspended sentences were to be abolished, what changes (if any) should be made to existing sentencing orders Should any new forms of orders be introduced?
3. If suspended sentences are retained, what should be their proper role?
4. Should a statement be included in the Sentencing Act 1991 setting out the purposes of a suspended sentence order? If so, what factors should be included?
5. Should some other form of guidance be provided to sentencers on the factors which should be taken into account in making an order to suspend?
6. Should the steps involved in making a suspended sentence order be clarified?
7. Should amendments be made to s 27(1) of the Sentencing Act 1991 (Vic) restricting the use of suspended sentences to cases involving ‘exceptional circumstances’?
8. Are there certain offences for which a partially suspended and/or wholly suspended sentence of imprisonment would never be appropriate?
9. Are there certain offences for which a partially suspended and/or wholly suspended sentence of imprisonment may be appropriate, but only in exceptional circumstances?
10. If the use of suspended sentences for certain categories of offences were to be restricted in some way, what would be the best way to achieve this (for example, by including a requirement in the legislation that suspended sentences only be permitted in exceptional circumstances, and/or by providing sentencing courts with some form of guidelines)?
11. Should courts be able to attach conditions to suspended sentence orders? If so, what sorts of conditions should be available?
12. Should a form of conditional suspended sentence be available for drug-addicted offenders? If so, what sorts of conditions should be available?
13. If a form of conditional suspended sentence is introduced in Victoria, should there be a power for the court to review and vary conditions?
14. Should the maximum term of imprisonment able to be suspended in Victoria be changed (for example, reduced, increased or be undefined to allow a sentence of imprisonment of any length to be suspended)?
15. Should amendments be made to impose a lower limit on terms of imprisonment that can be held wholly or partially in suspense? If so, what limit should apply?
16. Should any changes be made to the maximum operational period of suspended sentence orders? For example, should it be possible to order a longer operational period than currently applies, or should the maximum operational period be reduced?
17. If a form of conditional suspended sentence were to be introduced in Victoria: (a) What should be the maximum period of time during which the offender is subject to conditions?; and (b) Should the period during which the offender must not commit another offence be the same as, or longer than, the period of time during which he or she must comply with special conditions?
18. Should any changes be made to the options available to a court on breach of a suspended sentence?
19. Should any changes be made to s 31(6) of the Sentencing Act 1991 (Vic)?
20. Should breach of a suspended sentence order amount to a criminal offence?
21. Should a suspended sentence that is partially restored be suspended against further breaches?
22. Should the current availability of suspended sentences for young offenders under s 27 be changed in any way (for example, restricted to offenders who are aged 21 years or over)? If so, would your view change if a form of conditional suspended sentence was introduced in Victoria?
23. Should a court be permitted to order a young offender who has breached a suspended sentence to serve the sentence activated in a youth training centre or a youth residential centre?
24. Should a power be introduced under the Children and Young Persons Act 1989 (Vic) and/or the Sentencing Act 1991 (Vic) to suspend youth training centre orders and/or youth residential centre orders?
25. Should partially suspended sentences be abolished or retained as a sentencing option in Victoria?
26. Should partially suspended sentences be replaced with an imprisonment release order, or some other form of order?

1. Sentencing Act 1991 (Vic), s 27(3). [↑](#footnote-ref-1)
2. Sentencing Act 1991 (Vic), s 5(3). [↑](#footnote-ref-2)
3. Sentencing Act 1991 (Vic), s 27(1). [↑](#footnote-ref-3)
4. Dinsdale v R (2000) 202 CLR 321. [↑](#footnote-ref-4)
5. Sentencing Act 1991 (Vic), s 27(2). [↑](#footnote-ref-5)
6. Sentencing Act 1991 (Vic), s 27(3). [↑](#footnote-ref-6)
7. Sentencing Act 1991 (Vic), s 31. [↑](#footnote-ref-7)
8. Sentencing Act 1991 (Vic), s 31(5). [↑](#footnote-ref-8)
9. Sentencing Act 1991 (Vic), ss 31(5)–(5A). [↑](#footnote-ref-9)
10. The courts can also elect to partially suspend an imprisonment term, and/or combine it with a monetary fine. [↑](#footnote-ref-10)
11. This figure is based on a count of principal sentence. Refer to the Council’s website for counting rules <http://www.sentencingcouncil.vic.gov.au>. [↑](#footnote-ref-11)
12. These proportions were derived from a sample of suspended sentences based on a count of principal offence. Refer to the Council’s website for counting rules <http://www.sentencingcouncil.vic.gov.au>. [↑](#footnote-ref-12)
13. The total proportion of defendants that received a suspended sentence is based on a count of principal sentence, whereas the examination of trends between 1999–2000 and 2003–04 is based on a sample of all defendants that received a suspended sentence based on a count of principal offence. Refer to the Council’s website for counting rules <http://www.sentencingcouncil.vic.gov.au>. [↑](#footnote-ref-13)
14. Road Safety Act 1986 (Vic), s 30. [↑](#footnote-ref-14)
15. Sentencing Act 1991 (Vic), s 5(1)(b). [↑](#footnote-ref-15)
16. Sentencing Act 1991 (Vic), s 27(3). [↑](#footnote-ref-16)
17. Kate Warner, Sentencing in Tasmania (2nd ed 2002) [9.215]; Arie Freiberg, Sentencing Review: Pathways to Justice (2002) 120. [↑](#footnote-ref-17)
18. Freiberg (2002), above n 17, 123. [↑](#footnote-ref-18)
19. J Q Campbell, ‘A Sentencer’s Lament on the Imminent Death of the Suspended Sentence’ (1995) Criminal Law Review 293, 295. [↑](#footnote-ref-19)
20. See, for example, DPP v Fellows [2002] VSCA 58 (Unreported, Phillips CJ, Phillips JA and O’Bryan AJA, 2 May 2002) [32]–[33], [35], Phillips CJ with Phillips JA and O’Bryan AJA concurring; and DPP v Sims [2004] VSCA 129 (Unreported, Batt, Vincent and Eames JJA, 23 July 2004) [20], Batt JA and [34], Vincent JA. [↑](#footnote-ref-20)
21. See Sentencing Act 1991 (Vic), ss 19–21 (ICOs) and ss 37–38 (CBOs). [↑](#footnote-ref-21)
22. Sentencing Act 1991 (Vic), s 18Q(1). [↑](#footnote-ref-22)
23. Freiberg (2002), above n 17, 81–82. [↑](#footnote-ref-23)
24. Leslie Sebba, ‘Penal Reform and Court Practice: The Case of the Suspended Sentence’, in I Drapkin (ed), Studies in Criminology (1969) 133, 159. [↑](#footnote-ref-24)
25. Arie Freiberg, Sentencing Review: Discussion Paper (2001) 64. [↑](#footnote-ref-25)
26. Ibid. [↑](#footnote-ref-26)