Suspended Sentences

Final Report—Part I

May 2006

Sentencing Advisory Council

Published by the Sentencing Advisory Council
Melbourne Victoria Australia.

This Report reflects the law as at 1 April 2006.

National Library of Australia

Cataloguing-in-Publication

Victoria. Sentencing Advisory Council.
Suspended sentences : final report part 1.

Bibliography.

ISBN 1 921100 03 6 (pbk).

1. Sentences (Criminal procedure) - Victoria. I. Title.

364.6309945

Also published on www.sentencingcouncil.vic.gov.au
Authorised by the Sentencing Advisory Council, 4/436 Lonsdale Street, Melbourne. Printed by Big Print, 520 Collins Street, Melbourne.

Designed by Andrew Hogg Design.

Developed by Linton (Aust) Pty Ltd.

The publications of the Sentencing Advisory Council follow the Melbourne University Law Review Association Inc *Australian Guide to Legal Citations* (2nd edn, 2002).

Contents

List of Tables

List of Figures

Preface

Few issues have divided the community as strongly as suspended sentences. Views on this matter are widely divergent and strongly held. This sentence polarises opinions and provokes high emotion. Justice is a deeply felt issue, and properly so.

The release of our Discussion Paper in April 2005 and our Interim Report in October 2005 had the desired effect of eliciting a range of views and thoughtful responses to our proposals. We are grateful to those who took the time to prepare submissions to the Council and attend its various forums. This dialogue between the Council and the community, the bar, bench and legal profession, as well as many non-governmental organisations, is stimulating and constructive and, we believe, productive of better outcomes than a closed process.

Our Interim Report recommended significant, far-reaching changes to Victoria's sentencing system. It was bold and radical and prefigured a new structure which we believe will be more just, effective and workable. It was proffered with the explicit intention of allowing one final round of discussion and consultation. Those discussions were robust, both within and outside the Council, and this Final Report reflects the views that were put to us, though it is, of course, impossible to reconcile all of those views. Ultimately, we are required to take a stance on the contentious issues.

The Council remains committed to its view on the desirability of abolishing suspended sentences, but is very aware of, and sensitive to, the correctional and financial implications of the sudden removal of such a major sanction from the courts' dispositional repertoire. We have also taken into account the very strong views expressed by those intimately involved in the sentencing of offenders—the courts and legal practitioners—although they too, were not all of a like mind. This Final Report therefore recommends a more gradual approach to the abolition of suspended sentences, which will allow time for the correctional authorities to put the necessary infrastructure in place to ensure that the new system can operate effectively and also allow the courts to become accustomed to the new range of options. Our recommendations are intended to be implemented over a three-year period and will provide an opportunity for monitoring and adjustment.

This Final Report is published in two parts. This first part deals with reforms to suspended sentences which can be implemented without a major commitment of resources and which may address some of the more significant criticisms of these orders. The second part, to be published later this year, will set out in more detail the new orders we proposed in our Interim Report, taking into account the comments received during the consultation period.

Victoria Moore has continued to shoulder the major burden of research and writing in relation to this reference, very ably supported by Kelly Burns and other members of the Council's Secretariat. Jo Metcalf, the Council's CEO, has played a critical role throughout the reference, providing comments on draft reports, assisting with consultations and overseeing the report production process.

Finally, I thank the members of the Council for their contributions to what has been a challenging first reference. Council members have been generous with their time and expertise and have demonstrated a strong commitment to improving sentencing in Victoria for victims, offenders and the broader community.

Arie Freiberg
Chair
Sentencing Advisory Council

Contributors

Authors Victoria Moore
Kelly Burns

Editor L. Elaine Miller

Sentencing Advisory Council

Chair	Professor Arie Freiberg
Deputy-Chair	Thérèse McCarthy
Council Members	Carmel Arthur Carmel Benjamin AM Noel Butland Bernard Geary David Grace QC Andrew Jackomos* Professor Jenny Morgan Simon Overland Jeremy Rapke QC Barbara Rozenes
Chief Executive Officer	Jo Metcalf

* To 6 March 2006.

The Council thanks the following people and organisations for their assistance in the preparation of this report:

Court Services, Statistical Services Unit (Department of Justice), Justice Library (Department of Justice), Ms Prue Boughey, Ms Julie Bransden, Ms Jenni Coady, Dr Karen Gelb, Ms Shelley Goldwasser, Ms Sue Kaufmann, Ms Felicity Stewart, Mr Nick Turner, Professor John Walker and Ms Sarah Walker.

Abbreviations

ABS	Australian Bureau of Statistics
A Crim R	Australian Criminal Reports
AC	Appeal Cases (United Kingdom)
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AJA	Acting Justice of Appeal
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
CCTO	Combined Custody and Treatment Order
CBO	Community Based Order
CJ	Chief Justice
CLR	Commonwealth Law Reports
Cth	Commonwealth
CSO	Correction and Supervision Order
DHS	Department of Human Services
DPP	Director of Public Prosecutions
DTO	Drug Treatment Order
FCR	Federal Court Reports
ICO	Intensive Correction Order
IRO	Imprisonment Release Order
J	Justice (JJ plural)
JA	Justice of Appeal (JJA plural)
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWSC	New South Wales Supreme Court
NT	Northern Territory
P	president (judicial office)
QB	Law Reports, Queen's Bench
QC	Queens Counsel
Qld	Queensland
s	section (ss plural)
SA	South Australia
SASC	South Australian Supreme Court
SASR	South Australian State Reports
SCR	Canada Supreme Court Reports
Tas R	Tasmanian Reports
UK	United Kingdom
VAADA	Victorian Association of Alcohol and Drug Agencies
VALS	Victorian Aboriginal Legal Service Co-operative Ltd

Vic	Victoria
VR	Victorian Reports
VSC	Supreme Court of Victoria
VSCA	Supreme Court of Victoria Court of Appeal
WA	Western Australia
WAR	Western Australian Reports
YAO	Youth Attendance Order
YTC	Youth Training Centre
YRC	Youth Residential Centre

Glossary of Sentencing and Legal Terms

Adjourned undertaking *(ss 72–79 Sentencing Act 1991 (Vic))*	Release (unsupervised) with or without recording a conviction, for a period of up to five years, with conditions.
Combined custody and treatment order *(ss 18Q–18W Sentencing Act 1991 (Vic))*	A term of imprisonment served by a combination of an immediate prison term of at least six months followed by supervised drug rehabilitation treatment while living in the community (maximum 1 year).
Common law	The common law consists of principles of law arising from judicial decisions (rather than derived from legislation).
Community-based order *(ss 36–48 Sentencing Act 1991 (Vic))*	Supervised non-custodial sentence, with or without recording a conviction, with conditions including supervision, treatment and/or unpaid community work (maximum 2 years).
Deferral of sentencing *(s 83A Sentencing Act 1991 (Vic))*	The Magistrates' Court may defer sentencing a young offender aged 18 or over but under 25 years, and adjourn the proceedings for up to six months to enable the offender to demonstrate his or her rehabilitation.
Discharge *(s 73 Sentencing Act 1991 (Vic))*	After convicting a person of an offence a court may discharge that person.
Dismissal *(s 76 Sentencing Act 1991 (Vic))*	After finding someone guilty of an offence a court may dismiss the charge without recording a conviction.
Drug treatment order *(ss 18X–18ZS Sentencing Act 1991 (Vic))* [Drug Court Division of the Magistrates' Court only—Pilot program]	The Drug Court may impose a drug treatment order which consists of a treatment and supervision component (which operates for two years or until that part of the order is cancelled) and a custodial component (which must not exceed two years) (maximum 2 years).
Fine *(ss 49–69 Sentencing Act 1991 (Vic))*	Monetary penalty (can be in addition to or instead of another order and with or without recording a conviction).
Home detention order *(ss 18ZT–18ZZR Sentencing Act 1991 (Vic))*	A term of imprisonment served by home detention. This is not available for certain offences (e.g. sexual offences, breach of intervention or stalking order). While on a home detention order the offender is subject to electronic monitoring (maximum 1 year).
Imprisonment *(ss 9–18P Sentencing Act 1991 (Vic))*	A term of imprisonment is not always served by confinement in prison. It can be served in other ways such as by an intensive correction order (see below). The maximum term of imprisonment that a judge can impose for an offence is determined by Parliament, although courts generally have the discretion to sentence an offender to less than the maximum penalty.

Indefinite sentence
(ss 18A–18C Sentencing Act 1991 (Vic))

The Supreme and County Courts may impose an indefinite sentence on offenders deemed a serious danger to the community who are convicted of specified serious offences (e.g. murder, manslaughter, armed robbery, rape, sexual penetration of a child under 16).

Intensive correction order
(ss 19–26 Sentencing Act 1991 (Vic))

A term of imprisonment served in the community, combining intensive supervision and/or personal development programs and including conditions such as treatment and unpaid community work (maximum 1 year).

Life imprisonment

The Supreme Court can impose life imprisonment for the most serious offences (e.g. murder, treason, trafficking in a large commercial quantity of a drug of dependence). The court must still fix a minimum prison term which the offender must serve before being eligible for parole, unless the court considers the setting of a non-parole period inappropriate based on the nature of the offence or the past history of the offender, in which case the offender will remain in prison for the rest of his or her life.

Mandatory imprisonment

Some offences (e.g. driving while disqualified under section 30 of the *Road Safety Act 1986* (Vic)) have a mandatory prison sentence. This means that a judge must impose a term of imprisonment as part of the sentence.

Net-widening

'Net-widening' refers to the use of a more severe sentencing order than required to achieve the purpose of the sentence in a particular case: for example, the use of a suspended sentence for an offender who would not otherwise have received a prison sentence.

Parole
(s 11 Sentencing Act 1991 (Vic))

Parole is a form of supervised release for prisoners intended to ensure that they receive assistance in the transition from prison into the community while also being subject to supervision. A non-parole period is the minimum portion of a prison sentence that an offender must serve before becoming eligible for parole. When a court sentences an offender to a prison sentence of two years or more it must set a non-parole period unless it regards the fixing of the non-parole period as inappropriate. If a court sentences an offender to a prison sentence of 12 months or more but less than two years it may set a non-parole period. In both cases the non-parole period must be at least six months less than the term of the sentence.

Parsimony

The principle that a sentencer must not impose a sentence that is more severe than necessary to achieve the purpose or purposes for which the sentence is imposed. The principle of parsimony is given statutory recognition in Victoria in section 5(3) of the *Sentencing Act 1991* (Vic).

Sentence inflation

Sentence inflation, as it applies to suspended sentences, refers to a longer period of imprisonment than would have been imposed had the sentence been ordered to be served immediately, on the basis that it will be suspended.

Suspended sentence
(ss 27–31 Sentencing Act 1991 (Vic))

A specified prison term which is suspended wholly or in part for a specified time, subject to conditions to be of good behaviour (i.e. not reoffend) (maximum 2 years (Magistrates' Court), 3 years (County and Supreme Courts)).

Substitutional sanction

A substitutional sanction is a sentencing order that is intended to be used as a direct substitute for prison. Examples of substitutional sanctions in Victoria include suspended sentences, combined custody and treatment orders, home detention, and intensive correction orders. A court is required to impose a prison sentence before making one of these orders.

Youth training centre and youth residential centre orders
(ss 32–35 Sentencing Act 1991 (Vic))

A sentence requiring a young offender (under 21 years old) to be detained in a youth training centre (15 years or older) or youth residential centre (under 15 years old) (maximum 2 years (Magistrates' Court), 3 years (Supreme and County Courts)).

Executive Summary

Chapter 1: Overview

In August 2004, the Attorney-General, the Honourable Rob Hulls, MP, asked the Sentencing Advisory Council to advise him on the current use of suspended sentences, and whether reported community concerns about their operation indicated a need for reform. If reforms were required, the Council was asked to consider how the order could be improved: for example, whether it should be available for all offences and whether it should be subject to conditions. The Attorney-General expressed particular interest in the views of the community, including victims of crime, on these issues.

The Council releases this Final Report after having undergone a thorough and rigorous consultation process involving:

- Publication of a preliminary Information Paper in March 2005 presenting key facts and issues about suspended sentences and examining high–level sentencing trends in their use in Victoria against a background of trends in other Australian jurisdictions.

- Release of a Discussion Paper for public consultation in April 2005. This presented detailed information about the nature and use of suspended sentences in the courts, outlined a series of issues arising from use of the order, and posed a range of reform options for discussion. The Discussion Paper was intended to provide the foundation for informed community debate and consultation about the role of suspended sentences in Victoria. Submissions on the Discussion Paper were invited; 54 were received. The Council also convened a series of community forums, specialist roundtables, focus groups, workshops and meetings across the state.

- Release of an Interim Report in October 2005 to allow a final round of discussion and consultation on the preliminary position that the Council had reached as a result of its consultations on the Discussion Paper. Submissions were again invited; 25 were received. The Council also reconvened the roundtables and met with a range of individuals and organisations to discuss its interim proposals.

There can be no question that the issue of suspended sentences is divisive. Our consultations have revealed widely divergent and strongly held views.

Although many supported suspended sentences as a valuable sentencing option, others expressed dissatisfaction with their current status and operation. Many in the broader community have difficulty reconciling the legal classification of a wholly suspended sentence as a custodial sentence that is more severe than other conditional orders, when its practical consequence is that the offender is permitted to remain in the community under the sole restriction that he or she refrain from committing further offences during the period of the order. Many were also concerned about the use of suspended sentences for violent crimes, including rape and other forms of sexual assault. Support was expressed for allowing courts to attach conditions to suspended sentence orders, as well as for restricting the availability of the order where more serious offences are concerned.

Those who defended suspended sentences endorsed their rationale and current positioning in the hierarchy of sentencing orders. It was argued that the order could be improved by allowing courts to attach conditions and providing them with more flexibility in handling breaches of suspended sentences. However, concerns were raised about the possible effect of conditional suspended sentences, including their effect on breach rates should additional funding for services and supports not be made available, and the potential for courts to overload such orders with conditions. Reform options that involved the limiting of suspended sentences, for example by reducing the term of imprisonment able to be suspended, or restricting the offences for which an order to suspend could be made, were opposed as unnecessarily fettering judicial discretion.

In seeking to resolve the issues raised, the Council came to the preliminary view in its Interim Report that a more radical and holistic response to reform was required. We considered that reforming suspended sentences in the way that many advocated—by allowing conditions to be attached to the order—would fail to address the ambiguous nature of suspended sentences, and would compound a range of existing problems with their use. In a system already well equipped with conditional orders, a conditional suspended sentence would introduce the risk of further sentence overlap and escalation. We were concerned about the high probability that breach rates would increase if conditions were attached, and that the diversionary effects of the order would as a consequence be further eroded. Should the breach provisions be modified to allow for this, a central pillar of the order—the certainty that the sentence imposed would be activated on breach—would be substantially weakened. In the end we determined that these problems were irresolvable given the current form of the order.

The Council continues to be particularly concerned that suspended sentences (and other sentences used as substitutes for immediate imprisonment) are affecting community confidence in sentencing. The community, quite legitimately in our view, questions the logic of a decision that a prison sentence is, and then is not, appropriate. Like the Sentencing Review (2002) before us, we believe that substitutional sentences should be kept to a minimum and that alternatives to imprisonment should exist as credible sanctions in their own right.

Our Interim Report proposed the abolition of suspended sentences, as part of broader reforms to sentencing in Victoria. The model we presented is intended to preserve the principle of parsimony whereby a court must not impose a sentence that is more severe than necessary to achieve the purposes of the sentence, and that prison should be a sanction of last resort. The ultimate goal of the model was to move to a range of intermediate sanctions that were transparent, conceptually coherent, and understandable to victims, offenders and the broader community.

The Council's recommendations were not, as many interpreted them, a call for all offenders on suspended sentences to be imprisoned, or an affirmative response to calls for more punitive sentencing. Rather, we sought to find a more creative solution to the problems our consultations uncovered, and to provide a new range of orders that would perform substantially the same function as a suspended sentence and other substitutional sanctions, but that would do so in a different form. We believed then, as we do now, that it is possible to create sentencing orders that 'mean what they say', while also providing courts with a flexible range of orders to enable sentences to be tailored to the offence, the offender, and the purposes of sentencing (whether these are considered to be punishment, deterrence, denunciation, rehabilitation, community protection, or a combination of these purposes).

We also considered that the new orders would avoid the net-widening effects of suspended sentences while also providing courts with greater flexibility on breach. In putting forward our draft recommendations, we acknowledged that the proposals were far-reaching and could be seen as controversial.

Part 1 of this Final Report presents the Council's final recommendations in relation to suspended sentences and the proposed transition to the new range of sentencing orders. Part 2 of the Final Report, to be released later this year, will present the Council's final recommendations on the remaining draft proposals outlined in its Interim Report. The release of the Final Report in two parts reflects the process the Council itself has gone through in considering options for reform, as well as the staged implementation process it recommends.

Chapter 2: The Operation and Use of Suspended Sentences in Victoria

Chapter 2 explores the introduction and development of suspended sentences in Victoria and the current legal framework within which they operate. It also provides statistical data about trends in the use of suspended sentences in Victoria and in other jurisdictions.

Suspended sentences have proved to be an increasingly popular sentencing option in Victoria in both the higher courts and the Magistrates' Court. Between 1999–2000 and 2003–04, the proportion of defendants found guilty in the higher courts who received a wholly suspended sentence increased from 20 per cent to 24 per cent. Victoria now ranks third, behind South Australia (at 48%) and Tasmania (at 36%) in terms of its use of wholly suspended sentences in the higher courts.

In the Magistrates' Court over 1999–2000 and 2003–2004, the proportion of defendants who received a wholly suspended sentence as their principal (or most serious) sentence increased from 6 per cent to 7 per cent (from 1,905 to 2,912). In comparison, in New South Wales around 5 per cent of defendants sentenced in the Magistrates' Court receive a suspended sentence.

While it is often asserted that suspended sentences have a special value in deterring offenders from committing further offences, breach rates suggest that the suspended sentence may in fact be less successful than other orders in preventing reoffending. For example, the Arthur Anderson Review of Community Correctional Services found that 19 per cent of community-based orders and 15 per cent of parole orders are breached by further offending (with or without other breaches of conditions), compared to a breach rate for suspended sentences of 36 per cent for orders imposed in the higher courts, and 31 per cent for orders made in the Magistrates' Court.

Breach rates also affect the net impact of suspended sentences in diverting offenders from prison. There is evidence that suspended sentences are imposed not just in place of immediate imprisonment, but also instead of non-custodial orders lower in the sentencing hierarchy (a phenomenon referred to as 'net-widening'). When such sentences are activated upon breach, the diversionary effect of the initial sentence is eroded, because an offender who might otherwise have received a non-custodial outcome is incarcerated. Of the offenders prosecuted for breach in the higher courts, just over three-quarters (76%) had their sentence wholly or partly restored, compared to 64 per cent of offenders prosecuted for breach in the Magistrates' Court.

Chapter 3: The Debate: Are Suspended Sentences Necessary?

After reviewing all of the material from our consultations, the original conclusion of a majority of the Council—that the power to suspend a term of imprisonment should be removed, as part of broader reforms to sentencing orders—has not altered.

The suspended sentence, in our view, is an inherently flawed order. While historically the suspended sentence played an important role in diverting offenders from prison, in a sentencing system equipped with a range of alternatives, its retention is no longer necessary. We believe the changes proposed in our Interim Report will provide courts with a more credible and flexible range of intermediate sentencing orders that will overcome many of the existing problems with suspended sentences.

Confusion over what a suspended sentence is and what it is intended to achieve has not only affected levels of community confidence in sentencing, but is also evidence of the order's failure to satisfy its symbolic and communicative purpose. In our view this is due not simply to misunderstandings about the nature and role of suspended sentences, but also to the intrinsically ambiguous nature of the order. Education without reform will therefore provide only a partial solution; making the language and structure of sentencing more logical, transparent and conceptually coherent is also of crucial importance.

The Council is confident that the new range of sentencing orders proposed in the Interim Report will accommodate cases that previously might have resulted in a suspended sentence, without significant increases in the prison population. However, taking into account the concerns expressed to us about the possible impact of these changes should the Council's assumptions about sentencing behaviour be proved wrong, we have come to the view that suspended sentences should not be abolished immediately, but phased out over a three-year period.

In Chapter 4 of this Report, we recommend a number of modifications aimed at restricting the availability of suspended sentences and improving the overall operation of these orders for the remainder of the time that suspended sentences continue to be available.

As a guide, the Council suggests that three years would be a realistic time frame for the transition to the new orders and the removal of the power to suspend a prison term. While some commitment of time and resources will be required to implement the modifications recommended in this Report to suspended sentences, we envisage that these reforms can be made in the first year of the transitional period without a major financial undertaking from government.

We suggest that changes to other intermediate orders be introduced in the second year of the transitional period (2007–08). These changes were foreshadowed in the Council's Interim Report and are to be revisited in Part 2 of our Final Report. During this phase of the move to the new orders, both the modified form of suspended sentence and the new range of sentencing orders would be available to the courts in sentencing an offender. In the final phase of transition (2009), once the new sentencing regime has been established and is fully operational, we recommend that the power to suspend a prison sentence under section 27 of the *Sentencing Act 1991* (Vic), and related provisions, should be repealed.

The Council acknowledges that the reforms in the Interim Report are far-reaching and that time and resources will be required to implement our proposals effectively. A transitional period will enable sentencers, prosecutors, defence counsel, police and correctional authorities to adjust to the new framework. It will allow time for the necessary funding and infrastructure to be put in place to support the operation of the new orders, and for a more realistic assessment to be made of what role, if any, suspended sentences perform in light of the existence of other alternatives to immediate imprisonment.

Over this three-year period the Council will assume a role in monitoring and reporting on the impact of the reforms recommended in its Final Report. This will assist in identifying whether the reforms are operating as intended and what, if any, additional modifications are necessary.

RECOMMENDATIONS

1. Suspended sentences should be phased out in Victoria by December 2009.

   As a guide, the Council recommends that in the first year, the provisions of the *Sentencing Act 1991* (Vic) governing suspended sentences should be amended in line with Recommendations 3–15, to guide their appropriate use and restrict their availability for serious offences. In the second year (2007–08) other changes to intermediate orders recommended in Part 2 of the Council's Final Report should be introduced. In the final year, Part 3, Division 2, Subdivision 3 of the *Sentencing Act 1991* (Vic) should be repealed.

2. The Council should monitor and report on the use of suspended sentences and other orders over the three-year transitional period.

Chapter 4: Reform Options and Proposals

The retention of suspended sentences—even for a limited time—has again raised questions of what improvements, if any, can be made to their operation. In the Council's view suspended sentences are being overused and in some cases misused—diverting offenders not only from prison, but also from non-custodial orders.

Aim of the Proposals

In determining what changes to recommend, the Council's primary focus has been on maximising the effectiveness of suspended sentences while maintaining their conceptual integrity and protecting against their inappropriate use.

We have been conscious that much of the community concern about the use of suspended sentences has resulted from their use in particular types of cases. Such cases have often, though not always, concerned sexual offences and other violent offences, where the level of harm caused to a victim has been high. These offences account for only a tiny proportion of the total number of suspended sentences handed down annually. Nevertheless, the Council is sympathetic to the view that once a court has determined that a gaol sentence is appropriate for such offences, there should be a presumption that the sentence will be served. The reforms we recommend in this Report aim to restrict the use of suspended sentences for these more serious types of offences, and to provide greater guidance to courts on the circumstances that may make suspension inappropriate in an individual case.

Factors Relevant to Suspension

Currently, the only statutory criterion for whether a prison sentence should be suspended under section 27(1) of the *Sentencing Act 1991* (Vic) is that the court 'is satisfied that it is desirable to do so in the circumstances'.

In this Report we recommend that the following, non-exhaustive list of factors be set out in the legislation to guide the exercise of the discretion to suspend:

- the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence;
- whether the full or partial suspension of the imprisonment term imposed would fail to meet the purposes of denunciation and/or deterrence, due to the seriousness of the offence;
- the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders;
- whether the offence was committed during the operational period of a suspended sentence order; and
- the risk of the offender reoffending.

The Council believes that there are a number of benefits to be gained from setting out considerations that may be factors in the decision to suspend a sentence. A non-exhaustive list of these factors will promote community understanding of how the court reaches a decision to suspend. It may also help to promote more effective use of the order, both in terms of preventing reoffending and in minimising the possibility of inappropriate use of the order.

Should statutory guidance of the kind recommended be provided, it should be made clear that the factors are not intended to affect the operation of section 5 of the Sentencing Act or of the common law, and that consideration of other relevant factors is not precluded.

RECOMMENDATION

3. The *Sentencing Act 1991* (Vic) should be amended to provide a non-exhaustive list of factors to which a court should have regard when deciding whether suspension of a prison sentence is 'desirable in the circumstances'. Factors listed as relevant to the decision to suspend should include:
   - the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence;
   - whether the full or partial suspension of the imprisonment term would be so disproportionate to the seriousness of the offence that it would fail to properly denounce the type of conduct in which the offender engaged or to deter the offender or other persons from committing offences of the same or a similar character;
   - the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders;
   - whether the offence has been committed during the operational period of a suspended sentence order; and
   - the risk of the offender reoffending.

   It should be made clear that the listing of relevant factors is not intended to affect the operation of section 5 of the *Sentencing Act 1991* (Vic) or the common law, and does not preclude consideration of other relevant factors.

Limiting the Availability of Suspended Sentences

Many of the community concerns about the use of suspended sentences have resulted from their use in particular types of cases—typically serious violent offences where the level of harm to a victim is high. A suspended sentence, with its focus on an offender's rehabilitation, may be seen in such cases as failing to sufficiently meet the purposes of denunciation, deterrence and just punishment.

The Council accepts, as we believe many in the community do, that there may be instances in which it is appropriate for an offender to remain in the community, despite the seriousness of the offence—such as under one of the conditional orders recommended by the Council in the Interim Report. However, we share the concern that some offences are so serious that once a prison sentence has been imposed, at least part of the sentence should be served in prison.

One means of restricting the availability of suspended sentences for more serious types of offending would be to reduce the maximum term of imprisonment that can be suspended—for example from three years to two years. However, this may fail to catch many of the cases that cause most concern, such as sexual and other violent offences.

In this Report we therefore recommend the introduction of offence-based restrictions that limit the availability of wholly suspended sentences for 'serious offences' (as defined in section 3 of the *Sentencing Act 1991* (Vic)), including murder, manslaughter, rape, sexual penetration of a child, and intentionally causing serious injury. Under the changes, a court would be prevented from ordering full suspension of the sentence unless it was in the interests of justice to do so because of exceptional circumstances.

RECOMMENDATIONS

4. The current limits on the maximum term of imprisonment that can be suspended (3 years in the higher courts, and 2 years in the Magistrates' Court) under section 27(2) of the *Sentencing Act 1991* (Vic) should be retained.
5. The *Sentencing Act 1991* (Vic) should be amended to create a presumption against suspension of a prison sentence for certain 'serious offences' (as defined under section 3 of the Act). Once a court has determined that it is appropriate to sentence an offender convicted of a serious offence to a term of imprisonment, it should not be permitted to suspend the sentence in full unless the court is satisfied, taking into account the factors relevant to the decision to suspend, that it is in the interests of justice to do so because of the existence of exceptional circumstances.

The Operational Period

Currently the maximum operational period of a suspended sentence in Victoria is three years in the higher courts and two years in the Magistrates' Court (the same as the maximum term of imprisonment that may be suspended). While reducing the period of time during which an offender must comply with the order might reduce breach rates, the Council believes that the current maximum operational periods are appropriate, and recommends that they be retained.

RECOMMENDATION

6. The maximum operational period permitted under section 27(2A) of the *Sentencing Act 1991* (Vic) should remain at two years for suspended sentence orders imposed in the Magistrates' Court and three years for orders imposed in the higher courts.

Addressing Net-widening and Sentencing Inflation Effects

During the transitional period the Council sees some value in amending the Act to make clear that a court must not impose a term of imprisonment under section 27(1) that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended.

RECOMMENDATION

7. Section 27 of the *Sentencing Act 1991* (Vic) should be amended to clarify that a court must not impose a term of imprisonment under section 27(1) that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended.

A Conditional Suspended Sentence?

Many of those consulted supported the introduction of a power to attach conditions to suspended sentences. Allowing courts to attach conditions might address concerns that suspended sentences lack sufficient punitive content and are limited in their capacity to assist in rehabilitation. The availability of a conditional suspended sentence order would also provide the courts with greater flexibility in tailoring a sentence to the circumstances of the offence and the offender.

The Council is generally supportive of conditional orders. However, we are concerned that simply grafting conditions onto suspended sentence orders would fail to resolve more fundamental problems with these orders. We believe that the better option is for suspended sentences to be phased out, and for other conditional orders to be introduced that have a more coherent rationale and that exist as alternatives to imprisonment in their own right.

While conditions on suspended sentences could be introduced in the transitional phase prior to their removal, the Council is concerned that this would risk sentence escalation and lead to significantly higher breach rates. The Council does not consider that providing for more flexible breach provisions is the appropriate solution to such concerns. Any broadening of the courts' powers on breach is undesirable and would compromise the integrity and internal logic of the order. For these reasons the Council suggests that the additional funding and resources that would be required to support conditional suspended sentences properly are better directed towards the revised orders proposed by the Council in the Interim Report.

RECOMMENDATION

8. A power to attach conditions to suspended sentence orders should not be introduced.

Breach Provisions

Under section 31(1) of the *Sentencing Act 1991* (Vic), if an offender whose sentence of imprisonment has been suspended commits another offence punishable by a term of imprisonment, he or she is guilty of a separate offence under the Act. On breach, the court may impose a fine and must order the offender to serve all or part of the original gaol term 'unless it 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'. Other powers of the court on breach are to extend the operational period of the order or to make no order with respect to the suspended sentence.

While the Council is sympathetic to the need to take the individual circumstances of offenders into consideration, we have reached the view that the 'exceptional circumstances' test on breach should be retained. To remove the certainty that the original prison sentence imposed will be activated on breach would be to remove one of the essential features of a suspended sentence—its capacity for special deterrence. The less certain the consequences of breach, the more the 'sword of Damocles' hanging over the offender's head is reduced to 'a butter knife'.[1]

In line with the Council's view that substituted sentences should be kept to a minimum, the Council supports the current prohibition against courts substituting other forms of 'custodial' orders (such as combined custody and treatment orders, home detention or intensive correction orders) for a restored term of imprisonment, with one important exception. Currently a young person who breaches a suspended sentence order and has his or her sentence restored must serve the term in an adult prison unless transferred under the provisions of the *Children and Young Persons Act 1989*. In our view, provided that the young person is assessed as a suitable candidate for serving the period of detention in a youth facility, a court should have the power to substitute a period equivalent to the original term of imprisonment imposed, to be served in a youth training centre or youth residential centre.

The Council also recommends, from the perspective of encouraging a greater level of accountability and consistency in responses to breach, and providing judges and magistrates with a better basis for determining who is an appropriate or inappropriate candidate for suspension, that breach hearings be listed, wherever possible, before the judge or magistrate who imposed the original sentence (as is currently the practice in the higher courts).

---

[1] See *R v Brady* [1998] ABCA 7 [46] (Alberta Court of Appeal) and below n 24.

RECOMMENDATIONS

9. The current threshold for breach under section 31(1) of the *Sentencing Act 1991* (Vic) (the commission of an offence punishable by imprisonment) should be retained.

10. Where an offender breaches a suspended sentence by committing a further offence punishable by imprisonment during the operational period, the requirement that the suspended gaol term must be activated in the absence of exceptional circumstances under section 31(5A) of the *Sentencing Act 1991* (Vic) should be retained.

11. Where a court is dealing with a young offender (as defined under section 3 of the *Sentencing Act 1991*), the court should be permitted to cancel the order and resentence the offender to an equivalent period of detention in a youth training centre or a youth residential centre, subject to the requirements of section 32 of the *Sentencing Act 1991* (Vic) being satisfied.

12. Wherever possible, breach hearings should be listed before the same judge or magistrate who imposed the original sentence (reflecting the current practice in the higher courts).

Cumulative vs Concurrent Sentences on Breach

The Council sees no need to change the current presumption under section 31(6)(b) of the Act that a gaol term restored on breach of a suspended sentence should be served cumulatively on any other term of imprisonment, because the totality principle will continue to apply. This principle requires a court in sentencing an offender to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. We also acknowledge Anthony Bottoms' observation that '[t]o abolish the "consecutive rule" would be seen by most to kick an essential prop away from the suspended sentence'.[2] On this basis we recommend that the current presumption should remain.

RECOMMENDATION

13. The current presumption under 31(6)(b) of the *Sentencing Act 1991* (Vic), that the term activated on breach of a suspended sentence should be served cumulatively on any other term of imprisonment previously imposed unless the court orders otherwise, should remain.

The Offence of Breach of a Suspended Sentence Order

The recent Freiberg Sentencing Review confirmed that the breach offence appears to serve primarily a procedural rather than a punitive purpose, and recommended that breach of orders should no longer constitute a separate criminal offence. As an alternative means of ensuring that offenders could be brought back before the courts in cases of suspected breach, the Review suggested the introduction of a provision enabling a 'prescribed person' or a member of a prescribed class of persons to apply to the court and bring the offender before it, where he or she believes that the offender has breached the order.

The Council agrees with the Sentencing Review's conclusions and recommended approach.

---

[2] Anthony Bottoms, 'The Suspended Sentence in England 1967–1978' (1981) 21 (1) *The British Journal of Criminology* 1, 24.

RECOMMENDATION	
14.	Breach of a suspended sentence order should not constitute a separate offence. The mechanism set out in the *Pathways to Justice* report of the Sentencing Review 2002 should be adopted as the appropriate means of bringing an offender back before the court in the event of suspected breach.

Time Spent in Custody before Breach Proceedings

Under section 18 of the *Sentencing Act 1991* (Vic), if an offender is sentenced to a term of imprisonment or to a period of detention in an approved mental health service under a hospital security order in respect of an offence, any period spent by the offender in custody in relation to proceedings for that offence or arising from those proceedings must be taken into account as a period of imprisonment or detention already served under the sentence, unless the court orders otherwise. Because on proceedings for breach where the whole or part sentence suspended is activated, an offender is not being 'sentenced to a term of imprisonment', there is no clear power for a court to take into account any period spent in custody for breach when activating the original prison sentence imposed.

The Council considers that this uncertainty should be resolved. This could be achieved by clarifying that if a court takes the course of action under section 31(5) of restoring the sentence or part sentence held in suspense, any period of time during which the offender was held in custody in relation to those breach proceedings (including a period pending the determination of an appeal) may be reckoned as a period of imprisonment or detention already served under the sentence.

RECOMMENDATION	
15.	Section 18 of the *Sentencing Act 1991* (Vic) should be amended to make clear that if a court, under section 31(5), restores a sentence or part sentence held in suspense, any period of time during which the offender has been held in custody in relation to those breach proceedings (including a period pending the determination of an appeal) may be reckoned as a period of imprisonment or detention already served under the sentence.

Increasing the Effectiveness of Suspended Sentence Orders

Many people during the course of consultations spoke of the need for suspended sentence orders to be better targeted to those offenders for whom they are likely to be most effective in achieving rehabilitation. To bring this about, it is suggested that courts need more information to determine whether a particular offender is likely to be a suitable candidate for suspension. This information could include, for example, data about the characteristics of offenders who generally do not reoffend under such orders and the characteristics of those who are more likely to reoffend. Unlike other orders, a suspended sentence does not require the court to order a pre-sentence report prior to making the order. While this is seen as one of the attractions of suspended sentence orders, clearly there is a need for better information to be provided to the courts as a basis for making the decision to suspend.

The Council acknowledges the important ongoing responsibility of sentencing bodies, such as ours, in 'filling the knowledge gap' that has existed regarding the effectiveness of particular orders, and in providing information which can form the basis of discussions about which orders work best for which offenders and why. The monitoring role recommended by the Council, following the introduction of the recommended reforms to suspended sentences and transition to the new orders, is one means by which the Council hopes to meet this challenge.

Summary of Recommendations

1. Suspended sentences should be phased out in Victoria by December 2009. 51
As a guide, the Council recommends that in the first year, the provisions of the *Sentencing Act 1991* governing suspended sentences should be amended in line with Recommendations 3–15, to guide their appropriate use and restrict their availability for serious offences. In the second year (2007–08) other changes to intermediate orders recommended in Part 2 of the Council's Final Report should be introduced. In the final year, Part 3, Division 2, Subdivision 3 of the *Sentencing Act 1991* (Vic) should be repealed.

2. The Council should monitor and report on the use of suspended sentences and other orders over the three year transitional period. 51

3. The *Sentencing Act 1991* (Vic) should be amended to provide a non-exhaustive list of factors to which a court should have regard when deciding whether suspension of a prison sentence is 'desirable in the circumstances'. Factors listed as relevant to the decision to suspend should include:

   - the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence;
   - whether the full or partial suspension of the imprisonment term would be so disproportionate to the seriousness of the offence that it would fail to properly denounce the type of conduct in which the offender engaged or to deter the offender or other persons from committing offences of the same or a similar character;
   - the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders;
   - whether the offence has been committed during the operational period of a suspended sentence order; and
   - the risk of the offender reoffending.

   It should be made clear that the listing of relevant factors is not intended to affect the operation of section 5 of the *Sentencing Act 1991* (Vic) or the common law, and does not preclude consideration of other relevant factors. 62

4. The current limits on the maximum term of imprisonment that can be suspended (3 years in the higher courts, and 2 years in the Magistrates' Court) under section 27(2) of the *Sentencing Act 1991* (Vic) should be retained. 72

5. The *Sentencing Act 1991* (Vic) should be amended to create a presumption against suspension of a prison sentence for certain 'serious offences' (as defined under section 3 of the Act). Once a court has determined that it is appropriate to sentence a person convicted of a serious offence to a term of imprisonment, it should not be permitted to suspend the sentence in full unless the court is satisfied, taking into account the factors relevant to the decision to suspend, that it is in the interests of justice to do so because of the existence of exceptional circumstances. 72

6. The maximum operational period permitted under section 27(2A) of the *Sentencing Act 1991* (Vic) should remain at two years for suspended sentence orders imposed in the Magistrates' Court and three years for orders imposed in the higher courts. 74

7. Section 27 of *the Sentencing Act 1991* should be amended to clarify that a court must not impose a term of imprisonment under section 27(1) that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended. 79

Chapter 1: Overview

Scope of the Inquiry

1.1 The Attorney-General wrote to the Council on 24 August 2004 requesting the Council's advice on:

1. Whether reported community concerns are indicative of a need for reform of any aspect of suspended sentences.
2. The current use of suspended sentences, including:
   - the frequency with which they are used;
   - the offences for which they are used;
   - the length of sentences; and
   - breach rates.
3. Whether the operation of suspended sentences can be improved in any way; for example:
   - whether suspended sentences should be available in relation to all offences; and/or
   - whether they should be subject to any conditions (for example, conditional upon treatment orders).

The Attorney-General expressed particular interest in the views of the community, including victims of crime, on these issues.

Our Approach

1.2 The Council published a detailed Discussion Paper in April 2005 that examined the current use of suspended sentences in Victoria and outlined issues and options for reform. The release of the Discussion Paper was followed by an extensive public consultation process that included:

- six community forums held in Melbourne, Ballarat, Geelong, Wodonga, Warragul and Shepparton;
- a series of specialist roundtables focusing on legal issues, issues for offenders with a mental illness and/or intellectual disability, offenders with drug and alcohol problems, young offenders, and offenders convicted of a sexual offence;
- focus groups with victims of crime hosted in partnership with the Victims' Assistance and Counselling Program in Ringwood, Wodonga and Geelong;
- a workshop held in Melbourne to discuss issues of particular concern to victims and their families, with representatives of victims of crime; and
- individual meetings.

1.3 Submissions on the Discussion Paper were also invited, and 54 submissions were received.

1.4 Feedback received during consultations and in submissions informed the development by the Council of a set of draft recommendations. While the Council's original Discussion Paper was principally concerned with possible reforms to suspended sentences, it became apparent to the Council that any reforms to suspended sentences needed to be considered in the broader context of other existing sentencing orders. The Council released an Interim Report in October 2005 that recommended the abolition of suspended sentences as part of broader reforms to intermediate sentencing orders in Victoria.

1.5 The release of the Interim Report provided the opportunity to consult with those who had been involved in the first stage of the review, to gauge support for the draft proposals, and to identify any modifications that might be required. As part of this consultation process, the roundtables were reconvened and a number of individual meetings were held with representatives of the courts, those working with victims of crime (such as the Centres Against Sexual Assault), and the legal profession. A list of the roundtables held appears in Appendix 1. Victims' representatives who participated in the workshop following the release of the Discussion Paper were also briefed on the changes and invited to provide further feedback on the proposals.

1.6 The Council also invited submissions on the Interim Report. A total of 25 written submissions were received.

1.7 Part 1 of the Council's Final Report presents the Council's final recommendations in relation to suspended sentences and the proposed transition to a new range of sentencing orders. Part 2 of the Final Report, to be released later this year, will present the Council's final recommendations on the draft proposals outlined in its Interim Report. The release of the Final Report in two parts reflects the process the Council itself has gone through in considering options for reform and the staged implementation process recommended by the Council.

The Discussion Paper

1.8 The Council's Discussion Paper examined the current use of suspended sentences in Victoria and outlined issues and options for reform. The Council found that suspended sentences have become an increasingly popular sentencing option in Victoria in both the higher courts and Magistrates' Courts. In 2003–04, 31 per cent of offenders sentenced in the higher courts (688 offenders) received a suspended sentence as their most serious sentence.[3] In the Magistrates' Court over the same period, 7 per cent of offenders (5,539 offenders) were sentenced to a suspended gaol term as their most serious sentence.[4] A breach study was also conducted by the Council. The findings of this study are summarised at [2.41].

1.9 Issues identified in the Discussion Paper included:

- the disjuncture between the treatment at law of a suspended sentence as a severe sanction, and community perceptions of a suspended sentence as a 'let-off' or as no punishment at all;

---

3 Sentencing Advisory Council, *Sentencing Monitoring* (2005) Sentencing Advisory Council <http://www.sentencingcouncil.vic.gov.au> at January 2006. The most serious sentence is commonly referred to as the 'principal sentence'. For a discussion of the counting rules used for this analysis, see Sentencing Advisory Council, *Suspended Sentences: Discussion Paper* (2005) Appendix 5.

4 Ibid. Due to data issues, the Council's analysis in the Discussion Paper was based on a sample of the 5,539 suspended sentences handed down in the Magistrates' Court over this period. This sample (3,316/5,539) was based on suspended sentences handed down for the most serious offence found proven. For a discussion of the Council's methodology and findings, see Sentencing Advisory Council (2005), above n 3, Appendix 5.

- the appropriateness of suspended sentences for serious crimes of violence (such as rape, indecent assault, and intentionally or recklessly causing serious injury); and
- the risks of net-widening and sentence inflation, which may result in offenders receiving harsher sentences on breach and increase their risk of receiving a prison sentence if they commit further offences in the future.[5]

1.10 The Discussion Paper also outlined a number of possible options in relation to suspended sentences, including making no changes to the current law, reforming the operation of suspended sentences, and abolishing them altogether. Options for reform considered in the Discussion Paper included:

- providing courts with a power to attach conditions to suspended sentence orders in appropriate cases, to increase the punitive content of these orders and/or better provide for an offender's rehabilitation;
- restricting or limiting the use of suspended sentences for specified offences;
- making changes to the operational period or the maximum term of imprisonment that can be suspended; and
- reforming the current breach provisions, either by increasing the level of discretion available on breach, or tightening up the current 'exceptional circumstances' requirement.[6]

1.11 Overwhelmingly, those who made submissions[7] and participated in consultations[8] favoured the retention of suspended sentences. However, a small number of those consulted[9] and those who made submissions supported the abolition of suspended sentences as part of a call for mandatory sentences or harsher punishments[10] or on the basis that other sentencing options, such as home detention, could appropriately be used in their place.[11]

1.12 Despite support for the retention of suspended sentences, it became clear there was equally a level of dissatisfaction with their current status and operation. Some of the themes emerging from submissions and consultations were:

- a wholly suspended sentence of imprisonment as a 'custodial order' or as a 'term of imprisonment' is a fiction—'prison' should mean 'prison' (that is, a straight term of immediate imprisonment);

---

5 See further Sentencing Advisory Council (2005), above n 3, Chapter 7.

6 Ibid Chapter 8.

7 Submissions 2 (B. Abeysinghe), 4 (C. Moore), 5 (Y. Zole), 6 (M. Douglas), 9 (J. Hemmerling), 11 (Emmanuel College—C. Peddle, C. Finnigan), 13 (Ballarat Catholic Diocese Justice, Development and Peace Commission), 15 (Anonymous) [for offenders under the age of 18 years only who had a mental illness or a drug addiction], 20 (W. Atkinson), 23 (L. Francis) [only where there are 'extenuating circumstances'], 24 (County Court of Victoria), 31 (J. Bignold), 32 (Anonymous), 33 (J. Black), 35 (G. Anderson), 36 (Magistrates' Court of Victoria), 37 (A. Avery), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 40 (S. Rothwell) [only where there are 'extenuating circumstances'], 41 (Youthlaw), 42 (VAADA), 43 (Victorian Aboriginal Legal Service), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre), 51 (Law Institute of Victoria).

8 Feedback forms were completed by many participants of community forums and victims focus groups. Of the 118 feedback forms received, only nine favoured the abolition of suspended sentences as a sentencing option, with the remainder supporting their retention.

9 Submissions 8 (S. Mehanni), 11 (Emmanuel College—M. Azzopardi and A. Symons), 17 (F. and A. Waites), 26 (R. Thomas) [wholly suspended sentences only], 27 (D. A. Paul) [wholly suspended sentences only, with partially suspended sentences retained for cases involving exceptional circumstances].

10 Submission 8 (S. Mehanni).

11 Submission 11 (Emmanuel College—M. Azzopardi and A. Symons).

- the gap between an order to serve a straight term of imprisonment and a sentence of an equivalent term of imprisonment which is wholly suspended is too wide—a suspended sentence should have more of a punitive element;[12]
- courts should be permitted to attach conditions to suspended sentence orders;
- courts are using suspended sentences inappropriately in some cases—imposing a suspended sentence where a non-custodial penalty, such as a community-based sentence, may have been justified ('net-widening')—and this has serious implications on breach;
- the current breach provisions are too inflexible and risk injustice in individual cases (which, it was suggested, has led to the practice by some judicial officers of finding 'exceptional circumstances' where the offender's circumstances are merely changed rather than exceptional);
- suspended sentences put young people at risk of entering the adult correctional system, as on breach the young person must serve the sentence in an adult gaol unless transferred under the provisions of the *Children and Young Persons Act 1989*;[13] and
- wholly suspended sentences are inappropriate for serious crimes of personal violence, including rape, sexual assault and intentionally or recklessly causing serious injury.[14]

1.13 There was a particularly high level of support for introducing changes to allow courts to attach conditions to suspended sentence orders in appropriate cases. The need to address the fiction of a suspended sentence as a 'prison sentence' or a 'custodial sentence' was also identified as a priority issue by a number of those consulted.

---

12 Submission 29 (Professor van Groningen) argued that 'the imposition of a suspended sentence in a real way weakens the sentencing concept by not including a punitive element'. One submission argued there was a level of unfairness where an offender is held in custody on remand waiting for trial, while another offender receives a suspended sentence (and assuming he or she has not been held on remand, serves no time in custody): Submission 16 (Anonymous).

13 *Children and Young Persons Act 1989* (Vic) s 244(1).

14 See, for example, Submissions 3 (Anonymous), 5 (Y. Zole), 9 (J. Hemmerling), 11 (Emmanuel College—C. Peddle), 15 (Anonymous), 16 (Anonymous), 18 (T. Heselwood) [sexual offences], 23 (L. Francis), 40 (S. Rothwell) [murder, manslaughter, culpable driving (involving drug or alcohol use), serious violent offences, other violent offences, armed robbery, aggravated burglary, sexual offences (including rape), drug trafficking and drug cultivation], 46 (B. Pringle) ['crimes of violence, rape, sexual penetration of a child or adult, malicious, wilful or criminal damage to property and some anti-social offences involving firearms and weapons in the commission of an offence, assaults by kicking or in company'] and 47 (Anonymous) [suspended sentences should be available to violent offenders in exceptional circumstances only]. This view was also expressed by those who attended community forums and victims' focus groups. While 25 out of 112 responses on the feedback forms distributed to participants at the forums and focus groups supported the availability of suspended sentences for all offences, a high proportion expressed the view that they should not be available for serious sexual and other violent crimes, or should be available only in exceptional cases. Most respondents (72) believed that the power to suspend should be removed in the case of serious sexual offences (such as rape). A further nine respondents felt that only in exceptional cases is the power to suspend appropriate for the most serious sexual offences. Opinion was more divided on the question of whether suspended sentences should be available for the most serious violent (non-sexual) offences (such as culpable driving or intentionally/recklessly causing serious injury), with 35 respondents expressing the view that the power to suspend should not be available at all in such cases, and a further 43 that it should be available only in exceptional cases. Opinion was similarly divided in the case of other (non-rape) sexual offences, with 38 respondents favouring removal of the power to suspend in these cases, and 36 respondents favouring limiting the power to exceptional cases.

1.14 The Council's consultations highlighted that there is a clear disjuncture between the treatment at law of suspended sentences and community perceptions. As one submission observed:

> Suspended sentences are not seen by the public as the next best thing to a gaol sentence, they are not seen as a penalty, nor as a deterrent. Particularly by victims of crime-against-the-person, they are seen to be a 'slap on the wrist with a wet tissue paper'.[15] (emphasis in original)

1.15 Consultations with victims of crime[16] and various submissions[17] confirmed that the offender's receipt of a suspended sentence in some cases can make victims feel as if the offender has 'gotten off', while the victim and his or her family are left to deal with the consequences of this offending. The South Eastern Centre Against Sexual Assault (SECASA) reported that a suspended sentence could result in 'considerable distress' for a victim of sexual assault and lead victims to regard the legal system as 'unsupportive and a waste of time'.[18] A strong theme that emerged from all consultations held with victims of crime was the need for the impact of the offence on the victim to be properly understood and taken into account at sentencing.

The Interim Report

1.16 The responses to the Council's Discussion Paper and the consultation process led the Council to the view that merely tinkering with suspended sentences would not resolve some of the key concerns. The Interim Report reflected the Council's view that any recommended modifications to the use and operation of suspended sentences—such as introducing a conditional form of order—would fail to address more fundamental problems. These problems include the ambiguous nature of suspended sentences; the illogical nature of the reasoning process involved in making the order (requiring, on the one hand, a finding that a sentence of imprisonment rather than some other form of non-custodial order is appropriate, but on the other that the offender should not serve it, or in the case of a partially suspended sentence, should serve only part of it); and the effectiveness of the order in light of net-widening and sentence inflation effects and high rates of breach. The Council, like the Victorian Sentencing Review which reported in 2002, also shared concerns that sentences used as substitutes for actual prison time had eroded community confidence in sentencing and should be kept to a minimum.[19]

1.17 Taking these concerns into account, the Council recommended, as had the Victorian Sentencing Review before it, that sentencing orders should exist as sentences in their own right rather than being tied to imprisonment.[20] In line with this recommendation, the Council proposed that the existing range of intermediate sentencing orders should be rationalised, and a new range of sentencing orders should be introduced. It was envisaged that these new orders would change the form, but perform much the same function, as a suspended sentence and other existing intermediate orders, and would also be more conceptually coherent, transparent and flexible than existing orders.

---

15 Submission 27 (D. A. Paul).

16 Victims Focus Groups (Albury/Wodonga), 10 May 2005, (Geelong), 24 May 2005, (Ringwood) and 27 May 2005 and workshop with victims of crime representatives (Melbourne), 27 May 2005).

17 See, for example, Submissions 16 (Anonymous) and 52 (SECASA).

18 Submission 52 (SECASA).

19 Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 102.

20 Ibid 102.

1.18 The ultimate goal was to develop a range of orders that would deliver appropriate and flexible forms of sentences, but that would also be understandable to the broader community. Under this system, an offender sentenced to imprisonment would serve his or her sentence in prison. Other orders proposed would allow an offender to spend part of the sentence in prison and part in the community, or all of the sentence in the community under conditions of a more or less intensive nature, without the sentence being treated as if it was a form of imprisonment.

1.19 Following the release of the Interim Report, a high level of support has been expressed—largely by representatives of the courts and other members of the legal profession—for the retention of suspended sentences. Proponents of the retention of suspended sentences have rejected the Council's arguments for repealing the power to suspend terms of imprisonment. They have expressed concerns that the new orders proposed in the Interim Report will not fill the place of suspended sentences and that substantial and unsustainable increases in the prison population will result. Views put forward in submissions and during consultations, and the Council's recommendations, are discussed more fully in Chapter 2 of this Report.

1.20 One of the strong themes that emerged from those submissions supporting the retention of suspended sentences was that the real problem with suspended sentences was not with the order itself, but rather public perceptions of what the order was and what it was intended to achieve. It was argued that the education of the community, rather than the removal of suspended sentences as a sentencing option, would alleviate many of the community concerns, particularly if a power to attach conditions to suspended sentences was also introduced.

The Council's Final Recommendations

Retention vs Abolition

1.21 After reviewing the arguments both for and against such a move, the Council remains committed to the view that the power to suspend a term of imprisonment should be removed. The suspended sentence, in our view, is an inherently flawed order that has been overused, and in some cases misused. While historically the suspended sentence played an important role in diverting offenders from prison, in a sentencing system equipped with a range of alternatives, its retention is no longer necessary. We believe the changes proposed in our Interim Report will provide courts with a more credible, flexible and conceptually coherent range of intermediate sentencing orders that will overcome some of the existing problems with suspended sentences.

1.22 The Council hopes through these changes to achieve not only a better sentencing system, but a system that is more easily understandable to the broader community. We believe community concerns about suspended sentences are not simply due to a lack of understanding about the nature and purpose of these orders, but also to the intrinsically ambiguous nature of this and other orders used as substitutes for imprisonment. Education without reform, in our view, will therefore provide only a partial solution; making the language and structure of sentencing more logical, transparent and coherent also has an important role to play.[21]

---

[21] For a discussion of this form of 'truth in sentencing', see Julian Roberts, ' Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry (eds) *Reform and Punishment: The Future of Sentencing* (2002) 33.

1.23 The Council is confident that the new range of orders proposed will accommodate cases that previously might have resulted in a suspended sentence, without significant increases in the prison population. However, taking into account the concerns expressed regarding the possible consequences of the changes should the Council's assumptions about sentencing behaviour be proved wrong, the Council ultimately has come to the view that suspended sentences should not be abolished immediately, but phased out over a three-year period.

Benefits of A Transitional Period

1.24 Providing for a transitional period will enable sentencers, prosecutors, defence counsel and others involved in the administration of justice, such as correctional staff, to adjust to the new framework, and for a more realistic assessment to be made of what role, if any, suspended sentences perform in light of the existence of other alternatives to immediate imprisonment. A staged introduction of the new orders will also allow sufficient time to put the necessary funding and infrastructure in place to support the proper operation of the new orders. We accept that this will result in some degree of overlap between orders. However, we believe it is in the interests of justice, including the interests of those who will be sentenced during this transitional period, that the change to the new system be a gradual one. The nature of the modified range of intermediate orders, and the relationship between this new range of orders and suspended sentences over this transitional period, will be explored in the second part of our Final Report, to be released later this year.

Reforms to Suspended Sentences

1.25 The retention of suspended sentences—even for a limited time—has again raised questions of what improvements, if any, can be made to their operation. In our view suspended sentences are being overused and in some cases misused—diverting offenders not only from prison, but also from non-custodial orders.

1.26 We also share concerns expressed during consultations and in submissions that suspended sentences are generally inappropriate for serious violent offences—principally due to their failure to recognise the seriousness of these offences and the harm caused or risked. We note that the most concern was expressed about suspended sentences being used for offences involving some form of serious violence, or threatened violence.[22]

1.27 In this Report the Council has recommended a number of reforms aimed at better targeting suspended sentences to ensure their more appropriate use and restricting their availability for more serious offences over the transitional period. Changes recommended include:

- limiting the availability of suspended sentences for serious offences (as defined in section 3 of the *Sentencing Act 1991* (Vic)) by creating a presumption against suspension unless exceptional circumstances can be shown; and
- specifying factors in the legislation that a court must take into account in determining whether it is 'desirable in the circumstances' that a term of imprisonment be suspended, including:
  - whether, due to the seriousness of the offence, suspension of the sentence would fail to adequately meet the purposes of denunciation or deterrence;
  - the number of suspended sentences that the offender has received in the past and any prior breaches of those orders; and
  - the risk of the offender reoffending.

[22] See above n 14.

1.28 The Council acknowledges the high level of support, both following the release of the Discussion Paper and during our more recent consultations, for the introduction of a conditional form of suspended sentence order. Allowing courts to attach conditions may address some of the community concerns about suspended sentences, and possibly increase the success of the order through the use of therapeutic conditions. Such a move, however, would carry with it a number of risks, including possible sentence escalation, overlap between orders, and higher breach rates. It would also fail to address the substitutional nature of the order.

1.29 The Council is generally supportive of conditional orders that provide alternatives to immediate imprisonment. However, we continue to be concerned that the introduction of a power to attach conditions to suspended sentences, even if only for a transitional period, would carry with it real risks of sentence overlap and exacerbate existing problems of net-widening and sentence inflation.[23] The Council is also conscious of the time required to secure additional funding and resources to ensure the effective operation of such an order. The Council recommends that the new orders proposed in the Interim Report become operational in the second year of the transitional period; these, we believe, will perform substantially the same function as a conditional suspended sentence, albeit in a different form. For these reasons, we recommend that a power to attach conditions to suspended sentences should not be introduced. In cases where an offender has been convicted on more than one count of varying degrees of seriousness, courts will retain the option of combining a suspended sentence with a community-based order. In Part 2 of the Council's Final Report, we will present our recommendations in relation to the new range of intermediate orders and the suggested relationship between the proposed new orders and suspended sentence orders during the transitional period.

1.30 Much of the substance of a suspended sentence lies in the consequences for an offender on breach. A number of those who made submissions on the Discussion Paper argued for more flexible breach provisions. Greater flexibility, it was suggested, would allow for more just outcomes in individual cases and would also maximise the effectiveness of the order in diverting offenders from prison.

1.31 While the Council is sympathetic to the need to respond to the individual circumstances of offenders, ultimately we have reached the view that the 'exceptional circumstances' test on breach should be retained. To remove the certainty of activation of the original prison sentence imposed on breach in our view would be to remove one of the central pillars of a suspended sentence order: its capacity for special deterrence. The less certain the consequences of breach, the more the 'sword of Damocles' hanging over the offender's head

[23] Net-widening (as it applies to sentencing) and sentence inflation occur when offenders who previously would have been sentenced to a less severe sentence than imprisonment receive a suspended 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. See further [3.27]–[3.39].

is reduced to 'a butter knife'.[24] More flexible breach provisions also would provide offenders who have already been given the benefit of a suspended sentence with yet another opportunity denied to those who are sentenced to the same term of imprisonment, but ordered to serve it immediately.

1.32 In the Council's view the 'price' the offender agrees to pay for the suspension of what would otherwise have been an immediate term of imprisonment should be strict compliance with the order, and if that order is breached, the risk of serving the whole prison term suspended, save where exceptional circumstances can be demonstrated. The need to maintain a clear distinction between a suspended sentence on one hand (which is breached by further offending) and any conditions imposed (should such a power be introduced) assumes an even greater importance when considering what consequences should flow from breaching behaviour. Because the Council does not support the introduction of conditions, it has not been necessary to consider the vexed issue of breach. Where it is appropriate for greater emphasis to be placed on rehabilitation, but the consequences of breach of a suspended sentence are of particular concern to the court, the Council recommends that following the introduction of the new orders to be proposed in Part 2 of this Report, the proper course of action would be to make one of the alternative non-custodial orders in its place.

1.33 The Council's recommended reforms to suspended sentences are explored more fully in Chapter 4 of this Report.

---

[24] A suspended sentence of imprisonment is often described as hanging like the Sword of Damocles over the head of the offender: it will fall if he or she commits another offence during the operational period. A Canadian Court of Appeal has questioned the appropriateness of this metaphor as it relates to conditional sentences: 'This metaphor exaggerates the severity of a conditional sentence. Even if a conditional sentence could be equated to a sword, it does not hang by a thread, but by a rope. And the only way that this rope can break is if the offender himself cuts it. No one else can do so. This is within the exclusive and sole control of the offender. And with each passing day of the sentence, the "sword" shrinks until finally it becomes a butter knife'*: R v Brady* [1998] ABCA 7 [46] (Alberta Court of Appeal). However, unlike a suspended sentence, a conditional sentence is a sentence of imprisonment served in the community (as opposed to a sentence of imprisonment, the execution of which is suspended for a set period). The reference to the 'sword' becoming a 'butter knife' is therefore more applicable to a conditional sentence of imprisonment than to a suspended sentence of imprisonment. On breach of a conditional sentence the offender can only be ordered to serve the unexpired term of the sentence, whereas a breach of a suspended sentence of imprisonment may result in the offender being ordered to serve the whole period of imprisonment originally imposed.

Chapter 2: History and Current Use of Suspended Sentences

Introduction

2.1 In this chapter we briefly explore the introduction and development of suspended sentences in Victoria, the current legal framework, and trends in the use of suspended sentences in Victoria and other jurisdictions.

2.2 In the following chapters we explore the arguments for and against the retention of suspended sentence orders and options for reform, and present the Council's final recommendations. Part 2 of the Final Report will outline the Council's final recommendations on the other reforms proposed in the Interim Report, including the amalgamation of existing middle-range orders into two new forms of order. The Council believes that our reform proposals for suspended sentences should be considered in this broader context.

What is a Suspended Sentence?

2.3 A suspended sentence is a sentence of imprisonment imposed on an offender which is not activated. The imprisonment sentence may be either **wholly suspended**, in which case the offender does not serve any 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.

2.4 A suspended sentence involves two steps:

- the imposition of a term of imprisonment by the court on an offender; and
- an order that all or part of the gaol term be held in suspense for a set period ('the operational period').

2.5 If the offender commits another offence punishable by imprisonment during the operational period, then the court may order the offender to serve part or all of the original term of imprisonment.

The Historical Context

The Origins of the Suspended Sentence

2.6 The modern form of the suspended sentence first found its expression in 1891 in France in Bérenger's Bill,[25] and in the Belgian Lejeune Act of 1888, which came into force in 1889.[26] Both originated from a draft bill put before the French Senate in 1884 by Senator Bérenger, the purpose of which was stated to be:

---

[25] The title of the Bill was 'Bill on the progressive augmentation of sentences in cases of recidivism and on their mitigation for first time offences': Marc Ancel, *Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (1971) 11.

[26] Ibid 14.

> To mitigate the punishment sufficiently to avoid the dangers of imprisonment, while preserving the painful aspect of a penalty, which a simple fine does not generally achieve in our present moral state.[27]

2.7 The introduction of suspended sentences took place at a time when crime was increasing, but the usefulness of prison as punishment was coming under question.[28] Legal writers of the time saw a need for first-time offenders, usually sentenced to short terms of imprisonment, to be protected from the negative effects of detention and at the same time for more severe penalties to be imposed on repeat offenders. The nineteenth century also signalled a new emphasis on the rehabilitative potential of punishment, and consequently on more individualised forms of punishment.[29]

2.8 During debates on the 1890 French Bill, Senator Bérenger saw the potential of the suspended sentence of imprisonment:

> to create a special treatment for the man who has not previously been prosecuted and whose moral character, despite his offence, has remained sufficiently intact for society to have nothing to fear from his liberty.[30]

2.9 In other words, the new measure was intended to benefit first-time offenders,[31] who were not considered a danger to the community, with the ultimate aim of preventing recidivism.[32] Much as it is today, a suspended sentence was regarded as having an important deterrent effect on an individual offender, with the threat of the original sentence being imposed if he or she committed a further offence.[33]

2.10 No conditions of supervision were attached, as it was anticipated that offenders 'would rehabilitate themselves'.[34] The maximum period of imprisonment that could be suspended in France in practice was five years, while in Belgium suspension was only permitted under the 1899 law for sentences up to six months.[35] The operational period was fixed by law rather than determined by the sentencing judge.[36]

2.11 Following its introduction in France and Belgium, from the mid 1890s the suspended sentence was introduced in a number of countries, including across continental Europe and South America.

---

27 Ibid 18.

28 Ibid.

29 Ibid 12.

30 Session of the Senate, 6 March 1890, Bérenger's Report (*JO Doc Parl*, Annexe No. 27) 69, as cited in Ancel (1971), above n 25, 18.

31 The suspended sentence in its original form in France under Article 1 of the French legislation of 1891 was only permitted to be granted to someone with no previous sentence of imprisonment for a crime or for an 'ordinary offence', while in Belgium, under Article 9 of the 1888 legislation, suspension could only be granted to an offender with no previous sentence for a crime or offence regardless of whether this was a sentence of imprisonment or another sentence (for example, a fine): Ancel (1971), above n 25, 27–8.

32 Ibid 19.

33 Ibid 30.

34 Lejeune (1888) as cited in Ancel (1971), above n 25, 23. Ancel notes that the only form of supervision available would have been supervision by police, which had been abolished in France in 1885.

35 Ancel, above n 25, 26–8. Ancel suggests that in France 'the conditional sentence was advocated essentially for correctional penalties, which are, traditionally, up to five years' imprisonment or a fine', although it might also be applied to criminal penalties as long as the sentence imposed was imprisonment.

36 Ibid 31–2.

The History of Suspended Sentences in Victoria

2.12 Suspended sentences have not been a constant part of the Victorian sentencing landscape and have changed over time in their purpose and scope. Suspended sentences were first introduced in Victoria in section 532 of the *Crimes Act 1915* (Vic) and later in the *Crimes Act 1928* (Vic). They were initially limited to first-time offenders who were convicted and sentenced to imprisonment for a term not exceeding three years. Suspension was conditional upon the offender entering into a bond requiring him or her to be of good behaviour. The court could also impose conditions requiring the offender to be supervised by a probation officer, prohibiting the offender from associating with particular classes of person or from being in a particular location, requiring the offender to abstain from alcohol, or otherwise aimed at ensuring that the offender would lead 'an honest and industrious life'.[37]

2.13 Section 532 did not reappear in the 1958 *Crimes Act* (Vic). The general form of the suspended sentence of imprisonment was not reintroduced in Victoria until 1986 under sections 20–24 of the *Penalties and Sentences Act 1985* (Vic),[38] although in 1968 a conditional form of suspended sentence was introduced under section 13 of the *Alcoholics and Drug-Dependent Persons Act 1968* (Vic). Section 13 of the Act allowed the court to order a person who it was satisfied 'habitually used alcohol or drugs to excess' and who was convicted and sentenced to a term of imprisonment to be released upon entering a bond.[39]

2.14 The Victorian provisions in the *Penalties and Sentences Act 1985* were modelled on the English suspended sentence provisions.[40] Due to concerns that had arisen regarding the operation of suspended sentences in England, the Victorian power to suspend was restricted to prison sentences of 12 months or less.[41] A review carried out by the Starke Sentencing Committee in 1988 made a number of recommendations aimed at improving the operation of suspended sentences, including that:

- the length of sentences of imprisonment capable of being suspended be extended from 12 months to two years;
- the breaching provisions be overhauled; and
- the range of options available to courts on breach be expanded.[42]

2.15 In 1991 the *Penalties and Sentences Act 1985* (Vic) was repealed and the current *Sentencing Act 1991* (Vic) ('the Act') was introduced. Many of the recommendations made in the Starke Committee's report were reflected in the new legislation, including extension of the period of imprisonment that could be suspended to two years, and the inclusion of a conditional suspended sentence order for drug- and alcohol-addicted persons under section 28 of the Act.

---

37 *Crimes Act 1915* (Vic) and *Crimes Act 1928* (Vic) s 534(c).

38 Sections 20–24 of the *Penalties and Sentences Act 1985* came into operation on 12 February 1986.

39 *Alcoholics and Drug-Dependent Persons Act 1968* (Vic) s 13(1).

40 Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee, Volume 1* (1988) [6.12.2].

41 Ibid [6.12.1]; *Penalties and Sentences Act 1985* (Vic) s 21.

42 Victorian Sentencing Committee (1988), above n 40, 323–4.

2.16 In 1997 further substantial amendments were made to the Act by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic). Amendments relating to the use of suspended sentences in Victoria included:

- a further extension of the period of imprisonment that could be suspended from two to three years in the case of the higher courts; and
- changes to the breach provisions, including restricting the courts' discretion on breach by requiring the courts to order the offender, on breach, to serve the whole or part of the suspended term of imprisonment 'unless it 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'.[43]

Suspended Sentences in Other Jurisdictions

2.17 Victoria was not alone in abolishing and then reintroducing suspended sentences. New South Wales removed suspended sentences in 1974, only to reintroduce them in 2000 in line with recommendations made by the New South Wales Law Reform Commission.[44] Repeal of the section of the *Crimes Act 1900* (NSW) dealing with suspended sentences was recommended by the Criminal Law Committee in 1973.[45] The Committee expressed a preference for the 'common law bond' system which was seen as superior to suspended sentence orders in dealing with first-time offenders. An amended section 558 of the *Crimes Act 1900* (NSW) was intended to be a statutory form of the common law bond.[46]

2.18 More recently New Zealand removed suspended sentences as a sentencing option with the introduction of the *Sentencing Act 2002* (NZ). This change was made as part of broader reforms to sentencing and parole, including the abolition of the sentence of corrective training[47] and the replacement of periodic detention and community service with a community work order. Changes were also made to parole under the new *Sentencing Act 2002* and *Parole Act 2002* (NZ).[48] Since the abolition of the order and introduction of the new sentencing legislation, New Zealand has experienced a gradual increase in the proportion of sentences that are custodial from 8.2 per cent in 2001, to 8.4 per cent in 2002 and 8.6 per cent in 2003. The change from 2002 to 2003 alone represents about an 8 per cent increase

---

43 Section 31(5A) of the *Sentencing Act 1991* (Vic) was inserted by the *Sentencing and Other Acts (Amendment) Act 1998* (Vic) s 15.

44 New South Wales Law Reform Commission, *Sentencing* Report No. 79 (1996) [4.22]–[4.23].

45 New South Wales, Criminal Law Committee*, Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (1973) 15.

46 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 1974, 1363 as cited in New South Wales Law Reform Commission, *Sentencing* Discussion Paper 33 (1996) [9.60]. Under common law, a judge could release an offender for a fixed period of time, on the offender's own recognisance, with or without sureties, to be of good behaviour and to return for sentence if called upon to do so. For a discussion of section 558 of the *Crimes Act* (NSW) and its relationship with the common law bond, see Ivan Potas, *Sentencing Manual, Law Principles and Practice in New South Wales* (2001) 107–8.

47 Corrective training was a three-month custodial sentence for young offenders aged 16–19 years.

48 Under the previous *Criminal Justice Act 1985* (NZ), offenders sentenced to 12 months' imprisonment or less were released at the half-way point of their sentence. Other offenders on determinate sentences, with the exception of those involving a 'serious violent offence', were eligible for parole after serving one-third of their sentence, with a final release date two-thirds of the way through their sentence. Serious violent offenders, however, were not eligible for parole, and were released after serving two-thirds of their sentence. Under the *Parole Act 2002,* offenders who are sentenced to imprisonment for two years or less are released after serving half of their sentence. Offenders sentenced to determinate sentences of more than two years are eligible for parole, as was previously the case, after serving one-third of their sentence unless the court imposes a longer non-parole period. Offenders eligible for parole can now also be detained until the expiration of their entire sentence: Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (2004) [4.5].

in overall numbers of offenders receiving custodial sentences (from 7,930 in 2002 to 8,540 in 2003). The removal of suspended sentences as a sentencing option is believed to be one factor that may have contributed to this increase.[49]

2.19 Currently the power to order that a term of imprisonment be suspended exists in every jurisdiction in Australia.[50] There are differences as to how the power operates in those jurisdictions, including:

- the maximum length of the term of imprisonment that can be suspended;
- the operational period;
- whether additional conditions may attach to the order to suspend;
- the options available to a court on breach; and
- whether the sentence of imprisonment can be wholly or partially suspended.

2.20 Victoria is one of only three jurisdictions—together with Queensland and Western Australia—in which a court has no power to attach conditions or to make another form of conditional order in addition to the order to suspend if the offender is found guilty on a single count.[51] The sole condition with which an offender must comply is not to commit another offence during the operational period of the order. In Tasmania the court has a discretion to make the order 'subject to such conditions as the court considers necessary or expedient'.[52] The court may also make a community services order or probation order in respect of the offender.[53] In all other jurisdictions suspension is made conditional on the offender entering into a bond to be of good behaviour and to comply with other conditions of the bond, including those set by the court.

2.21 England and Wales also recently introduced a new form of suspended sentence order under the *Criminal Justice Act 2003* (UK). Under the new form of suspended sentence order, courts are required to attach at least one condition with which the offender must comply during what is referred to as 'the supervision period'.[54] Conditions available to the court include unpaid community work, supervision, activity requirements, program requirements, curfew requirements, residence requirements, mental health treatment requirements, and drug and alcohol treatment. A recent report released by the UK Home Office found that supervision was the most common condition attached to the new orders (44 per cent), followed by program requirements (24 per cent) and unpaid work (17 per cent).[55]

---

49 Ibid 104. The information on custodial sentences excludes offenders who received suspended sentences prior to abolition, and suspended sentences that were activated (due to the person offending within the suspension period); however, it includes offenders imprisoned for the offence that led to the activation of the suspended sentence.

50 *Crimes Act 1914* (Cth) s 20(1)(b); *Crimes (Sentencing) Act 2005* (ACT) s 12; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12; *Sentencing Act 1995* (NT) s 40; *Penalties and Sentences Act 1992* (Qld) s 144; *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) s 7; *Sentencing Act 1991* (Vic) s 27; *Sentencing Act 1995* (WA) s 76.

51 While a court in Victoria may make a community-based order in addition to a suspended sentence order, it cannot do so on a single count.

52 *Sentencing Act 1997* (Tas) s 24.

53 *Sentencing Act 1997* (Tas) s 8(1)(a)–(b). The court also has the power to fine an offender and to make a driving disqualification order in respect of the offender: *Sentencing Act 1997* (Tas) s 8(1)(c)–(d).

54 The 'supervision period' is separate from the 'operational period'. Both the supervision period and the operational period must be at least six months and not more than two years: *Criminal Justice Act 2003* (UK) c 44, s 189(3). However, the supervision period must not end later than the operational period of the order: *Criminal Justice Act 2003* (UK) c 44, s 189(4).

55 National Offender Management Service, Home Office (UK), *Offender Management Caseload Statistics: Quarterly Brief July to September 2005* (2006).

Suspended Sentences in Victoria: The Current Situation

Power to suspend a term of imprisonment

2.22 In Victoria, under section 27 of the *Sentencing Act 1991* (Vic) a court may suspend a term or terms of imprisonment not exceeding three years in the case of the County Court and Supreme Court, or two years in the case of the Magistrates' Court,[56] wholly or partly 'if satisfied that it is desirable to do so in the circumstances'.[57] The prison sentence can be suspended in the higher courts for up to three years, or two years in the Magistrates' Court,[58] and this period of suspension is referred to as 'the operational period'. The discretion to suspend a term of imprisonment has been exercised widely by Victoria's criminal courts, with 31 per cent of people sentenced in the higher courts and 7 per cent of those sentenced in the Magistrates' Court receiving a suspended sentence. The use of suspended sentences in Victoria is discussed further at [2.32]–[2.43].

2.23 The courts' discretion to suspend is generally broad. However, an order to suspend may only be made where the sentence of imprisonment, if unsuspended, 'would be appropriate in the circumstances having regard to the provisions of [the] Act'.[59] The Court must therefore have regard to the general purposes of sentencing and the factors set out in section 5 of the *Sentencing Act 1991* (Vic), and section 5(3) which provides that 'a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'.[60]

2.24 A court may only suspend a term of imprisonment. Therefore, while a court has the power under section 32 of the Act to make a youth training centre order or youth residential centre order if the offender is under 21 years at the time of sentencing, it has no power to suspend those orders.[61]

---

56 *Sentencing Act 1991* (Vic) s 27(2).

57 *Sentencing Act 1991* (Vic) s 27(1).

58 *Sentencing Act 1991* (Vic) s 27(3).

59 *Sentencing Act 1991* (Vic) s 27(3).

60 While under section 5(4) a court must not impose a sentence requiring the confinement of an offender (for example, in a correctional facility) 'unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender', in *R v Haddara* (1997) 95 A Crim R 108 Justice Callaway expressed the view that rather than suggesting a choice between, among other things, a suspended and an unsuspended sentence of imprisonment, it was 'more likely that the word "confinement" [in s 5(4)] was chosen in order to embrace custodial sentences other than imprisonment (such as youth training centre orders and youth residential centre orders)'. Therefore 'unlike s5(3), s 5(4) may not be directed at all to the choice between a suspended and an unsuspended sentence': at 111. See also *DPP v Alateras* [2004] VSCA 214 (Unreported, Callaway, Eames and Nettle JJA, 17 December 2004), [6] fn 3, Eames J.

61 In 2003–04, almost 50 people sentenced in Victoria's higher courts attracted a youth training centre order, accounting for 2 per cent of all people sentenced. In the Magistrates' Court, 235 people were sentenced to detention in a youth training centre, accounting for 0.3% of all people sentenced during 2003–04: Department of Justice, unpublished data.

Limitations on power to suspend

2.25 There are some circumstances in which a suspended sentence may not be ordered. For example, the courts are prohibited under the *Sentencing Act 1991* (Vic) from suspending that part of a sentence of imprisonment ordered to be served in prison as a result of an offender breaching a combined custody and treatment order (CCTO),[62] an intensive correction order (ICO),[63] or a suspended sentence order.[64] If a court orders the unexpired part of the sentence (in the case of CCTOs and ICOs) or the whole sentence or part sentence held in suspense (in the case of a suspended sentence) to be served in prison in the event of breach, the custodial term must be served immediately, and unless the court otherwise orders, cumulatively on any other term of imprisonment previously imposed.[65]

2.26 Under the *Crimes Act 1958* (Vic), there is no power to suspend a prison term imposed on an offender convicted of:

- carrying a firearm when committing an indictable offence;[66] or
- carrying an offensive weapon when committing a sexual offence.[67]

Relationship with other orders

2.27 When an offender receives a suspended sentence for a single offence, the only other sentencing order the court may impose in Victoria is a fine.[68] In other words, a court may not sentence an offender to a suspended sentence of imprisonment and, for example, a community-based order for a single offence. In other jurisdictions (for example Tasmania),[69] a suspended sentence may be combined with other orders, such as a community service order and a probation order.

2.28 In 2003–04, less than one per cent (18 out of nearly 8,000) of all charges proven in the higher courts attracted a suspended sentence in combination with a fine.[70] Fine amounts ranged from $500 to $10,000. In the majority of cases—17 of the 18 orders made—the fine was combined with a wholly rather than partially suspended sentence.[71] Over the same period, only one charge proven attracted a sentence of imprisonment in combination with a fine ($12,800).[72]

---

62 *Sentencing Act 1991* (Vic) s 18W(8).

63 *Sentencing Act 1991* (Vic) s 26(4).

64 *Sentencing Act 1991* (Vic) s 31(6).

65 *Sentencing Act 1991* (Vic) ss 18W(8) (CCTO), 26(4) (ICO), 31(6) (suspended sentence). Note that in the case of CCTOs, if the offender is still serving the original custodial part of the sentence, the part of the sentence which was to be served in the community, and which the court orders on breach to be served in custody, is to be served immediately on the completion of the original custodial part of the sentence.

66 *Crimes Act 1958* (Vic) s 31A.

67 *Crimes Act 1958* (Vic) s 60A.

68 Under section 49(1) of the *Sentencing Act 1991* (Vic) a court may fine an offender in addition to any other sentence imposed—including a suspended sentence.

69 *Sentencing Act 1998* (Tas) s 8(1). In the Supreme Court of Tasmania in 2000, 55 per cent of wholly suspended sentences and 47 per cent of partly suspended sentences were combined with some other order (29 per cent with probation, 12 per cent with community service orders, 9 per cent with compensation orders, and 2 per cent with fines or other conditions): Kate Warner, *Sentencing*, Issues Paper No. 2, Tasmania Law Reform Institute (2002) 67.

70 Department of Justice, unpublished data. Equivalent data for the Magistrates' Court are unavailable at this time.

71 Ibid.

72 Ibid.

2.29 Under Part 4 of the *Sentencing Act 1991* (Vic), other orders may be made in addition to the sentence imposed. These include:

- a restitution order, which may require:
  - a person in possession or control of stolen property to return the property;
  - an offender to return the stolen property or, if it has been sold, the proceeds of the sale; or
  - payment of a sum to another person, out of money taken from the offender's possession upon his or her arrest.
- a compensation order for personal injury, requiring a person to pay an amount for:
  - pain and suffering experienced by a victim as a direct result of the offence; and/or
  - some or all of a victim's counselling, medical or other costs.
- a compensation order for property loss or damage, requiring a person to pay compensation for the loss, destruction of, or damage to property as a result of the offence.
- an order for recovery of assistance provided under the *Victims of Crime Assistance Act 1996* (Vic).
- the cancellation or suspension of a driver's licence.

2.30 A court also has the power under the *Confiscation Act 1997* (Vic) to make a confiscation order as well as impose a sentence. Any property used to commit an offence or any property obtained with the proceeds of an offence (for example, a house) can be confiscated by the state.

2.31 Under changes introduced in 2004, a court in sentencing an offender for specified sexual offences may also make a sex offender registration order which requires an offender to comply with reporting requirements under the *Sex Offenders Registration Act 2004* (Vic). For some offences the obligation to comply with the reporting requirements under that Act is automatic.[73]

---

[73] The list of registrable offences when committed against children includes serious sex offences involving, for example, sexual penetration, assault with intent to rape, indecent assault, and possession or production of child pornography. The legislation also provides for an offender who commits a sexual offence against an adult to be registered. The offender in this case must be sentenced as a 'serious sexual offender', which means someone who has been convicted of two or more sexual offences or at least one sex offence and one violent offence for which a custodial sentence was imposed and who is then found by the courts to have committed another sex offence, for example rape or indecent assault.

The Use of Suspended Sentences in Victoria and Other Jurisdictions

Use of Suspended Sentences

INTRODUCTION

2.32 As we noted in our Discussion Paper, suspended sentences are an increasingly popular sentencing disposition in Victoria.[74] In 1990, suspended sentences accounted for just 4 per cent of sentences received by defendants proven guilty in the Magistrates' Court in Victoria. By 2003–04 had increased to 7 per cent.[75] Similarly in the higher courts, suspended sentences accounted for 12 per cent of all defendants found guilty in 1986 and increased to 31 per cent by 2003–04.[76] In 2003–04, a total of 6,227 gaol terms were suspended in Victoria,[77] representing around 7 per cent of all defendants found guilty.

2.33 In New South Wales, suspended sentences account for around 4 per cent of penalties handed down by all courts,[78] and in New Zealand, prior to their abolition, the proportion of sentences that were suspended was between 3 per cent and 4 per cent.[79] In Canada, based on 2003 figures, around 5 per cent of defendants are sentenced to a conditional sentence (a sentence substituted for immediate imprisonment, similar in nature to an intensive correction order).[80]

SUSPENDED SENTENCES IN THE HIGHER COURTS

2.34 The Australian Bureau of Statistics (ABS) has collected data on the use of suspended sentences and other orders across all jurisdictions in Australia.[81] The ABS reported that in the higher courts in Victoria in 2004–05, around 24 per cent of offenders received a wholly suspended sentence as their principal sentence, compared with a national average of 17.4 per cent.[82] Two jurisdictions—South Australia and Tasmania—reported a significantly higher proportion of defendants receiving a suspended sentence in the higher courts than Victoria (48.2% and 35.7% respectively).[83] Queensland reported the lowest usage, with 11.5 per cent

---

74 The Council's full findings, including the use of suspended sentences for particular offence categories and trends in their use in Victoria, is reported in the Council's Discussion Paper: Sentencing Advisory Council (2005), above n 3, Chapter 5.

75 Sentencing Advisory Council (2005), above n 3.

76 Ibid.

77 Ibid.

78 Georgia Brignell and Patrizia Poletti, *Suspended Sentences in New South Wales* (2003) 29 *Sentencing Trends and Issues*.

79 Spier and Lash (2004), above n 48.

80 Statistics Canada, 'Cases in adult criminal court by type of sentence; total convicted cases, prison, conditional sentence, probation, by province and Yukon Territory 2003', <http://www40.statcan.ca/l01/cst01/legal22a.htm>, visited on 26 April 2006. Adult Criminal Court Survey data are not reported by Manitoba, Northwest Territories and Nunavut. As Quebec does not report conditional sentence data, the overall proportion of defendants sentenced to a conditional sentence may be slightly higher.

81 Australian Bureau of Statistics, *Criminal Courts, Australia 2004–05* Catalogue No. 4513.0 (2005). The ABS has adopted unique counting rules for the purposes of national comparability. For an explanation of the differences between the counting rules of the ABS and those adopted by the Council, see Sentencing Advisory Council (2005), above n 3, Appendix 5.

82 Ibid.

83 Ibid.

of offenders receiving a suspended sentence as their principal sentence, followed by the Northern Territory (12.6%), New South Wales (13.9%), Western Australia (16.3%), and the Australian Capital Territory (21%).[84]

2.35 Partially suspended sentences represented only a small proportion of all suspended sentence orders. In 2003–04, the Victorian higher courts suspended a total of 688 imprisonment terms, of which 21 per cent (146) were partially suspended.[85]

2.36 In Australia suspended sentences are a significantly more popular sentencing option than in England and Wales, where until April 2005, the option to suspend was available only in exceptional circumstances.[86] Over the period April–June 2005 only 2.5 per cent of offenders sentenced in the Crown Court received a wholly suspended sentence, compared to around 35 per cent of offenders who received a community sentence, fine, or absolute or conditional discharge and around 60 per cent who were sentenced to a term of imprisonment to be served in detention or in the community.[87]

2.37 In comparison, in 2003–04 in the higher courts in Victoria, only 19 per cent of defendants received a non-custodial sentence,[88] such as a fine, community-based order or adjourned undertaking, while around 46 per cent were sentenced to a term of imprisonment to be served in detention or in the community.[89] Although there are jurisdictional differences between the Crown Court and the Victorian higher courts, these figures suggest that while there is a higher rate of imprisonment in England, non-custodial sentencing options, and in particular forms of community sentences (the sanction received by some 29.5 per cent of offenders) are also more frequently utilised in the higher courts in England and Wales than in Victoria. In Canada (based on 2003 figures) only around 5 per cent of offenders were sentenced to a conditional sentence, with over a third (35 per cent) receiving immediate imprisonment and 45 per cent receiving probation, although these sentencing outcomes were across all courts.

SUSPENDED SENTENCES IN THE MAGISTRATES' COURT

2.38 Based on ABS findings, at the Magistrates' Court level, Victoria ranks relatively highly in terms of the proportion of sentences handed down that are 'custodial'. Of sentences in the Victorian Magistrates' Court, 13.5 per cent are custodial, compared to, for example, New South Wales at 10 per cent.[90] As suspended sentences are classed by the ABS as 'custodial', the high proportion of custodial orders may be due in part to the numbers of suspended sentence orders made, as approximately 7 per cent of defendants found guilty in

---

84 Ibid.

85 Department of Justice, unpublished data.

86 The new *Criminal Justice Act 2003* suspended sentences provisions (ss 189–194 *Criminal Justice Act 2003* (UK)), which removed the requirement that 'exceptional circumstances be shown before an order to suspend could be made, came into operation on 4 April 2005 (*The Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005* (UK), SI 2005/950).

87 National Offender Management Service, Home Office, *Sentencing Statistics Quarterly Brief: England and Wales: April to June 2005 (Crown Court and Magistrates' Courts)* [As originally published—The Home Office has advised that these figures will be revised] (2005).

88 Sentencing Advisory Council (2005), above n 3. Sanctions classed as 'non-custodial' in the *Sentencing Act 1991* (Vic) include community-based orders, fines and adjourned undertakings. They do not, however, include wholly suspended sentences, which are treated as a form of custodial order.

89 Ibid.

90 ABS (2005), above n 81.

Victoria in the Magistrates' Court receive a wholly or partially suspended sentence,[91] compared with only around 5 per cent of defendants in the New South Wales Magistrates' Court.[92]

2.39 As with the higher courts, partially suspended sentences represent only a small proportion of all suspended sentences (12 per cent in 2003–04).[93]

The Diversionary Impact of Suspended Sentences

2.40 One of the benefits of suspended sentences is their capacity to divert offenders from prison, thereby decreasing the prison population, while providing an opportunity for offenders to rehabilitate in the community. The diversionary potential of suspended sentences is directly related to how they are being used (such as in place of immediate terms of imprisonment or as alternatives to non-custodial orders), rates of breach, and restoration rates on breach. If suspended sentences were to be used only in place of an immediate prison term, and breach and restoration rates were relatively low, the diversionary impact of suspended sentences would be high. However, high rates of breach and restoration of the original prison sentence imposed may result in the diversionary effects of the order being minimal—particularly if accompanied by a degree of net-widening from non-custodial orders.

2.41 The Council examined breach rates in a study reported in its Discussion Paper.[94] Table 1 and Figures 1 and 2 summarise the Council's findings on the overall proportion of suspended sentences that were breached by further offending and the proportion of these that resulted in the offender being ordered to serve the original prison term imposed. Around 36 per cent of offenders who received a suspended sentence in the higher courts were found to have subsequently breached the sentence. Of these offenders, just over three-quarters (76%) had their sentence wholly or partly restored. Rates of breach in the Magistrates' Court were slightly lower, with around 31 per cent of offenders breaching the order, and just under two-thirds (64%) of these having the original sentence restored. When considered in light of possible net-widening effects found by the Council, and discussed further at [3.33]–[0], the effectiveness of suspended sentences—both in terms of deterring offenders from reoffending and diverting offenders from prison—may be questioned.

Table 1: Breach and restoration rates, by court level (higher courts 1998–99, Magistrates' Court 2000–01)[95]

	Breach rate		Restoration rate	
	%	No.	%	No.
Higher courts	36%	175	76%	133
Magistrates' Court	31%	1,519	64%	969

91 In the Discussion Paper released in 2005, the Council reported that 7 per cent of defendants received a wholly suspended sentence of imprisonment in 2003–04. The Department of Justice has since revised the sentencing statistics provided to the Council and wholly and partially suspended sentences are reported to account for 7 per cent of all defendants sentenced in 2003–04. The revised figures accord with the information presented by the Council on its online Sentencing Monitoring resource.

92 NSW Bureau of Crimes Statistics and Research, 'NSW Local Court: Penalty for Principal Offence 2004', <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_lc_04>, visited on 26 April 2006.

93 Sentencing Advisory Council (2005), above n 3.

94 For a discussion of the Council's methodology and findings, see Sentencing Advisory Council (2005), above n 3, [4.59]–[4.92].

95 Sentencing Advisory Council (2005), above n 3.

Figure 1: Suspended sentences in the higher courts 1998–99

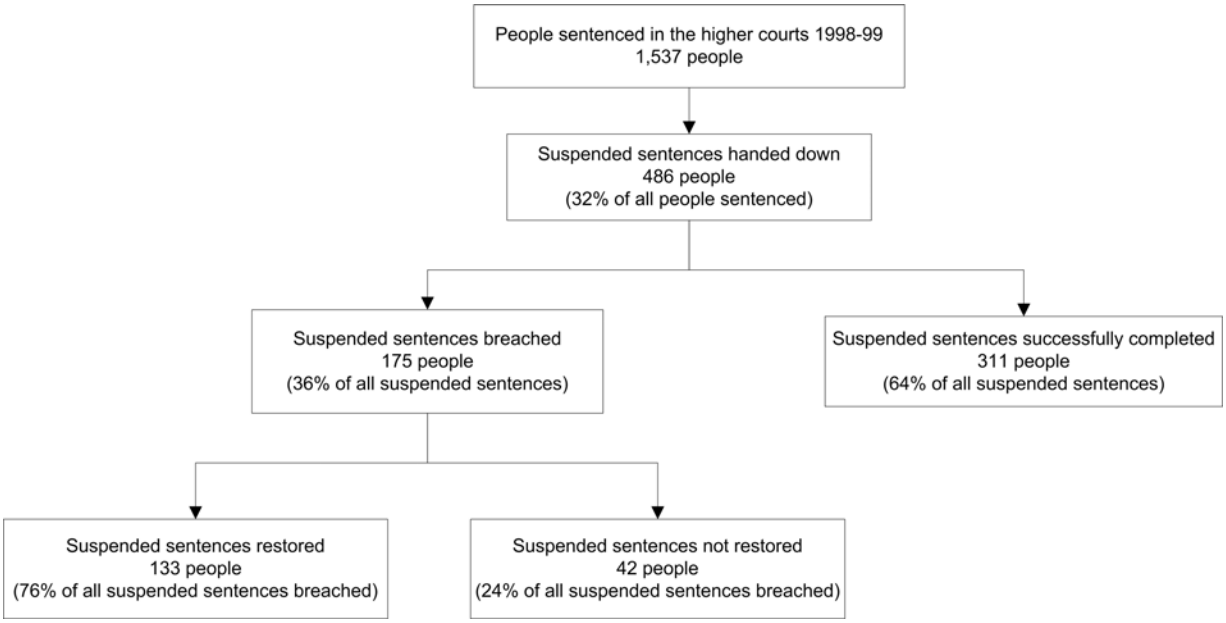
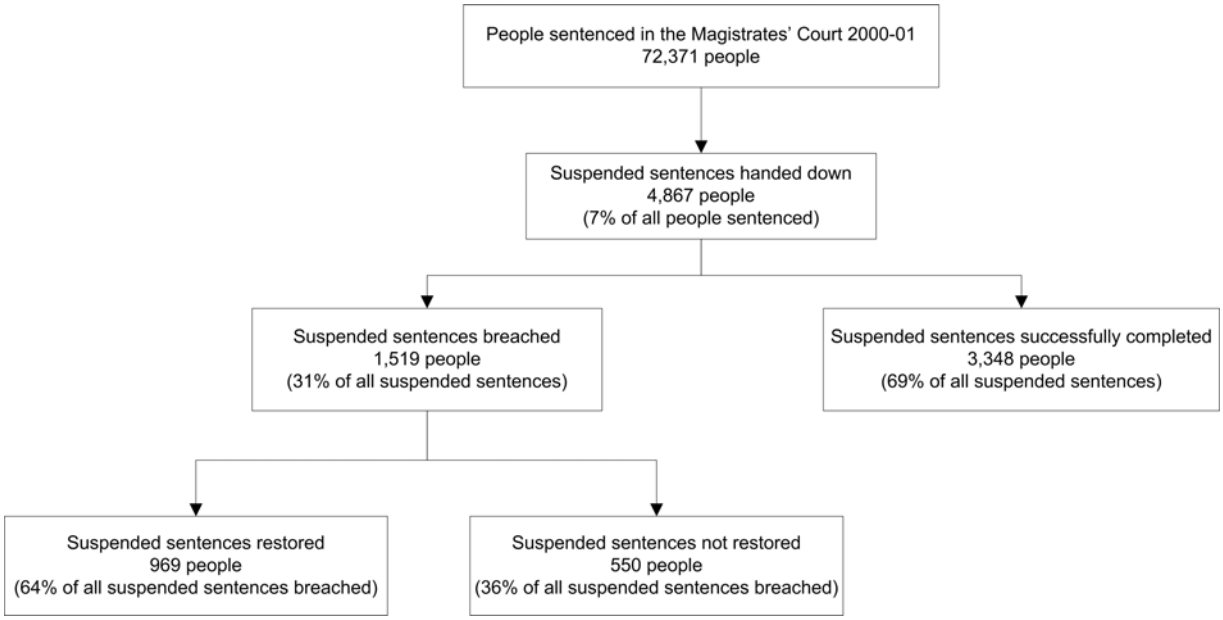


Figure 2: Suspended sentences in the Magistrates' Court 2000–01



2.42 As Table 2 shows, when compared to other correctional orders, suspended sentences appear to have a relatively low breach rate. However, unlike suspended sentences, other orders can be breached both by further offending and by failing to comply with other conditions of the order.

Table 2: Breach rates by order type[96]

Order	Breach rate
Community-based orders[(a)]	46%
Parole orders [(a)]	39%
Intensive correction order [(a)]	38%
Suspended sentences (higher courts)[(b)]	36%
Suspended sentences (Magistrates' Court) [(b)]	31%
Community based orders—work only [(a)]	29%

(a) These breach rates are for orders made over 1999–2000 and were sourced from Arthur Anderson Business Consulting, *Review of Community Correctional Services in Victoria: Appendix—Volume 3*, Department of Justice (Victoria) (2000).

(b) The breach rates for suspended sentences in the higher courts are for orders made over 1998–99 and for the Magistrates' Court 2000–01 and were sourced from the Council's study of breach rates. The Council's methodology and findings are reported in the Council's *Suspended Sentences: Discussion Paper* (2005).

2.43 When breach rates are broken down according to whether the breach was due to further offending or because of a failure to comply with other conditions of the order, a different trend is evident. Table 3 and Figure 3 show a much higher rate of breach by further offending for suspended sentences than for other correctional orders. For example, based on the breach data represented in Table 3, 19 per cent of community-based orders and 15 per cent of parole orders were breached by further offending (with or without other breaches of conditions) compared to a breach rate for suspended sentences of 36 per cent in the higher courts, and 31 per cent in the Magistrates' Court. This suggests that suspended sentences are in fact less successful than other forms of orders served in the community as a means of preventing reoffending. The special deterrent effect of suspended sentences may therefore be overstated.

96 Breach information for community-based orders, intensive correction orders and parole orders has been sourced from the Arthur Anderson Business Consulting, *Review of Community Correctional Services in Victoria: A Draft Report to the Office of the Correctional Services Commissioner: Department of Justice* (2000).

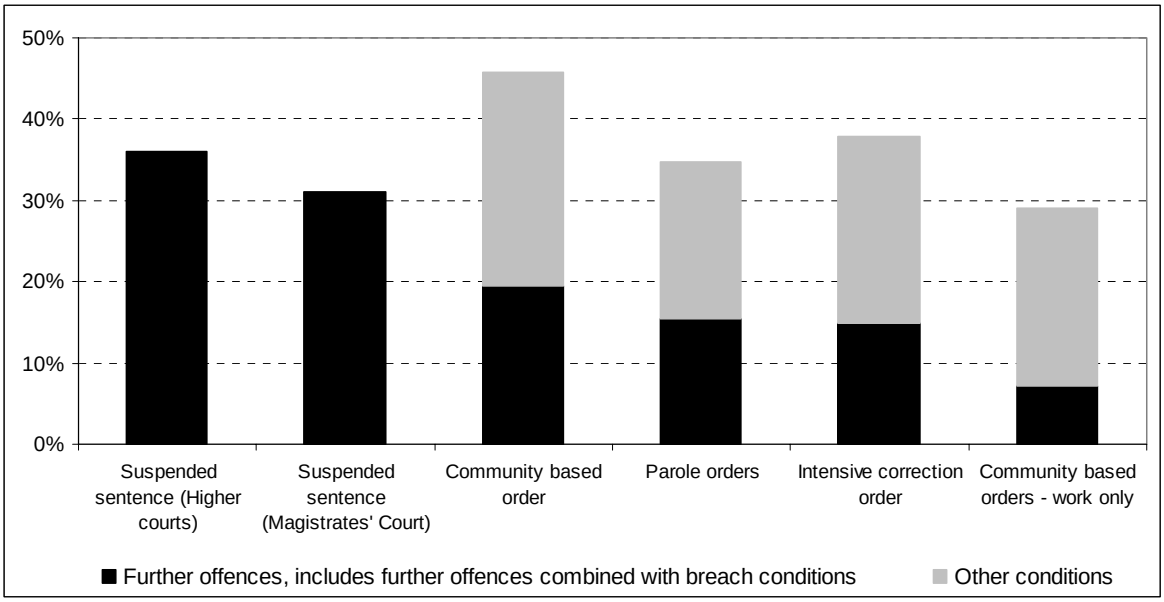
Table 3: Breach rates by order type and breach type

	Further offences	Further offences and other conditions	Other conditions
Community-based orders[(a)]	6%	13%	26%
Parole orders [(a)]	4%	11%	19%
Intensive correction order [(a)]	5%	10%	23%
Suspended sentences (higher courts)[(b)]	36%	–	–
Suspended sentences (Magistrates' Court) [(b)]	31%	–	–
Community based orders—work only [(a)]	2%	5%	22%

(a) These breach rates are for orders made over 1999–2000 and were sourced from Arthur Anderson Business Consulting, *Review of Community Correctional Services in Victoria: Appendix—Volume 3*, Department of Justice (Victoria) (2000).

(b) The breach rates for suspended sentences in the higher courts are for orders made over 1998–99 and for the Magistrates' Court 2000–01 were sourced from the Council's study of breach rates. The Council's methodology and findings are reported in the Council's Discussion Paper (2005).

Figure 3: Breach rates by order type and breach type



Chapter 3: The Debate: Are Suspended Sentences Necessary?

Introduction

3.1 As discussed in Chapter 2, suspended sentences have proved to be an increasingly popular sentencing option in the Victorian courts over the years. In 1990 wholly suspended sentences accounted for just 4 per cent of sentences received by defendants proven guilty in the Magistrates' Court in Victoria.[97] This increased to 7 per cent in 2003–2004.[98] In the higher courts in 1986, 12 per cent of all defendants sentenced received a suspended sentence (either wholly or partially suspended), compared with 31 per cent of all defendants sentenced in 2003–04.[99]

3.2 Assuming that the courts are using suspended sentences as intended in all cases (that is, in place of imprisonment rather than in circumstances where a non-custodial order would have been appropriate), the outright abolition of suspended sentences may have a significant effect on the prison population. Based on data for 2003–04, it could result in more than 6,000 additional prisoners in Victoria each year.[100] As a consequence, the adult imprisonment rate could increase by around 170 per cent—from 73 per 100,000 total population, to 198 per 100,000 total population (including those on remand). Even if it is accepted that some net-widening from non-custodial orders occurs, this could still result in a significant number of offenders being ordered to serve an immediate term of imprisonment.[101] The abolition of suspended sentences, without accompanying reforms to existing sentencing orders, would therefore be likely to have significant consequences for sentencing in Victoria.

3.3 The recent Sentencing Review initially considered the abolition of suspended sentences.[102] However, those consulted following the release of the Review's Discussion Paper were overwhelmingly in favour of their retention. The order was seen as having an important place in the sentencing hierarchy for first-time offenders, or offenders with limited criminal histories, who have committed serious offences but have demonstrated that they have been rehabilitated and do not require a program intervention.[103] The Review recommended that suspended sentences be retained in Victoria, with some modifications to the breach provisions.

3.4 The Council's Interim Report on suspended sentences recommended the abolition of suspended sentences as part of a package of broader reforms to intermediate sentencing orders in Victoria. In making this recommendation, we accepted many of the past criticisms of suspended sentences, including concerns about net-widening and sentence inflation. The Council also agreed that the making of a suspended sentence order involves a somewhat illogical reasoning process: on the one hand the court must take into account all the circumstances of the offence and the offender in determining that a term of imprisonment

---

97 Sentencing Advisory Council (2005), above n 3.

98 Ibid.

99 Ibid.

100 Ibid.

101 On the net-widening effects of suspended sentences, see [3.27]–[3.39].

102 Arie Freiberg, *Sentencing Review: Discussion Paper* (2001) 62.

103 Freiberg (2002), above n 17, 123.

should be imposed, and on the other hand, it must take these same factors into account in determining that the sentence should be suspended. The Council shared concerns, identified by the recent Sentencing Review, that the substitutional nature of suspended sentences and other orders substituted for immediate prison time was affecting community confidence in the justice system. Like the Sentencing Review, we called for such sentences to exist as sentences in their own right. We argued that by introducing two new forms of order—an imprisonment plus release order (IRO) and a correction and supervision order (CSO)—a court could achieve the same outcome without maintaining the fiction of a suspended sentence as a 'prison' sentence.

3.5 A number of those who made submissions and participated in consultations on the Interim Report were not persuaded that the Council's concerns provided a sufficient basis for removing suspended sentences, or that the new orders recommended would take the place of the suspended sentence. Many of the arguments advanced reflected those in our Discussion Paper. We revisit these arguments, together with those for removing the power to suspend, below.

The Case for Abolition

Introduction

3.6 While suspended sentences are now an established part of the sentencing landscape in Victoria and elsewhere, they are also one of the most commonly criticised sentencing orders. As one commentator, writing about the introduction of the suspended sentence in England, remarked:

> The suspended sentence has clearly caused great confusion to all concerned with it—to the sentencer contemplating its use, the offender often—despite the statutory incantation—unable to grasp its implications, and the population at large puzzled by its intended message.[104]

3.7 A minority of those who participated in consultations[105] and who made submissions in response to the Discussion Paper[106] and the Interim Report[107] supported the abolition of suspended sentences. In this section we briefly revisit some of the criticisms of suspended sentences and arguments for the abolition of suspended sentences, before discussing the current review and the Council's final recommendations.

---

104 D A Thomas, 'Developments in Sentencing 1964–1973' (1974) *Criminal Law Review* 685, 688.

105 See above n 8. Of the 118 feedback forms received, only nine favoured the abolition of suspended sentences as a sentencing option, with the remainder supporting their retention.

106 Submissions 8 (S. Mehanni), 11 (Emmanuel College—M. Azzopardi and A. Symons), 17 (F. and A. Waites), 26 (R. Thomas) [wholly suspended sentences only], 27 (D. A. Paul) [wholly suspended sentences only, with partially suspended sentences retained for cases involving exceptional circumstances].

107 Submissions 3 (Confidential), Submission 5 (T. McCallister), 8 (G. Leech) and 9 (R. Thomas).

Perceptions of Suspended Sentences

3.8 As the Victorian Sentencing Review recognised, while in the eyes of the law a suspended sentence is a significant penalty, in the public mind the offender awarded such a sentence is regarded as 'getting off', 'walking free', or as having received a 'slap on the wrist.'[108] In the Council's Discussion Paper we noted that the representation of offenders as 'walking free' when a suspended sentence was imposed was a common one.[109] A number of articles also described offenders receiving suspended terms of imprisonment as having been 'spared jail'[110] and as 'avoiding'[111] or 'dodging' jail.[112]

3.9 The Council's more recent consultations and submissions again highlighted that there is a clear disjuncture between the treatment at law of suspended sentences as a severe penalty and community perceptions:

> As an ordinary citizen observing the operation of the system I find the use of suspended sentences as the single most abhorrent factor in the administration of justice in Victoria…The community expends time, money and effort in the provision of a police service and justice system. That system investigates crime, presents evidence to the court and the court then finds that an offence punishable by imprisonment has been committed by the defendant. It then lets him or her go free. The community does not consider that to be justice. I do not consider that to be justice…A suspended sentence is not a penalty.[113]
>
> Suspended sentences are <u>not</u> seen by the public as the next best thing to a gaol sentence, they are <u>not</u> seen as a penalty, nor as a deterrent. Particularly by victims of crime-against-the-person, they are seen to be a "slap on the wrist with a wet tissue paper".[114] (emphasis in original)

---

108 Freiberg (2002), above n 19, 120.

109 This search was conducted for the period 7 December 2002–6 December 2004. Headlines included: 'Cash-spree mum walks from court', *Herald Sun* (Melbourne), 5 April 2003, 15; 'As killer son is jailed for 30 years and wife walks free, angry family says … SHE WON'T GET A CENT', *Herald Sun* (Melbourne), 11 April 2003; 'Spy affair closes as prostitute walks free', *Herald Sun* (Melbourne), 5 April 2003, 15; 'ATM thieves go free', *Herald Sun* (Melbourne), 6 October 2004; 'Headbut man walks free', *Herald Sun* (Melbourne), 24 November 2004, 11; 'One in 10 rapists walk free', *The Age* (Melbourne), 16 October 2004; 'Priest walks free on sex assault charges', *The Age*, 16 December 2003; 'Mercy-death husband walks free from court', *The Age* (Melbourne), 25 July 2003; 'Tomahawk attack: pensioner walks free', *The Age* (Melbourne), 25 April 2003. The phrase also appeared in the text of a number of articles.

110 Headlines included: 'Tobacco haul man spared jail', *Herald Sun* (Melbourne), 3 April 2003, 28; 'Death race hoon spared', *Herald Sun* (Melbourne), 14 November 2003, 12; 'Anorexic twin spared prison: suspended sentence after treatment vow', *Herald Sun* (Melbourne), 9 November 2004, 3; and 'Sex abuser spared jail', *Herald Sun* (Melbourne), 30 November 2004, 12.

111 Headlines included: 'Racing thief avoids jail', *Herald Sun* (Melbourne), 10 April 2003, 31; 'Abalone poacher avoids jail term', *Herald Sun*, 23 September 2003, 22; 'Crime mum avoids prison', *Sunday Herald Sun* (Melbourne), 2 November 2003, 35; 'Net pirates avoid jail', *Herald Sun* (Melbourne), 19 November 2003, 2; 'Chemist avoids prison', *Herald Sun* (Melbourne), 17 July 2004, 13; 'Chef broke into woman's home to attack her as she slept, but … Rape intruder avoids prison', *Herald Sun* (Melbourne), 24 July 2004, 2; 'Wedding thief avoids prison', *Herald Sun* (Melbourne), 2 September 2004, 31; 'Crim avoids extra jail for gun in cell' *Herald Sun* (Melbourne), 29 September 2004, 5; 'Outcry from crime victim groups as teacher avoids jail', *The Age* (Melbourne), 11 November 2004; 'Repentant ATM installers avoid jail over $70,000', *The Age* (Melbourne), 8 October 2004; 'Parents' pardon helps son avoid jail', *The Age* (Melbourne), 11 September 2004; 'Role model' Muir avoids jail, warned to behave', *The Age* (Melbourne), 16 March 2003; and 'Children in hot car: mother avoids jail', *The Age* (Melbourne), 24 February 2004.

112 Headlines included: 'Barber dodges locks', *Herald Sun* (Melbourne), 9 October 2004, 14; and 'Woman dodges jail term: teacher sex fury', *Herald Sun* (Melbourne), 11 November 2004, 1.

113 Discussion Paper Submission 26 (R. Thomas).

114 Discussion Paper Submission 27 (D. A. Paul).

3.10 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. However, in contrast to orders such as community-based orders (CBOs), no conditions apply to a person under a suspended sentence. Provided the offender does not commit an offence during the operational period, there are no restrictions placed on his or her time or resources. While a suspended sentence is intended to be a more severe sentence than non-custodial orders such as CBOs and fines, which are lower in the sentencing hierarchy, it appears that suspended sentences are regarded as a lighter sentence by many people.

3.11 Some of the apparent dissatisfaction with suspended sentences appears to relate to the nature of the order itself. As Justice Kirby observed in the High Court decision of *Dinsdale v The Queen*:

> The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without reoffending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrongdoing or even by offenders themselves. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.[115]

3.12 A South Australian study found that victims of crime ranked suspended sentences as the least severe community-based sanction, in contrast to judicial officers, who ranked them as the next most severe after home detention.[116] Other research suggests that offenders also view a suspended sentence as less punitive than probation or some form of financial penalty.[117] A recent New Zealand Ministry of Justice survey of 387 people sentenced to periodic detention found that of all the types of sentences respondents were asked to rank, there was the greatest variation among respondents in the ranking of suspended sentences.[118]

---

115 (2000) 202 CLR 321, 346–7, Kirby J.

116 Jenny Pearson and Associates, Justice Strategy Unit, Attorney-General's Department, South Australia, *Review of Community-Based Offender Programs: Final Report* (1999) 40.

117 See, for example, Leslie Sebba and Gad Nathan, 'Further Explorations in the Scaling of Penalties' (1984) 23 (3) *The British Journal of Criminology* 221, 231. Sebba reported the findings of a study which found that offenders ranked suspended sentences of 6 months, 12 months and 3 years below a fine of $500 and below 3 years' probation. These results need to be interpreted with caution due to the small number of respondents (15 prisoners).

118 New Zealand Ministry of Justice, *Talking About Sentences and Crime: The Views of People on Periodic Detention* (2003). Overall, the nine-month suspended sentence with an operational period of 18 months was given a mean ranking of 6, suggesting that most offenders considered it more severe than a fine of $200, a fine of $500, 12 months supervision, 100 hours community service, or four months periodic detention, but less severe than a six-month residential community program, a fine of $1,000, 12 months periodic detention, or terms of imprisonment between three months and three years. However, close to one in three (30 per cent) ranked it in the four 'least tough' positions and 16 per cent ranked it more severe than three months in prison: New Zealand Ministry of Justice, *Talking About Sentences and Crime: The Views of People on Periodic Detention* (2003) 24 (Table 4.1) and 29.

3.13 Perceptions of sentencing are important not only from a public confidence perspective, but also because of the nature of sentencing. Sentencing is not just about punishment, rehabilitation and community protection, but also performs important symbolic and communicative functions.[119] In sentencing an offender, courts censure the offender's conduct, signifying the wrongfulness of his or her actions, and through the sentence passed, endeavour to deter the offender and others from committing similar offences in the future. The effectiveness of this symbolic and communicative endeavour depends on offenders and the broader community understanding what the court, in sentencing, is setting out to convey. It could be argued that confusion over what a suspended sentence is, and where it should sit in the sentencing hierarchy, is evidence of the order's failure to satisfy this central purpose.

Suspended Sentences and Proportionality

3.14 A related criticism is that suspended sentences violate the principle that punishment should be proportional to the gravity of the offence and the culpability and degree of responsibility of an offender. Under the two-step process advocated by the High Court in *Dinsdale v The Queen*,[120] a judicial officer must first decide on the appropriate sentence to be imposed. Having decided that a term of imprisonment of a particular length is required, he or she can then make an order to suspend. At this point the court may place greater emphasis on the individual circumstances of the offender and his or her prospects of rehabilitation, which may result in quite different outcomes for different offenders despite the fact they have committed similar offences. Concerns might therefore be raised about the proportionality of a suspended sentence on the basis that the offender is being treated more leniently than others who have been convicted of similar offences but ordered to serve an immediate term of imprisonment. As Bottoms has observed, such concerns:

> are not raised because of any particular belief in the intrinsic moral value of punishment *per se* … nor because of a strong adherence to deterrence theory, but rather out of an overriding concern with the comparative distribution and the proportionality of punishments as between different offences and offenders.[121]

3.15 There is also a risk that differences between offenders who receive suspended sentences will lead to unfairness, as

> the imposition of the suspended sentence on those unlikely to offend means they will get insufficient penalty for their crime; while for those likely to fail the eventual penalty may well be unduly harsh [given the tendency of courts to impose the suspended sentence in place of a non-custodial sentence and impose longer sentences of imprisonment when suspending] … Thus the disparity between the penalties eventually imposed upon those responding and those not responding becomes, in the end, quite unjustly wide.[122]

---

119 Censure can therefore be seen as performing both an instrumental function (reducing offending by signifying the wrongfulness of the offender's actions) and an expressive one (expressing society's condemnation regardless of any effect this might have in preventing future offending).

120 (2000) 202 CLR 321.

121 Anthony Bottoms, 'The Suspended Sentence in England 1967–1978' (1981) 21 (1) *The British Journal of Criminology* 1, 20. As Bottoms notes, this is quite distinct from the argument that a suspended sentence is insufficient punishment on the grounds of retributivism and the order's capacity for special and general deterrence (the 'taste of imprisonment' argument): 20–1.

122 Ibid 18.

3.16 While the courts have suggested that a suspended sentence should not be seen as 'a mere exercise in leniency',[123] it has been acknowledged that

> [n]evertheless, there is a very substantial difference between a sentence of imprisonment for a given term and a sentence of imprisonment for that term which is wholly or largely suspended.[124]

3.17 Concerns of parity of sentence in cases where one or more co-offenders have been sentenced to suspended terms have sometimes formed a basis of appeal against sentence.[125] For example, in *R v Sotiriadis* the Court of Appeal found that while the appellant should not receive a wholly suspended sentence simply because the sentences imposed upon his co-offenders were wholly suspended, breach of the principle of parity reopened the appeal court's sentencing discretion.[126] On the other hand, *in R v McConkey (No. 2)* the court found that an immediate gaol term for one offender and a fully suspended sentence combined with a two-year CBO for his co-offender did not infringe the principle of parity.[127] This was because the sentencing judge had found a number of relevant differences between the appellant and his co-offender: the appellant had been the instigator of the offences, and his co-offender was only 19 (making rehabilitation a more important sentencing consideration in his case).[128]

3.18 Historically, the paramount aims of the suspended sentence were to prevent criminal behaviour and allow for the rehabilitation of the offender, rather than to make the punishment fit the gravity of the offence. In response to these arguments, therefore, it could be argued that concerns of 'just punishment' and equal treatment of offenders should be subordinated in some cases to the need to provide offenders with a proper environment for rehabilitation, so as to reduce the likelihood that they will reoffend.

3.19 The Victorian Sentencing Review *Discussion Paper* pointed to suspended sentences' lack of a punitive aspect as a factor supporting their possible abolition:

> Every sanction, other than the lowest in the hierarchy, must carry with it some punitive component, and these should increase logically as one progresses up the sanction ladder. If the target group for suspended sentences is the first offender who does not require rehabilitative intervention from the state, then what is required is a credible punishment which carries sufficient pain to convince the community that some degree of retribution has been exacted.[129]

3.20 The arguments above support the contention that either suspended sentences should be abolished, or if they are to continue to occupy a place in our sentencing hierarchy above non-custodial orders, such as CBOs and fines, additional conditions should attach to the order.

---

123 *R v Davey* (1980) 2 A Crim R 254, 262.

124 *R v Pulham* (2000) 109 A Crim R 541, 542, Batt JA. See also *R v Groom* [1999] 2 VR 159, 168, Batt JA.

125 For a discussion of the principle of parity see Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd edn, 1999) 347–349.

126 [2004] VSCA 171 (Unreported, Callaway, Buchanan and Eames JJA, 20 September 2004).

127 [2004] VSCA 26 (Unreported, Buchanan and Eames JJA and Smith AJA, 9 March 2004).

128 Ibid [37].

129 Arie Freiberg, above n 102, 62.

The Problematic Nature of Suspended Sentences

3.21 Suspended sentences have also been criticised on the basis of their ambiguous nature and the reasoning process a court must go through in determining that a prison sentence should be imposed, but should not be served. At the initial point of sentencing, a suspended sentence is intended to achieve denunciation and deterrence through the formal imposition of a prison sentence; the decision to suspend then provides an opportunity to facilitate the offender's rehabilitation and avoid the negative effects of the prison sentence being served. Therefore while it is treated at law as a prison sentence, a suspended sentence is very different from a term of imprisonment immediately served. David Thomas, an English legal commentator, has therefore suggested that suspended sentences 'could be considered an attempt to have our cake and eat it—to preserve the deterrent effect of a sentence of imprisonment while avoiding or minimising the social cost of enforcing it'.[130]

3.22 Historically, suspended sentences were introduced as a means of sparing a first-time offender from prison. However, as other sentencing orders that perform the same diversionary function have developed over time, the rationale and internal logic of the suspended sentence, together with its continued place in the sentencing hierarchy, has come under increasing scrutiny.

3.23 In Victoria, before a court can make an order that a sentence of imprisonment should be suspended, it must first be satisfied that a term of imprisonment—rather than other orders, such as a fine or a community-based order—is the appropriate sentence.[131] The court must then be satisfied that, due to the particular circumstances of the case, it is desirable for the offender to serve his or her sentence in the community.[132] 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.[133] It could be argued that this reasoning process is flawed.

3.24 It has also been suggested that this type of reasoning leads to unfairness, as mitigating factors are given a 'double effect' which tends to benefit white-collar and middle-class offenders.[134] Sentencers may regard white-collar offenders and those with stable employment, family support and other advantages as suitable candidates for a suspended sentence because they are considered less likely to reoffend than are offenders who are unemployed, have drug and alcohol problems, or live more chaotic lives. These subjective assessments of personal characteristics and the risk of reoffending could lead to different sentences being imposed on persons who have committed similar offences. Offenders who commit similar offences, it could be argued, should receive similar sentences regardless of their personal circumstances.

---

130 Thomas (1974), above n 104, 688.

131 *Sentencing Act 1991* (Vic) s 27(3) and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5 and similar provisions in Canada and New Zealand.

132 Julian Roberts and Thomas Gabor, 'Living in the Shadows of Prison: Lessons from the Canadian Experience in Decarceration' (2004) 44 (1) *The British Journal of Criminology* 92. In *R v CJE* (2000) 120 A Crim R 18 [18] Fitzgerald JA observed that '[a] balancing of the considerations which led to a conclusion that no sentence other than imprisonment is appropriate may, nonetheless, lead to a decision that execution of the sentence should be suspended'.

133 Kate Warner, *Sentencing in Tasmania* (2nd edn, 2002) [9.215]; Freiberg (2002), above n 19, 120.

134 Bottoms (1981), above n 121, 17; Kate Warner, 'Sentencing Review 1999' (2000) 24(6) *Criminal Law Journal* 355.

3.25 Others may contend that the reasoning process involved in the making of the order is not flawed but rather perfectly supportable. For example, Dr Steven Tudor in his submission to the Council argued:

> There are two reasons why this seeming paradox is only apparent and should not be regarded as showing that the suspended sentence is an intellectually flawed kind of sentencing order.
>
> First, the appropriateness of the range of appropriate sentences in a particular case will often largely depend on the particular sentencing *purpose*, for example, punishment (understood as retribution), deterrence, community protection, rehabilitation, etc. This means that, while it may well be appropriate—*in terms of retribution*—to send an offender to prison for two years, it may also be appropriate—*in terms of rehabilitation*—to grant him or her a conditional or restricted liberty. Thus a different sentencing purpose can license as appropriate a sentencing order that would be inappropriate when assessed against a different sentencing purpose …
>
> Secondly, and independently, there is the simple fact that sentencing is not always about justice; it may sometimes allow for *mercy*, which is, by definition, a break with justice … The option, then, of suspending a prison term is one way in which such mercy may be exercised. This means that even if one were to concede that a wholly suspended sentence would in fact … be inconsistent with what would be 'appropriate' or 'just', nonetheless, the merciful option that is built into sentencing discretion can allow it.[135] (emphasis in original)

3.26 The High Court in *Dinsdale v The Queen* has expressly recognised that 'the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term'.[136] It may be the case that more weight should be accorded to the aims of denunciation and just punishment at the initial point of sentencing, while rehabilitation (and mercy) may assume greater significance in determining, for example, whether a sentence imposed should be suspended. Regardless of whether such an approach is intellectually defensible, it could still be argued that the distinctions made between the weight to be given to a particular sentencing purpose or factor at different stages in the sentencing process are somewhat artificial. Such an approach would also be a departure from that typically taken by the courts in all other cases, which requires them to balance the different sentencing purposes and considerations in determining the appropriate sentence. It is little surprise, then, to find that during the debates in England on the 1972 Criminal Justice Act, suspended sentences were characterised as similar to parole, and that a court, having decided that imprisonment is appropriate, should have to 'constitute itself into a parole body' when deciding whether or not the sentence should be suspended.[137]

Net-Widening and Sentence Inflation Effects

3.27 In theory the use of suspended sentences should prevent offenders otherwise destined for prison from being imprisoned—or, in the case of a partially suspended sentence, allow them to be imprisoned for a lesser period. However, research has consistently shown that although suspended sentences achieve this, they also lead to net-widening and sentence inflation.

3.28 Net-widening occurs when offenders who previously would have been sentenced to a less severe sentence than imprisonment receive a suspended 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. One

---

135 Discussion Paper Submission 34 (Dr S. Tudor).

136 *Dinsdale v The Queen* (2000) 202 CLR 321, 348, Kirby J.

137 *House of Commons* Committee Debates col 329 (Mr Elystan Morgan) as cited in Bottoms (1981), above n 121, 17.

reason for this outcome may be that courts are sometimes using suspended sentences not as an alternative to imprisonment, but as an alternative to a non-custodial sentence. Anthony Bottoms, writing of the English experience with suspended sentences, has suggested that this 'malfunction' may be due to the special attraction of suspended sentences for sentencers:

> [I]f the offender is one whom the court feels really ought (because of his [or her] previous record, type of crime, etc) to receive 'something more' than a fine or probation, then the suspended sentence becomes a natural choice. It allows the court to do something which *looks* sufficiently severe in such a case, but which may cost nothing; as a matter of judicial psychology, the measure must often have been virtually irresistible.[138]

3.29 Further, net-widening is unlikely to be challenged by offenders on appeal unless they perceive the suspended sentence as being harsher than the sentence they might otherwise have received.[139] Similarly, the inflation of a sentence on the basis of its having been suspended is unlikely to be the subject of appeal. As one commentator has remarked: 'A defendant who has committed an offence so serious as to merit imprisonment but who has had that sentence wrongly suspended [or perhaps, who receives a longer sentence of imprisonment than would otherwise be appropriate] is obviously more likely to be out celebrating than dashing to the Court of Appeal.'[140] The consequences of net-widening and sentence inflation, for an individual offender, are therefore only likely to become fully apparent when the suspended sentence order is breached.

3.30 The consequence of breaching a suspended sentence should be, in the absence of exceptional circumstances, the activation of the original sentence. As the second offence has been committed by the offender during the operational period of a suspended sentence order, the court may consider that only a custodial sentence is appropriate. There is a presumption in such cases that the sentence of imprisonment activated on breach will be made cumulative on the sentence of imprisonment imposed for the second offence.[141] As a result, an offender who breaches a suspended sentence order is likely to face a substantial period of imprisonment, whereas a non-custodial sentence or a shorter term of immediate imprisonment may have been an appropriate disposition for the initial offence and/or for any subsequent offences committed.

3.31 Recent research conducted on behalf of the Judicial Commission of New South Wales found evidence of the net-widening effect of suspended sentences.[142] The study looked at the effect on the prison population and the use of non-custodial orders when suspended sentences were reintroduced as a sentencing option in NSW. This research found that for all ten offences under study in the lower courts, there was a drop in the proportion of cases in which a penalty less severe than a suspended sentence (such as a community service order or bond) was imposed, following the introduction of the new suspended sentence provisions. With one exception, this drop was greater than any decrease in penalties more severe than a suspended sentence (periodic detention, home detention, or imprisonment). Overall, there was a drop of 3.6 per cent in the use of less severe penalties (from 89.3 per cent of all dispositions, to 85.7 per cent after the introduction of suspended sentences), compared to a drop of just 0.5 per cent (10.7 to 10.2 per cent) in the case of more severe penalties.[143]

---

138 R. F. Sparks, 'The Use of Suspended Sentences' (1971) *Criminal Law Review* 384, 399.

139 See for example *R v Glenn* [2005] VSCA 31 (Unreported, Vincent and Nettle JJA and Cummins AJA, 10 February 2005).

140 J. Q. Campbell, 'A Sentencer's Lament on the Imminent Death of the Suspended Sentence' (1995) *Criminal Law Review* 293, 294.

141 *Sentencing Act 1991* (Vic) s 31(6)(b). For a discussion of the operation of this section, and the Council's views, see [4.194]–[4.201].

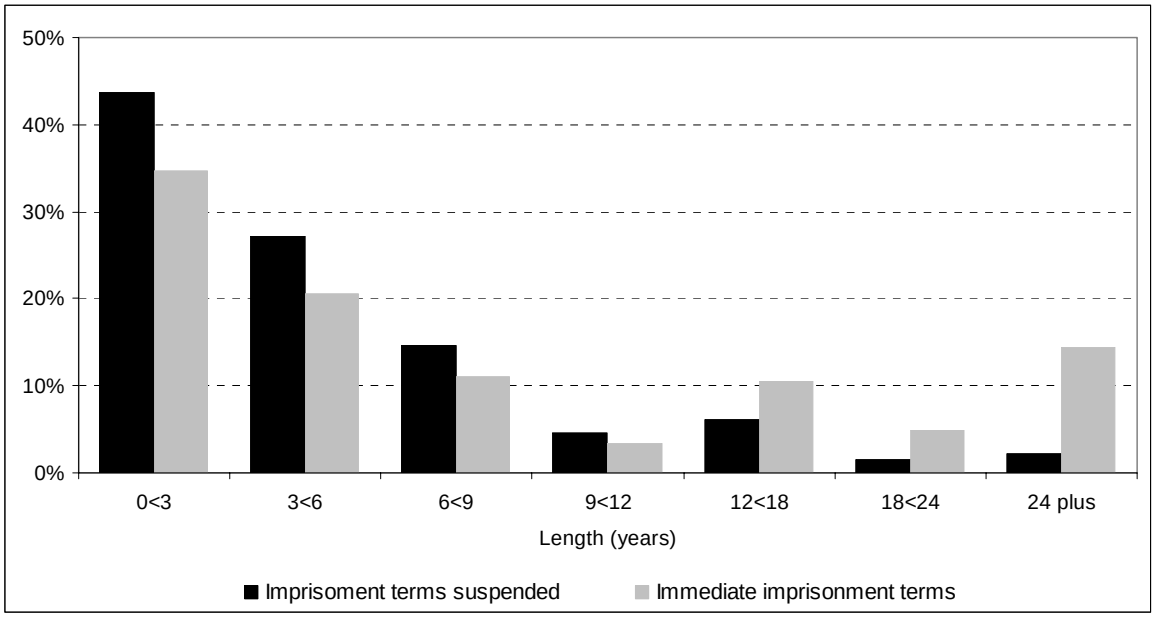
142 Brignell and Poletti (2003), above n 78.

143 Ibid 11.

3.32 In the higher courts, overall penalties more severe than suspended sentences actually increased slightly in New South Wales following the introduction of suspended sentences (1.1 per cent, from 72.9 to 74.0 per cent post-introduction).[144] All ten offences under examination showed a drop in the proportion of cases where a penalty less severe than a suspended sentence was imposed, but there was some variation in whether the use of penalties more severe than suspended sentences increased, decreased or remained unchanged following the introduction of the suspended sentence provisions. The largest drop in penalties more severe was in the case of the supply of less than a commercial quantity of a prohibited drug (10 percentage points, from 67 to 57 per cent post-introduction).[145]

3.33 There have been few Victorian studies on the impact of suspended sentences on the prison population.[146] Drawing on available data, it appears that suspended sentences sometimes result in net-widening in Victoria. As Figure 4 indicates, short sentences of under six months comprise a greater proportion of suspended sentences than they do of the proportion of prison sentences ordered to be served immediately. In 2003–04, 71 per cent of sentences suspended were prison sentences of under six months (4,413 suspended sentences out of a total of 6,227), compared with 55 per cent of prison terms ordered to be served immediately (2,707 prison sentences out of a total of 4,890).[147]

Figure 4: Imprisonment terms suspended and immediate imprisonment terms by length—higher courts and Magistrates' Court 2003–04[148]



144 Ibid 14.

145 Ibid 14. The NSW study recognises that sentencing patterns may also be a result of factors such as harsher sentencing practices more generally, and an increase in serious crime since the introduction of suspended sentences. The use of guideline judgments is also identified in the report as having a potential effect: ibid 16.

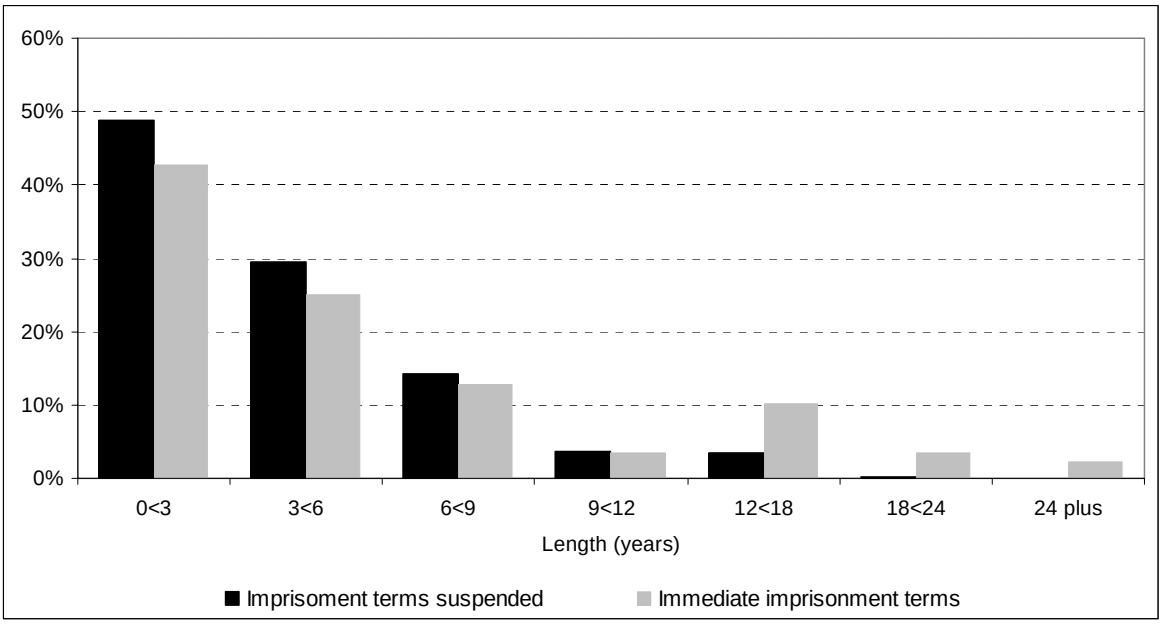
146 One of the few studies was conducted by David Tait: David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985–1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143.

147 Department of Justice, unpublished data.

148 Department of Justice, unpublished data.

3.34 Figure 5 shows that in 2003–04, 78 per cent of suspended prison sentences in the Magistrates' Court were sentences of less than six months (4,343 suspended sentences out of a total of 5,539), compared to 68 per cent of prison sentences immediately served (2,663 prison sentences out of a total of 3,927).[149] This pattern is consistent with some penalty escalation at the point of initial sentencing.[150]

Figure 5: Imprisonment terms suspended and immediate imprisonment terms by length—Magistrates' Court 2003–04[151]



3.35 In the higher courts, the data may also provide evidence of net-widening. In 2003–04, 39 per cent of prison sentences suspended were sentences of under 12 months (269 suspended sentences out of a total 688) compared with 12 per cent of prison sentences served immediately (see Figure 6).[152]

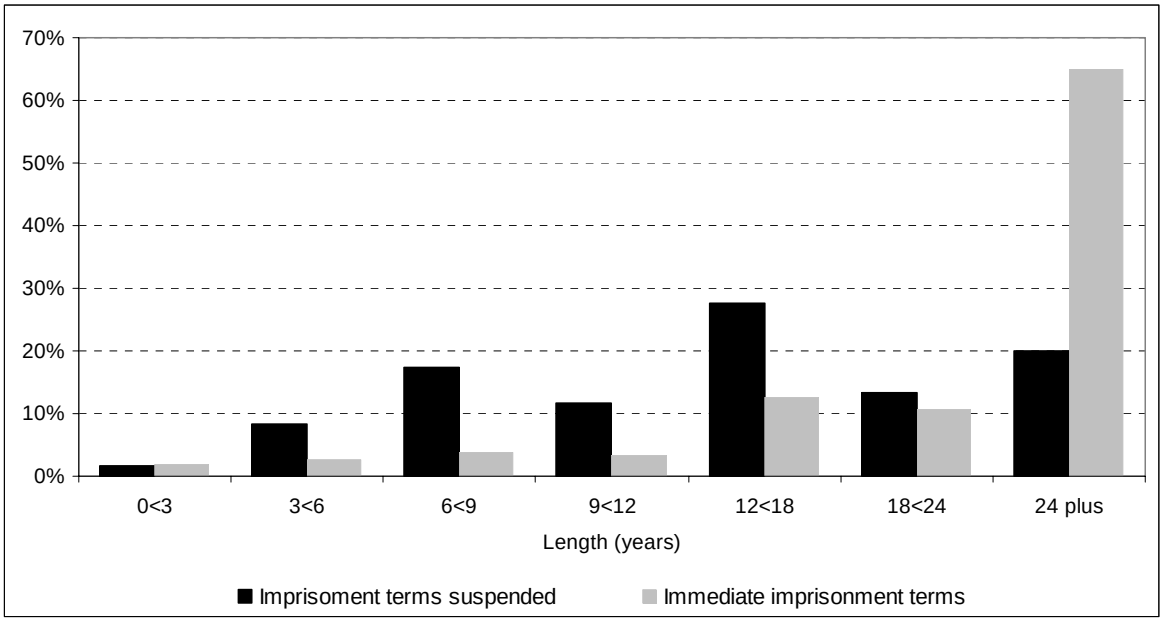
149 Department of Justice, unpublished data.

150 See Tait (1995), above n 146.

151 Department of Justice, unpublished data.

152 Department of Justice, unpublished data.

Figure 6: Imprisonment terms suspended and immediate imprisonment terms by length—higher courts 2003–04



3.36 Rather than showing net-widening, these trends could suggest that courts are quite properly suspending short prison sentences, in recognition of the negative effects of such sentences on offenders.

3.37 A New Zealand study noted that another effect of net-widening is its potential to increase the prison population where suspended sentences are activated on breach, even if some offenders who might otherwise have served a sentence of imprisonment are also given suspended sentences. A New Zealand Ministry of Justice Report found that overall, there was an activation rate of 24–29 per cent (710–1,040 offenders), compared with an estimated drop in prison admissions of between 820 and 1,140, leading to the conclusion that suspended sentences may actually have caused an overall increase in imprisonment.[153]

3.38 The potential of suspended sentences for net-widening and sentence inflation provides arguments for both their abolition and their reform. Reforms which potentially might address current problems could include:

- providing greater guidance to courts on the circumstances in which it is appropriate to impose a suspended sentence, including clarifying that a suspended sentence should not be considered unless a sentence of imprisonment of equivalent length would be appropriate;
- imposing a lower limit on the term of imprisonment that can be suspended; or
- providing greater flexibility to courts when dealing with breaches, including removing the current presumption in favour of cumulative sentences.

3.39 It may also provide an argument for greater use of other sentencing orders which allow the offender to serve his or her sentence in the community.

153 Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1988 to 1997* (1998) 140.

The Case for Retention

Introduction

3.40 Overwhelmingly, those who made submissions[154] and participated in consultations on the Discussion Paper[155] favoured the retention of suspended sentences. This support continued following the release of the Interim Report.[156] The Victorian Bar, reflecting the views of many who advocated retaining suspended sentences, submitted that '[t]he Bar's view at this point in time is that suspended sentences are an important sentencing tool and have a useful role to play, even if widespread reforms were made to sentencing'.[157] A number of strong concerns were expressed, including that the removal of suspended sentences would 'remove a very significant option from the sentencer's armoury, thereby unduly fettering judicial discretion'.[158]

The Special Nature and Value of Suspended Sentences

3.41 The proponents of suspended sentences regard them as occupying a unique and important place in the sentencing hierarchy. They argue that unlike most other forms of sentencing orders, a suspended sentence allows for the seriousness of the offence and/or the offender's conduct to be acknowledged in a formal sense through the imposition of a sentence of imprisonment, while at the same time allowing mitigating factors to be taken into account and the goal of rehabilitation to be recognised by allowing the offender to remain in the community. The option to suspend also allows for the exercise of mercy where this is called for.[159]

---

154 Submissions 2 (B. Abeysinghe), 4 (C. Moore), 5 (Y. Zole), 6 (M. Douglas), 9 (J. Hemmerling), 11 (Emmanuel College—C. Peddle, C. Finnigan), 13 (Ballarat Catholic Diocese Justice, Development and Peace Commission), 15 (Anonymous) [for offenders under the age of 18 years only who had a mental illness or a drug addiction], 20 (W. Atkinson), 23 (L. Francis) [only where there are 'extenuating circumstances'], 24 (County Court of Victoria), 31 (J. Bignold), 32 (Anonymous), 33 (J. Black), 35 (G. Anderson), 36 (Magistrates' Court of Victoria), 37 (A. Avery), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 40 (S. Rothwell) [only where there are 'extenuating circumstances'], 41 (Youthlaw), 42 (VAADA), 43 (Victorian Aboriginal Legal Service), 44 (Fitzroy Legal Service), 45 (Mental Health Legal Centre), and 51 (Law Institute of Victoria).

155 See above n 8. Of 118 feedback forms completed, only 9 favoured the total abolition of suspended sentences.

156 Submissions 6 (B. Abeysinghe), 11 (Law Institute of Victoria), 12 (Victoria Legal Aid), 13 (Mental Health Legal Branch, DHS), 14 (J. Chen), 15 (VALS), 17 (The Victorian Bar Inc), 18 (Criminal Defence Lawyers' Association), 20 (Youthlaw), 21 (Criminal Bar Association), 22 (Fitzroy Legal Service Inc). Strong support for the retention of suspended sentences was also voiced at the Legal Issues Roundtable (8 December 2005), Roundtable on Offenders with a Mental Illness or Cognitive Impairment (17 November 2005) and at other meetings held.

157 Submission 17 (The Victorian Bar Inc).

158 Submission 23 (Federation of Community Legal Centres).

159 On the differences between 'mitigation' and 'mercy' see Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 (1) *Monash University Law Review* 1, 9–13 and Steven Tudor, 'Modes of Mercy' (2003) 28 *Australian Journal of Legal Philosophy* 79, 85.

3.42 The Law Institute of Victoria reflected this view in its submission, commenting:

> The LIV considers that the disposition of suspended sentence has a particular function in allowing courts to achieve this balance in particular cases. We consider that a suspended prison sentence allows the court to provide high denunciation of the offending, general and specific deterrence, appropriate punishment and facilitate offender rehabilitation.[160]

3.43 The New South Wales Law Reform Commission, in recommending the reintroduction of suspended sentences in NSW, pointed to the denunciatory effect of a suspended sentence as one of its principal attractions. Acknowledging the number of objections to their reintroduction raised in submissions, the Commission observed:

> [I]n our view, the advantages of adding suspended sentences to the range of available sentencing options outweigh these objections. Suspended sentences have been said to be 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. In these situations, it has been argued that other forms of conditional release are not appropriate because they do not allow for proper denunciation of the offence through the imposition of a custodial sentence.[161]

3.44 Bottoms has suggested that for this reason:

> [The suspended sentence] has acquired … a special psychological attraction to sentencers in that they can feel they are being punitive and passing a severe sentence, while at the same time allowing themselves the warmth of recognising the humanity of their leniency.[162]

3.45 Because of their special nature, wholly suspended sentences are also seen to have a unique capacity to achieve justice in individual cases. Referring to the existence of a number of 'positive examples' of the use of suspended sentences, the Federation of Community Legal Centres in its submission commented: 'It is abundantly clear to the community lawyers who were involved in these cases … that great injustice would have resulted had their clients been imprisoned'.[163]

3.46 Those supporting the continued value of suspended sentence, such as the Law Institute of Victoria, also pointed to the formal imposition of a prison sentence as having serious consequences for an offender:

> [T]he imposition of a prison sentence (however served) has international and national implications. A person sentenced to a term of imprisonment must usually declare that on any application to enter another country, and domestically, for example, on application for certain occupations. Whether or not the term was served immediately or suspended is irrelevant in these circumstances; it is the imposition of the prison sentence that carries the internationally recognised ranking of the offending. In this light the choice to suspend the sentence is seen as a reflection of the local custom of how sentences should be served.[164]

---

160 Submission 12 (Law Institute of Victoria).

161 New South Wales Law Reform Commission, *Sentencing,* Report No. 79 (1996) [4.22]. In NSW, a suspended sentence order requires the defendant to enter a bond, to which may be attached a number of conditions: *Crimes (Sentencing Procedure) Act 1999*, ss 12, 9 and 95.

162 Bottoms (1981), above n 121, 20.

163 Submission 23 (Federation of Community Legal Centres).

164 Submission 11 (Law Institute of Victoria). This view was endorsed by the Fitzroy Legal Service Inc (Submission 22).

3.47 Criticisms that suspended sentences as custodial sentences are a 'fiction' and 'lack substance' were dismissed by some as unwarranted, and as reflecting 'fundamental misconceptions about the nature and purpose of suspended sentences'.[165] The possible consequences on breach of serving some or all of the term suspended was suggested as justifying positioning the suspended sentence above other orders, such as a community-based order.[166] It was further noted that the fact the offender has already received a prison sentence 'also affects the severity of consequences for the minority of offenders who reoffend'[167]—for example, by increasing the likelihood of offenders receiving a sentence of immediate imprisonment.

3.48 The Criminal Bar Association was also among those who challenged the perception of a suspended sentence as a 'soft option':

> The notion that a suspended sentence is a soft option should be put to rest. A suspended sentence carries permanent stigma, severe consequences if breached and sets a benchmark for the repeat offender. A suspended sentence enables the public interest in the rehabilitation of the offender to be promoted, whilst at the same time having a punitive effect and deterring further offending.[168]

3.49 The Victorian Aboriginal Legal Service viewed suspended sentences as being of a different character to other sentencing dispositions in the sentencing hierarchy:

> Suspended sentences are an alternative to a custodial order, or conceptually similar to a deferred sentence … Suspended sentences are in effect a case of putting the goal of rehabilitation ahead of the goal of punishment in situations where the defendant and their circumstances provide reason to believe that rehabilitation is probable. They operate like a switch or a turn-off from the sentencing highway. They represent a side track which can lead back to offence free behaviour.

3.50 The Criminal Defence Lawyers' Association viewed suspended sentences as particularly useful for 'first-time offenders and for those offenders who are able to demonstrate a commitment to rehabilitation'.[169] Fitzroy Legal Service Inc repeated comments made in an earlier submission by the St Kilda Community Legal Centre that:

> Suspended sentences are capable of providing positive outcomes for offenders with drug and/or alcohol dependence. Such orders may be especially effective where an offender is already voluntarily engaged in a process of rehabilitation, or in order to provide the impetus to engage seriously in such measures to avoid a custodial term (the 'last chance' rationale).[170]

---

165 Submission 21 (Criminal Bar Association). See also Submission 18 (Criminal Defence Lawyers' Association): 'We strongly disagree with the conclusion that a suspended sentence is a "fictional" custodial sentence'.

166 Submission 18 (Criminal Defence Lawyers' Association).

167 Submission 22 (Fitzroy Legal Service Inc).

168 Submission 21 (Criminal Bar Association). See also Federation of Community Legal Centres (Submission 23): ' … suspended sentences do contain a substantial punitive element. They are regarded as a serious penalty, being only one step below actual imprisonment. The stigma associated with a custodial sentence is not to be underestimated. Further, the recording of a criminal conviction is mandatory, which has a very significant adverse effect on the offender's future.' Similar views were expressed at roundtables held.

169 Submission 18 (Criminal Defence Lawyers' Association).

170 Submission 22 (Fitzroy Legal Service Inc) citing the 'Submission of the St Kilda Community Legal Centre to the Sentencing Advisory Council Inquiry into Suspended Sentences' (June 2005) (Discussion Paper Submission 49).

3.51 The County Court of Victoria, in its submission on the Discussion Paper, suggested that because orders such as combined custody and treatment orders and home detention (and, to a lesser extent, intensive correction orders) are not often made in the County Court, the abolition of suspended sentences would create too wide a gap between an actual prison term and a community-based order.[171] CCTOs, home detention and ICOs accounted for less than 4 per cent of all sentences in the higher courts in 2003–04.[172] Concerns about the 'gap' that would be left in the sentencing hierarchy were repeated in more recent consultations[173] and submissions[174]—a gap which, it was suggested, would not be adequately filled by the proposed new orders.

3.52 A suspended sentence, it was argued, 'affords flexibility in sentencing an offender where there would be no utility in the imposition of additional punitive sanctions or rehabilitative conditions'.[175] Examples were given of circumstances in which a suspended sentence provided a degree of flexibility not afforded by other orders. These include situations where an offender is already serving a custodial sentence and is sentenced for earlier offences committed before he or she was incarcerated, in which case the court may impose a suspended sentence to run concurrently with the offender's supervision on parole; or where an offender is sentenced on multiple charges and receives a 'cocktail' of sentencing orders, some of which have conditions.[176]

3.53 Partially suspended sentences were also regarded as performing a useful function as an alternative to conditional forms of release, such as parole.[177] Partially suspended sentences may be particularly useful in the case of offenders sentenced to terms of imprisonment of less than 12 months and therefore ineligible for parole,[178] as they allow for a period of unsupervised release (or in the case of jurisdictions with a conditional form of order, supervised release) during which the offender is under some form of control by the state. For shorter sentences of under 12 months, in the absence of an order that the sentence be wholly or partially suspended, an offender is required to serve the whole period in prison. However, keeping in mind the negative effects of short prison sentences and the high cost of imprisonment (see further [3.60] and [4.84]), it could be argued that in cases where courts are considering sentencing an offender to a short term of imprisonment, they should instead consider making a non-custodial order. Should the court determine that a short prison sentence is the only appropriate sentence but there are particular mitigating factors, it could further be argued, courts should simply take this into account in setting the term of imprisonment.

---

171 Submission 24 (County Court of Victoria).

172 In 2003–04 the higher courts made three CCTOs, one home detention order and 77 ICOs: Department of Justice, unpublished data.

173 For example, Legal Issues Roundtable (8 December 2005).

174 See, for example, Submission 18 (Criminal Defence Lawyers' Association).

175 Submission 18 (Criminal Defence Lawyers' Association).

176 Submission 18 (Criminal Defence Lawyers' Association). Similar examples were given at the Legal Issues Roundtable (8 December 2005). Even should the new orders proposed by the Council be introduced, it was argued, there would be cases where a suspended sentence was still appropriate; for example in cases where an offender had significant and relevant priors and had already served previous sentences of imprisonment: Legal Issues Roundtable (8 December 2005).

177 See, for example, Discussion Paper Submission 45 (Mental Health Legal Centre).

178 Under section 11 of the *Sentencing Act 1991* (Vic) a court is only permitted to fix a non-parole period if the sentence of imprisonment imposed is 12 months or more. Sentencers must set a non-parole period for sentences of imprisonment of two years or more unless the court considers the fixing of a non-parole period to be inappropriate in the circumstances. In the case of sentences of imprisonment of 12–23 months, the power to fix a non-parole period is discretionary.

3.54 In its Interim Report the Council suggested that the function of a partially suspended sentence could be performed equally well by a new form of order that allowed courts to combine a short period of imprisonment with a period of release on conditions. Unlike parole, release from prison once the custodial part of the sentence had been served would be automatic. Alternatively, courts could be permitted to combine a term of imprisonment with a form of conditional order when sentencing an offender for a single offence. In Victoria, courts may combine a community-based order (CBO) with up to three months' imprisonment when sentencing an offender for a single offence, although this option is rarely used by the courts. Over the period 1999–2000 to 2003–04, only 16 defendants were sentenced in the higher courts to a CBO combined with a term of imprisonment under section 36(2) of the *Sentencing Act 1991* (Vic).[179] An increased term of imprisonment that can be combined with a CBO might capture many of the cases that currently are dealt with by way of a partially suspended sentence. For example, in the higher courts over the period 1999–2000 to 2003–2004, 94 per cent of defendants who received a partially suspended prison sentence served a prison sentence of 12 months or less prior to release.[180] These options, together with the Council's final recommendations, will be discussed further in Part 2 of our Final Report.

The Effectiveness of Suspended Sentences

3.55 A number of submissions pointed to the breach rates as evidence of the success of suspended sentences rather than their failure.[181] In most cases, it was argued, suspended sentences 'are effective in preventing reoffending'.[182] Fitzroy Legal Service Inc submitted:

> Low rates of recidivism have additional benefits including reduced levels of offending, increased community safety, [and] lower direct and indirect community costs.
>
> Suspended sentences give due weight to rehabilitation rather than treating retribution as a sole or even primary aim of sentencing. The focus on rehabilitation also works to reduce reoffending and therefore costs to the community, while increasing community safety. It is arguable that these positive effects are of longer-term nature than anything achieved by retribution, which imposes its own costs, not only on offenders but also on the community at large.[183]

3.56 The Federation of Community Legal Centres, also referring to the rates of breach, viewed reduced rates of reoffending as 'a key benefit of suspended sentences for individuals and the community as a whole'.[184] On the basis of suspended sentences not being activated on breach in the higher courts and Magistrates' Court (24% and 36% respectively), the Federation suggested that 'the 'success' rate for suspended sentences is as high as 80%'.[185] The Federation further argued that:

> The remaining 20% of cases where a suspended sentence has been breached and the offender incarcerated do not imply a flaw in the sentencing process or the disposition itself. These cases may indicate that a suspended sentence may not have been the appropriate disposition in all of the circumstances, but only with the benefit of hindsight rather than an obvious miscarriage of the sentencer's discretion.[186]

---

179 Department of Justice, unpublished data.

180 Department of Justice, unpublished data.

181 See, for example, Submissions 21 (Criminal Bar Association) and 22 (Fitzroy Legal Service Inc).

182 Submission 21 (Criminal Bar Association).

183 Submission 22 (Fitzroy Legal Service Inc).

184 Submission 23 (Federation of Community Legal Centres).

185 Submission 23 (Federation of Community Legal Centres).

186 Submission 23 (Federation of Community Legal Centres).

3.57 As discussed at [2.41]–[2.43], breach data collected by the Council support the finding that offenders on suspended sentence orders are more likely to breach by committing further offences than offenders on other types of correctional orders, such as community-based orders and parole. Around 36 per cent of offenders who receive a suspended sentence in the higher courts, and 31 per cent in the Magistrates' Court, go on to commit further offences. While not all offenders who breached their suspended sentences had their original prison sentence restored, they did commit further offences. On this basis, it could be argued, suspended sentences are not as effective as they should be, and less effective than other forms of sentencing orders in preventing reoffending.

Increase in Imprisonment and Associated Financial and Social Costs

3.58 If suspended sentences were abolished, even with the introduction of new orders, it is likely that at least some offenders who currently would receive a suspended sentence would be sentenced to serve a period of immediate imprisonment. A number of those who were consulted and made submissions[187] pointed to this increase as a real risk should the power to suspend be removed. As discussed above at [3.2], the impact of abolition, without changes to other intermediate sentencing orders, could be considerable.

3.59 As noted at [2.18], following the abolition of suspended sentences in New Zealand under the new *Sentencing Act 2002*, custodial sentences increased by around 8 per cent (from 7,930 in 2002 to 8,540 in 2003). It is believed that the removal of suspended sentences as a sentencing option may have contributed to this increase.[188] Although the consequences of abolishing suspended sentences in Victoria are unknown, it is possible that similar increases may result.

3.60 Any increase in offenders sentenced to immediate imprisonment or to other orders served in the community would clearly place additional strain on the existing prison system and correctional resources. A suspended sentence currently does not require any investment of resources, provided the offender does not commit another offence during the operational period of the order. When compared with the total costs of imprisonment ($228 per day per prisoner or around $83,000 per prisoner per year)[189] and the costs associated with managing offenders under community correctional orders such as CBOs ($12.70 per offender per day, or $4,635 per year),[190] the financial risks of removing suspended sentences could be significant. Keeping in mind that over 6,000 people received a suspended sentence in Victoria during 2003–04 alone, the financial risk of removing the option to suspend a term of imprisonment (assuming that suspended sentences are only used as alternatives to custodial sentences) could be considerable.

---

187 See, for example, Submissions 15 (VALS) and 22 (Fitzroy Legal Service Inc).

188 Spier and Lash (2004), above n 48, 104. The data on custodial sentences excludes offenders who received suspended sentences prior to abolition, and suspended sentences that were activated (due to persons offending within the suspension period); however, it includes offenders imprisoned for the offence that led to the activation of the suspended sentence.

189 Steering Committee for the Review of Government Service Provision, Productivity Commission, *Report on Government Services 2006* (2006), Supporting Tables, Table 7A.34, available at <www.pc.gov.au/gsp/reports/rogs/2006/justice/attachment07.pdf> as at 3 March 2005. This estimate is for the financial year 2004–05 and consists of capital costs of $35.60 per prisoner per day and recurrent costs of $192.20 per prisoner per day.

190 Ibid Table 7A.37. This consists of capital costs of 60 cents per prisoner per day and recurrent costs of $12.19 per prisoner per day.

3.61 The Fitzroy Legal Service Inc in its submission voiced concerns that the abolition of suspended sentences and consequent higher rates of imprisonment would have not only financial, but also social consequences:

> It is well known that exposure to the prison system has disastrous effects for the individual, undermining productive attempts at rehabilitation outside the prison system, as well as on family members and friends.[191]

3.62 Higher rates of recidivism were suggested to be another consequence of higher rates of imprisonment:

> Increased numbers in the prison system are also likely to lead to higher rates of recidivism as people become exposed to criminal elements while serving sentences of imprisonment and after release continue to associate with these elements, largely because of their exposure while inside, and the stigmatic effect[s] of their sentences are such that they are unable to access many critical supports. Chief among these is gainful employment, a crucial feature of successful rehabilitation.[192]

3.63 In 2004–05, 46 per cent of prisoners released in Victoria returned to corrective services as a result of further offending within two years.[193] This is comparable to the national average of 45 per cent of prisoners returning to corrective services within two years of release.[194] Of all Australian jurisdictions, Victoria reported the second lowest proportion of prisoners returning to corrective services within two years.[195]

Other Impacts

3.64 Other concerns about removing or limiting the availability of suspended sentences related to conviction rates. For example, the Federation of Community Legal Centres suggested that if suspended sentences were no longer available for some or all offences, offenders may be less willing to plead guilty, which could result in lower conviction rates.[196] This could also lead to court delays and additional costs associated with a greater number of cases proceeding to trial, and was seen as having 'potentially disastrous consequences for the reporting of sexual offences'.[197]

3.65 The possible effect on persons convicted of offences with mandatory minimum terms of imprisonment (such as repeat offences for driving while disqualified and driving while authorisation is suspended under section 30 of the *Road Safety Act 1986* (Vic)) was also raised.[198] In 2003–04, 839 of the 3,316 defendants (25 per cent) who received a suspended sentence for their most serious offence in the Magistrates' Court had been convicted of an

---

191 See also Submission 23 (Federation of Community Legal Centres).

192 Submission 23 (Federation of Community Legal Centres).

193 Steering Committee for the Review of Service Provision [Australia], R*eport on Government Services 2006: Volume 1: Education, Justice, Emergency Management* (2006). This information is also available on the Council's website as part of its sentencing monitoring service: Sentencing Advisory Council (2005), above 3.

194 Ibid.

195 Ibid. Queensland had the lowest rate of prisoners returning to corrective services (37 per cent) and was the only jurisdiction to report a return rate below the national average. Western Australia had the highest rate with almost half (49 per cent) of prisoners returning to corrective services within two years of release.

196 Submission 23 (Federation of Community Legal Centres). See also Discussion Paper Submission 2 (B. Abeysinghe).

197 Submission 23 (Federation of Community Legal Centres).

198 See, for example, Submissions 18 (Criminal Defence Lawyers' Association), 20 (Youthlaw) and 21 (Criminal Bar Association).

offence under section 30 of the Road Safety Act.[199] If suspension of a prison sentence were no longer possible, and should other substitutional sanctions, such as ICOs, not be considered suitable, the courts would be left with no other alternative than to sentence the offender to an immediate term of imprisonment. This would lead to a significant increase in prison admissions. In the Interim Report the Council suggested that other sentencing orders recommended in that report, such as a community order with tailored conditions, may provide a more appropriate response to this type of offending than a short straight term of imprisonment.[200] This will be discussed further in Part 2 of the Council's Final Report.

Addressing Community Perceptions of Suspended Sentences

3.66 A number of those who supported the retention of suspended sentences suggested a community education campaign as an appropriate way of addressing 'community misconceptions' about the punitive effect of suspended sentences and the effectiveness of suspended sentences in deterring offenders from further offending.[201] Pointing again to the effects of imprisonment, the LIV submitted:

> the long term, and in some cases, permanent impacts of having a term of imprisonment imposed, whether served wholly, partially or totally suspended, is often overlooked by those advocating against suspended prison sentences. The LIV notes that during the operative period of a suspended prison sentence … the whole sentence hangs over the offender. The LIV suggests that this is the main reason most suspended prison sentences can be seen as successfully dealing with the offender … The LIV considers that this disposition is designed to [have] and has a behavioural modification effect on offenders that lasts throughout the operational period. The LIV submits that the effect this has on reforming the lives of appropriately sentenced offenders is often overlooked.[202]

3.67 The Criminal Defence Lawyers' Association, acknowledging the 'disjuncture between the treatment of suspended sentences at law as a severe penalty and perceptions of some in the community who regard suspended sentences as a soft option', argued that:

> the misconception of suspended sentences by sections of the community is not an adequate reason to remove suspended sentences as an option within the sentencing hierarchy. The CDLA believes that much of the blame for the apparent disjuncture lies with inadequate and biased reporting of sentencing decisions by the media.
>
> We support the views expressed by Victoria Legal Aid and others that the appropriate response should be education of the community and we believe the courts, media and the legal professional have a critical role to play in this process.[203]

3.68 At the Legal Issues Roundtable it was argued that the problem the community had with suspended sentences was not with the concept of a suspended sentence, but rather with the fact that offenders who had their sentence suspended had not been imprisoned.[204] The new orders proposed in the Interim Report, it was suggested, would be subjected to similar criticism.[205]

---

199 Sentencing Advisory Council (2005), above n 5.

200 Sentencing Advisory Council, *Suspended Sentences: Interim Report* (2005) [3.14].

201 Submission 11 (Law Institute of Victoria). See also Submission 22 (Fitzroy Legal Service Inc): 'We submit [community] concerns are misconceived and reflect a lack of understanding about the nature and purpose of suspended sentences. If they are not misconceived, they are simply inappropriate. Punitive sentencing and gaoling offenders are not ends in themselves'. This point was also made at the Legal Issues Roundtable (8 December 2005).

202 Submission 11 (Law Institute of Victoria).

203 Submission 18 (Criminal Defence Lawyers' Association).

204 Legal Issues Roundtable (8 December 2005).

205 Ibid.

3.69 The Criminal Bar Association, among others,[206] called for the Council to 'focus on its function of better informing the community about the purposes of suspended sentences, rather than advocating their abolition'.[207] The Federation of Community Legal Centres suggested that if changes to the order are thought necessary to support community understanding, 'consideration should be given to changing the name of suspended sentences to better reflect their role and nature'.[208]

The Interim Report

3.70 As noted above, a minority of those who participated in consultations and who made submissions in response to the Interim Report supported the abolition of suspended sentences.[209] Similarly, the overwhelming majority of those who made submissions and participated in consultations following the release of the Discussion Paper favoured the retention of suspended sentences, with a small minority supporting their abolition as part of a call for mandatory sentences or harsher punishments, or on the basis that other sentencing options, such as home detention, could appropriately be used in their place.

3.71 However, as we noted in our Discussion Paper, despite support for the retention of suspended sentences, there is clearly a level of dissatisfaction with their current status and operation. Some of the criticisms of suspended sentences expressed during consultations and in submissions have included:

- the classification of a wholly suspended sentence of imprisonment as a 'custodial order' or as a 'term of imprisonment' is a fiction—'prison' should mean 'prison' (that is, a straight term of immediate imprisonment);
- wholly suspended sentences are inappropriate for serious crimes of personal violence, including rape, sexual assault and intentionally or recklessly causing serious injury;
- the gap between a sentence of a straight term of imprisonment and an equivalent term of imprisonment which is wholly suspended is too wide—a suspended sentence should have more of a punitive element;
- courts should be permitted to attach conditions to suspended sentence orders;
- courts are using suspended sentences inappropriately in some cases—imposing a suspended sentence where a non-custodial penalty, such as a community-based sentence, may have been justified ('net-widening')—and this has serious implications on breach; and
- the current breach provisions are too inflexible and risk injustice in individual cases (which, it was suggested, has led to the practice by some judicial officers of finding 'exceptional circumstances' where the offender's circumstances are merely changed rather than exceptional).[210]

---

206 See, for example, Submissions 22 (Fitzroy Legal Service Inc) and 23 (Federation of Community Legal Centres).

207 Submission 21 (Criminal Bar Association).

208 Submission 23 (Federation of Community Legal Centres).

209 See above [3.7].

210 However, a majority of those who participated in community forums and focus groups following the release of the Council's Discussion Paper considered the current breach provisions to be 'fair and appropriate' Of the 108 responses received on feedback forms distributed at these forums and focus groups, 67 agreed with the statement that current breach provisions were 'fair and appropriate', while 14 thought they were too tough and 27 too lenient.

3.72 In seeking to resolve some of these criticisms the Council came to the preliminary view, apparently contrary to the views in submissions and consultations, that suspended sentences should no longer be available in Victoria. This view was reached largely on the basis that to reform suspended sentences in the way supported by many—the introduction of a conditional order—would not only fail to address the ambiguous nature of suspended sentences and their continued status at law as a 'prison' sentence, but would risk creating more problems than it would solve, compromising the integrity of the order. The risks of a modified version of suspended sentences with conditions, we felt, included sentence escalation and higher breach rates, further decreasing the effectiveness of the order in diverting offenders from prison. Should the breach provisions be modified to allow for this, a central pillar of the suspended sentences—the certainty that the sentence imposed would be activated on breach of the suspended sentence—would, we believed, be substantially weakened. In the end we determined that these problems were irresolvable in the context of the current form of the order.

3.73 The Council wishes to stress that our recommendation that suspended sentences be abolished was not, as some interpreted it, a call for all offenders on suspended sentences to be imprisoned and a response to calls for more punitive sentencing.[211] Rather, it was an attempt to find a more creative solution to addressing the principal concerns expressed to us by creating a new range of orders that performed substantially the same function as a suspended sentence and other substitutional sanctions, but in a different form. In doing so we felt it was possible to meet the brief of responding to community concerns that sentences should mean what they say, while providing a range of orders with a flexible suite of conditions tailored to the offence, the offender, and the purposes of sentencing in a particular case (whether these are considered to be punishment, deterrence, denunciation, rehabilitation, community protection, or a combination of these purposes) that would avoid the net-widening effects of suspended sentences and provide greater flexibility on breach.

The Council's View

3.74 The philosophical differences between those who accept that a suspended sentence is more severe than other non-custodial orders and who believe it to be an appropriate substitute for immediate prison time, and those who question the internal logic, position, and continued need for such an order are fundamental and unlikely ever to be satisfactorily resolved. Those who support the retention of suspended sentences emphasise the importance of retaining a mechanism that recognises the objective seriousness of the offence, through the formal imposition of a term of imprisonment, while allowing the offender to remain in the community, where this is appropriate. In response to criticisms that suspended sentences lack punitive content, proponents of the order point to the offender's conviction and the presence of the prison sentence on the offender's criminal record, and the possibility on breach of having the sentence activated. They also point to the value of a suspended sentence in allowing for the rehabilitation of the offender in the community. Related, more practical concerns include the potential for the removal of this order to lead to increases in imprisonment, with the associated costs to the community and the offender, as well as increases in the use of conditional orders, which are seen as intrusive and in many cases as setting offenders up for failure.

3.75 Those who support the abolition of suspended sentences, on the other hand, see suspended sentences as occupying an uncertain place in the sentencing hierarchy. They question the internal logic of the order, which requires a court first to determine that a sentence of imprisonment rather than one of the existing non-custodial options is appropriate, and then to determine that it would be inappropriate for the offender to serve it. They may suggest, as the Council did in the Interim Report, that the formal imposition of a prison sentence to

---

211 See, for example, Submission 15 (VALS)—'Hooked on Punishment'.

achieve the condemnatory purpose of sentencing is unnecessary, and serves to erode the denunciatory power of imprisonment as well as community confidence in the justice system. If prison is the appropriate sentence, then the offender should serve his or her sentence in prison.

3.76 Other criticisms relate to the fact that a suspended sentence—a supposedly severe penalty—lacks sufficient punitive content. A suspended sentence, when compared with a prison sentence ordered to be immediately served, may therefore be seen to result in a disparity of outcomes as between offenders. Accepting that the interests of rehabilitation in some cases outweigh punishment, one solution may be to allow courts to attach conditions to suspension. However, given the existing problems with suspended sentences and the risks of attaching conditions to these orders, providing for an alternative suite of non-custodial orders may offer a better solution. A majority of the Council in the Interim Report took this position, arguing that the availability of more credible, flexible non-custodial sanctions to which conditions might be attached—whether for the purposes of punishment, rehabilitation, deterrence, community protection, or a combination of these purposes—would in the long term provide a more useful option than the existing suspended sentences, or a modified version of them.

3.77 These two competing views have been at the heart of the Council's deliberations concerning whether suspended sentences should be abolished, as the Council had provisionally recommended, or should be retained, as forcefully argued by those supporting this course of action. While we have given careful consideration to the views put to us, the original conclusion of a majority of the Council—that the best option is to remove suspended sentences as a sentencing option and to introduce a new range of intermediate orders—has not altered. A minority of the Council, while supporting the proposed changes to intermediate orders, and the other reforms this Report recommends, support the modified version of suspended sentences being retained indefinitely when justified by an offender's rare and exceptional circumstances.

3.78 The Council maintains the view that the criticisms of suspended sentences have significant force and do not merely suggest, as some have argued, a need to educate the community about their use and proper role. Just as many from the legal profession have made clear that they have not been persuaded by the Council's arguments justifying the abolition of suspended sentences, a majority of the Council have failed to be persuaded by arguments justifying their retention.

3.79 While it is true, as some have pointed out, that the decision to suspend is generally based on concerns of rehabilitation rather than punishment, the fact remains that a suspended sentence is treated at law as a 'prison' sentence regardless of the fact the offender may never step inside a prison. The community, quite legitimately in our view, questions how a sentence that results in an offender going back into the community can be viewed as a direct substitute for an actual period of detention. Unlike other substituted sentences, there is no form of supervision or control, beyond the power to initiate breach proceedings should the offender commit another offence. To consider the offender as being in the 'custody of the state' appears to us to be contrary to good logic at best, and misleading at worst.[212] Nor are the negative consequences for the offender of having a prison sentence on his or her record,

---

212 Fox and Freiberg recognise that the 'concept of custody' embodied in the description of a sentencing order as 'custodial' in nature is more extensive than that of 'imprisonment'. The fact a person is subject to a custodial order does not mean that he or she is necessarily held in custody, in the sense of being held in confinement in a prison or correctional centre, but rather that the person is in the 'custody of the state' for the term of the order, with the state having the power to 'coercively intervene in that individual's daily life' for the period of time the offender is under a custodial order: Fox and Freiberg (1999), above n 125, 637–8. In the case of a suspended sentence, 'coercive intervention' is only permitted in cases where the offender has committed another offence and only on proceedings for breach being initiated.

with all this might entail, sufficient in our view to justify the current position of the suspended sentence in the sentencing hierarchy.[213] Even if conditions were attached to address these issues, and protections put in place to discourage net-widening and sentence inflation, it would not resolve what Justice Kirby referred to as the 'tension' between determining that imprisonment is appropriate, and then, considering all the same factors, that it is not appropriate for the offender to serve it. This should not be interpreted as a criticism of judicial officers who are simply applying the law, but rather a criticism of the premise of the order itself.

3.80 Historically, the need for suspended sentences was driven by a lack of available alternatives to imprisonment. With the development of other alternative sanctions, the need for its retention may be questioned. As a Council we continue to be particularly concerned that sentencing orders used as substitutes for immediate imprisonment not only carry with them real risks of net-widening and sentence inflation, but have contributed to decreasing levels of public confidence in the justice system. The evidence gathered by the Council and in other jurisdictions suggests that previous concerns about the effects of suspended sentences may be well-founded.

3.81 The Council also rejects arguments that the imposition of a prison sentence is necessary to recognise the gravity of the offence regardless of whether it is ultimately suspended. In our view the danger is that where suspended sentences are overused, or are seen as being used inappropriately, the symbolic and denunciatory power of imprisonment in censuring the offender's criminal conduct is eroded. Ultimately this reduces the capacity of the suspended sentence to perform a denunciatory function. If the principal justification for imposing a suspended sentence is to achieve formal recognition of the seriousness of the offence and satisfy the purpose of general deterrence while allowing for an offender's rehabilitation in the community, we believe this outcome can be achieved without a court going through the process of determining that a prison sentence is, and then is not, appropriate.

3.82 The ambiguous nature of suspended sentences, in our view, has impaired the operation of the order and fostered confusion, rather than understanding and trust. If sentencing is intended to be partly a communicative endeavour, suspended sentences appear to have failed in this task. We envisage that the changes recommended in the Council's Interim Report will deliver a range of sentencing orders that achieve greater clarity, transparency and conceptual coherence, and that make sense to the broader community.

3.83 We note some suggestions that the best way to remedy the treatment at law of a suspended sentence as a term of imprisonment is simply to reclassify the order as a 'non-custodial' order and to remove section 27(5) of the *Sentencing Act 1991*, which provides that 'a wholly suspended sentence of imprisonment must be taken to be a sentence of imprisonment for the purposes of all enactments' apart from those relating to disqualification for, or loss of, office or the forfeiture or suspension of pensions or other benefits.[214] This suggestion, however, would fail to address our more fundamental concerns that the logic of the order is flawed. If a court finds, after rejecting other alternatives, that a sentence of imprisonment is the appropriate sentence, then in our view it should be served. If an alternative option focused on rehabilitation is supported, then this should be permitted without going through the process of determining that a prison sentence is appropriate, and then after considering the same factors again, that the offender should not serve it.

---

213 We note that this classification and positioning is not universal. For example, in NSW suspended sentences are classified in Part 2, Division 3 of the *Crimes (Sentencing Procedure) Act 1999* as a 'non-custodial alternative', together with community service orders, good behaviour bonds and dismissals, discharges and deferrals.

214 See, for example, Liberal Party of Australia. 'Labor must change suspended sentencing law ASAP' (Media Release, 16 May 2005); and Liberal Party of Australia, 'Bracks must take responsibility—Change the law now!' (Media Release, 13 February 2006).

3.84 Further, while there are particular hurdles that must be overcome by the prosecution in bringing appeals against sentence,[215] section 27(5) does not in itself, as has been suggested, add an additional hurdle by requiring appeal courts to treat the sentence as if it is a sentence of imprisonment to be immediately served. Rather, the approach on appeal to the question of manifest inadequacy is dictated by the nature of the order itself and the process a sentencer must go through in making the order—the imposition of a prison sentence of an appropriate length, and the exercise of the discretion to suspend it.[216] Removing section 27(5) would also lead to the perverse result of removing certain consequences for an offender who has received a suspended sentence. For example, the 'enactments' to which section 27(5) refers include provisions defining persons prohibited from possessing, carrying or using a registered firearm under the *Firearms Act 1996* (Vic) or from obtaining a licence under the Act.

3.85 The Council is also concerned about what we see as the overuse of suspended sentences in recent years and the high rates of breach when compared to other orders. Data previously released by the Council provide some evidence that while suspended sentences are being used in many cases as intended (that is, in place of an immediate term of imprisonment), they also appear to be encroaching on the territory previously occupied by non-custodial sentences such as community-based orders, bonds and fines.[217] With the exception of South Australia and Tasmania, the data from the higher courts would seem to suggest that the suspended sentence is a more popular sentencing option in Victoria than are its equivalents in most other jurisdictions. The increasing attraction of suspended sentences for sentencers in Victoria, in our view, is evidence of the existing sentencing culture in Victoria (and possibly a lack of faith in existing alternatives), rather than a confirmation that such a disposition is an indispensable part of the courts' sentencing armoury.

3.86 We are confident that cases which previously may have resulted in a wholly suspended sentence would be adequately accommodated within the new sentencing framework proposed in the Interim Report without attendant significant increases in the prison population. However, we are sensitive to the concerns expressed by many that that while the new orders might be appropriate in some cases instead of a suspended sentence, removing the option of a suspended sentence altogether would risk substantial, and ultimately

---

215 The general approach taken by appeal courts to Crown appeals against sentence, is reviewed by Justice Eames in *R v Rzek* [2003] VSCA 97 (Unreported, Batt, Vincent and Eames JJA, 6 August 2003) [22]–[23]: 'The principles which apply to a Director's appeal are well established. Such an appeal should only be brought in the 'rare and exceptional case' and the court should not intervene unless a very clear case of error has been made out. An appellate court may not intervene merely because its members thought the sentence inadequate and that its members would have reached a different conclusion as to the appropriate sentence. The appellate court may only intervene where material error of law or fact has been demonstrated in the approach to sentencing adopted by the judge. In some cases no specific error of fact or law might be identified and yet the sentence itself might reveal such manifest inadequacy or inconsistency with proper sentencing standards as to constitute error in principle'. See also *R v Clarke* [1996] 2 VR 520, 522, Charles JA.

216 In reality, appeal courts may treat the length of the sentence and decision to suspend as interrelated issues when considering whether the term of the sentence is, or is not, manifestly inadequate. See, for example, Justice Phillips in *DPP v Waack* (2001) 3 VR 194, 199: 'I am clear in my own view that a wholly suspended sentence of 18 months' imprisonment was manifestly inadequate. The argument for the director was put in two parts, first that the sentence of 18 months was inadequate and secondly that a wholly suspended sentence was inadequate. I see no need to approach the matter in that bifurcated manner. It seems to me that a wholly suspended sentence of 18 months was manifestly inadequate and that is all that need be said.' Suspension alone is unlikely to support a finding of manifest inadequacy where the term of imprisonment held in suspense is found to be within range, unless 'the decision to suspend the total effective sentence wholly was such that it can be described as so improper as to render the ultimate sentence as manifestly inadequate': *DPP v Johnston* (2004) 10 VR 85, 102. See also *DPP v Oversby* [2004] VSCA 208 (Unreported, Callaway, Eames and Nettle JJA, 18 November 2004) [22], Nettle JA and [13], Callaway JA.

217 See further [3.33]–[3.36].

unsustainable, increases in the Victorian prison population that would be of little benefit, but of great cost to the community.

3.87 We accept that many of the Council's assumptions—including the replacement of many wholly suspended sentences by the new CSO—are premised on a particular view of likely sentencing behaviour once the option to suspend a prison sentence is removed. For example, we note that New Zealand has experienced an increase in custodial sentences in recent years following the introduction of the *Sentencing Act 2002* (NZ) (see [2.18] above). However, in the United Kingdom, the introduction of a restriction on the use of suspended sentences to cases where exceptional circumstances could be shown (bringing their use down to between 1–2 per cent of all sentences),[218] did not appear to result in an increase in the use of immediate imprisonment; rather evidence suggested that courts made greater use of community sentences.[219] While we may draw upon the experiences of other jurisdictions that have taken the step to abolish or restrict the use of suspended sentences, such as New Zealand and England,[220] the context in which the changes have been recommended and the culture of sentencing behaviour in these jurisdictions and Victoria are very different.

3.88 The Council has also been conscious of the need to allow sufficient time for the development and implementation of the orders proposed in the Interim Report, including the securing of additional funding to support the new system before it becomes operational. Introducing the changes proposed before the systems and resources are in place is clearly not desirable. In this context we acknowledge the concerns expressed in a number of submissions that change of this magnitude should be approached with caution, as it requires time to identify all the possible implications and to allow any necessary adjustments to be made to the new orders.

3.89 Taking these considerations into account, the Council has reached the view that while the abolition of suspended sentences should remain the ultimate goal, they should be retained for a transitional period but in a restricted form. The changes we recommend are discussed in the following chapter of this report. We believe that these modifications can be implemented in the early stages of the transitional period without a major commitment of resources. Retaining a limited power to suspend during the transitional period will enable sentencers, prosecutors and defence counsel to adjust to the new framework. It will also allow the Council to monitor which cases fall to be dealt with by suspended sentences and by extension, which cases the existing alternative orders fail to accommodate. We concede that this approach will result in some inevitable overlap between orders but we believe the benefits of a staged implementation of our proposals outweigh any potential disadvantages. The overriding principle of the new framework will still be parsimony, with prison remaining a sanction of last resort.

---

218 Under s 5(1) of the *Criminal Justice Act 1991* (UK), which came into effect in 1992, amendments were made to the use of fully suspended sentences, restricting their use to cases in which 'exceptional circumstances' could be shown. Between 1993 and 2003 the overall proportion of defendants receiving wholly suspended sentences in the Crown Court fell from three per cent to two per cent. In the Magistrates' Court over the same period, the proportion of defendants receiving a wholly suspended sentence remained constant at just one per cent: Research, Development and Statistics Directorate, Home Office, *Sentencing Statistics 2003: England and Wales* (2005) [4.15].

219 Andrew Ashworth, *Sentencing and Criminal Justice* (2nd edn, 1995) 287. Like New Zealand, however, there were other major changes to sentencing that occurred at the same time, which saw a rise in both community sentences and custodial orders in England from 1993 onwards.

220 In April 2005, new suspended sentence provisions were introduced in England and Wales under the *Criminal Justice Act 2003* (UK) c 44 removing the 'exceptional circumstances' requirement and introducing conditions. See further [2.21].

3.90 As a guide we suggest that a realistic time frame for the transition to the new orders and removal of the power to suspend a prison term would be three years. In the short term, reforms should be made to narrow the operation and scope of suspended sentences in line with our recommendations in this report. In the second year (2007–08), changes to other intermediate orders—as foreshadowed in the Council's Interim Report and to be revisited in Part 2 of our Final Report—should be introduced. During this phase of the transitional period both the modified form of suspended sentence and the new range of sentencing orders would be available to the courts in sentencing an offender. The Council proposes to monitor closely the use of suspended sentences and other orders over the transitional period. In the final phase of transition (2009), once the new sentencing regime has been established and is fully operational, the power to suspend a prison sentence under section 27 of the *Sentencing Act 1991* (Vic), and related provisions, should be repealed.

RECOMMENDATIONS

1. Suspended sentences should be phased out in Victoria by December 2009.

   As a guide, the Council recommends that In the first year, the provisions of the *Sentencing Act 1991* governing suspended sentences should be amended in line with Recommendations 3–15, to guide their appropriate use and restrict their availability for serious offences. In the second year (2007–08) other changes to intermediate orders recommended in Part 2 of the Council's Final Report should be introduced. In the final year, Part 3, Division 2, Subdivision 3 of the *Sentencing Act 1991* (Vic) should be repealed.

2. The Council should monitor and report on the use of suspended sentences and other orders over the three year transitional period.

Chapter 4: Reform Options and Proposals

Introduction

4.1 The retention of suspended sentences—even for a limited time—again raises questions of what improvements, if any, can be made to this sentencing order. In this chapter we recommend a number of changes aimed at improving the operation of suspended sentences.

4.2 One of the reforms that had the highest level of support following the release of the Discussion Paper was the introduction of a power to attach conditions to suspended sentences. During consultations on the Interim Report this support remained. However, after closely considering the merits of introducing a conditional form of suspended sentences during the transitional period, the Council has reached the view that conditions should not be introduced. The Council is confident that the new forms of orders recommended in the Interim Report, once operational, will perform substantially the same function as a conditional suspended sentence order, while minimising risks of sentence inflation and providing some flexibility to courts dealing with breaches. The time required to secure the additional resources to support the effective operation of a new conditional order has also been an important consideration.

4.3 In determining what changes to recommend, the Council's primary focus has been on maximising the effectiveness of suspended sentences while protecting against the order's inappropriate use. One of the important changes recommended is the provision of legislative guidance to courts on the factors that may make a case inappropriate for suspension, such as the nature of the offence, the number of times the offender had previously received a suspended sentence, and the risk of the offender reoffending. These factors to some extent replicate the kinds of considerations sentencers routinely take into account in deciding whether or not to exercise the discretion to suspend. However, the Council believes there is merit in clearly articulating these factors in the legislation.

4.4 We have also been conscious that much of the community concern about the use of suspended sentences has resulted from their use in particular types of cases. Such cases have often concerned offenders convicted of sexual offences and other violent offences, where the level of harm caused to a victim has been high. A suspended sentence, with its focus on an offender's rehabilitation, may be seen in such cases as failing to meet the purposes of denunciation, deterrence and just punishment. While this may in part be due to an absence of conditions imposed on the offender, as discussed above, the Council has rejected the introduction of a conditional form of order as providing the best solution.

4.5 The Council accepts, as we believe the community would, that there may be instances where despite the seriousness of the offence, it is appropriate for the offender to remain in the community—such as under one of the conditional orders recommended by the Council in the Interim Report. However, in the case of serious violent offenders, once a sentencer is satisfied that a prison sentence rather than a non-custodial sentence is warranted, the Council believes there should be a strong presumption that the offender will actually serve it. For this reason the Council has recommended that restrictions be placed on the availability of the order for a range of serious violent offences, including murder, manslaughter, rape, sexual penetration of a child and intentionally causing serious injury.

4.6 This is consistent with moves made last year in Canada by the previous Liberal Government to introduce similar amendments to the Canadian *Criminal Code*.[221] The proposed amendments, should they have been passed, would have created a presumption against a court making a conditional sentence order (a conditional order allowing an offender to serve his or her sentence in the community) in the case of offenders convicted of serious personal injury offences (as defined by the *Criminal Code*),[222] terrorist activities, offences related to organised crime and offences 'in respect of which, on the basis of the nature and circumstances of the offence, the expression of society's denunciation should take precedence over other sentencing objectives … unless the court is satisfied that it is in the interests of justice to do so because of exceptional circumstances'.[223] The Council has recommended that a similar 'exceptional circumstances' standard should apply for offences defined as 'serious offences' under section 3 of the *Sentencing Act 1991* (Vic), including manslaughter, rape and intentionally causing serious injury.

4.7 The Council has also resolved that provisions regulating the powers of the court when dealing with a breach of suspended sentence should remain largely unchanged. The two principal advantages of suspended sentences are argued to be their capacity to divert offenders from prison, and to discourage reoffending through the threat of activation of the original sentence on breach.[224] In the Council's view the integrity of the order and its capacity for special deterrence would be seriously compromised should the certainty of reactivation on breach be removed. It is largely on this basis that we have decided against recommending a relaxation of the current breach provisions. While it is true that greater flexibility might allow net-widening and sentence inflation effects to be more effectively dealt with at the point of breach, the Council believes the better option is to avoid these effects altogether by more precise targeting of the order and by providing more flexible community-based alternatives at the point of sentencing.

---

221 *Criminal Code*, RS C 1985, c 46. An election was held in January 2006 resulting in the Conservative Party forming Government.

222 Section 752 of the *Criminal Code*, RS C 1985, c 46 defines 'serious personal injury offence' as: (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person, or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for 10 years or more; or (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

223 Bill C-70, 'An Act to amend the Criminal Code (conditional sentence of imprisonment)', cl. 4 inserting a new section 742.1. The bill was introduced under the then Minister for Justice and Attorney-General, the Hon Irwin Cotler. A new bill was introduced into Parliament on 4 May 2006 by the current Minister for Justice and Attorney-General, the Hon Vic Toews, Bill C-9, 'An Act to amend the Criminal Code (conditional sentence of imprisonment)'. If passed, this Act would exclude persons convicted of an offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more from being eligible for a conditional sentence. The Council does not support this approach for reasons discussion below at [4.62]–[4.68].

224 These two factors have been identified by Bottoms as originating from the two different theories about the purpose of suspended sentences and their appropriate use: the 'avoiding imprisonment theory' and the 'special deterrent theory': Bottoms (1981), above n 121. See also Sentencing Advisory Council (2005), above n 3, [2.16]–[2.18].

Purposes of a Suspended Sentence of Imprisonment

The Current Situation

4.8 Apart from the maximum period of imprisonment that may be suspended, the only limitations on a court when making an order to suspend a term of imprisonment are that 'the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to the provisions of the Act'[225] (including the general purposes of sentencing and other relevant factors set out in section 5) and that the court 'is satisfied that it is desirable to do so in the circumstances'.[226] The equivalent provisions operating in other jurisdictions are similarly broad. For example, in Queensland a court may suspend a term of imprisonment if the court is 'satisfied that it is appropriate to do so in the circumstances',[227] while in South Australia a court may suspend if the court 'thinks that good reason exists for doing so'.[228]

4.9 The leading authority on suspended sentences is the High Court decision of *Dinsdale v The Queen*, which found that in applying a suspended sentence, the rehabilitation of the offender is not the only or even the predominant consideration.[229] *Dinsdale* concerned an appeal to the High Court against a decision of the Western Australia Court of Criminal Appeal to set aside a suspended sentence imposed by the District Court. The reference to a sentence of imprisonment being otherwise 'appropriate in all the circumstances' in the equivalent Western Australian section was considered.[230] The Court suggested that factors relevant both to the offence and to the offender should be taken into account:

> … the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term. This means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender. It would be surprising if the legislation were to warrant, at the second step [the decision whether to suspend the term of imprisonment], concentration of attention only on matters relevant to the offender, such as issues of the offender's rehabilitation and the court's mercy. On the contrary, the structure and language of s 76(2) of the Act support the view that what is required by a proposal that a term of imprisonment should be suspended is reconsideration of 'all the circumstances'. This necessitates the attribution of 'double weight' to all of the factors relevant both to the offence and to the offender—whether aggravating or mitigating—which may influence the decision whether to suspend the term of imprisonment.
>
> Adopting this approach, then, permits attention to be given not only to the circumstances personal to the offender but also to the objective features of the offence. These may, in a particular case, outweigh the personal considerations of rehabilitation and mercy. They may require that the prison sentence be immediately served, despite mitigating personal considerations.[231]

---

225 *Sentencing Act 1991* (Vic) s 27(3).

226 *Sentencing Act 1991* (Vic) s 27(1).

227 *Penalties and Sentences Act 1992* (Qld) s 144(2).

228 *Criminal Law (Sentencing) Act 1988* (SA) s 38(1). In South Australia suspension is conditional on the defendant entering into a bond to be of good behaviour and comply with other conditions (if any) of the bond.

229 *Dinsdale v The Queen* (2002) 202 CLR 321, 348–9, Kirby J. See also Gleeson CJ and Hayne J at 329 and Gaudron and Gummow JJ at 330.

230 *Sentencing Act 1995* (WA) s 76(2).

231 *Dinsdale v The Queen* (2000) 202 CLR 321, 348–9, Kirby J.

4.10 In *Dinsdale* Justice Kirby further observed that Australian courts have:

> … considered [it] undesirable to attempt to circumscribe the language of the statute [referring to the circumstances in which an order to suspend may be made] by reference to supposed formulae, particular considerations or any other gloss.[232]

4.11 The Starke Sentencing Committee reviewed the earlier version of the Victorian provision that appeared in the *Penalties and Sentences Act 1985* (Vic).[233] It favoured keeping the statutory guidance on the circumstances in which a term of imprisonment might be suspended 'relatively general', and recommended that more detailed guidance be provided in the form of guideline judgments.[234] In making this recommendation, the Committee referred to the English Court of Appeal decision in *R v Clarke*,[235] which set out guidelines for the imposition of a partially suspended sentence in England, as a potential model.

Options for Reform

4.12 In its Discussion Paper the Council suggested that there might be some benefit in more clearly articulating the sorts of considerations that should guide the making of an order to suspend. A statement of purpose could also be included in the legislation, setting out the purposes to which an order is directed. For example, section 18X(1) of the *Sentencing Act 1991* (Vic) provides that the particular purposes of a drug treatment order are:

(a) to facilitate the rehabilitation of the offender by providing a judicially-supervised, therapeutically oriented, integrated drug or alcohol treatment and supervision regime;

(b) to take account of an offender's drug or alcohol dependency;

(c) to reduce the level of criminal activity associated with drug or alcohol dependency;

(d) to reduce the offender's health risks associated with drug or alcohol dependency.

4.13 Possible benefits of including a purpose statement would include providing better guidance to sentencers on the principles to be applied, and promoting a better understanding in the community of the basis on which a suspended sentence order might be made. Relevant purposes suggested in the Discussion Paper included:

- to formally denounce the offender's conduct;
- to facilitate the rehabilitation of the offender;
- to allow mercy to be exercised in appropriate cases; and/or
- to deter the offender from further offending.

---

232 Ibid.

233 *Penalties and Sentences Act 1985* (Vic) s 21(1).

234 Sentencing Committee (1988), above n 40, 324.

235 *R v Clarke* [1982] 3 All ER 232. The Court commented: 'In general the type of case that we have in mind is where the gravity of the offence is such that at least six months' imprisonment is merited, but when there are mitigating circumstances which point towards a measure of leniency not sufficient to warrant total suspension.' While the court cautioned that 'examples are always dangerous', they offered as examples of appropriate cases for a partly suspended sentence 'some serious 'one-off' acts of violence' which are usually met with immediate terms of imprisonment; 'some cases of burglary which at present warrant 18 months' or two years' imprisonment, where the offender is suitably qualified in terms of his record; some cases of fraud on public departments or some credit card frauds, where a short immediate sentence would be insufficient; some cases of handling involving medium-range sums of money; some thefts involving breach of trust; some cases of stealing from employers': at 236, Lord Lane CJ.

4.14 On the other hand, as the broad purposes of sentencing are set out in section 5 of the *Sentencing Act 1991* (Vic), it could be argued that there is little value to be gained by a separate statement of purpose in the legislation.

4.15 The legislation might also set out factors either supporting suspension or making suspension undesirable in the circumstances. Alternatively, guidance of a more general nature on the approach to be taken might be provided by the Court of Appeal—for example by including reference to relevant factors in a guideline judgment.[236] Under section 6AC of the *Sentencing Act 1991* (Vic), a guideline judgment may set out factors such as:

- the criteria to be applied in selecting from various sentencing options;
- the weight to be given to the various purposes of sentencing;
- the criteria by which a court may determine the gravity of an offence or which may be used to reduce the sentence for an offence;
- the weighting to be given to relevant criteria;
- any other matter consistent with the principles contained in the Act.

4.16 The court might include reference in a guideline judgment to some of the factors that may be taken into account in making an order to suspend, and to when suspending a sentence of imprisonment may be appropriate. This may promote greater consistency of approach.

Submissions

STATEMENT OF PURPOSE

4.17 In submissions on the Discussion Paper, there was little support for including a statement of purpose in the legislation.[237] Many considered a purpose statement unnecessary due to the general guidance provided by section 5 of the Act,[238] and undesirable because it might fetter judicial discretion to impose a suspended sentence where the court considered it appropriate to do so.[239] The Victorian Aboriginal Legal Service suggested that if a statement were to be included in the Act, 'it should be drafted more broadly than the general sentencing principles'; the submission argued that '[i]f the statement simply recites sentencing principles or is narrower than sentencing principles then it should not be introduced'.[240] It was further suggested that educational strategies were the most appropriate and effective way to deal with 'media and community misunderstandings as to the role of suspended sentences'.[241]

---

236 A guideline judgment sets out guidelines to be taken into account by courts in sentencing offenders. The power to make a guideline judgment was recently introduced in Victoria under Part 2AA of the *Sentencing Act 1991* (Vic) and is restricted to the Court of Appeal. A guideline judgment may apply generally, to a particular court or class of court, to a particular offence or class of offence, to a particular penalty or class of penalty, or to a particular class of offender: *Sentencing Act 1991* (Vic) s 6AA.

237 Those who were opposed to the inclusion of such a statement included the Fitzroy Legal Service (Discussion Paper Submission 44), the Mental Health Legal Centre (Discussion Paper Submission 45) and Youthlaw (Discussion Paper Submission 41).

238 Discussion Paper Submissions 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 41 (Youthlaw) and 44 (Fitzroy Legal Service).

239 Discussion Paper Submissions 41, (Youthlaw), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

240 Discussion Paper Submission 43 (VALS).

241 Discussion Paper Submission 44 (Fitzroy Legal Service). See also Discussion Paper Submission 39 (Federation of Community Legal Centres).

GUIDELINES ON THE USE OF SUSPENDED SENTENCES

4.18 While some felt that it was useful for courts to be aware of factors relevant to the decision to suspend and appropriate responses to breach, again concerns were raised that any guidance provided should not be structured in such a way as to restrict discretion.[242] Victoria Legal Aid, which expressed particular reservations about including guidelines in the legislation, argued that listing some factors but not others 'will effectively give disproportionate weight to the included factors at the expense of others' and would create a need to amend legislation constantly in order to keep pace with community values.[243]

4.19 Guidance in the form of a guideline judgment issued by the Court of Appeal was identified as a another possible approach,[244] although guideline judgments were seen by some as carrying risks similar to those of legislative guidelines.[245] Many considered that additional guidance was unnecessary in light of the general purposes and factors relevant to sentencing set out in section 5 of the Act.[246]

4.20 Victoria Legal Aid argued that should the Council be persuaded that greater guidance is desirable, this should be achieved by way of judicial education.[247] Some suggested that providing information to the courts, including data on what sentences are being imposed, the circumstances in which they are imposed and factors contributing to breach, would help to encourage an informed and consistent approach.[248]

4.21 The Federation of Community Legal Centres, the Fitzroy Legal Service, Youthlaw and the Mental Health Legal Centre identified a number of factors that should be considered relevant if some form of guidance were adopted, including:

- any mental health issues of the offender and the prospects of rehabilitation in the community compared with those prospects in prison;
- any drug or alcohol issues that have contributed to the offending behaviour and the prospects of the offender's rehabilitation in the community compared with such prospects in prison;
- the relative youth of the offender and his or her prospects of rehabilitation in the community compared with such prospects in prison;
- the appropriateness of an immediate sentence given an offender's disability and the supports and facilities available in prison;
- the particular cultural background of the offender where this would tend to make the effect of incarceration harsher;
- the need to avoid a custodial sentence in the case of Indigenous offenders in light of the findings of the Royal Commission into Aboriginal Deaths in Custody; and
- the prior criminal history of the offender and his or her likelihood of reoffending.

---

242 See, for example, Discussion Paper Submissions 36 (Magistrates' Court of Victoria), 39 (Federation of Community Legal Centres), 41 (Youthlaw), 44 (Fitzroy Legal Service), 45 (Mental Health Legal Centre), and 48 (K. Davies).

243 Discussion Paper Submission 38 (Victoria Legal Aid).

244 See, for example, Discussion Paper Submissions 39 (Federation of Community Legal Centres) and 41 (Youthlaw).

245 Discussion Paper Submission 38 (Victoria Legal Aid).

246 Discussion Paper Submission 44 (Fitzroy Legal Service).

247 Discussion Paper Submission 38 (Victoria Legal Aid).

248 See, for example, Discussion Paper Submissions 39 (Federation of Community Legal Centres), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

The Council's View

4.22 The Council does not see a need to set out a separate statement of purpose for suspended sentence orders. Section 5 of the Act is cast in sufficiently broad terms to encompass the individual purposes for which an order to suspend may be made.

4.23 However, the Council believes that there are a number of benefits to be gained from setting out considerations that may be factors in the decision to suspend. While it could be argued that the common law provides judicial officers with the appropriate level of guidance and flexibility, setting out a non-exhaustive list of these factors in the legislation will encourage community understanding of how the decision to suspend is made by the court. It may also assist in more effective application of the order, both in terms of preventing reoffending and in minimising the possibility of inappropriate use of the order.

4.24 General guidance drawn from the case law on the considerations relevant to the decision to suspend is found in the *Victorian Sentencing Manual*.[249] The factors identified in the Sentencing Manual are those which would generally support a decision to suspend. They include:

- the unlikelihood of the offender reoffending;
- the offender's previous good character;
- the lack of prior convictions, or prior convictions that carry little weight;
- the fact that the offender has not previously been imprisoned;
- the offender's age (youth or advanced age);
- the offender's health;
- the offender's responsibility for the care of dependent children;
- steady, continuous employment (or good prospects of employment);
- the offender's rehabilitation (or good prospects of rehabilitation); and
- the fact that the offender was an informer.[250]

4.25 The Council acknowledges that it is often a unique combination of factors, rather than any one factor in isolation, that suggests that suspension is appropriate or inappropriate in a particular case. However, we consider that it would be appropriate for judicial officers to have regard to the additional factors identified by the Federation of Community Legal Centres and its member centres as bearing on that decision, including cultural factors. The Council suggests that similar factors will be relevant for a court to keep in mind when considering an offender's suitability for the new forms of orders proposed in the Interim Report.

4.26 The Council further sees some benefit in articulating more clearly in the legislation the factors that might make suspension inappropriate in the circumstances, as these are less commonly the subject of comment by appeal courts. While the list is not exhaustive, the Council suggests the following as highly relevant considerations:

- the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence;
- whether the full or partial suspension of the imprisonment term would be so disproportionate to the seriousness of the offence that it would fail either to denounce the type of conduct in which the offender engaged or to deter the offender or other persons from committing offences of the same or a similar character;

---

249 Judicial College of Victoria, *Victorian Sentencing Manual* (2005).

250 Ibid [13.7.5.3].

- the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders;
- whether the offence was committed during the operational period of a suspended sentence order; and
- the risk of the offender reoffending.

We explain the reasons for including each of these factors below.

4.27 By according these factors formal legislative recognition, courts will be expressly required to take these factors into account in determining, once a prison sentence has been imposed, whether it should be suspended. The Council recommends that if statutory guidance of the kind recommended is provided, it should be made clear that the factors are not intended to affect the operation of section 5 or of the common law, and that consideration of other relevant factors should not be precluded.

Denunciation, General Deterrence and Seriousness of the Offence

4.28 The first two factors listed reflect the types of considerations the Council believes, that courts should already take into account in determining whether suspension is appropriate, but to which sentencers have sometimes had insufficient regard. It is important, in the Council's view, to state these considerations as limiting the discretion to suspend at the point of initial sentencing, particularly as the grounds on which a Director's appeal on sentence may be allowed are difficult to satisfy.[251] Even after proper grounds for allowing the appeal have been established, and the court has determined that it is appropriate to resentence the offender, appeal courts, mindful of the principle of double jeopardy, are generally reluctant to order an offender to serve an immediate term of imprisonment.[252] In this context, it is critical that the discretion to suspend at the initial point of sentencing is exercised in a way that properly takes into account all relevant considerations.

4.29 We note that the approach recommended is largely consistent with that originally advocated in Canada, which would have restricted the availability of conditional sentences of imprisonment in the case of defined offences, and offences 'in respect of which, on the basis of the nature and circumstances of the offence, the expression of society's denunciation should take precedence over other sentencing objectives'.[253] The Council's recommendations in relation to offence-based restrictions are discussed at [4.62]–[4.68].

---

251 A summary of the principles that apply to Director's appeals and proper grounds of appeal is provided in *R v Clarke* (1996) 2 VR 520, 522, citing *Griffiths v R* (1977) 137 CLR 293, 310, Barwick CJ; *Malvaso v R* (1989) 168 CLR 227, 234, Deane and McHugh JJ; *Everett v R* (1994) 181 CLR 295, 299, Brennan, Deane, Dawson and Gaudron JJ; *R v Allpass* (1993) 72 A Crim R 561, 562–3 and *R v Osenkowski* (1982) 30 SASR 212, 212–13, King CJ.

252 See, for example, Eames JA in *DPP v Anderson* [2005] VSCA 68 (Unreported, Warren CJ, Batt and Eames JJA, 6 April 2005) [59]: 'I would be very slow to exercise my own discretion on a Director's appeal to order that an offender be arrested and commence a sentence of immediate imprisonment. It is the trial judge who has the primary obligation to impose sentence and it is a very serious step to imprison a person who has been dealt with and released into the community by a trial judge. Even if in the exercise of my own discretion I would at first instance or on appeal have been minded to impose some period of immediate imprisonment, I would now decline to do so, in the exercise of the overriding discretion held by the appellate court upon a Director's appeal' [footnotes omitted]. See more generally *R v Clarke* (1996) 2 VR 520, 522.

253 See above [4.6].

4.30 While some have questioned whether concerns of proportionality should properly factor into the decision to suspend a prison sentence,[254] the relevance of the seriousness of the offence, together with considerations of denunciation and general deterrence to this decision has received some recognition by the Court of Appeal in recent years. For example, in *DPP v Waack*[255] (a case involving a brutal attack by a young offender on a man outside a hotel) the court upheld a Crown appeal on the basis that a wholly suspended sentence of 18 months' imprisonment was manifestly inadequate, and resentenced the offender to 18 months' imprisonment with a non-parole period of 12 months. The Court concluded that this was 'one of those cases in which the seriousness of the offence and the offending was such as to demand a custodial sentence, despite the factors in mitigation' such as the offender's youth, remorse, lack of relevant criminal history, and prospects for rehabilitation.[256] Similarly, in *DPP v Johnston,* the court found that the 'seriousness of the offences … and the deliberate and wanton manner in which they were committed'[257] justified the court overturning a wholly suspended sentence of 12 months' imprisonment and a fine of $10,000 and resentencing the offender to a partially suspended sentence of two years and nine months, with nine months to be served immediately. In that case the respondent had been convicted of two counts of affray, one of assault and one of intentionally and unlawfully damaging property.

4.31 In the more recent case of *Director of Public Prosecutions v KE*—a case of a female school teacher convicted of six counts of taking part in acts of sexual penetration with a child under 16 years (a student)—the Court of Appeal held that a sentence of 22 months' imprisonment wholly suspended was manifestly inadequate. The offender was resentenced to a term of two years and eight months' imprisonment with six months to be served immediately and 26 months suspended. In determining that a partially rather than wholly suspended sentence was appropriate, Justice Callaway observed that unless the respondent was required to serve part of her sentence in prison, 'the principle of equality will not be observed, nor would the Court sufficiently condemn the respondent's conduct'.[258]

Previous Suspended Sentences and Further Offending

4.32 One of the objectives in setting out a list of factors to be taken into account by a court in making a suspended sentence is to better target suspended sentences to those offenders for whom this type of sentence is likely to be successful. While the fact that an offender has previously received a suspended sentence should not necessarily preclude suspension, the number of previous suspended sentences and any breaches, the Council considers, are directly relevant to the decision to suspend. In the case of an offender with a history of breaching suspended sentence orders, the capacity of yet another suspended sentence for special deterrence must be assumed to be limited. The fact that an offence has been committed during the operational period should also, in most cases, suggest that the case is one inappropriate for suspension. In our view, unless the offending occurred earlier but has only recently come to light, or is directly related to the offending behaviour for which the suspended sentence was ordered when the offender has previously been given the benefit of a suspended sentence but has committed further offences, the case must be of a very exceptional kind to justify the court imposing a prison term and then determining that it should be wholly suspended.

---

254 For example, Justice Batt in *R v Groom* [1999] 2 VR 159 observed that: 'if the sentence of imprisonment, if unsuspended, must under s. 27(3) be proportionate, the desirability of suspension must be determined by reference to some other consideration or factor': at 170. .

255 *DPP v Waack* (2001) 3 VR 194.

256 *DPP v Waack* (2001) 3 VR 194, 199, Phillips JA.

257 (2004) 10 VR 85, [65].

258 *DPP v KE* (2005) 11 VR 287, 296–297 (Batt and Buchanan JJA concurring).

4.33 While there are no data available on this issue, we have found examples where offenders who had received suspended sentences on a number of occasions were given a further suspended sentence upon breach. For example, in the recent case of *DPP v* Anderson[259] (an appeal on sentence from the County Court to the Court of Appeal) the offender had received a suspended sentence on five prior occasions, two of which he had breached. During the operational period of the most recent suspended sentence imposed, the offender committed the offence of recklessly causing serious injury. Despite the most recent offence having been committed during the operational period of an earlier suspended sentence, the offender again received a suspended sentence.[260]

RISKS OF THE OFFENDER REOFFENDING

4.34 It is true that assessing with any degree of certainty whether a particular offender is likely to reoffend is fraught with difficulty. However, in circumstances where an offender has a substantial criminal history and is assessed on this basis as having a high risk of reoffending, or where the consequences of any further offending would risk serious harm to any future victim (such as a case where an offender has been convicted of a sexual offence against children), the Council believes the presumption should be against suspension.

RECOMMENDATIONS

3. The *Sentencing Act 1991* (Vic) should be amended to provide a non-exhaustive list of factors to which a court should have regard when deciding whether suspension of a prison sentence is 'desirable in the circumstances'. Factors listed as relevant to the decision to suspend should include:
   - the nature and gravity of the offence, including any physical or emotional harm done to a victim and any injury, loss or damage resulting directly from the offence;
   - whether the full or partial suspension of the imprisonment term would be so disproportionate to the seriousness of the offence that it would fail to properly denounce the type of conduct in which the offender engaged or to deter the offender or other persons from committing offences of the same or a similar character;
   - the number of occasions on which the offender has previously received a suspended sentence, and any prior breaches of suspended sentence orders;
   - whether the offence has been committed during the operational period of a suspended sentence order; and
   - the risk of the offender reoffending.

   It should be made clear that the listing of relevant factors is not intended to affect the operation of section 5 of the *Sentencing Act 1991* (Vic) or the common law, and does not preclude consideration of other relevant factors.

259 *DPP v Anderson* [2005] VSCA 68 (Unreported, Warren CJ, Batt and Eames JJA, 6 April 2005).

260 Ibid. On appeal the original sentence of 12 months' imprisonment wholly suspended for a period of two years was set aside and the offender resentenced to 22 months' imprisonment wholly suspended for a period of two years.

Limiting the Availability of Suspended Sentences

Introduction

4.35 Many of the concerns about the use of suspended sentences appear to relate to their use in cases involving serious offences against the person, such as rape and intentionally causing serious injury. This raises the issue of whether suspended sentences should be available in all cases, or limited in some way. In the Council's Discussion Paper we suggested that some offences, such as rape or manslaughter, might be seen as so serious that only an immediate term of imprisonment is appropriate. In such cases considerations such as rehabilitation may be regarded as less important than the need to punish the offender, formally censure the offender for his or her conduct, and deter others from committing similar offences.

4.36 Offenders who receive suspended sentences for serious violent crime constitute only a tiny proportion of all offenders receiving a suspended sentence,[261] yet often are the subject of much media attention and community concern. This might be seen as reflecting a general view that a suspended sentence is simply not an appropriate outcome in these cases.

4.37 There are a number of possible means by which the availability of suspended sentences for more serious offences might be limited. Specifying factors relevant to the decision to suspend, as recommended above, is one means of discouraging the use of suspended sentences in cases where, because they allow the offender to avoid imprisonment, they would fail to denounce the offender's conduct sufficiently or to deter others from committing similar offences. Other options which might be considered include amendments to the *Sentencing Act 1991* (Vic) to:

- make the option to suspend unavailable for specified offences, or for offences with a specified maximum penalty (for example, 10 years or more);
- limit the availability of the power to suspend for specified offences or offences with a specified maximum penalty to those where exceptional circumstances can be shown; or
- reduce the length of the gaol term that can be suspended—for example, from three years in the higher courts to two years (the current maximum term that applies in NSW) or to 12 months (as is the case in England and Wales).

The Current Situation

OFFENCE-BASED RESTRICTIONS

4.38 There are few limits on the types of offences for which a prison sentence may be suspended. However, under the *Crimes Act 1958* (Vic), there is no power to suspend the whole or any part of a sentence when sentencing an offender convicted of:

- carrying a firearm when committing an indictable offence;[262] or
- carrying an offensive weapon when committing a sexual offence.[263]

---

261 See further Appendix 3.

262 *Crimes Act 1958* (Vic) s 31A.

263 *Crimes Act 1958* (Vic) s 60A.

4.39 While there are few legislative restrictions, a number of cases have suggested that for some serious violent offences a sentence of immediate imprisonment will be warranted, in the absence of exceptional circumstances. The Court of Appeal considered the use of suspended sentences for rape—and more specifically digital rape—in *R v Schubert*.[264] Justice Brooking, in rejecting the appeal against a sentence of four years' imprisonment, stated:

> Generally speaking, a digital rape should result in an immediate custodial sentence of substantial duration, and the sentencer should ensure that a substantial part of that sentence will be actually served. Of course, there are no absolute rules, but, generally speaking, notwithstanding a plea of guilty, previous good character and genuine remorse, a rapist, whether the rape is digital or of a different kind, stands in very grave danger of an immediate custodial sentence.[265]

4.40 Justice Winneke, then President of the Victorian Court of Appeal, echoed this view, suggesting that 'there will be very few crimes of rape, digital or otherwise, which in my opinion will warrant a non-custodial sentence'.[266] These views were later affirmed by the Chief Justice of the Supreme Court in *DPP v Fellows*.[267] Justice Phillips suggested that while the words 'in exceptional circumstances' were not used 'to describe the setting in which non-custodial sentences for rape should be imposed … in my opinion, *Schubert* and *Buhagiar* stand for that proposition'.[268] In *Fellows* the Court of Appeal upheld an appeal on the grounds that a sentence of three years wholly suspended for a period of three years for one count of rape was inadequate by reason of its suspension.

4.41 The Court of Appeal recently reconsidered the use of suspended sentences for rape in *Director of Public Prosecutions v Sims*.[269] Justice Eames (in the majority), in dismissing an appeal by the Director of Public Prosecutions against a wholly suspended sentence for aggravated burglary, two counts of rape and indecent assault, observed:

> As the authorities … demonstrate, in most instances a crime of rape will result in a sentence of immediate imprisonment, notwithstanding the presence of mitigating factors. But each case must be judged according to its own circumstances.[270]

4.42 Justice Batt (in the minority) further remarked:

> The seriousness of aggravated burglary and rape requires general deterrence, denunciation and just punishment to be the paramount purposes to be served by a sentence for them … Whilst I accept that there are no absolutes, my assessment is that, in the absence of exceptional circumstances, a sentence which permitted a person who had raped another twice in the other's own home to avoid immediate imprisonment is 'so disproportionate to the seriousness of the crime' that it would 'shock the public conscience'.[271] (footnotes omitted)

---

264 [1999] VSCA 25 (Unreported, Winneke P, Brooking and Ormiston JJA, 23 February 1999).

265 Ibid [16], Brooking J.

266 Ibid [20], Winneke P.

267 [2002] VSCA 58 (Unreported, Phillips CJ, Phillips JA and O'Bryan AJA, 18 April 2002) [32]–[33].

268 Ibid [35].

269 [2004] VSCA 129 (Unreported, Batt, Vincent and Eames JJA, 23 July 2004) [31].

270 Ibid [32].

271 Ibid [20].

4.43 Between 1999–2000 and 2003–04, of the 166 people sentenced for rape, 21 received an order that did not require the offender to serve an immediate term of imprisonment or youth detention, accounting for around 13 per cent of all people sentenced for rape over this period.[272] Of these just under half—or 10—received wholly suspended sentences, constituting 6 per cent of all offenders sentenced for rape over this period.[273] This suggests that courts are generally reluctant to use the power to wholly suspend or make some kind of non-custodial order for serious sexual offences, such as rape.

4.44 Similarly, in the case of manslaughter and intentionally causing serious injury, the courts have appeared to accept that exceptional circumstances are required, at least in some sorts of cases, before suspension can be considered. For example, in *DPP v Buhagiar and Heathcote*[274] the Crown appealed against the full suspension of sentences of two years' imprisonment and three years' imprisonment, arguing that the suspension rendered the sentence manifestly inadequate and disproportionate to the seriousness of the offences.[275] The offences included charges of burglary and intentionally causing serious injury. In considering the sentence imposed on the first respondent, the Court of Appeal held:

> … the nature of the offence of intentionally causing serious injury, as here committed by an offender who had relevant prior convictions, is such that, in the absence of exceptional or extraordinary circumstances, an immediate custodial sentence is called for.[276]

4.45 Only five of the 99 people (5 per cent) sentenced for manslaughter between 1999–2000 and 2003–04 received a wholly suspended sentence.[277] However, over the same period one out of every four people sentenced for intentionally causing serious injury received a suspended sentence (104 out of 415).[278] Of these, 67 people had their sentence wholly suspended, representing 16 per cent of all offenders sentenced for this offence. With 16 per cent of all people sentenced for this offence receiving a wholly suspended sentence, it seems unlikely that an 'exceptional circumstances' standard is being applied in all cases, but perhaps reserved for offenders with previous convictions for similar types of offending.

---

272 Sentencing Advisory Council, *Sentencing Snapshot: Sentencing Trends for Rape in Victoria,* No. 7, (December 2005) Table 1. Offenders ordered to serve an immediate term of imprisonment included nine offenders sentenced to a partially suspended prison sentence and one offender sentenced to a combined custody and treatment order.

273 Ibid.

274 [1998] 4 VR 540.

275 The length of the terms of imprisonment imposed and the lack of an order for cumulation were not challenged by the Director of Public Prosecutions on appeal. Nevertheless, significant comment was made by the court, both on the adequacy of the terms imposed and on the failure to order cumulative terms of imprisonment: *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 542–3, Ormiston J and 546, Batt and Buchanan JJA.

276 *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 547, Batt and Buchanan JJA. However, the court found that in this instance the sentencing judge had not erred in concluding that there were exceptional or extraordinary circumstances in the form of the respondent's strong prospects of rehabilitation.

277 Sentencing Advisory Council, *Sentencing Snapshot: Sentencing Trends for Manslaughter in Victoria,* No. 5, (December 2005) Table 1. These cases included: *R v Stavreski* (2004) 145 A Crim R 44; *R v Makike* [2003] VSC 340 (Unreported, Harper J, 26 August 2003); *R v Marden* [2000] VSC 558 (Unreported, Vincent J, 21 November 2000); and *R v Denney* [2000] VSC 323 (Unreported, Coldrey J, 4 August 2000). Two offenders received a partially suspended sentence.

278 Sentencing Advisory Council (2005), above n 5.

TERM OF IMPRISONMENT ABLE TO BE SUSPENDED

4.46 In Victoria, the maximum term of imprisonment that may be ordered to be held wholly or partially in suspense is three years (in the case of the County Court and Supreme Court)[279] and two years (in the case of the Magistrates' Court).[280] In some jurisdictions (the ACT, South Australia and Tasmania) and in the case of federal offenders there is no limit on the length of a sentence that can be suspended. In Queensland, Western Australia and the Northern Territory, a five-year limit applies, while in New South Wales the maximum term of imprisonment that may be held in suspense is two years. Different operational periods may also be ordered.

Options

LIMITING THE AVAILABILITY OF SUSPENDED SENTENCES BY OFFENCE

4.47 As discussed above, an option for preventing courts from making suspended sentences in more serious cases would be to identify specific offences for which the option to suspend should not be available. Another approach would be to exclude their use for offences carrying a maximum penalty of, for example, 10 years or more. The effect on sentencing trends would vary depending on the approach taken.

4.48 Table 4 suggests the possible effect in the higher courts of making the option to suspend unavailable altogether for offences defined as 'serious offences' under section 3 of the *Sentencing Act 1991* (Vic),[281] including murder, manslaughter, intentionally causing serious injury and rape (see further Appendix 3).

Table 4: Effect of removing the ability to suspend prison sentences for s 3 *Sentencing Act 1991* (Vic) offences based on higher court outcomes 1999–2000 to 2003–04

	Current situation (incl. s.3 offences)	Suspended sentences (excl. s.3 offences)	Change
Number of suspended sentences	2,689	2,179	– 510
Suspended sentences as a proportion of all sentences	29%	23%	– 6 percentage points

Source: Sentencing Advisory Council, *Discussion Paper* (2005)

279 *Sentencing Act 1991* (Vic) s 27(2)(a).

280 *Sentencing Act 1991* (Vic) s 27(2)(b).

281 This definition is used for the purposes of the Subdivision (1A) of Division 2 of Part 3 of the *Sentencing Act 1991* (Vic) relating to the power of the court, when an offender has been convicted of certain serious offences to sentence him or her to an indefinite term of imprisonment. Under section 18B a court must only make such an order 'if satisfied, to a high degree of probability, that the offender is a serious danger to the community'.

4.49 Arguments against removing or restricting the availability of suspended sentences for particular offences include those discussed in relation to removing the power to suspend more generally, such as a potential reduction in guilty pleas. It might also encourage charge and plea negotiations on the part of the defence to move the offender outside the scope of the provisions.

4.50 While some offences may warrant the imposition of an immediate custodial sentence, it could also be argued that provision should be made for the exceptional case. Courts have generally regarded any attempts to limit the circumstances in which suspension may be appropriate as dangerous. In *R v Wacyk* Justice Perry of the South Australian Court of Appeal, in taking this position, commented:

> The exercise of the discretion [to suspend a term of imprisonment] miscarries if it is approached with a preconceived view that any particular offence or class of offences may only properly be met by an immediate custodial term of imprisonment … Notwithstanding indications given from time to time by this Court that certain offences ordinarily call for an immediate custodial term, there must always be room for the odd exception. Strictures that a given offence or class of offences will ordinarily deserve an immediate custodial term are nothing more than an indication that the need for general deterrence attaching to them will commonly outweigh idiosyncratic features attaching to the case, including considerations personal to the offender …
>
> It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of the particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender.[282]

4.51 Rather than removing the power to suspend altogether for serious offences, an alternative option would be to allow the court to retain some discretion to suspend in some cases—for example, where exceptional circumstances can be shown. This would allow courts to make a suspended sentence order in cases where ordering the offender to serve the prison sentence might result in some injustice, but would actively discourage courts from doing so in other cases. This would substantially reflect the position already existing in Victoria as it applies to offences such as rape and manslaughter. On this basis, the inclusion of such a restriction in the legislation might be regarded as unnecessary. On the other hand, making express reference to this principle in the legislation and referring to specific offences that should be covered might resolve any residual uncertainty about the circumstances in which an order to suspend should be made. It might also perform an important symbolic function by making clear that the offences defined should result in an immediate term of imprisonment, in all but the most exceptional cases.

4.52 Even if the use of suspended sentences were restricted to exceptional circumstances for some categories of offences, there would still be differences of opinion as to what would constitute 'exceptional circumstances'. For example, in *DPP v Sims*,[283] involving a Crown appeal against a suspended sentence for rape, the majority of the Court of Appeal appeared to accept that the circumstances in that case could have been regarded as exceptional or highly unusual and that the sentencing judge had therefore not fallen into error in making an order to suspend. In a dissenting judgment, Justice Batt made clear that in his view, the circumstances fell short of this standard (see above [4.41]–[4.42]).

---

282 *R v Wacyk (1996)* 66 SASR 530, 535–6, Perry J.

283 [2004] VSCA 129 (Unreported, Batt, Vincent and Eames JJA, 23 July 2004).

Reducing the Maximum Term of Imprisonment Able to Be Suspended

4.53 As noted above, many of the apparent community concerns about suspended sentences relate to their use in cases involving more serious offences. If the term of imprisonment able to be suspended were to be restricted to sentences of, for example, two years and under (or 12 months and under), the use of suspended sentences might be excluded in many of the more controversial cases.[284]

4.54 On the other hand, it could be argued that if suspended sentences are intended to be a serious alternative to imprisonment, their availability should be extended to those cases which justify imposing a term of imprisonment of more than three years, for example because of the serious nature of the offence, but in which there are particular extenuating circumstances justifying a merciful response. Some critics of suspended sentences have in fact suggested that if suspended sentences are to have any place in sentencing systems with a range of alternatives to imprisonment, it is in relation to these more serious types of offences where a substantial sentence of imprisonment would ordinarily be warranted.[285]

4.55 In the Victorian Sentencing Review's *Discussion Paper* released in 2002, one of the options considered was restricting the maximum term of imprisonment that could be held in suspense to two years.[286] This was consistent with the Review's position that 'sentencing options should be of a realistic length' and that the maximum length of any conditional order should be two years.[287] It was felt that conditional orders that are too long are as a general principle undesirable, as they simply increase the chances that the offender will breach the order—either by failing to comply with the conditions of the order or by committing another offence.[288] The Sentencing Review ultimately made no recommendations on this issue.

4.56 A reduction in the maximum term of imprisonment from three years to two years would only affect the higher courts, while reducing the maximum term of imprisonment from three years to 12 months would have an impact in both the higher courts and the Magistrates' Court. As Tables 6 and 7 illustrate, in the higher courts reducing the maximum length of imprisonment that can be suspended from three to two years (Table 5), or from three years to 12 months (Table 6), would not only result in fewer cases being eligible for suspension, but may have the consequence of making the option unavailable to offenders who are less likely to breach. These findings are consistent with the Council's earlier research, which found that the likelihood of a breach of a sentence handed down in the higher courts declines in proportion to the increasing length of the term of imprisonment suspended. There could be a number of reasons for this, such as a stronger deterrent effect of a longer suspended sentence, and/or the lower risk of reoffending by offenders who have been convicted of more serious offences and who are considered good candidates for suspension.

---

284 This suggestion, as it relates to conditional sentences of imprisonment, has been made by Roberts and Gabor: Julian Roberts and Thomas Gabor, 'Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration' (2004) 44 *British Journal of Criminology* 92, 101–2.

285 See, for example, Thomas (1974), above n 104. David Thomas argues that '[i]f [a suspended sentence] is to have any use in a system which is already equipped with probation and the conditional discharge, it is in relation to the relatively serious cases where the offence would normally attract a substantial sentence of imprisonment but quite exceptional mitigating circumstances justify a departure from normal practice': at 688.

286 Freiberg (2001), above n 102, discussion point 13.

287 Ibid 50.

288 Ibid 63–4.

Table 5: Higher court outcomes 1999–2000 to 2003–04 based on the maximum term of imprisonment being reduced from three to two years

Description	Current situation (Max: 3 years)	Option A (Max: 2 years)	Change
Number of suspended sentences	2,689	2,423	– 266
Suspended sentences as a proportion of all sentences	29%	26%	– 3 percentage points
Breach rate (based on 1998–99 data)	36%	38%	+ 2 percentage points

Source: Department of Justice, unpublished data.

Table 6: Higher court outcomes 1999–2000 to 2003–04 based on the maximum term of imprisonment being reduced from three years to 12 months

	Current situation (Max: 3 years)	Option B (Max: 12 months)	Change
Number of suspended sentences	2,689	1,523	– 1,166
Suspended sentences as a proportion of all sentences	29%	16%	– 13 percentage points
Breach rate (based on 1998–99 data)	36%	42%	+ 6 percentage points

Source: Department of Justice, unpublished data.

4.57 As Table 7 illustrates, reducing the maximum term of imprisonment that can be suspended to 12 months would have little impact on overall sentencing outcomes in the Magistrates' Court. This is because the overwhelming majority of prison sentences suspended in the Magistrates' Court (99 per cent) are short prison sentences (12 months or less).

Table 7: Magistrates' Court outcomes 1999–2000 to 2003–04 based on the maximum term of imprisonment being reduced from two years to 12 months

	Current situation (Max: 2 years)	Option B (Max: 12 months)	Change
Number of suspended sentences	25,525	25,298	– 227
Suspended sentences as a proportion of all sentences	7%	7%	No change
Breach rate (based on 2000–01 data)	31%	31%	No change

Source: Department of Justice, unpublished data.

Submissions and Consultations

4.58 A number of those who made submissions and participated in consultations following the release of the Discussion Paper expressed the view that wholly suspended sentences were inappropriate for serious crimes of personal violence, such as rape, sexual assault and intentionally or recklessly causing serious injury.[289] Participants in the Melbourne workshop with victims of crime representatives suggested that suspended sentences should not be available for crimes involving sexual and other forms of violence, but rather reserved for non-violent offences.[290]

4.59 At the sexual offences workshop some participants supported the view that as a general principle courts should not impose a suspended sentence for rape.[291] It was argued that once a court has determined that a term of imprisonment should be imposed for sexual offences (such as rape), the court should not be permitted to suspend it.[292] It was further suggested that particularly in the case of intrafamilial abuse, other community-based options should be available; otherwise the willingness of victims and their families to report the abuse could be affected.[293] Linking offenders into treatment programs was also seen as important.[294]

4.60 The courts and legal practitioners expressed strong opposition to the introduction of any limits, with respect to either the types of offences for which suspension was available[295] or changes to the maximum term of imprisonment able to be suspended.[296] The Criminal Defence Lawyers' Association, reflecting the views of many others, argued that 'any prohibition on sentencing options in [sexual offence] cases would constitute an impermissible fetter on the discretion of a sentencing judge or magistrates'. Citing the Court of Appeal case in *DPP v Sims* [2004] VSCA 129, the Association commented that 'the Court of Appeal has expressed a clear view about penalty in such cases and in our submission leaves no doubt as to the principles that apply generally in such cases'.[297]

4.61 It could be argued that in light of the Council's recommendations to set out factors that may make suspension undesirable in the circumstances, there is no need to impose any offence-specific restrictions, as this is sufficient to guard against the inappropriate exercise of the discretion to suspend.

---

289 See above n 14.

290 Victims of Crime Workshop (Melbourne), 27 May 2005. It was, however, suggested that there may be some exceptional cases where a suspended sentence may be warranted. It was also felt there was a need to better define what might count as 'exceptional'.

291 Sexual Offences Workshop (16 June 2005).

292 Sexual Offences Workshop (16 June 2005).

293 Sexual Offences Workshop (16 June 2005). It was commented that there are particular challenges in unpacking victims' issues. It is generally very difficult to determine what victims want. They are very upset. They want the abuse to stop, they want to be believed, but may not necessarily want the offender to go to gaol.

294 Sexual Offences Workshop (16 June 2005).

295 See, for example, Discussion Paper Submissions 38 (Victoria Legal Aid), 43 (VALS) and 44 (Fitzroy Legal Service).

296 Those who supported the current maximum term of three years in the higher courts and two years in the Magistrates' Court included the County Court of Victoria (Discussion Paper Submission 24), His Honour Judge Anderson (Discussion Paper Submission 25), (Victoria Legal Aid (Discussion Paper Submission 38), the Federation of Community Legal Centres (Discussion Paper Submission 39), Youthlaw (Discussion Paper Submission 41), VALS (Discussion Paper Submission 43), Fitzroy Legal Service (Discussion Paper Submission 44) and the Mental Health Legal Centre Inc (Discussion Paper Submission 45).

297 Submission 18 (Criminal Defence Lawyers' Association).

The Council's View

4.62 As discussed in Chapter 3, the Council believes that suspended sentences are being overused, and in some cases are being used inappropriately. In the case of serious violent offences against the person, once a court has determined that a sentence of imprisonment is appropriate, we believe there should be a strong presumption that the offender should serve a period of immediate imprisonment. This is because in most cases the need for denunciation and general deterrence will outweigh other considerations such as facilitating the offender's rehabilitation. This will not prevent the use of alternative orders, such as those proposed by the Council in the Interim Report, in cases where the court considers it appropriate for the offender to remain in the community subject to conditions of a punitive, rehabilitative or therapeutic nature. The range of conditions applied under such orders must still, however, be commensurate with the seriousness of the offence.

4.63 While there are a number of possible models, the Council believes that the desirable approach is to create a presumption against suspension for specified offences. The critical factor, in our view, should not be the particular maximum penalty that applies to an offence, or the term of imprisonment imposed, but rather that the offence involves the actual infliction of serious bodily harm or threatened violence against the person.

4.64 Such an approach reflects existing Court of Appeal authority, which recognises that a term of immediate imprisonment for offences such as rape, and intentionally causing serious injury, is ordinarily warranted. Based on the use of wholly suspended sentences from 1999–2000 to 2003–04 in the higher courts, the alternative option of limiting the term able to be suspended to two years would fail to catch many of those offences which are the cause of most concern. For example, the majority of cases of taking part in an act of sexual penetration with a child that attracted a wholly suspended sentence would remain eligible for full suspension following the introduction of a two-year limit.[298]

4.65 After considering the available existing definitions in the *Sentencing Act 1991* of 'serious offences', 'sexual offences', 'violent offences' and 'serious violent offences', we have resolved that the offences defined as 'serious offences' under section 3 of the Act for the purposes of the indefinite sentences provisions provide an appropriate benchmark of seriousness. The offences defined in section 3, including murder, manslaughter, intentionally causing serious injury, rape, incest and sexual penetration of a child, are by their very nature offences for which considerations of denunciation and deterrence will predominate over other considerations and in all but the most exceptional of cases, suggest that the case is one that is inappropriate for suspension. This approach would not, of course, prevent the courts from identifying other offences in relation to which a similar presumption should apply.

4.66 We note that armed robbery is also included in the section 3 definition. Armed robbery clearly can have a significant effect on victims and this should be reflected in the sentence imposed. However, of all the offences listed, armed robbery encompasses perhaps the broadest range of behaviour in terms of seriousness, ranging from well-planned armed robberies of banks involving a number of co-offenders armed with firearms, to offences committed on the spur of the moment by individuals, typically with drug problems, using crude weapons, such as sticks, screwdrivers, or syringes. The Council believes that the test of 'exceptional circumstances' in the context of armed robbery should be flexible enough to allow courts to achieve the right balance in reflecting the seriousness of the particular offence concerned.

---

[298] Department of Justice, unpublished data. Of the cases where an offender received a wholly suspended sentence as his or her principal sentence for this offence over the period 1998–99 to 2003–04, 83 (92 per cent) were sentences of two years or under, while only 7 (8 per cent) were sentences of between two and three years.

4.67 While the Council notes that there was some support for removing the power to suspend prison sentences altogether for serious violent crimes, we support the retention of the option for the rare or exceptional case where it is in the interests of justice to do so. While we are reluctant to identify individual cases, for the purposes of illustration we suggest that the manslaughter case study that appears in our Discussion Paper, based on the case of *R v Makike,*[299] is an instance in which full suspension of the sentence imposed achieved a just outcome. We believe that once the new orders come into operation, they will provide a more appropriate alternative to a suspended sentence where there are exceptional circumstances justifying the offender remaining in the community—particularly as conditions will be attached to such orders. However, in the meantime we support the power to suspend being limited rather than removed altogether.

4.68 We acknowledge that exercise of the power to partially suspend in such cases could bring the case outside the scope of the 'exceptional circumstances' restriction. For example, a court could recognise a short period of time served by an offender in custody prior to sentencing as constituting the unsuspended part, ordering the remainder to be suspended. However, we are reluctant to impose a similar 'exceptional circumstances' restriction on the use of partially suspended sentences, as an offender spends time in custody in the case of a partially suspended sentence. The Council will, however, undertake to monitor the use of partially suspended sentences for these offences over the transitional period, with a view to identifying any issues with their use.

RECOMMENDATIONS

4. The current limits on the maximum term of imprisonment that can be suspended (3 years in the higher courts, and 2 years in the Magistrates' Court) under section 27(2) of the *Sentencing Act 1991* (Vic) should be retained.
5. The *Sentencing Act 1991* (Vic) should be amended to create a presumption against suspension of a prison sentence for certain 'serious offences' (as defined under section 3 of the Act). Once a court has determined that it is appropriate to sentence a person convicted of a serious offence to a term of imprisonment, it should not be permitted to suspend the sentence in full unless the court is satisfied, taking into account the factors relevant to the decision to suspend, that it is in the interests of justice to do so because of the existence of exceptional circumstances.

299 [2003] VSC 340 (Unreported, Harper J, 26 August 2003).

The Operational Period

The Current Situation

4.69 In Victoria the maximum operational period that can be ordered is three years in the higher courts and two years in the Magistrates' Court.[300] Different jurisdictions have adopted different operational periods during which a suspended sentence order must not be breached. These do not always correlate with the maximum term of imprisonment able to be held in suspense. For example, in Western Australia sentences of up to five years' imprisonment may be suspended for a maximum period of two years.[301] In some jurisdictions, provision is made for an operational period longer than the term of imprisonment held in suspense. For example, under the *Criminal Justice Act 2003* (UK), a term of imprisonment of up to 51 weeks may be suspended for a period of six months to two years.[302]

Relationship between the Operational Period and Breaches

4.70 The Council's breach study found that the relationship between the length of the operational period and breach rates in Victoria is different for the higher courts and the Magistrates' Court. In the Magistrates' Court the length of the operational period did not appear to influence the likelihood of breach.[303] However, for the higher courts a positive relationship was found between breach rates and the length of the operational period: suspended sentences with operational periods of more than 18 months had breach rates of over 40 per cent, compared with breach rates of less than 10 per cent for those with operational periods of 18 months or less.[304] It was not clear from the information collected at what point orders with longer operational periods had been breached (for example, shortly after the sentence was imposed, or closer to the expiration of the operational period).[305]

Options

4.71 By lowering the maximum operational period of suspended sentence orders, it might reduce breach rates as offenders would be 'at risk' of having their sentence activated as a result of further offending for a shorter period of time. Without knowing at what point offenders typically breach their orders, however, the consequences of lowering the maximum operational period are relatively unknown.

---

300 *Sentencing Act 1991* (Vic) s 27(2A).

301 *Sentencing Act 1995* (WA) s 76(1).

302 *Criminal Justice Act 2003* (UK) c 44, s 189(3). A distinction is made in the Act between the supervision period (during which an offender must comply with requirements in the order, such as activity and work requirements) and the operational period (during which the offender must not commit another offence). The supervision period and operational period must each be a period of at least six months (*Criminal Justice Act 2003* (UK) c 44, s 189(3)) and the supervision period must not end later than the operational period (*Criminal Justice Act 2003* (UK) c 44, s 189(4)).

303 Sentencing Advisory Council (2005), above n 3, [4.85]–[4.86].

304 Ibid [4.74]–[4.76] and Appendix 3, Table 39.

305 Sentencing Advisory Council (2005), above n 3.

4.72 Alternatively, the maximum operational period could be increased. This may be seen as appropriate by some, particularly in the absence of conditions, to increase the punitive value of the order. The offender would have the sentence of imprisonment imposed hanging over his or her head for a longer period of time, and would also suffer the consequences of being under sentence for this extended period of time, for example by being excluded from membership of a particular organisation or prohibited from holding public office.[306] This may, however, risk an increase in breach rates, further eroding the diversionary potential of suspended sentences.

Submissions and Consultations

4.73 The majority of submissions that made reference to the operational period were in favour of retaining the current maximum operational period.[307] However, there was some support both for lowering the maximum operational period to 12 months or 18 months on the basis that it might decrease the chances of breach,[308] and for adopting a longer operational period to operate in conjunction with conditions.[309]

The Council's View

4.74 The Council supports the current maximum operational period of the order being retained. It is appropriate, in our view, that the maximum operational period bears some relationship to the maximum term of imprisonment able to be suspended. While lowering the maximum operational period might have the outcome of reducing breach rates, without more information being gathered about the point at which suspended sentences are breached, such an outcome would not be assured.

4.75 In the Council's view the current breach rates simply demonstrate a need for the better targeting of suspended sentences to those for whom the order is likely to be most successful rather than providing a basis for reducing the maximum term of the order.

RECOMMENDATION

6. The maximum operational period permitted under section 27(2A) of the *Sentencing Act 1991* (Vic) should remain at two years for suspended sentence orders imposed in the Magistrates' Court and three years for orders imposed in the higher courts.

306 See, for example, *Workplace Relations Act 1996 (Cth),* Schedule 1B, ss 213A(b) and 215 which have the effect of disqualifying a person convicted of certain prescribed offences from standing for election or being elected or appointed to an office within a registered organisation for a period of five years after conviction, of if sentenced to a suspended sentence, five years from the date the order expires.

307 See, for example, Discussion Paper Submissions 41 (Youthlaw) [although, should any changes be made, Youthlaw supported a maximum two year operational applying to young offenders], 44 (Fitzroy Legal Service Inc) and 45 (Mental Health Legal Centre).

308 Discussion Paper Submission 43 (VALS).

309 Discussion Paper Submission 40 (S. Rothwell).

Addressing Net-Widening and Sentence Inflation Effects

Introduction

4.76 As discussed above at [3.33]–[3.35], on the basis of the Council's analysis of available data it appears that suspended sentences may result in net-widening in Victoria. A number of factors could contribute to net-widening and sentence inflation, such as a lack of credible and flexible sentencing options that provide courts with useful alternatives, and the availability of these options in different regions of the state. For example, a recent review in New South Wales of community-based sentencing options available in rural and remote parts of the state and to disadvantaged populations identified the lack of available alternative sentencing options in some areas as a factor contributing to the use of suspended sentences.[310]

4.77 The *Sentencing Act 1991* (Vic) contains some provisions intended to guard against courts making a suspended sentence order where a non-custodial order would have been appropriate, or in cases where a prison sentence is the appropriate disposition, artificially inflating the term of the sentence on the basis that it will be suspended. Under section 27(3) of the Act, 'a court must not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to the provisions of [the] Act'—including section 5. Section 5(3) of the *Sentencing Act 1991* (Vic) provides that 'a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'. Under section 5(4) a court is prohibited from imposing a sentence requiring the confinement of an offender (for example, in a correctional facility) 'unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender'.[311]

4.78 Victorian courts have affirmed that, consistent with section 27(3) of the Act, a court must not impose a suspended sentence unless a sentence of imprisonment would be appropriate in the circumstances[312] of the length actually imposed.[313] The extent to which section 27(3) and related sections of the *Sentencing Act 1991* (Vic) are effective in discouraging net-widening and sentence inflation, however, is uncertain.

---

310 Standing Committee on Law and Justice, New South Wales Legislative Council, *Community-Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* Report No 30 (2006) [5.18] and [5.82]–[5.84].

311 *Sentencing Act 1991* (Vic) s 5(4).

312 See, for example, *R v Simmons* [1998] 2 VR 13, 16–17, Brooking JA (Hayne JA and Ashley AJA concurring); *DPP v Johnston* [2004] VSCA 150 (Unreported, Ormiston, Batt and Chernov JJA, 27 August 2004).

313 See, for example, *R v TDJ* [2003] VSCA 151 (Unreported, Winneke P, Vincent and Eames JJA, 11 September 2003). In *TDJ* the Court of Appeal allowed an appeal by an offender against a sentence of three years fully suspended on the basis that the term of imprisonment set, albeit suspended, was manifestly excessive.

Options

4.79 One option to discourage net-widening and sentence inflation from non-custodial orders might be to set a lower limit on the term of imprisonment that can be suspended. For example, a 28-week lower limit was originally considered in England and Wales for the new form of conditional suspended sentence introduced under the *Criminal Justice Act 2003* (UK); it was reduced to 14 days before the provisions came into operation.[314] But such an option could simply compound the problem—for example, by leading courts to increase the gaol terms imposed even further to bring them within the lower limit of sentences that are able to be suspended.

4.80 In the higher courts, breach rates are highest for suspended imprisonment terms of up to six months (85 per cent). Nearly half (47 per cent) of all suspended imprisonment terms that were breached in the higher courts were for a period of up to six months.[315] Given the high rate at which these short sentences in the higher courts are breached, it is likely that the effect of abolishing the power to suspend prison sentences of less than three months or six months would be to reduce the overall breach rates.

4.81 The Council's findings suggest that breach rates would decline significantly should such a limitation be imposed (see Tables 8–11 below). For example, should a three-month limit be introduced, based on data collected by the Council, breach rates in the higher courts could be expected to drop from 36 to 30 per cent, while if a six-month limit were adopted, breach rates could be as low as 23 per cent.

Table 8: Higher court outcomes 1999–2000 to 2003–04 if a lower limit of three months on the term of imprisonment able to be suspended was adopted

	Current situation (no lower limit)	Lower limit of three months	Change
Number of suspended sentences	2,689	2,513	– 7%
Suspended sentences as a proportion of all sentences	29%	27%	– 2 percentage points
Breach rate (based on 1998–99 data)	36%	30%	– 6 percentage points

Source: Department of Justice, unpublished data.

314 *The Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005* (UK) SI 2005/643.

315 See further Sentencing Advisory Council (2005), above n 3, [4.70]–[4.73].

Table 9: Higher court outcomes 1999–2000 to 2003–04 if a lower limit of six months on the term of imprisonment able to be suspended was adopted

	Current situation (no lower limit)	Lower limit of six months	Change
Number of suspended sentences	2,689	2,071	– 23%
Suspended sentences as a proportion of all sentences	29%	22%	– 7 percentage points
Breach rate (based on 1998–99 data)	36%	23%	– 13 percentage points

Source: Department of Justice, unpublished data.

4.82 As Tables 10 and 11 show, the effect of these changes in the Magistrates' Court would be dramatic in terms of the overall number of suspended sentences. However, based on the breach data collected by the Council for 2000–01, the effect on breach rates would be minimal.

Table 10: Magistrates' Court outcomes 1999–2000 to 2003–04 if a lower limit of three months on the term of imprisonment able to be suspended was adopted

	Current situation (no lower limit)	Lower limit of 3 months	Change
Number of suspended sentences	25,525	13,513	– 47%
Suspended sentences as a proportion of all sentences	7%	4%	– 3 percentage points
Breach rate (based on 2000–01 data)	31%	32%	+ 1 percentage point

Source: Department of Justice, unpublished data.

Table 11: Magistrates' Court outcomes 1999–2000 to 2003–04 if a lower limit of six months on the term of imprisonment able to be suspended was adopted

	Current situation (no lower limit)	Lower limit of six months	Change
Number of suspended sentences	25,525	5,521	– 78%
Suspended sentences as a proportion of all sentences	7%	1%	– 6 percentage points
Breach rate(based on 2000–01 data)	31%	28%	– 3 percentage points

Source: Department of Justice, unpublished data.

4.83 If one of these lower limits were to be adopted, some offenders who previously would have received a short suspended term of imprisonment might instead be ordered to serve a straight term of imprisonment, or alternatively be sentenced to some other type of order, such as a CBO or ICO. Provided that this occurs, and that courts do not inflate the prison sentences imposed to allow them to suspend, it could also be expected that breach rates for suspended sentences would drop. Lower breach rates are likely to result in a decrease in the overall number of offenders ordered to serve the original prison sentence imposed. Applying a lower limit to prison sentences that can be suspended might therefore improve the overall effectiveness of suspended sentences in diverting offenders from prison.

4.84 Breach rates aside, it could be argued that not all short suspended sentences are due to net-widening, and removing the option to suspend for short prison sentences would unfairly affect these offenders. This includes offenders convicted of offences with a mandatory minimum term of imprisonment (for example, section 30 of the *Road Safety Act 1986*, second and subsequent offences of driving while disqualified or while authorisation suspended). As recognised in a recent report by the Australian Institute of Criminology, even a short period spent out of the community may have negative effect on the offender's family and workplace relationships, and may lead to loss of accommodation and employment.[316] Short-term prisoners may also have difficulty accessing in-prison programs and are unlikely to be subject to post-release supervision (due to, for example, the absence of parole as an option), which may increase their likelihood of reoffending.[317]

4.85 A less risky approach to discouraging net-widening might be to amend section 27(3) of the *Sentencing Act 1991* (Vic) to make clear that a court must not impose a term of imprisonment under section 27(1) that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended.

4.86 Finally, assuming that some degree of net-widening and sentence inflation is inevitable, the breach provisions could be made more flexible—for example, by allowing courts to resentence on breach or to substitute a lesser term of imprisonment on activation of the original sentence imposed. These types of powers already exist in some jurisdictions (see further [4.137]).

Submissions and Consultations

4.87 Very little support was provided for imposing a lower-limit on the term of imprisonment able to be suspended. It was suggested that rather than serving as an incentive for courts to use lower-level orders, it would result in more people sentenced to short terms of imprisonment serving their sentence in prison.[318]

4.88 The removal of the option to suspend in the case of offences with a mandatory term of imprisonment, such as offences under section 30 of the *Road Safety Act 1986* (Vic) was also raised an issue of concern. In 2003–04, 839 of the 3,316 defendants (25 per cent) who received a suspended sentence for their most serious offence in the Magistrates' Court had been convicted of an offence under section 30 of the *Road Safety Act 1986* (Vic). Should suspension of a prison sentence no longer be possible, and without the issue being addressed in some other way, the courts would be left with no other alternative than to sentence the offender to an immediate term of imprisonment. This would lead to a significant increase in prison admissions.

---

316 Maria Borzycki, *Interventions for Prisoners Returning to the Community* (Australian Institute of Criminology, 2005) 53.

317 Maria Borzycki and Eileen Baldry, 'Promoting Integration: The Provision of Prisoner Post-release Services', *Trends and Issues in Crime and Criminal Justice*, No. 262 (Australian Institute of Criminology, 2003) 2.

318 See, for example, Legal Issues Roundtable (8 December 2005).

4.89 Substantial support was, however, expressed by many for making the breach provisions more flexible to provide courts with a broader range of options on breach. The options for amending the breach provisions, and the Council's views, are discussed below at [4.160]–[4.167] and [4.182]–[4.193].

The Council's View

4.90 The Council believes that setting a lower limit on the term of imprisonment that can be suspended would only exacerbate existing problems of sentence inflation, without satisfactorily resolving problems of net-widening. We consider that the better approach to discourage the use of suspended sentences where a non-custodial order may be appropriate is to introduce orders that provide more attractive alternatives to the courts, such as those proposed by the Council in its Interim Report, and for the legislation explicitly to provide that a sentence of imprisonment, suspended or otherwise, is only to be imposed where the purpose or purposes of sentencing cannot be achieved by one of these alternative orders.

4.91 However, during the transitional period we see some value in amending the Act to make clear that a court must not impose a term of imprisonment under section 27(1) that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended. While this is already implicit in the wording of section 27(3), and consistent with the approach endorsed by the Court of Appeal in Victoria, such an amendment would remove any existing ambiguity as to the intention of this section. We note that some equivalent provisions operating in other jurisdictions provide guidance to the courts in this respect. For example, section 76(2) of the *Sentencing Act 1995* (WA) provides:

> Suspended imprisonment is not to be imposed unless imprisonment *for a term equal to that suspended* would, if it were not possible to suspend imprisonment, be appropriate in all the circumstances. (emphasis added)

RECOMMENDATION

7. Section 27 of *the Sentencing Act 1991* (Vic) should be amended to clarify that a court must not impose a term of imprisonment under section 27(1) that is longer than the term of imprisonment to which the person would have been sentenced had the sentence not been suspended.

A Conditional Suspended Sentence?

The Current Position

4.92 In Victoria the only condition of a suspended sentence order is that the offender does not commit another offence punishable by imprisonment during the operational period. An offender who breaches this condition risks the activation of the period of imprisonment that has been wholly or partially suspended.[319]

4.93 A suspended sentence cannot be combined with other sentencing orders, apart from a fine,[320] on a single charge. For example, if a person is convicted of one count of assault, the court can make a suspended sentence order, but is not permitted to also make a community-based order (CBO).[321] However, a de facto form of conditional suspended sentence may be created where the offender has been convicted of more than one offence, as the court may sentence an offender to a suspended sentence on one charge, and a community-based order on another. Of the 690 offenders who were given a suspended sentence in the higher courts in 2003–04, 90 (13 per cent) were also sentenced to a CBO.

4.94 One of the criticisms of suspended sentences in Victoria has been that an offender is not subject to any demands on his or her time or resources, provided that he or she does not commit another offence. An option for reform considered in the Discussion Paper was to provide courts with the power to attach conditions in some or all cases.

4.95 A form of conditional suspended sentence is available in the Australian Capital Territory, Northern Territory, New South Wales, South Australia, and Tasmania, and for federal offences. In the Northern Territory a court may suspend a sentence of imprisonment 'subject to such conditions as the court thinks fit'.[322] In Tasmania a suspended sentence may be subject to such conditions 'as the court considers necessary or expedient'.[323]

4.96 In the ACT, New South Wales and South Australia, the offender is required to enter a bond, to which may be attached a number of conditions.[324] The Commonwealth 'recognizance release order' is a similar option available to the court when sentencing a federal offender.[325] In New South Wales, however, a person may not be required to perform community service work, or to make any payment, whether in the nature of a fine, compensation or otherwise.[326]

---

319 *Sentencing Act 1991* (Vic) s 31.

320 Under section 49(1) of the *Sentencing Act 1991* (Vic) a court may fine an offender in addition to any other sentence imposed—including a suspended sentence.

321 The making of a CBO by a court is expressly prohibited under s 36(2) *Sentencing Act 1991* (Vic) where the term of imprisonment imposed has been wholly or partly suspended.

322 *Sentencing Act 1995* (NT) s 40(2).

323 *Sentencing Act 1997* (Tas) s 24.

324 *Crimes (Sentencing) Act 2005* (ACT) s 12(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1); *Criminal Law (Sentencing) Act 1988* (SA) s 38(1).

325 *Crimes Act 1914* (Cth) s 20(1)(b).

326 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c).

4.97 In South Australia, a range of conditions may be attached to the bond, including requirements that the offender:

- be under the supervision of a community corrections officer for a specified period;
- reside (or not reside) with a specified person or in a specified place or area;
- perform a specified number of hours of community service;
- undergo medical or psychiatric treatment; and/or
- abstain from drugs of a specified class or from alcohol.[327]

4.98 In the ACT, core conditions of the bond include reporting any changes of contact details and complying with any direction given in relation to the good behaviour order.[328] Other conditions include community service work, rehabilitation programs and supervision.

4.99 England and Wales also recently introduced a new form of suspended sentence order under the *Criminal Justice Act 2003* (UK). Under the new form of suspended sentence order, courts are required to attach at least one condition, with which the offender must comply during 'the supervision period'.[329] Conditions available to the court include unpaid community work, supervision, activity requirements, program requirements, curfew requirements, residence requirements, mental health treatment requirements, and drug and alcohol treatment (see above [2.21]).

4.100 It could also be argued that courts should be making greater use of the power to fine in combination with a suspended sentence where it is appropriate to increase the punitive effect of the order and to impose a 'price' for suspension.[330] As with conditions, problems might arise, however, should the offender breach and the prison sentence be activated. The fact the offender has been ordered to pay a fine and subsequently had the suspended prison sentence activated could be objected to on the ground that this would constitute double punishment for the original offence.[331] Even if a power to vary the amount of fine on breach of the order were to be introduced, the use of a fine could have an unfair impact on the offender who pays the fine shortly after being sentenced, or who is convicted again towards the end of the operational period.[332]

---

327 *Criminal Law (Sentencing) Act 1988* (SA) s 42.

328 *Crimes (Sentencing) Act 2005* (ACT) s 86(1).

329 The 'supervision period' is separate from the 'operational period'. Both the supervision period and the operational period must be at least six months and not more than two years: *Criminal Justice Act 2003* (UK) c 44, s 189(3). However, the supervision period must not end later than the operational period of the order: *Criminal Justice Act 2003* (UK) c 44, s 189(4).

330 On the problems with such an approach, see D A Thomas, 'Case and Comment: *R v Genese*' (1976) *Criminal Law Review* 459.

331 Anthony Bottoms, 'The Advisory Council and the Suspended Sentence' (1979) Ibid437, 442. As Bottoms suggests, because there is evidence that courts impose a longer sentence than they otherwise would have had the sentence not been suspended, this situation may, in fact, result in an even worse result for offenders: Anthony Bottoms, 'The Advisory Council and the Suspended Sentence' (1979) 437, note 22.

332 Ibid. Bottoms suggests that a possible means of overcoming this would be to legislate to require a fine (or alternatively, a fixed number of hours of community service) to be ordered with a suspended sentence, payable at fixed intervals during the operational period.

4.101 The greater use of fines might also be viewed as contrary to the legal principles governing the making of a suspended sentence order.[333] Before a court may suspend a sentence of imprisonment, it must first determine that a sentence of imprisonment (rather than some other form of non-custodial order) is appropriate, set the appropriate length and then determine whether it should be suspended. As a suspended sentence is still, in a legal sense, a 'prison' sentence, it could be argued that a fine should only be used in combination with suspended imprisonment where the court would have done so had the imprisonment been ordered to be served.[334] On the other hand, as Andrew Ashworth has suggested, the making of an order for both suspended imprisonment and a fine 'does not compel the inference that the court regards a suspended sentence alone as "getting away with it"', but rather may be seen as simply 'another mitigated form of imprisonment, suitable for more serious crimes by first offenders who also have the means to pay a fine'.[335]

Submissions and Consultations

4.102 Many of those who participated in consultations[336] and who made submissions[337] on the Interim Report continued to support the option of a conditional form of suspended sentence in Victoria. The Criminal Defence Lawyers' Association, which was among those who supported the availability of conditions, saw them as beneficial both in terms of addressing criticisms that suspended sentences lack substance as a sentencing order and providing more flexibility, thereby increasing levels of compliance:

> The CDLA considers that criticism of suspended sentences as lacking substance as a sentencing order and the potential for suspended sentences to contribute to sentence inflation can be properly addressed by giving courts the power to impose additional conditions, whether punitive, therapeutic or rehabilitative in appropriate cases …
>
> …
>
> Extending the power of courts to tailor conditions imposed on a wholly suspended sentence to the individual offender's circumstances would deliver significant improvement in flexibility of sentencing and thereby increase the potential for compliance with such orders.[338]

4.103 Support for conditions, however, was not universal. For example, the Mental Health Legal Centre Inc, referring to its earlier submission, expressly opposed the introduction of a conditional order.[339] Some, such as the Fitzroy Legal Service Inc, while also supporting the retention of the unconditional form of suspended sentence, were concerned that should conditions be introduced, they should have a therapeutic and rehabilitative focus rather than a punitive purpose.[340] In the roundtable discussing issues for offenders with a mental illness or cognitive impairment, it was felt that people with such problems were often coerced into

---

333 Thomas (1976), above n 330, 460.

334 Ibid.

335 Andrew Ashworth, 'Justifying the First Prison Sentence' (1977) *Criminal Law Review* 661.

336 For example the Legal Issues Roundtable (8 December 2005). However, reservations were expressed by participants at the Roundtable on Offenders with a Mental Illness or Cognitive Impairment (17 November 2005) about the usefulness of conditions for offenders with a mental illness or cognitive impairment. The issue of resourcing was another issue of concern.

337 See, for example, Submissions 11 (Law Institute of Victoria), 18 (Criminal Defence Lawyers' Association) and 21 (Criminal Bar Association).

338 Submission 18 (Criminal Defence Lawyers' Association).

339 Submission 24 (Mental Health Legal Centre Inc). In its earlier submission the MHLC argued: 'A suspended sentence with conditions ceases to be a suspended sentence and is a new form of disposition'. It was further submitted that conditional orders 'ought to be further down the sentencing hierarchy than imprisonment'.

340 Submission 22 (Fitzroy Legal Service Inc).

accepting conditions simply because they did not understand the implications. Concerns were also raised that conditions in such cases, which were often put in place to 'assist' offenders, in fact set these offenders up for failure because the services in the community simply were not available.[341] The Mental Health Legal Centre was one of a number of those who raised these concerns in their submissions:[342]

> We believe little would be gained for people with psychiatric disability by tailoring suspended sentences, for example by attaching conditions and providing for an additional suspended sentence akin to the old section 28 which deals with Drug and Alcohol provisions. The likelihood of clients breaching an order is high unless the mental health system is committed to providing them with a service, not by a decision of the court.[343]

4.104 A number of those who made submissions were of the view that while conditions seemed to be a good idea in theory, in practice their success would depend on the availability and accessibility of services and the existence of other supports:

> Whether a suspended sentence (with attached conditions) is a suitable disposition for offenders with a mental illness depends largely on that person's access to health services such as General-Practitioners and where appropriate, specialist mental health services. This also depends on whether the individual has viable supports in the community.[344]

4.105 Similar reservations were expressed by the Victorian Aboriginal Legal Service (VALS), which, in the context of a discussion of the new conditional orders proposed by the Council, noted the particular difficulties likely to be experienced by Indigenous offenders and other disadvantaged groups in complying with such conditions:

> People with higher levels of disadvantage are going to encounter more difficulties complying with requirements than the average person. The requirements assume literacy, mobility, income, willingness to use mainstream services and an understanding of bureaucratic procedure.[345]

4.106 In their original submission, VALS argued that attaching conditions to suspended sentence orders would only be appropriate if there were adequate levels of funding provided to support the provision of services.[346] VALS further suggested that should conditions be introduced, supports should be put in place for offenders 'to know what their obligations are and how to meet them' so as to minimise the chances of them breaching the order.[347]

4.107 The Department for Victorian Communities saw this as an argument for therapeutic and rehabilitative rather than punitive conditions, and for wider availability of culturally appropriate services and programs.

> The majority of Indigenous offenders breach conditional orders and it is therefore important that the focus of such conditions be on therapeutic and rehabilitative outcomes, as opposed to punitive responses, and that culturally appropriate services and programs be accessible to further these aims.[348]

---

341 Roundtable on Offenders with a Mental Illness or Cognitive Impairment (17 November 2005).

342 See, for example, Submission 13 (Mental Health Branch, Department of Human Services).

343 Submission 24 (Mental Health Legal Centre).

344 Submission 13 (Mental Health Branch, Department of Human Services).

345 Submission 15 (VALS).

346 Discussion Paper Submission 43 (VALS).

347 Ibid. The kinds of supports, it was suggested, could be provided by court registrars and agencies independent of the courts, such as VALS (on the condition that additional funding was provided for this purpose).

348 Submission 19 (Department for Victorian Communities).

4.108 The temptation for the courts to overload orders with conditions when sentencing people with disabilities was also the subject of criticism on the basis that this not only made orders more onerous for this category of offenders, but in many cases was not justified by the level of offence:

> As advocates appearing in Supreme and County Courts where … conditions are often attached [on people with disabilities], we are extremely concerned about the use of conditional sentences. It is our experience that more and more these become onerous. In a recent matter before the Supreme Court a client of the MHLC, on extended leave, had half a page of conditions. Upon review, before a new judge, he received an expanded set of conditions—three pages which included specific directions to mental health support workers and mental health professionals about their daily involvement with this particular person. There was no need for such imposition. The client had been exemplary in terms of adhering to the previous conditions and there was no evidence before the Court that further conditions needed to be introduced. This overzealous application of conditions has been mirrored by our experience in the County Court where conditions become onerous and look more like bail conditions than in fact conditions obliging the person to treatment as appropriately directed by their forensic psychiatrist.[349]

4.109 The Mental Health Legal Centre suggested:

> careful consideration and extensive education of decision makers needs to be provided to ensure there is a proper balance between the nature of the offence with the appropriate length of treatment or support program. The order imposed must clearly be proportionate to the offence and must be lawfully applied.[350]

A Conditional Suspended Sentence for Offenders with Drug and Alcohol Issues

4.110 One of the options considered in the Council's Discussion Paper was the possible reintroduction of a conditional sentencing order for offenders with a drug or alcohol dependency related to their offending behaviour.

4.111 The early form of such an order was introduced in 1968 in Victoria under section 13 of the *Alcoholics and Drug-Dependent Persons Act 1968* (Vic). Section 13 of the Act allowed the court to order a person who it was satisfied 'habitually used alcohol or drugs to excess' and who had been convicted and sentenced to a term of imprisonment to be released upon entering a bond.[351] The bond was conditional on the offender seeking treatment in a treatment centre for a period specified by the court of six to 24 months and abstaining from using alcohol or drugs for such period as the court thought fit. The court could also give directions as to the supervision and treatment of the offender in the treatment centre and had the power to vary or revoke any such direction.[352] The order could be made 'for any offence in respect of which drunkenness or drug addiction [was] a necessary part or condition or contributed to the commission of the offence'.[353] On breach of the bond the court could direct that the original sentence of imprisonment be activated.[354]

---

349 Submission 24 (Mental Health Legal Centre). This point was also made at the Roundtable on Offenders with a Mental Illness or Cognitive Impairment (17 November 2005).

350 Submission 24 (Mental Health Legal Centre).

351 *Alcoholics and Drug-dependent Persons Act 1968* (Vic) s 13(1).

352 *Alcoholics and Drug-dependent Persons Act 1968* (Vic) s 13(9).

353 *Alcoholics and Drug-dependent Persons Act 1968* (Vic) s 13(1)(a).

354 *Alcoholics and Drug-dependent Persons Act 1968* (Vic) s 13(5).

4.112 In 1991 the current *Sentencing Act 1991* (Vic) ('the Act') introduced a new section 28 providing for a conditional suspended sentence for drug- or alcohol-addicted persons. While the general power to suspend a sentence of imprisonment was restricted to two years, there was no upper limit set on the term of imprisonment that could be suspended under section 28. The circumstances in which an order to suspend could be made were similar to that of the earlier section 13 order; however, the offender was not required to enter into a bond. Rather, there were conditions attached to the order to suspend, requiring the offender to undertake treatment for a period of six to 24 months and abstain from using drugs or alcohol during the treatment period.[355] Unlike the old section 13 order, an offender under a section 28 order was also required to submit to drug and alcohol testing as directed by the medical officer of a treatment centre[356] and could be required by the court to participate in the services set out in a justice plan.[357] The treatment period could be less than or greater than the term of suspended imprisonment. The court retained a power to supervise the offender and could vary the terms of the order or grant the offender an earlier discharge.

4.113 The new section 28 overcame one of the deficiencies of the section 13 order by including a specific condition that the offender must not commit another offence punishable by imprisonment during the period of the order.[358] However, as noted in the recent Freiberg Sentencing Review Report, the section 28 order suffered from a number of the same problems as the section 13 order, including:

- a lack of adequate resources for treatment;
- problems with effective monitoring;
- the continued operation of a total abstinence requirement; and
- delays in obtaining pre-sentence reports.[359]

4.114 In 1997 substantial amendments were made to the Act by the *Sentencing and Other Acts (Amendment) Act 1998* (Vic). The Act repealed section 28, at the same time introducing a new form of order: the combined custody and treatment order (CCTO). A CCTO is available where the court is considering sentencing an offender to a term of imprisonment of not more than 12 months, and allows the court to impose a sentence of imprisonment of not more than 12 months and to order that no fewer than six months of the sentence imposed be served in custody and the balance be served in the community on conditions attached to the order.[360] The conditions may require that the offender not commit another offence punishable by imprisonment; they may also include treatment conditions and reporting conditions.[361] Additional program conditions may also be attached, including the requirement that the offender submit to drug and alcohol testing during the period of the order.[362]

---

355 *Sentencing Act 1991* (Vic) s 28(2)(a)–(b).

356 *Sentencing Act 1991* (Vic) s 28(2)(c).

357 *Sentencing Act 1991* (Vic) s 28(2). A justice plan is a statement prepared by the Department of Human Services for offenders with an intellectual disability, which specifies services that are recommended for the offender and designed to reduce the likelihood that he or she will reooffend.

358 *Sentencing Act 1991* (Vic) s 28(7).

359 Freiberg (2002), above n 19, 80–1. In addition, it was suggested that 'courts felt uneasy about undertaking an ongoing supervisory role': Freiberg (2002), above n 19, fn 84.

360 *Sentencing Act 1991* (Vic), s 18Q.

361 *Sentencing Act 1991* (Vic), s 18R.

362 *Sentencing Act 1991* (Vic), s 18S.

THE INTERIM REPORT

4.115 In the context of discussions about the possible usefulness of a conditional suspended sentence, a number of those who made submissions pointed to deficiencies in the operation of existing conditional orders. Both CCTOs and ICOs were criticised as being too inflexible[363] and extremely difficult for offenders to complete successfully. Due to their intensive nature, it was suggested, it was difficult for offenders to hold down full-time employment or participate in vocational training or educational programs.[364] CCTOs were particularly singled out as failing to achieve their rehabilitative purpose due to the lack of adequate treatment services in prison and disruption of treatment because of time spent in prison.[365] At one roundtable, participants noted that by the time offenders are sentenced many have already spent some time in custody but have not received any treatment. Consequently there is only time for the offender to be admitted into a short program (10–12 weeks) and the person is then transferred out of prison with little supervision and support.[366]

4.116 A number of people supported the abolition of CCTOs for reasons which included the requirement that the offender serve a gaol term.[367] At the same time there was some support for the introduction of some form of suspended sentence with conditions, although with more flexible breach provisions than the current 'exceptional circumstances' test.[368] There was felt to be a need for an order between an intensive correction order and a community-based order that would be suitable for offenders with drug and alcohol issues.[369] The old section 28 orders were seen by some as providing a useful sentencing option, although the abstinence condition was regarded as unrealistic and as one of the problems of the original order.

4.117 Over the period 1999–00 to 2003–04 fewer than 0.5 per cent of all defendants sentenced by Victorian criminal courts received a CCTO. The courts have made even less use of CCTOs in recent years, with a 70 per cent decline (from 152 in 1999–2000 to 43 in 2003–04).[370] From 1999 to 2004 the proportion of all defendants proven guilty who received a CCTO decreased, from 0.2 per cent to 0.1 per cent.[371]

4.118 Rather than seeking to fix an order in which the courts have clearly lost confidence, the Council recommended in its Interim Report that the most beneficial aspects of the CCTO (the provision for a period of supervised release with treatment and other services) should be incorporated in new orders, and the less beneficial aspects (such as the lack of flexibility in setting the 'custodial' component, and the short period of the order) should be discarded.

---

363 See also Discussion Paper Submissions 24 (County Court of Victoria) and 38 (Victoria Legal Aid).

364 This view was expressed during community forums held and other consultations. See, for example, Roundtable (Offenders with Drug and Alcohol Issues), 19 May 2005.

365 Discussion Paper Submissions 38 (Victoria Legal Aid) and 39 (Federation of Community Legal Centres).

366 Roundtable (Legal Issues), 23 May 2005.

367 See, for example, Discussion Paper Submissions 38 (Victoria Legal Aid) and 39 (Federation of Community Legal Centres). Judge Anderson (Submission 35) also noted there are significant limitations with CCTOs.

368 Roundtable on Offenders with Drug and Alcohol Issues (19 May 2005).

369 Roundtable on Offenders with Drug and Alcohol Issues (19 May 2005).

370 Department of Justice, unpublished data.

371 See further Sentencing Advisory Council (2005), above n 3, Appendix 4.

SUBMISSIONS AND CONSULTATIONS

4.119 The Victorian Alcohol and Drug Association (VAADA),[372] Victoria Legal Aid,[373] the Federation of Community Legal Centres,[374] and the Victorian Aboriginal Legal Service (VALS)[375] were among those who made submissions on the Discussion Paper who supported the introduction of a conditional suspended sentence targeted to offenders with drug and alcohol issues. There was also some support for this option during consultations.[376]

4.120 Victoria Legal Aid suggested that such an order should replace the current combined custody and treatment order (CCTO), and would have a number of advantages over that order, including:

- the lack of a prison term which might disrupt treatment and/or support services;
- access to the full range of community treatment and support services;
- the fact that it would apply to all offences and could be imposed by any court; and
- the fact that it would provide flexibility as to the type of conditions, length of sentence and the operational period.[377]

4.121 For many, support for this option was conditional on 'appropriate and sufficient supports and services [being] made available for rehabilitation in the community',[378] and conditions not being too onerous:[379]

> Conditions should not be too onerous and should not include requirements of abstinence evidenced by urine testing. Conditions should be flexible enough to take into account the realities of rehabilitation. These realities include the likelihood of relapse on a number of occasions, the lengthy and difficult assessment process for residential rehabilitation programs and the significant waiting periods for entry into residential rehabilitation programs.

4.122 While it was acknowledged that the provision of drug treatment was resource intensive, it was suggested that ultimately such treatment was more cost effective, being 'nowhere near the cost of incarceration of an offender'.[380]

4.123 Following the release of the Interim Report, there continued to be strong support for the reintroduction of a conditional suspended sentence order for offenders with drug and alcohol issues, from organisations including the Criminal Bar Association[381] and Victoria Legal Aid.[382] It was suggested that such an option would be 'far better than the current inflexible

---

372 Discussion Paper Submission 42 (VAADA).

373 Discussion Paper Submission 38 (Victoria Legal Aid).

374 Discussion Paper Submission 39 (Federation of Community Legal Centres).

375 Discussion Paper Submission 43 (Mental Health Legal Centre).

376 Roundtable (Offenders with Drug and Alcohol Issues), 19 May 2005.

377 Discussion Paper Submission 38 (Victoria Legal Aid).

378 Discussion Paper Submissions 39 (Federation of Community Legal Centres). See also Discussion Paper Submissions 44 (Fitzroy Legal Service), 45 (Mental Health Legal Centre) and 49 (St Kilda Legal Service Co-Operative Ltd).

379 Discussion Paper Submissions 39 (Federation of Community Legal Centres), 44 (Fitzroy Legal Service) and 49 (St Kilda Legal Service Co-Operative Ltd). See also Submission 42 (VAADA).

380 Discussion Paper Submission 49 (St Kilda Legal Service Co-Operative Ltd). Similar views were expressed at the two roundtables held focusing on offenders with drug and alcohol issues (19 May 2005 and 22 November 2005).

381 Submission 21 (Criminal Bar Association).

382 Submission 12 (Victoria Legal Aid).

combined custody and treatment order', which requires an immediate term of imprisonment to be imposed.[383]

4.124 Participants of the roundtable held focusing on offenders with drug and alcohol issues[384] saw the provision of adequate funding and resources to support any new conditional orders introduced as critical to the success of these orders. The provision of information to courts at the time of sentencing was also viewed as having an important role to play. Participants emphasised the importance of keeping any conditions imposed relatively general so that they could be tailored by clinicians to the circumstances of the individual offender and to avoid inappropriate and unrealistic conditions being set.

THE COUNCIL'S VIEW

4.125 As discussed in Chapter 2, the Council believes that suspended sentences are an inherently flawed order. Simply attaching conditions to suspended sentences, while potentially improving the order's capacity to respond to concerns about just punishment and offender rehabilitation, would in our view fail to resolve more fundamental problems with the order. For this reason the Council believes the better option is for suspended sentences to be phased out as a sentencing option, and other conditional orders introduced, which exist as alternatives to imprisonment in their own right and have a more coherent rationale.

4.126 As the new conditional orders under the timetable proposed would not become operational until 2007–08, it could be argued that a conditional suspended sentence order should be available during this interim period. However, introducing a power to attach conditions to a suspended sentence even for this limited period of time would carry with it a number of risks. These risks include those identified by the Sentencing Review: sentence escalation and possible confusion over when a conditional suspended sentence or, for example, an ICO or a combination order is appropriate.

4.127 Based on the breach data for existing conditional orders, it also seems likely that allowing courts to attach conditions to suspended sentences would result in significantly higher breach rates. Taking into account the net-widening and sentence inflation effects of suspended sentences and existing breach provisions, the result of introducing a conditional order is likely to be more offenders serving a prison sentence than the number who would have previously done so, and for longer periods of time. While more flexible breach provisions might alleviate these effects, in our view any broadening of the courts' powers on breach is undesirable and would compromise the integrity and internal logic of the order (see further [4.187]–[4.188]).

4.128 Finally, to allow courts to attach conditions, in our view, would merely accentuate the 'penological ambiguity'[385] of a suspended sentence. A conditional suspended sentence would both be a prison sentence imposed but not activated unless breached, and a conditional sentence served by an offender. In order to make a conditional suspended sentence, the court also would have to go through the apparently contradictory reasoning process of deciding that a prison sentence, rather than a non-custodial order, is warranted, determine that it is appropriate to suspend it, and then consider whether the sorts of conditions that would have been available under a non-custodial order should be attached.

4.129 The Council is also sensitive to concerns expressed by a number of legal services and community organisations that without proper resources, conditions even of a therapeutic or rehabilitative nature set offenders up for failure. In the case of a conditional suspended

---

383 Submission 21 (Criminal Bar Association).

384 Roundtable (Offenders with Drug and Alcohol Issues), 22 November 2005.

385 D.A. Thomas, 'Case and Comment: *R v Uche*' (1975) *Criminal Law Review* 400, 401.

sentence, breach of conditions would risk triggering the activation of the original sentence imposed. When breach is again considered in the context of the possible net-widening and sentence inflation effects of suspended sentences, we believe there is a very real risk that conditions imposed for the purpose of helping an offender to obtain the services and treatment required may in fact result in a far harsher sentence being imposed when those services are not provided, and the offender breaches. Supervisory and work conditions have similar resource and breach implications.

4.130 Taking all these considerations into account, the Council believes it is undesirable to introduce a conditional form of suspended sentence and that any additional funding and resources that would be required are better directed towards the kind of orders proposed by the Council in our Interim Report. However, courts will retain the option of combining a suspended sentence with a community-based order in cases where an offender has been convicted on more than one count of varying degrees of seriousness.

4.131 We note that in making this recommendation, Victoria will remain one of the three Australian jurisdictions, along with Queensland and Western Australia, that do not have a power to attach conditions to a suspended sentence order, or to combine a suspended sentence with another form of conditional order, such as a good behaviour bond, for a single offence. However, we believe that the new orders, to be discussed in Part 2 of the Final Report, will serve the function of a conditional suspended sentence when they come into operation, with the benefit of more flexible breach provisions. In particular, we acknowledge the strong support voiced for a conditional order for offenders with substance abuse problems and suggest that the new forms of orders provide a better and more flexible option for these offenders than the existing combined-custody and treatment order or intensive correction order. Under the model proposed, drug treatment orders will continue to be available in the Drug Court division of the Magistrates' Court.

4.132 Keeping in mind some of the risks of this option identified at [4.100], the Council also sees the potential for courts to use the supplementary power to fine more frequently. This may allow the courts to make a suspended sentence order with additional punitive value where this is warranted and where the financial circumstances of the offender can support the payment of such a fine. As indicated above, while this power already exists, it is rarely used (see above [2.28]). In calculating the amount of such a fine, clearly it is important that the court take into account not only the capacity of the offender to pay, but also the real possibility on breach that the offender will be ordered to serve the original sentence imposed in prison.[386]

4.133 In Part 2 of the Council's Final Report the Council will discuss in detail its recommendations in relation to the new orders, including proposed conditions. The Council will also discuss what the relationship should be between the proposed new orders and existing sentencing orders (including suspended sentences) during the transitional period.

RECOMMENDATION

8. A power to attach conditions to suspended sentence orders should not be introduced.

[386] In doing so, we accept the argument advanced by D. A. Thomas that if the fine combined with a suspended sentence is seen as the 'price' for suspension, it should be calculated according to principles different from those that would apply had the court been determining the amount of a fine alone for the offence: Thomas (1976), above n 330, 461.

Breach of a Suspended Sentence

The Current Position

4.134 Under the *Sentencing Act 1991* (Vic), if an offender whose sentence of imprisonment has been suspended commits another offence punishable by a term of imprisonment during the operational period of the order, he or she is guilty of a separate offence under the Act.[387] On breach, the court may impose a fine of up to 10 penalty units[388] and must order the offender to serve all or part of the original gaol term 'unless it 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'.[389] Other actions the court can take on breach are:[390]

- to activate part of the sentence or part sentence held in suspense;
- to extend the period of the order suspending the sentence to not later than 12 months after the date of the order; or
- to make no order with respect to the suspended sentence.

4.135 Should the court decide not to activate the whole of the sentence or part sentence held in suspense, it must state its reasons for not doing so in writing.[391] Any restored gaol term must be served immediately and cumulatively upon any other term of imprisonment unless the court orders otherwise.[392] There is no power for the court to order, for example, that the sentence of imprisonment be served by way of intensive correction in the community (under an ICO) or by way of home detention.[393]

4.136 A breach study conducted by the Council, and reported on in the Council's Discussion Paper, revealed that 24 per cent (42 out of 175) of defendants who had breached a suspended sentence imposed in the higher courts in 1998–99 did not have the original sentence activated, suggesting that the court in these cases found exceptional circumstances supporting an alternative course of action. The remaining 76 per cent of defendants had the original prison sentence partially or wholly restored. In the Magistrates' Court, 64 per cent of defendants who breached an order imposed in 2000–01 had their prison sentence partially or wholly restored, with the court making no order or extending the operational period of the order in the remaining 36 per cent of cases (550 out of 1,519 defendants).[394]

---

387 *Sentencing Act 1991* (Vic) s 31(1).

388 The value of a penalty unit as fixed by the Treasurer in accordance with s 11(1)(b) of the *Monetary Units Act 2004* (Vic) for the financial year commencing 1 July 2005 is $104.81: *Victorian Government Gazette*, 14 April 2005, 722. The maximum fine that currently may be imposed is therefore $1,048.10.

389 *Sentencing Act 1991* (Vic) s 31(5A).

390 *Sentencing Act 1991* (Vic) s 31(5).

391 *Sentencing Act 1991* (Vic) s 31(5B)

392 *Sentencing Act 1991* (Vic) s 31(6).

393 See *R v Bice and Another* (2000) 2 VR 364. In *Bice* it was noted that the making of such orders would amount to re-sentencing the offender, albeit with limited options available. As Justice Smith observed, 'the judge is restoring the sentence, not imposing it': at 371. See also Justice Callaway at 369: 'The concept is a suspended sentence, not suspending sentencing'.

394 For a discussion of the Council's methodology and findings, see Sentencing Advisory Council (2005), above n 3, [4.59]–[4.91].

Breach Provisions in Other Australian Jurisdictions

4.137 Unlike Victoria, some jurisdictions have provided courts with a broad discretion on breach, including a power to resentence an offender for his or her original offence. For example, in the ACT and under federal law, when an offender breaches any of his or her good behaviour obligations, the court has the power to restore the original sentence of imprisonment imposed or to resentence the offender for the offence.[395] In Tasmania a similar power exists.[396]

4.138 Breach provisions in most other jurisdictions, like Victoria, create a presumption in favour of the activation of the original sentence. For example, in South Australia and New South Wales, if the offender breaches a condition of his or her good behaviour bond the court must activate the original sentence of imprisonment unless the court is satisfied that the breach was trivial or there are good reasons for excusing the offender's failure to comply.[397] In South Australia the court may in such circumstances:[398]

- extend the term of the bond (by up to one year);
- extend the period of time within which any remaining hours of community work must be performed (by up to six months);
- cancel unperformed hours of community service;
- revoke or vary any other condition of the bond; or
- if the bond has expired, require the offender to enter into a new bond for a period of up to one year.

4.139 In New South Wales, South Australia, the Northern Territory, Queensland, Western Australia and Victoria, unlike the ACT and Tasmania, there is no power to resentence an offender on breach; however, in South Australia, if the sentence of imprisonment is activated on breach, the court may also reduce the term of the sentence 'if it considers that there are special circumstances justifying it in so doing'.[399] In New South Wales a court may order that the sentence of imprisonment is to be served by way of periodic detention or home detention.[400]

---

395 *Crimes (Sentence Administration) Act 2005* (ACT) s 110(2); *Crimes Act 1914* (Cth) s 20A(5)(c)(ic)–(i). Under s 20A(5)(c) of the *Crimes Act 1914* (Cth) the court also has the power to fine the offender up to $1,000, amend the order to extend the period of the good behaviour bond, or to take no action.

396 Under s 27(4)(b) of the *Sentencing Act 1997* (Tas) the court has a power to substitute a sentence to take effect in place of the suspended sentence. However, under section 27(5) the court may not impose a greater term of imprisonment than was imposed by the suspended sentence. Sentencing orders available in Tasmania under s 7 of the *Sentencing Act 1997* (Tas) include imprisonment, community service orders, probation orders, fines and adjournments. On breach a court also has the power to vary the conditions on which the sentence was suspended: *Sentencing Act 1997* (Tas) s 27(5)(c).

397 *Criminal Law (Sentencing) Act 1988* (SA) ss 58(1) and 58(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3).

398 *Criminal Law (Sentencing) Act 1988* (SA) s 58(3).

399 *Criminal Law (Sentencing) Act 1988* (SA) s 58(4). The Australian Law Reform Commission has suggested that federal sentencing legislation should provide a similar power allowing a court dealing with a breach to vary the order by ordering that the offender be imprisoned for a lesser period than that originally imposed: Australian Law Reform Commission, *Sentencing of Federal Offenders: Discussion Paper* Discussion Paper 70 (2005) Proposal 17-2.

400 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2).

4.140 Breach provisions in Queensland, Western Australian and the Northern Territory are similar to the old section 31 of the Victorian *Sentencing Act 1991* (Vic). Section 80 of the *Sentencing Act 1995* (WA) and section 43 of the *Sentencing Act 1995* (NT) require a court to activate the term of imprisonment held in suspense unless it determines that 'it would be unjust to do so in view of all the circumstances that have arisen [or, in WA, which 'have become known'] since the suspended sentence was imposed'. The Queensland Act also provides that the court must order the offender to serve the whole of the suspended sentence of imprisonment 'unless it is of the opinion that it would be unjust to do so'.[401] Under section 147(3) of the *Penalties and Sentences Act 1992*, in determining whether it would be unjust to order the offender to serve the whole sentence of imprisonment, the court must consider, along with any special circumstances arising since the sentence was imposed:

- whether the offence was trivial;[402] and
- the seriousness of the original offence (including any physical or emotional harm done to a victim and any damage, injury or loss caused).[403]

4.141 Other orders the court may make on breach in Queensland, the Northern Territory and Western Australia—which also exist in Victoria—include:

- extending the operational period;[404] and
- ordering the offender to serve part of the sentence held in suspense.[405]

4.142 As is the case in Victoria, the Northern Territory and Western Australia, on breach a court also has the option of making no order with respect to suspended sentences.[406] In Western Australia this order must be accompanied by a fine of up to $6,000.[407]

4.143 In no jurisdiction (other than Victoria) does the act of breaching a suspended sentence order constitute a separate criminal offence. One of the recommendations of the Freiberg Sentencing Review was to amend section 31 of the *Sentencing Act 1991* (Vic) to abolish this offence.[408] This option is discussed at [4.202]–[4.208].

---

401 *Penalties and Sentences Act 1992* (Qld) s 147(2).

402 Section 147(3(a) of the *Penalties and Sentences Act 1992* (Qld) sets out a number of factors to be taken into account in determining whether an offence is 'trivial', including: the nature of the offence and circumstances in which it was committed; the degree of culpability of the offender for the subsequent offence and consequences of activating the whole sentence; the antecedents and any criminal history of the offender; the prevalence of the original and subsequent offences; efforts at rehabilitation; the degree to which the offender has reverted to criminal conduct; and the motivation for the subsequent offence. In Queensland a suspended sentence order can only be breached if an offender commits another offence punishable by imprisonment.

403 *Penalties and Sentences Act 1992* (Qld) s 147(3)(b).

404 *Penalties and Sentences Act 1992* (Qld) s 147(1)(a); *Sentencing Act 1995* (NT) s 43(5)(e)–(ea); *Sentencing Act 1995* (WA) s 80(1)(c). The operational period can be extended for a maximum of 12 months in Queensland and 24 months in Western Australia.

405 *Penalties and Sentences Act 1992* (Qld) s 147(1)(c); *Sentencing Act 1995* (NT) s43(5)(d); and *Sentencing Act 1995* (WA) s 80(1)(b).

406 *Sentencing Act 1995* (NT) s 43(5)(f) and *Sentencing Act 1995* (WA) s 80(1)(d).

407 *Sentencing Act 1995* (WA) s 80(1)(d).

408 Freiberg (2002), above n 19, recommendation 15, 131.

The 'Exceptional Circumstances' Requirement

BACKGROUND

4.144 The 'exceptional circumstances' requirement was introduced into the suspended sentence order breach provisions in 1998.[409] Prior to these amendments, courts had some flexibility in dealing with breaches. Under the old section 31(7) the court was required on breach to restore the sentence:

> unless it is of the opinion it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence.[410]

4.145 The provision was amended on the basis that in many cases, the failure to activate the original sentence of imprisonment upon breach 'erodes the effectiveness of this sentencing order and brings the legal system into disrepute'.[411] The then Attorney-General, the Honourable Jan Wade, MP, in introducing the bill amending the breach provisions, suggested that while the power to suspend a sentence of imprisonment was 'intended to provide offenders with one last chance … in practice this has not been the case'.[412]

ESTABLISHING 'EXCEPTIONAL CIRCUMSTANCES'

4.146 In the breach study conducted by the Council, we found that 76 per cent of breaches proven in the higher courts resulted in the original suspended sentence being restored, compared to 64 per cent in the Magistrates' Court. It can therefore be concluded that 'exceptional circumstances' were found in at least 24 per cent of breach matters heard by the higher courts, and 36 per cent of those heard by the Magistrates' Court.[413] A study of matters accepted and rejected in the County Court as constituting 'exceptional circumstances' revealed that a broad range of factors alone or in combination had led to the finding of exceptional circumstances. However, while there appear to be substantial similarities between factors accepted by the court as amounting to exceptional circumstances and factors that were rejected, in each case it appeared to be the unique combination, rather than the individual factors themselves, which led the court to this finding.[414]

4.147 As with the circumstances in which suspension of a sentence of imprisonment may be considered desirable more generally, the Court of Appeal has exercised caution in its guidance to sentencers on what might satisfy the 'exceptional circumstances' test. In *R v Stevens*, which concerned an appeal against the restoration of a previously suspended prison sentence on breach, Justice Brooking commented:

> I am reluctant to see a jurisprudence of 'exceptional circumstances' develop for the purposes of subsection (5A). I will, however, offer the obvious observation that we must be careful to ensure that the subsection is not treated as if it did not contain the adjective 'exceptional' but simply spoke of 'circumstances', and couple with it the obvious observation that the 'exceptional circumstances' must have arisen since the suspended sentence was passed.[415]

---

409 *Sentencing and Other Acts (Amendment) Act 1997* (Vic).

410 *Sentencing Act 1991* (Vic) s 31(7) repealed by the *Sentencing and Other Acts (Amendment) Act 1997 (Vic).*

411 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 874 (Jan Wade).

412 Ibid.

413 See further Sentencing Advisory Council (2005), above n 3, [4.59]–[4.91].

414 Ibid [4.51]–[4.58].

415 [1999] VSCA 173 (Unreported, Brooking, Charles and Buchanan JJA) [10], Brooking JA.

4.148 Justice Hedigan of the Supreme Court of Victoria, in considering the meaning of 'exceptional circumstances' in the earlier decision of *Owens v Stevens*, observed:

> The use of the phrase 'exceptional circumstances' is not unknown in the legal lexicon. S[ection] 13 of the *Bail Act* is a well-known example.
>
> Exceptional is defined, contextually, in the Oxford English Dictionary … as meaning 'unusual, special, out of the ordinary course'. This does [not] mean any variation from the norm.
>
> The facts must be examined in light of the Act, the legislative intention, the interests of the prosecuting authority, the defendant and the victims. It may be that the circumstances amounting to exceptional must be circumstances that rarely occur and perhaps be outside reasonable anticipation or expectation.
>
> Courts have been both slow and cautious about essaying definitions of phrases of this kind, leaving the content of the meaning to be filled by the ad hoc examination of the individual cases. Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are relevant factors.[416]

4.149 In a later decision, *Kent v Wilson*,[417] an appeal from a decision of the Magistrates' Court, Justice Hedigan found that the magistrate had erred in finding exceptional circumstances as a basis for confirming a combined custody and treatment order. The 'exceptional circumstances' in that case were said to be the fact that the offender had gained employment, was working six days a week, was learning a trade, was in a new relationship, and was living independently. The court found that these were 'changed circumstances' only:

> The respondent, of course, contended that the circumstances here did arise since the order was made. As a consequence, he is driven to rely upon the essential human normality of the behaviour, but saying there was something exceptional, that is, that it was an exceptional circumstance to get a job, leave home and live with a woman independently. These are, to my judgment, merely changed circumstances. Not only are they not exceptional but, if not normal, at least commonplace. It cannot have been the legislative intention, nor is it the Act's reasonable construction, that an exceptional circumstance was one that with respect to the relevant offender amounted to no more than a change of lifestyle from abnormal to normal.
>
> … The logical consequence of the magistrate's finding is that a released prisoner with a serious criminal record involving drugs and alcohol would have an easier task of establishing exceptional circumstances merely because the post-gaol behaviour was a notable improvement. The paradox is that the respondent claims that the exceptional circumstance is the living of an unexceptional mode of life. This is, to repeat the phrase, the mirror image of the argument rejected by Beach J in the bail application of Hanna El Rahi … that previous good character, a good work record and a supportive family could amount to exceptional circumstances for bail purposes. Here the argument is that the 'conversion' from a life of previous deplorable behaviour (such conversion only lasting about 70 days at the time and not including any adherence to the promise to report in two days) constitutes exceptional circumstances. In my opinion, this is mere sophistry and seeks to stand both ordinary language and the statute on their respective heads.[418]

---

416 *Owens v Stevens* (Unreported, Hedigan J, 3 May 1991).

417 *Kent v Wilson* [2000] VSC 98 (Unreported, Hedigan J, 24 March 2000).

418 Ibid [29] and [40].

4.150 In *R v McLachlan*[419] the Court of Appeal found that although an offender's compliance with the terms of an intensive correction order and performance of unpaid community work could amount to 'exceptional circumstances', the sentencing judge did not err in deciding that in the circumstances of this case, they did not. The offender in *McLachlan*, while complying with the formal terms of the order, including attending drug rehabilitation and performing 345 hours of unpaid community work, had breached the ICO on a continuous basis during the period of the order by using and trafficking in drugs.

4.151 In *R v Sutorius* the court further found that a threat made against the offender while she was in custody was not sufficient to establish that the offender was afraid of being imprisoned in the correctional centre, or that there was a grave risk of assault, or that the offender believed there was a grave risk of assault in the correctional centre, any of which might have constituted 'exceptional circumstances'.[420]

4.152 Factors recognised by the Supreme Court as constituting 'exceptional circumstances' in *R v Snip* included:[421]

- a delay between the commission of the breaching offence and the court proceedings on the breach;
- no further breaches of the order since the commission of the breaching offence; and
- the offences constituting the breach being of a 'very different [kind] from the type of offence' that was the subject of the original order to suspend.

4.153 The meaning of 'exceptional circumstances' was recently reconsidered by Justice Dodds-Streeton in *DPP v Marell*.[422] The magistrate in *Marell* had relied on the different character of the breaching offences as the reason for choosing not to restore the original suspended sentence. The original charges for which the suspended sentence of four months' imprisonment was imposed were two counts of driving while authorisation was suspended. Subsequently the defendant was convicted of a number of charges including drug trafficking and possession, for which he was sentenced to 270 days' imprisonment with 102 days suspended (168 days having already been served) and fined $2,000. The magistrate extended the operational period by 12 months and fined the defendant $500 on each of the charges.

4.154 In considering the scope of the discretion afforded by section 31(5A) of the *Sentencing Act 1991*, Justice Dodds-Streeton expressed the view that unless 'exceptional circumstances' were found, restoration of the suspended sentence was required:

> While there may be debate about the scope of 'exceptional circumstances', and there is an element of discretion in relation to determining whether it would be unjust to restore the suspended sentence, in my opinion … constistently with Hedigan J's holding in *Kent v Wilson*, in the absence of a finding of exceptional circumstances, the terms of s 31(5A) mandate the restoration of the suspended sentence. Discretion, in that sense, is excluded.[423]

---

419 [1999] 2 VR 665.

420 [2001] VSCA 70 (Unreported, Phillips, Batt and Chernov JJA, 9 May 2001). A previous threat made prior to the offender's sentencing hearing had been rejected by the sentencing judge as constituting exceptional circumstances.

421 [2000] VSC 205 (Unreported, Hampel J, 24 March 2000).

422 [2005] VSC 430 (Unreported, Dodds-Streeton J, 10 November 2005).

423 Ibid [79].

4.155 Justice Dodds-Streeton referred approvingly to Justice Hedigan's analysis of 'exceptional circumstances' in *Kent v Wilson* , affirming:

> 'Exceptional circumstances' within the meaning of s 31(5A) imply something unusual, special, out of the ordinary course, perhaps rarely encountered or outside reasonable anticipation or expectation.[424]

4.156 In allowing the appeal, Justice Dodds-Streeton concluded that the different nature of the offences for which the suspended sentences were imposed, even taken together with the length of imprisonment already served by the defendant and early plea of guilty to some charges, were not 'individually or in combination, unusual, special or out of the ordinary course' or 'rarely encountered or outside reasonable expectation'.[425] Nor were there any other factors that were sufficient, either alone or in combination, to constitute 'exceptional circumstances'.[426]

4.157 Shortly after Justice Dodds-Streeton handed down her judgment, the Court of Appeal reconsidered the meaning of 'exceptional circumstances' in *R v Steggall*.[427] The applicant in *Steggall* had been sentenced to 25 months' imprisonment wholly suspended for an operational period of three years for a number of charges, including obtaining financial advantage by deception, obtaining property by deception, and theft. Under section 206B of the *Corporations Act 2001* (Cth), the applicant was, by virtue of his convictions for dishonesty, disqualified from managing a corporation for five years from the date of conviction. The defendant was subsequently charged and convicted of two offences against section 206A of the *Corporations Act 2001* (Cth) of managing a corporation while disqualified and three offences against section 1308(2) of that Act of making a false or misleading statement in a document submitted to the Australian Securities and Investments Commission. He was convicted of each charge and fined a total of $5,000. The offences constituted a breach of the earlier suspended sentence imposed and breach proceedings were initiated. Counsel for the defendant argued that the following constituted 'exceptional circumstances' within the meaning of section 31(5A) of the *Sentencing Act 1991* (Vic):

> 1) The considerable delay between the offending between 1 September 2000 and 31 January 2003 and the institution of the breach proceedings on 26 August 2004.
>
> 2) Evidence of improvement in the applicant's psychological condition since the time of the original offending and the offending between 1 September 2000 and 31 January 2003.
>
> 3) Evidence that since the offending between 1 September 2000 and 31 January 2003 the applicant had been rehabilitated in his commercial dealings.
>
> 4) The dependence of members of the applicant's family and business associates on the applicant continuing in his current employment.
>
> 5) What was said to be the relative lack of seriousness of the breaching offences.
>
> 6) The considerable support which the applicant had from family and friends.
>
> 7) The fact that the applicant had complied with his bail obligations subsequent to a bail variation.[428]

---

424 Ibid [94].

425 Ibid.

426 Ibid.

427 [2005] VSCA 278 (Unreported, Buchanan, Eames and Nettle JJA, 23 November 2005).

428 Ibid [9].

4.158 However, the judge was not persuaded that these factors, either alone or in combination, constituted 'exceptional circumstances'. The original sentence was restored and a non-parole period of eight months set. On appeal it was argued that the judge misconstrued the nature of 'exceptional circumstances' for the purposes of the section and gave too little weight to the factors relied upon as establishing exceptional circumstances.[429] Referring to the Attorney-General's second reading speech of the bill introducing the 'exceptional test' into section 31 of the Act, Justice Nettle (Buchanan and Eames JJA concurring) observed:

> If … the language of s 31(5A) were not enough in itself to demonstrate an intention to make it harder for offenders to escape the consequences of breaching a suspended sentence, the second reading speech to my mind makes plain that the amendment was intended to have just that effect. Previously, it was enough to avoid restoration of a suspended sentence if, upon the sort of balancing exercise essayed in Newman, it were found that there was good reason in justice and the public interest not to do so. Now, with the requirement of "exceptional circumstances", it is plain that something more than good reason is required.
>
> Like the sentencing judge, I consider that the something more is that if an offender breaches a suspended sentence he or she shall be compelled to serve the whole of the sentence unless the circumstances are so exceptional as to be beyond reasonable contemplation or expectation.[430] (footnotes omitted)

4.159 Considering each of the factors submitted as constituting exceptional circumstances, the court rejected these as sufficient to establish 'exceptional circumstances'. In respect of the applicant's previous good character, good work record and his supportive family, Justice Nettle observed that such factors 'rarely, if ever, amount to exceptional circumstances for bail purposes' and in his view were even less likely to amount to 'exceptional circumstances' for the purposes of deciding whether a suspended sentence should be restored.[431] While not excluding the possibility that the disproportion between the seriousness of a breaching offence and the sentence of imprisonment to be activated might constitute an 'exceptional circumstance' within the meaning of section 31(5A), Justice Nettle found that in the present case they did not—the breaching offences being described as 'calculated and devious' and as 'reflect[ing] dishonesty of much the same kind as led to the offences for which the suspended sentence was imposed'.[432]

FLEXIBILITY VS CERTAINTY

4.160 There are three main arguments for providing flexibility on breach:

- 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 ('sentence inflation'); and
- the offence which constitutes the breach may be a minor offence.[433]

---

429 Ibid [11].

430 Ibid [15]–[16].

431 Ibid [25].

432 Ibid [28] (footnotes omitted).

433 Leslie Sebba, 'Penal Reform and Court Practice: The Case of the Suspended Sentence' in Israel Drapkin (ed) *Studies in Criminology* (1969) 133, 159.

4.161 On the one hand, more flexible breach provisions might allow for a more just outcome in individual cases and reflect current court practices. As found in the breach study carried out by the Council for the Discussion Paper, in 36 per cent of breach cases found proven in the Magistrates' Court, magistrates determined that there were 'exceptional circumstances' and made an order other than activation of the sentence or part sentence held in suspense. The higher courts were less likely to find 'exceptional circumstances'. For 76 per cent of breach cases found proven, the higher courts ordered the original gaol term to be served (in whole or in part)—with 24 per cent resulting in the court either making no order or extending the operational period of the order.

4.162 Providing courts with a full or limited power to resentence would address some of the past criticisms, including that of Justice Smith in *R v Bice*:[434]

> It is in the community interest that sentencing judges be able to determine the most appropriate disposition of a particular offender to meet the circumstances existing at the time of that disposition. Much can change in 12 months and, while a suspended sentence must only be imposed where a term of imprisonment is appropriate, there is an inherent tension in the concept of a suspended sentence and there is considerable scope for proper variation in judicial decisions as to their imposition. I suggest that the availability of intensive correction orders and combined custody and treatment orders to judges dealing with breach of suspended sentences is something government policy-makers should examine.[435]

4.163 The Sentencing Review, supporting the need for this type of reform, commented:

> The Court's observation [in *Bice*] about the subtle differences between serving a term of imprisonment, serving a term of imprisonment partly in custody and partly in the community (the combined custody and treatment order), serving a term of imprisonment by way of intensive correction in the community and serving a term of imprisonment that is suspended wholly or partly and the difficulties occasioned when these provisions are breached suggest that this area of sentencing law is in urgent need of clarification.[436]

4.164 There are a number of possible models that might provide the courts with greater flexibility in dealing with breaches. These include introducing a broad power to resentence (such as is available in the ACT and for federal offenders), a limited power to substitute other forms of substituted sanctions (such as exists in NSW) or to revert to the old section 31(7) which allowed a court to choose not to activate the original sentence of imprisonment if it was of the opinion that it would be 'unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence'. Such a provision could also set out particular factors to be taken into account. For example, in the Interim Report, the Council suggested that the considerations the court might take into account when determining what action to take on breach of the new orders proposed could include:

- the nature of the breach, the circumstances in which it was committed and the offender's motivation;
- the extent to which the offender had complied with the order;
- any evidence that the offender has made genuine efforts at rehabilitation since the original sentence was imposed;

---

434 (2000) 2 VR 364.

435 Ibid 372.

436 Freiberg (2002), above n 19, 101.

- the seriousness of the original offence and (where relevant) the seriousness of the subsequent offences, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender; and
- any special circumstances arising since the original sentence was imposed.[437]

4.165 Providing a wider discretion to the courts not to activate the original sentence on breach might also alleviate some of the potential problems caused by net-widening and sentence inflation. On the other hand, greater flexibility could simply result in both offenders and sentencers finding suspended sentences an even more attractive sentencing option, resulting in higher levels of net-widening from non-custodial orders and sentence inflation. As noted in the Discussion Paper,[438] such a move could also remove or substantially compromise the deterrent effect of the sentence, because activation of the original sentence on breach would not be assured.[439]

4.166 The 2002 Freiberg Sentencing Review found that there was strong support for making available to courts a broader range of options to resentence offenders on breach of orders. The presumption that a sentence of imprisonment must be restored was seen as having a number of negative consequences, including an increase in the prison population and a decrease in the use of suspended sentences and other orders for young offenders (as the lack of flexibility on breach may discourage their use).[440] A presumption in favour of cumulative sentences on breach was also regarded as unduly limiting the sentencing discretion and a recommendation made that section 31(6)(b) should be repealed.[441]

4.167 As a general principle, the Review recommended that the courts be given sufficient flexibility, in dealing with breaches of orders, to be able to take into account any changed circumstances and the extent to which the offender has complied with the order.[442] In line with this, the Review recommended that the current breach provision be repealed and replaced with a limited power to resentence that would allow a court to revoke the original sentence and, subject to the conditions governing such orders, impose an ICO, a youth training centre order or a drug treatment order.[443] The Review further recommended that a new provision be introduced requiring the court to take into account an offender's behaviour during the period of suspension when determining how to deal with him or her following breach, and suggested that consideration be given to articulating criteria to guide the courts in deciding whether to restore the sentence or revoke it and resentence.[444]

---

437 These factors were modelled on those set out under s 147(3) of the *Penalties and Sentences Act 1992* (Qld).

438 Sentencing Advisory Council (2005), above n 3, [8.114].

439 Sebba (1969), above n 117, 159.

440 Caroline Ball, 'The Youth Justice and Criminal Evidence Act 1999: Part 1: A Significant Move Towards Restorative Justice, or a Recipe for Unintended Consequences?' (2000) *Criminal Law Review* 211; Freiberg (2002), above n 19, 111.

441 Freiberg (2002), above n 19, 131, recommendation 18.

442 Ibid recommendation 11.

443 Ibid recommendation 17.

444 Ibid 130–132, recommendations 16 and 19.

SUBMISSIONS AND CONSULTATIONS

4.168 While a majority of those who participated in community forums and focus groups following the release of the Discussion Paper considered the current breach provisions to be 'fair and appropriate',[445] a number of those who made submissions[446] and participated in the specialist roundtables believed that the current breach provisions relating to suspended sentences were too inflexible and onerous. Criticisms of the breach provisions included that in determining whether the original sentence should be activated, the exceptional circumstances provision does not adequately allow for factors such as the relative seriousness of the offence constituting the breach and the original offence for which the suspended sentence was ordered;[447] how far into the order the second offence was committed;[448] changes in the offender's circumstances;[449] or issues arising from circumstances in which a breach has occurred due to an offender's mental illness or intellectual disability.[450] It was suggested that increasing flexibility on breach would allow for just outcomes in individual cases[451] and reflect current practices of the courts.[452]

4.169 Other criticisms included the lack of consistency in approach as to what courts accepted as 'exceptional circumstances' and the narrow interpretation of 'exceptional circumstances' in some cases.[453] VALS suggested that if 'exceptional circumstances' were to be retained, it should be defined more broadly, for example to recognise as exceptional circumstances situations 'when a person who hitherto had problems is doing well'.[454] They further recommended that cultural issues should be taken into account, such as an offender living with extended family members who are dependants.[455]

4.170 Inflexible breach provisions were seen by some as having unfair consequences for disadvantaged offenders, particularly when considered in light of possible net-widening and sentence inflation effects and the lack of appropriate supports. For example, the Victorian Aboriginal Legal Service Inc (VALS), while noting that Indigenous offenders appear less likely to be given a suspended sentence, submitted that there is anecdotal evidence to suggest that a majority of Indigenous offenders on suspended sentences breach these orders.[456]

---

445 See above n 210.

446 See, for example, Discussion Paper Submissions 24 (County Court of Victoria), 36 (Magistrates' Court of Victoria), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 42 (VAADA), 43 (VALS), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

447 Discussion Paper Submission 38 (Victoria Legal Aid): 'minor breach offences may not justify imprisonment' and Submission 44 (Fitzroy Legal Service).

448 Victoria Legal Aid (Discussion Paper Submission 38) suggested that the current provisions provided a disincentive for offenders to attempt to comply with the order, as a breach that occurred one week after the order was made would attract the same consequences as one that occurred after two years of good behaviour. See also Discussiion Paper Submission 5 (Y. Zole).

449 Discussion Paper Submissions 44 (Fitzroy Legal Service) and 38 (Victoria Legal Aid).

450 Discussion Paper Submissions 45 (Mental Health Legal Centre)—supplementary comments.

451 Discussion Paper Submissions 34 (S. Tudor), 36 (Magistrates' Court of Victoria), 39 (Federation of Community Legal Centres), 41 (Youthlaw), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

452 Discussion Paper Submission 41 (Youthlaw). Dr Steven Tudor argued that 'we should not legislatively countenance the imposition of sentences specifically regarded as "unjust"; nor should judges skew the facts to fit the legislation (if this is what is happening)': Discussion Paper Submission 34.

453 See, for example, Discussion Paper Submission 43 (VALS).

454 Ibid.

455 Ibid.

456 Ibid.

4.171 Around 6 per cent of all persons sentenced in the Magistrates' Court in 2004–05 received a wholly suspended sentence, compared with approximately 4 per cent of Indigenous offenders.[457] Of offenders sentenced in the Shepparton and Broadmeadows Koori Courts, however, 9 per cent received a wholly suspended sentence. While breach of a suspended sentence accounted for less than 1 per cent of all charges proven in the Magistrates' Court in 2004–05, more than 3 per cent of all charges proven in the Shepparton Koori Court were for breach of a suspended sentence.[458] This provides some evidence that Indigenous offenders are more frequently prosecuted for breach.

4.172 Reasons for breach by Indigenous offenders suggested by VALS include a lack of appropriate and culturally sensitive services, the absence of mechanisms to help offenders to comply with the orders, a failure to communicate properly to Indigenous offenders what a suspended sentence is or the implications for them of reoffending, and the particular patterns of offending exhibited by Indigenous offenders.[459] VALS attributed the success of the Koori Court in achieving lower rates of breach of orders imposed in that court to proper targeting of suspended sentence orders to offenders who 'have got their lives on track and/or have support mechanisms in place that enable them to break out of a cycle of crime', the linking of defendants on suspended sentence orders with appropriate services, and court processes that allow people to participate more easily and understand what is going on, through the use of more informal procedures and more time spent determining the appropriate sentence.[460]

4.173 There was some support for a return to the previous provision that the sentence be activated 'unless unjust in view of all the circumstances',[461] and for giving courts a power to resentence on breach (to the full range of sentencing options, or to one of the available custodial orders).[462] The Federation of Community Legal Centres also argued that the threshold for breaches (the commission of another offence 'punishable by imprisonment') was too low and that only reoffending that was 'serious [and related] offending' should constitute a breach of the order.[463] A similar suggestion was also made at some of the community forums held.[464] Victoria Legal Aid also supported a reduction in the period of time within which breach proceedings could be commenced under section 31(2) of the *Sentencing Act 1991* (Vic) from three years to 12 months.[465]

---

457 Department of Justice, unpublished sample data.

458 Mark Harris, *'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (Report commissioned by the Department of Justice) (2006). Charges proven for breach of suspended sentences in the Koori Court do not necessarily relate to suspended sentences imposed by the Koori Court.

459 Discussion Paper Submission 43 (VALS).

460 Discussion Paper Submission 43 (VALS).

461 Discussion Paper Submissions 24 (County Court of Victoria), 34 (S. Tudor) 38 (Victoria Legal Aid) and 44 (Fitzroy Legal Service). Victoria Legal Aid favoured spelling out relevant issues such as the nature and circumstances of the original and breach offences, the personal circumstances of the offender, and the extent of the defendant's compliance since the original sentence.

462 Discussion Paper Submissions 36 (Magistrates' Court of Victoria), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

463 Discussion Paper Submission 39 (Federation of Community Legal Centres). See also Submission 38 (Victoria Legal Aid).

464 For example, the forum held at Ballarat (5 May 2005).

465 Discussion Paper Submission 38 (Victoria Legal Aid).

4.174 A majority of submissions received in response to the Interim Report—primarily from representatives of the legal profession—supported a return to a test of whether restoration would be 'unjust in the circumstances'.[466] The Criminal Defence Lawyers' Association, which was among those advocating the removal of the 'exceptional circumstances' standard, argued:

> The application of the exceptional circumstances test as defined in *Kent v Wilson* is unduly restrictive and illogical in that it does not allow a court to appropriately acknowledge an offender's rehabilitation in the period since the order was imposed. In our submission retention of the current test is neither in the interests of the community nor the individual offender.[467]

4.175 The Law Institute saw the removal of the 'exceptional circumstances' requirement as better providing for the concept of parsimony in responding to breached sentencing orders.[468]

4.176 The particular difficulties experienced by some groups of offender, such as offenders with a mental illness, was again highlighted. This was seen by some as a basis for introducing special defences for those who breached by reason of their mental illness[469] or for extending the scope of exceptional circumstances:

> we believe there should be a more creative application of exceptional circumstances. It is our experience that our clients cannot establish exceptional circumstances although they may have been unwell at the time of new offences; this must be addressed to allow these circumstances, which are not exceptional, to be considered and without the reverse onus that presently exists.[470]

4.177 Others who made submissions in response to the Discussion Paper supported the current breach provisions,[471] arguing that as the offender had received a significant advantage in having his or her prison term suspended, the original sentence should be served if the offender breached the order by further offending, in the absence of exceptional circumstances. There was also some support for tightening up the current breach provisions, for example by requiring mandatory activation of the sentence imposed for the first and any type of breach,[472] and removing the power of the court to make no order.[473] Supporting this general position, one submission made in response to the Council's Discussion Paper argued:

> A person who does not take up the generous offer of a second chance given by the court has no right to another chance and should be further punished for showing no remorse and no respect for the court.[474]

---

466 See Submissions 11 (the Law Institute of Victoria), 18 (the Criminal Defence Lawyers' Association), 20 (Youthlaw), 21 (the Criminal Bar Association), 22 (Fitzroy Legal Service Inc) and 23 (Federation of Community Legal Centres).

467 Submission 18 (Criminal Defence Lawyers' Association).

468 Submission 11 (Law Institute of Victoria).

469 Submission 13 (Mental Health Branch, DHS). See also Discussion Paper Submission 25 (Mental Health Legal Centre Inc).

470 Submission 24 (Mental Health Legal Centre Inc).

471 Discussion Paper Submissions 23 (L. Francis) and 40 (S. Rothwell).

472 Discussion Paper Submissions 6 (M. Douglas) and 25 (M. Roach).

473 Discussion Paper Submission 27 (D. A. Paul).

474 Discussion Paper Submission 25 (M. Roach).

4.178 Based on the breach study conducted by the Council, mandatory activation of the original sentence imposed on breach would result in around 1,700 additional people a year being admitted to Victoria's prisons. In light of the known net-widening and sentence inflation effects of suspended sentences, this would effectively eradicate any of the diversionary benefits of suspended sentences.[475]

4.179 The finding of 'exceptional circumstances' in cases involving merely 'changed' rather than 'exceptional' circumstances was also a matter of concern.[476] As one forum participant suggested: 'Exceptional circumstances should in fact be EXCEPTIONAL' (emphasis in original).[477] Some also felt that judges needed to be more selective as to who received a suspended sentence[478] and saw the issue of poor targeting of offenders as related to current breach rates.[479]

4.180 The Victoria Police submission was among the few submissions in response to the Interim Report that supported the retention of the 'exceptional circumstances' requirement on the basis of its well-established meaning:

> In relation to the use of terminology, Victoria Police would strongly urge that 'exceptional circumstances' not be replaced with 'unjust in the circumstances'. Victoria Police recognises that the law is settled in relation to the meaning of 'exceptional circumstances' and is concerned that 'unjust in the circumstances' is not only less onerous than the current test, but also introduces a concept which is not currently codified or supported by any authority.[480]

4.181 Victoria Police also supported the introduction of guidelines on the meaning of 'exceptional circumstances' as a way of encouraging greater consistency of approach by courts in responding to breaches.[481]

THE COUNCIL'S VIEW

4.182 As we recognised in the Interim Report,[482] there is an inherent tension between seeking to respond to breaches in a flexible way, and communicating clearly to the offenders and the community that breaches will be dealt with seriously.

4.183 With the introduction of the new orders proposed, the Council envisages that during the transitional period when both suspended sentences and the new orders are available, there will be significant overlap between a suspended sentence and other intermediate orders. Both suspended sentences and the new correction and supervision order (CSO) could be seen as serving the purpose of diverting offenders from prison by allowing offenders who might have otherwise served an immediate term of imprisonment to remain in the community. However, the CSO would provide courts with greater flexibility on breach—for example to vary the conditions of the order. Once the new sentencing framework is in place, the main points of distinction between a suspended sentence and a CSO will be the

---

475 For a discussion of the Council's findings and methodology, see Sentencing Advisory Council (2005), above n 3, [4.59]–[4.91].

476 On the issue of exceptional circumstances generally, and a discussion of findings of the Council's study of outcomes on breach in the higher courts and Magistrates' Court, see Sentencing Advisory Council (2005), above n 3, [4.45]–[4.47] and [4.59]–[4.91].

477 Response to Feedback Form, Community Forum.

478 Discussion Paper Submission 7 (C. Murphy).

479 Discussion Paper Submission 9 (J. Hemmerling).

480 Submission 16 (Victoria Police).

481 Ibid.

482 Sentencing Advisory Council (2005), above n 3, [4.44].

treatment at law of a suspended sentence as a sentence of imprisonment, and what commentators have sometimes referred to as the 'special deterrent effect' of suspended sentences.[483]

4.184 During the Council's more recent consultations a number of people pointed to the rates of breach of suspended sentences—36 per cent in the higher courts and 31 per cent in the Magistrates' Court—as evidence of the success of the order, particularly when compared with the breach rates for other orders. However, based on breach figures compiled for other intermediate orders, it seems that suspended sentences are in fact *less* successful than other correctional orders in preventing reoffending during the period of the sentence. The apparently higher breach rates of other correctional orders can be attributed to the conditional nature of these orders, which can be breached not only by further offending, but also by a failure to comply with other conditions of the order (see above [2.41]–[2.43]).

4.185 Breach rates of sentencing orders are related not only to the nature of the order, but to other factors, such as the type of offenders selected as appropriate candidates for such orders. For example, a low likelihood of reoffending and ties to the community may operate as powerful factors in favour of suspension in individual cases. Assuming that sentencers are more likely to impose a suspended sentence, rather than an immediate term of imprisonment or some other form of order, such as an ICO or a CBO, on offenders at lower risk of reoffending, it might be expected that the breach rates for suspended sentences should be lower than other orders, independent of the possible special deterrent effect of the order itself. Further, breach rates will only ever be reflective of those offenders whose further offences are detected and prosecutions commenced. It might be assumed on this basis that offenders under other conditional correctional orders, including supervisory conditions, would be more likely to have any of their further offences detected. When considered in this context, the high rates of breach by further offending may be seen as even less defensible and may provide a basis, while the order continues to exist, for better targeting of these orders (see further [4.212]–[4.215]).

4.186 Regardless of these considerations, in our view there is little doubt that an offender who is sentenced to a wholly suspended term of imprisonment receives a significant advantage over an offender sentenced to the same term of imprisonment to be served immediately (with or without the possibility of parole). On this basis alone, it could be argued that an offender who receives such an advantage must do so in the knowledge that on breach by further offending, he or she is at real risk of serving the whole suspended period in prison. We believe that such a view is strengthened by the treatment of a suspended sentence at law as a custodial sentence.

4.187 A suspended sentence, by its very nature, implies a sentence imposed but not executed, conditional on the offender not reoffending. The less certain are the consequences of breach, the less its potential capacity for special deterrence. While the certainty of being caught and subjected to punishment has generally been found to have a stronger deterrent effect than the severity of punishment,[484] removing the certainty of consequences on breach, in the Council's view, would seriously compromise the integrity and underlying rationale of the order. As noted in our Discussion Paper:

> in its original conception [a suspended sentence] was seen as a solemn warning together with a precise and calculated threat; it was designed for the casual offender not yet corrupted by imprisonment, for the individual whose behaviour and character might be considered normal and in whom, it seems, confidence can be placed on the strength of that warning and that threat.[485]

---

483 See, for example, Bottoms (1981), above n 121.

484 Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity* (1999) 5–6.

485 Ancel (1971), above n 25, 36.

4.188 It is largely for these reasons that the Council believes that no changes to the 'exceptional circumstances' test should be considered. Further, while we note there was some support for the threshold for breaches (the commission of another offence 'punishable by imprisonment') to be lifted to only serious and related offending to constitute breach, we believe the current standard, which is consistent with other jurisdictions, should not be changed. We further see no need to change the current period during which breach proceedings may be commenced.

4.189 Courts that make an order to suspend must therefore do so in the full knowledge that if the offender commits another offence, even if such an offence is of a different kind or seemingly trivial in comparison, there is a real risk that he or she will serve the entirety of the sentence suspended in prison. This should be taken into account both in determining whether the case is an appropriate one for suspension and in setting the appropriate operational period of the order.

4.190 During the course of its initial deliberations, the Council gave some consideration to clarifying the meaning of 'exceptional circumstances' by articulating some of the factors that a court must take into account on breach, such as the trivial nature of the subsequent offence when compared to the effects of activating the suspended sentence, or any significant efforts by the offender at rehabilitation that might move his or her current circumstances into the realm of 'exceptional'. Arguably, such an approach would signify a departure from the character attributed to 'exceptional circumstances' recently affirmed by the Court of Appeal in *R v Steggall*,[486] as 'something unusual, special, out of the ordinary course, perhaps rarely encountered or outside reasonable anticipation or expectation'.[487] Ultimately the Council has resolved that the existing caselaw provides sufficient and appropriate guidance to the courts as to how the matter of establishing 'exceptional circumstances' should be approached, and that no further legislative guidance is required. If an offender is considered to be at high risk of reoffending at the point of sentencing, the court should consider making some other form of order that will provide the offender with more support.

4.191 In line with the Council's view that substituted sentences should be kept to a minimum, we further support the current prohibition against courts substituting other forms of 'custodial' orders (such as CCTOs, home detention or ICOs) for a restored term of imprisonment, with one important exception. Currently a young person who breaches a suspended sentence order and has his or her sentence restored must serve the term in an adult prison unless transferred under the provisions of the *Children and Young Persons Act 1989*.[488] In our view, provided the young person is assessed as suitable to serve the period of detention in a youth facility, a court should have the power to substitute a period equivalent to the original term of imprisonment imposed to be served in a youth training centre or youth residential centre. We note that some support was provided for this option following the release of the Discussion Paper[489] and the Interim Report.[490]

---

486 [2005] VSCA 278 (Unreported, Buchanan, Eames and Nettle JJA, 23 November 2005). This is consistent with the interpretation adopted by Justice Hedigan in *Owens v Stevens* (Unreported, 3 May 1991), and later in *Kent v Wilson* [2000] VSC 98 (Unreported, 24 March 2000).

487 *DPP v Marell* [2005] VSC 430 (Unreported, Dodds-Streeton J, 10 November 2005) [94].

488 *Children and Young Persons Act 1989* (Vic) s 244(1).

489 See, for example, Discussion Paper Submissions 36 (Melbourne Magistrates' Court), 41 (Youthlaw), 44 (Fitzroy Legal Service Inc) and 45 (Mental Health Legal Centre). The Magistrates' Court also expressed support for the concept of a suspended youth training centre order with conditions to be administered by Juvenile Justice. The Council believes the new orders (including the new youth order) proposed in the Interim Report would perform much the same functions as a conditional suspended YTC order, with the benefit of more flexible options on breach.

490 See, for example, Submissions 18 (Criminal Defence Lawyers' Association).

4.192 In doing so we acknowledge concerns expressed by many that suspended sentences may in many cases be an inappropriate disposition for young offenders, as the lack of supervision and support may set them up for failure. The same concerns apply to many offenders with a mental illness, cognitive impairment or serious substance abuse issues. While we share these concerns, we consider that it is inappropriate to deny a young person the opportunity to serve the period of detention in a facility best suited to their circumstances and level of vulnerability—particularly given that these facilities exist and the YTC and YRC orders are already treated as custodial alternatives to imprisonment. We believe the best time for a young person to be assessed as suitable for these forms of youth order is immediately prior to being ordered to serve it, and for this reason support this option over a suspended YTC order or YRC order supported by some.[491] It is anticipated the new youth supervision and correction order proposed by the Council in our Interim Report will provide courts with a better alternative for some young offenders, where conditions are required, but a different model is needed in order to provide the young person with the proper support. The Council's recommendations in relation to the new youth order, and other orders proposed in the Interim Report, will be presented in Part 2 of our Final Report.

4.193 Finally, the Council recommends, from the perspective of encouraging a greater level of accountability and consistency in responses to breach, and assisting magistrates with a better basis upon which to determine who is an appropriate or inappropriate candidate for suspension, that breach hearings be listed, wherever possible, before the magistrate who imposed the original sentence, as is currently the practice in the higher courts. We note that this was identified during consultations as a possible explanation for the comparatively low rates of restoration on breach in the Magistrates' Court when compared to the higher courts.[492]

RECOMMENDATIONS

9. The current threshold for breach under section 31(1) of the *Sentencing Act 1991* (Vic) (the commission of an offence punishable by imprisonment) should be retained.
10. Where an offender breaches a suspended sentence by committing a further offence punishable by imprisonment during the operational period, the requirement that the suspended gaol term must be activated in the absence of exceptional circumstances under section 31(5A) of the *Sentencing Act 1991* (Vic) should be retained.
11. Where a court is dealing with a young offender (as defined under section 3 of the *Sentencing Act 1991*), the court should be permitted to cancel the order and resentence the offender to an equivalent period of detention in a youth training centre or a youth residential centre, subject to the requirements of section 32 of the *Sentencing Act 1991* (Vic) being satisfied.
12. Wherever possible, breach hearings should be listed before the same judge or magistrate who imposed the original sentence (reflecting the current practice in the higher courts).

491 See, for example, Discussion Paper Submission 36 (Magistrates' Court of Victoria).

492 Legal Issues Roundtable (8 December 2005).

Cumulative vs Concurrent Sentences on Breach

THE CURRENT SITUATION

4.194 Under s 16 of the *Sentencing Act 1991* (Vic) there is a general presumption that any term of imprisonment imposed will be served concurrently with any uncompleted sentence or sentences of imprisonment or detention that have been imposed at the same time or before.[493] Section 31(6)(b) of the Act provides that if a court, on breach, orders an offender to serve a term of imprisonment held in suspense, that term must be served cumulatively on any other term of imprisonment imposed 'unless the court otherwise orders'.

ARGUMENTS FOR AND AGAINST THE PRESUMPTION OF CUMULATION

4.195 The Sentencing Review recommended that section 31(6)(b) be repealed.[494] However, Bottoms has suggested that:

> *To abolish the 'consecutive rule' would be seen by most to kick an essential prop away from the suspended sentence*. This is because, if the offender is not seen to suffer a double penalty at the second conviction, then apparently the first sentence becomes simply a let-off and the failed offender has escaped without penalty.[495] (emphasis in original)

4.196 In just under half (22) of the 49 cases reviewed by the Council in the study of exceptional circumstances in the County Court, where the original sentence of imprisonment was activated on breach and some order for cumulative or concurrent sentences appeared to have been made, an order was made for the activated sentence to be served concurrently with another term of imprisonment.[496] In a further 17 cases, an order was made for them to be partially cumulative and partially concurrent.[497] As the existing provision does not seem to be a barrier to sentences being served concurrently, some might argue that there is no need for reform.

4.197 It might be argued that rather than removing this presumption, the existing provision should be made less flexible, requiring courts to make the sentence activated on breach cumulative. Otherwise, as suggested above, the offender could be seen as escaping punishment for the initial offence for which the suspended sentence was imposed. The legislation should avoid contributing to the perception that a suspended sentence constitutes no punishment at all. Making the provision less flexible, however, could result in some disproportionate sentences.

---

493 See also *R v Mantini* [1998] 3 VR 340. There are a number of exceptions to this, including offences committed while an offender is released under a parole order or on bail. In these cases, if a sentence of imprisonment is imposed, it must be served cumulatively on any period of imprisonment imposed unless otherwise directed by the court because of the existence of exceptional circumstances: *Sentencing Act 1991* (Vic) ss 16(3)–16(3C).

494 Freiberg (2002), above n 19, recommendation 18.

495 Bottoms (1981), above n 121, 24.

496 Sentencing Advisory Council (2005), above n 3, [4.53] and Table 5.

497 Ibid. In a further 18 cases no order for concurrency or cumulation was made as the offender was not serving any other term of imprisonment. In seven cases, there was no order for concurrency or cumulation in the sentencing remarks; nor was there any reference made to whether the offender was already serving a term of imprisonment.

4.198 While section 31(6) of the *Sentencing Act 1991* (Vic) creates a presumption that the sentence restored on breach will be made cumulative on any sentence previously imposed (for example, for the offences constituting the breach), the principle of totality must still be observed.[498] As Justice McHugh of the High Court observed in *Postiglione v R*:

> The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.[499]

4.199 In the case of a suspended sentence, this means that the aggregate sentence imposed on breach must not be inappropriate, taking into account the offences constituting the breach and the original offences for which the suspended sentence order was made. In effect, this means that the court must consider ordering at least partial concurrency where the aggregate sentence (taking into account the activated suspended sentence and the sentence imposed for the breaching offence or offences) would, when considered against the offender's overall criminality, be regarded as inappropriate.

SUBMISSIONS AND CONSULTATIONS

4.200 A number of those who made submissions on the Discussion Paper supported the repeal of the presumption in favour of any restored term being served cumulatively on any other term of imprisonment imposed.[500] For example, Victoria Legal Aid argued that the current provisions requiring the restored term to be served immediately, and unless otherwise ordered, cumulatively on any other term of imprisonment, 'are inconsistent with the principle of totality'.[501]

THE COUNCIL'S VIEW

4.201 The Council sees no need to change the current presumption in favour of cumulation, as the totality principle will continue to apply, requiring a court in sentencing an offender to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. We also concur with Anthony Bottoms' observation that '[t]o abolish the "consecutive rule" would be seen by most to kick an essential prop away from the suspended sentence'. We therefore recommend that the current presumption should remain.

RECOMMENDATION

13. The current presumption under 31(6)(b) of the *Sentencing Act 1991* (Vic) that the term activated on breach of a suspended sentence should be served cumulatively on any other term of imprisonment previously imposed unless the court orders otherwise, should remain.

---

498 *R v Aleksov* [2003] VSCA 44 (Unreported, Cummins AJA, Callaway and Batt JJA, 9 April 2003). On the issue of sentence concurrency and cumulation and the principle of totality, see generally *Mill v R* (1988) 166 CLR 59.

499 (1997) 189 CLR 295, 307–308. See also Gummow J, 321 and Kirby J, 340.

500 See, for example, Discussion Paper Submissions 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 41 (Youthlaw), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

501 Discussion Paper submission 38 (Victoria Legal Aid).

The Offence of Breach of a Suspended Sentence Order

THE CURRENT SITUATION

4.202 Under the current law, a breach of a CCTO, an ICO, a suspended sentence, a CBO or an adjourned undertaking (whether for failure to comply with a condition of the order or for committing a further offence) amounts to a further offence, the maximum penalty for which is a Level 10 fine.[502]

4.203 As noted above, in no other jurisdiction in Australia does a breach of suspended sentence order, or related order, constitute a separate offence. Rather, alternative mechanisms are used to bring an offender back before a court. For example, in New South Wales, on suspected breach of the conditions of a good behaviour order, the court may call the offender to appear before it, and if the accused fails to appear, may issue a warrant for the offender's arrest or authorise an 'authorised officer' to issue a warrant for the offender's arrest.[503] In Queensland—a jurisdiction in which, like Victoria, a court has no power to attach conditions to suspended sentence orders—if a police officer or an authorised corrective services officer suspects, on reasonable grounds, that the offender has committed an offence in or outside Queensland during the operational period of the order, the officer may apply for a summons in the Magistrates' Court requiring the offender to appear before the court that made the order.[504] The magistrate may issue the summons or issue a warrant directed to all police officers to arrest the offender and bring the offender before the court that made the order, to be dealt with for the subsequent offence and breach of the original order.[505]

THE SENTENCING REVIEW

4.204 The recent Freiberg Sentencing Review confirmed that the breach offence appears to serve primarily a procedural rather than punitive purpose and recommended that breach of orders should no longer constitute a separate criminal offence.[506] As an alternative means of ensuring that offenders could be brought back before the courts in cases of suspected breach, the Review suggested the introduction of a provision enabling a 'prescribed person' or a member of a prescribed class of persons to apply to the court and bring the offender before it, where it appears that an offender has breached the conditions of the order without reasonable excuse.[507] The form recommended by the Sentencing Review was as follows:

> 1. If at any time while a [combined custody and treatment order (s 18W), an intensive correction order (s 26), a suspended sentence (s 31), a community-based order (s 47) and a conditional release order (s 79)] is in force, it appears to a prescribed person or a member of a prescribed class of persons that the offender has failed without reasonable excuse to comply with any condition of it or with any requirement of the regulations made, the offender may be brought before

---

502 See above n 388.

503 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98. It is a requirement under section 12 of the Act that when a court makes a suspended sentence order, the offender must enter into a good behaviour bond. On breach of the bond, the court must revoke the bond, unless satisfied that the offender's failure to comply with the conditions of the bond was trivial in nature, or that there are good reasons to excuse the offender's failure to comply with the conditions of the bond: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3).

504 *Penalties and Sentences Act 1992* (Qld) s 146A(1)–(2).

505 *Penalties and Sentences Act 1992* (Qld) s 146A(3). However, a court may only issue a warrant if the complaint is under oath and the magistrate is satisfied that the offender would not appear in answer to a summons: *Penalties and Sentences Act 1992* (Qld) s 146A(7).

506 Freiberg (2002), above n 19, 116–19.

507 Ibid 119.

(a) the proper venue of the Magistrates' Court, if the order was made by the Magistrates' Court; and

(b) the Supreme Court or the County Court, if the community-based order was made by that court.

2. An application to bring the person before the court may be made by a prescribed person or a member of a prescribed class of persons.

3. An application under sub-section (1) may be made at any time up until 3 years after the date on which the failure to comply is alleged to have been committed.

4. An offender may be brought before the Court by way of notice served under the Regulations or by way of summons or arrest to be dealt with according to law.

5. If the Court is satisfied beyond reasonable doubt that the offender has failed to comply with a condition of an order by committing an offence punishable by imprisonment, it may [see powers of court].

6. If the Court is satisfied on the balance of probabilities that the offender has failed to comply with the conditions of the order it may … [see powers of court].[508]

SUBMISSIONS AND CONSULTATIONS

4.205 As noted in the Interim Report, there was little support in submissions and during consultations for retaining the offence of breach of a suspended sentence order.[509] It was argued that treating breach of an order as a criminal offence risks sentence escalation and 'double penalties' for an offender.[510] One submission commented that if the offence of breach was introduced simply as a means of initiating court proceedings, this seemed 'a peculiarly heavy-handed way to deal with what is really an administrative problem in getting the person before the court'.[511] Concerns were also raised that the imposition of a fine on breach was 'ineffective and merely an administrative burden', particularly where the offender is unable to pay the fine.[512]

4.206 On the other hand, the offence of breach may be regarded as an important means of signifying that a breach has occurred, and of encouraging courts to respond to breaches in a way that takes into account the seriousness of the original offence and the sentencing order originally imposed. Retaining a separate offence may further be seen as important in terms of public confidence, in that it signifies that there are consequences for non-compliance with orders.

---

508 Ibid 119.

509 This issue was discussed briefly at the Legal Issues Roundtable (23 May 2005). Some submissions also expressed support for the proposal in the Interim Report that breaches of sentencing orders should no longer constitute separate offences (see, for example, Submission 21 (Criminal Bar Association)). However, a few submissions supported the retention of the offence of breach of a suspended sentence order: Discussion Paper Submissions 9 (J. Hemmerling) and 15 (Anonymous).

510 Discussion Paper Submissions 39 (Federation of Community Legal Centres) and 41 (Youthlaw).

511 Discussion Paper Submission 34 (S. Tudor).

512 Discussion Paper Submission 39 (Federation of Community Legal Centres).

THE COUNCIL'S VIEW

4.207 The Council continues to agree with the Sentencing Review's conclusions that the existing breach provisions are an unsatisfactory way to deal with what is essentially a procedural issue. We therefore recommend that the approach recommended by the Sentencing Review should be adopted to bring an offender suspected of breach of a suspended sentence order (and other orders) back before the court.

4.208 On breach the offender will still be subject to the activation of the original sentence imposed, and to any additional penalty imposed by the court for the offence constituting the breach committed during the operational period of the order. Any activated term will be served immediately, and unless the court otherwise orders, cumulatively on any other term of imprisonment previously imposed.[513] The Council has further attempted to guard against an offender receiving a suspended sentence for any offence breaching a suspended sentence order, by specifying that the fact that the offence was committed during the operational period of an order is relevant in determining whether it is desirable for any term of imprisonment imposed for that offence to be suspended.

RECOMMENDATION

14. Breach of a suspended sentence order should not constitute a separate offence. The mechanism set out in the *Pathways to Justice* report of the Sentencing Review 2002 should be adopted as the appropriate means of bringing an offender back before the court in the event of suspected breach.

513 *Sentencing Act 1991* (Vic) s 21(6).

Time Spent in Custody Before Breach Proceedings

THE CURRENT POSITION

4.209 Under section 18 of the *Sentencing Act 1991* (Vic), if an offender is sentenced to a term of imprisonment or to a period of detention in an approved mental health service under a hospital security order in respect of an offence, any period spent by the offender in custody in relation to proceedings for that offence or arising from those proceedings must be taken into account as a period of imprisonment or detention already served under the sentence, unless the court orders otherwise. Because on proceedings for breach where the whole of the sentence or part sentence suspended is activated, an offender is not being 'sentenced to a term of imprisonment', there is no clear power for a court to take into account any period spent in custody for breach when activating the original prison sentence imposed.

4.210 The Criminal Defence Lawyers' Association has called for this uncertainty to be resolved by clarifying that any period spent by the offender in custody should be reckoned as a period already served under the sentence when all or part of a suspended sentence is activated on breach.[514]

THE COUNCIL'S VIEW

4.211 The Council believes there would be some injustice if a court was not permitted to take into account periods of time spent in custody as time already served under the sentence. This is particularly relevant where the offender is sentenced to a non-custodial order as a result of a breach of the original order, and where the original sentence imposed is restored. The Council therefore supports the call by the Criminal Defence Lawyers' Association for this uncertainty to be resolved. This could be achieved by clarifying that if a court takes the course of action under section 31(5) of restoring the sentence or part sentence held in suspense, any period of time during which the offender was held in custody in relation to those breach proceedings (including a period pending the determination of an appeal) may be reckoned as a period of imprisonment or detention already served under the sentence.

RECOMMENDATION

15. Section 18 of the *Sentencing Act 1991* (Vic) should be amended to make clear that if a court, under section 31(5), restores a sentence or part sentence held in suspense, any period of time during which the offender has been held in custody in relation to those breach proceedings (including a period pending the determination of an appeal) may be reckoned as a period of imprisonment or detention already served under the sentence.

514 Submission 18 (Criminal Defence Lawyers' Association).

Increasing the Effectiveness of Suspended Sentence Orders

4.212 A number of those who made submissions emphasised that suspended sentences are not about punishing an offender, but rather facilitating an offender's rehabilitation and avoiding the significant financial and social costs of imprisonment. High breach rates diminish the diversionary effect of suspended sentences, as a court must, in the absence of exceptional circumstances, restore the sentence held in suspense. The Federation of Community Legal Centres pointed out in their submission that current rates of breach and restoration may be attributable to suspended sentences 'not hav[ing] been the appropriate disposition in all of the circumstances, but only with the benefit of hindsight rather than an obvious miscarriage of the sentencer's discretion'.[515] Many people during the course of consultations spoke of the need for orders to be better targeted to those offenders for whom they are likely to be most effective in achieving rehabilitation. Improving offenders' understanding of their responsibilities under a suspended sentence was seen as another way of improving their operation.[516]

4.213 In order for this to occur, it is suggested that courts need more information to determine whether a particular offender is likely to be a suitable candidate for suspension: for example, information about the characteristics of both offenders who generally do not reoffend under such orders, and those who are more likely to reoffend. A suspended sentence is unique in that a pre-sentence report is not mandatory before an order for suspension can be made; while this is seen by many as one of the attractions of the order, it may also make an assessment of the offender's likelihood of successfully completing the order without breaching more difficult. While this should not be the only consideration guiding the determination of whether it is appropriate to suspend a sentence, it clearly must be one of them.

4.214 More experienced judicial officers are likely to develop a 'feel' for the types of offenders who typically reappear for breaches, and those who do not. The practice of listing breach proceedings before the same magistrates wherever possible, as recommended by the Council above, should assist those sitting in the Magistrates' Court to target their orders more effectively. However, clearly this can be no substitute for proper information provided to courts on the profile of those who receive suspended sentences, and of those who breach. From the data currently collected from the courts, this is a difficult if not impossible task.

4.215 One of the core functions of the Council, which is given statutory recognition under section 108C of the *Sentencing Act 1991* (Vic), is to provide statistical information on current sentencing practices to members of the judiciary and others, and to conduct research. Under the Act, the Council is also charged with the task of conducting research and disseminating information on sentencing. The Council acknowledges the important ongoing responsibility of sentencing bodies in 'filling the knowledge gap' that has existed regarding the effectiveness of particular orders in meeting their objectives, and in providing information which can form the basis of discussions of which orders work best for which offenders and why. While some important work has been done in this area—such as the evaluation of the operation of the

---

515 Submission 23 (Federation of Community Legal Services).

516 See, for example, Discussion Paper Submission 43 and Submission 15 (VALS). VALS further suggested that in order to emphasise the rehabilitative component of a unconditional suspended sentence, offenders could be required to submit a non-enforceable 'rehabilitation plan' or 'zero offending plan'. A rehabilitation plan, it was argued would 'help emphasise the seriousness of the situation, help identify support people or services and involve the offender starting to take responsibility for changing'.

Drug Court and drug treatment orders[517]—there is still a basic lack of information on these issues. The monitoring role recommended by the Council, following the introduction of the recommended reforms to suspended sentences and transition to the new orders, is one means by which the Council hopes to meet this challenge.

4.216 We also see a need, while suspended sentences continue to be available, to find ways of better communicating the meaning and consequences of suspended sentence orders to offenders. Under section 27(4) of the *Sentencing Act 1991* (Vic) a court proposing to make an order suspending a sentence of imprisonment is required before making the order to explain, or cause to be explained, to the offender in plain language the purpose and effect of the proposed order and the consequences that may follow on breach by further offending. However, concerns have been raised that offenders do not always fully appreciate the consequences of being under a suspended sentence order.[518] Current breach rates may provide some evidence of this. While the court must necessarily assume some responsibility for assisting an offender to understand his or her obligations, the Council believes others, such as the offender's legal representatives, also have an important role to play.

Conclusion

4.217 The Council is confident that the reforms recommended in this chapter will improve the operation of suspended sentences during the transitional period prior to their abolition. In recommending a phasing out of suspended sentences and the introduction of a new suite of sentencing orders, the Council hopes to achieve a sentencing system that provides courts with more credible and flexible sentencing options, which are conceptually coherent and make sense to victims, offenders, and the broader community. The end result, we believe, will be both an improvement in the range of sentencing orders, and greater community understanding of and confidence in sentencing.

4.218 As the new orders proposed come into operation, we envisage a marked reduction in the use of suspended sentences. However, while suspended sentences continue to be available, we believe the changes recommended will encourage a more appropriate use of the order by providing courts with clear guidance on the factors that may make a case an inappropriate one for suspension, and in the case of serious offences involving actual or threatened harm to a victim, creating a strong presumption against suspension. These changes are also designed to promote a shared understanding between the courts, victims, offenders and the broader community regarding the purpose and proper role of suspended sentences while they continue to be available. Over the transitional period the Council will continue to monitor the use and operation of suspended sentences to determine whether the reforms are operating as intended.

4.219 In Part 2 of our Final Report the Council will present its final recommendations on the remainder of the draft proposals outlined in its Interim Report.

---

517 A number of reports have now been released evaluating the effectiveness of the Drug Court pilot program, including a benefit and costs analysis of the program undertaken by Acumen Alliance: *Benefit and Cost Analysis of the Drug Court Program: Final Report* (2005), and a series of reports prepared by Health Outcomes International Pty Ltd in collaboration with Turning Point Alcohol and Drug Centre Inc: Silvia Alberti et al, *Court Diversion Program Evaluation—Overview Report: Final Report* (Vol. 1) (2004); Julian King et al, *Process Evaluation and Policy and Legislation Review: Final Report* (Vol. 2) (2004); and Silvia Alberti et al, *Health and Well-being Study—Victorian Drug Court: Final Report* (Vol. 3) (2004).

518 See, for example, Submission 15 (VALS).

References

Acumen Alliance, *Benefit and Cost Analysis of the Drug Court Program: Final Report* (Melbourne, 2005).

Alberti, Silvia, King, Julian, Hales, Jim et al, *Court Diversion Program Evaluation—Overview Report: Final Report (Vol. 1)* (Turning Point Alcohol and Drug Centre Inc. in collaboration with Health Outcomes International Pty Ltd, 2004).

Alberti, Silvia, Panjari, Mary, Ritter, Alison et al, *Health and Well-Being Study—Victorian Drug Court: Final Report (Vol. 3)* (Turning Point Alcohol and Drug Centre Inc. in collaboration with Health Outcomes International Pty Ltd, 2004).

Ancel, Marc, *Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris* (Heinmann, London, 1971).

Ashworth, Andrew, 'Justifying the First Prison Sentence' (1977) *Criminal Law Review* 661.

Ashworth, Andrew, *Sentencing and Criminal Justice* (2nd edn) (Cambridge University Press, 1995).

Australian Bureau of Statistics, *Criminal Courts, Australia 2004-05*, Catalogue 4513.0 (2005).

Australian Law Reform Commission, *Sentencing of Federal Offenders: Discussion Paper,* Discussion Paper 70 (2005).

Ball, Caroline, 'The Youth Justice and Criminal Evidence Act 1999: Part 1: A Significant Move Towards Restorative Justice, or a Recipe for Unintended Consequences?' (2000) *Criminal Law Review* 211.

Borzycki, Maria and Baldry, Eileen, *Promoting Integration: The Provision of Prisoner Post-Release Services*, Trends & Issues in Crime and Criminal Justice No 262 (Australian Institute of Criminology, 2003).

Borzycki, Maria, *Interventions for Prisoners Returning to the Community* (Australian Institute of Criminology, 2005).

Bottoms, Anthony, 'The Advisory Council and the Suspended Sentence' (1979) *Criminal Law Review* 437.

—— 'The Suspended Sentence in England 1967–1978' (1981) 21(1) *The British Journal of Criminology* 1.

Brignell, Georgia and Poletti, Patrizia, *Suspended Sentences in New South Wales* Sentencing, Sentencing Trends and Issues No 29 (Judicial Commission of New South Wales, 2003).

Campbell, J Q, 'A Sentencer's Lament on the Imminent Death of the Suspended Sentence' (1995) *Criminal Law Review* 293.

Fox, Richard, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1.

Fox, Richard and Freiberg, Arie, *Sentencing: State and Federal Law in Victoria* (2nd edn) (Oxford University Press, 1999).

Freiberg, Arie, *Sentencing Review 2001: Discussion Paper* (Department of Justice, Melbourne, 2001).

—— *Pathways to Justice: Sentencing Review 2002* (Department of Justice, Melbourne, 2002).

Mark Harris, *'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (Report commissioned by the Department of Justice) (Department of Justice, 2006).

Jenny Pearson & Associates, *Review of Community Based Offender Programs: Final Report* (Justice Strategy Unit, Attorney-General's Department, South Australia, 1999).

Judicial College of Victoria, *Sentencing Manual* (2005) <www.judicialcollege.vic.edu.au> at 24 March 2006.

King, Julian, Fletcher, Bevan, Alberti, Silvia et al, *Process Evaluation and Policy & Legislation Review: Final Report (Vol. 2)* (Turning Point Alcohol and Drug Centre Inc. in collaboration with Health Outcomes International Pty Ltd, 2004).

National Offender Management Service, Home Office, *Offender Management Caseload Statistics: Quarterly Brief: July to September 2005: England and Wales* (2006).

—— *Sentencing Statistics Quarterly Brief: England and Wales: April to June 2005 (Crown Court and Magistrates' Courts)* [As originally published] (2005).

New South Wales, Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (1973).

New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996).

—— *Sentencing*, Report 79 (1996).

New South Wales, Legislative Council, Standing Committee on Law and Justice, *Community-Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* Report No 30 (2006).

New Zealand Ministry of Justice, *Talking About Sentences and Crime: The Views of People on Periodic Detention* (2003).

Potas, Ivan, *Sentencing Manual: Law, Principles and Practice in New South Wales* (Judicial Commission of New South Wales and Lawbook Co, 2001).

Research, Development and Statistics Directorate, Home Office, *Sentencing Statistics 2003: England and Wales* (2005).

Roberts, Julian, 'Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry (eds) *Reform and Punishment: The Future of Sentencing*, (Willan Publishing, 2002).

Roberts, Julian and Gabor, Thomas, 'Living in the Shadows of Prison: Lessons from the Canadian Experience in Decarceration' (2004) 44(1) *The British Journal of Criminology* 92.

Sebba, Leslie, 'Penal Reform and Court Practice: The Case of the Suspended Sentence' in Israel Drapkin (ed) *Studies in Criminology*, (Magnes Press, Jerusalem, 1969).

Sebba, Leslie and Nathan, Gad, 'Further Explorations in the Scaling of Penalties' (1984) 23(3) *The British Journal of Criminology* 221.

Sentencing Advisory Council, *Suspended Sentences: Discussion Paper* (Melbourne, 2005).

—— *Suspended Sentences: Interim Report* (2005).

—— *Sentencing Snapshot: Sentencing Trends for Manslaughter in Victoria*, No 5 (September 2005).

—— *Sentencing Snapshot: Sentencing Trends for Rape in Victoria*, No 7 (December 2005).

—— *Sentencing Monitoring* (2005) <http://www.sentencingcouncil.vic.gov.au> at January 2006

Sparks, R F, 'The Use of Suspended Sentences' (1971) *Criminal Law Review* 384.

Spier, Philip, *Conviction and Sentencing of Offenders in New Zealand: 1988 to 1997* (Ministry of Justice, Wellington, 1998).

Spier, Philip and Lash, Barb, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice, Wellington, 2004).

Tait, David, 'The Invisible Sanction: Suspended Sentences in Victoria 1985– 1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143.

Thomas, D A, 'Developments in Sentencing 1964–1973' (1974) *Criminal Law Review* 685.

—— 'Case and Comment: *R v Uche*' (1975) *Criminal Law Review* 400, 401.

—— 'Case and Comment: *R v Genese*' (1976) *Criminal Law Review* 459.

Tudor, Steven, 'Modes of Mercy' (2003) 28 *Australian Journal of Legal Philosophy* 79.

Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee, Volume 1* (1988).

von Hirsch, Andrew, Bottoms, Anthony, Burney, Elizabeth et al, *Criminal Deterrence and Sentence Severity* (Hart Publishing, Oxford, 1999).

Warner, Kate, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355.

—— *Sentencing in Tasmania* (2nd edn) (Federation Press, Sydney, 2002).

—— *Sentencing*, Issues Paper No 2 (Tasmania Law Reform Institute, 2002).

Appendix 1—Roundtables

Roundtables

Offenders with a Mental Illness/Intellectual Disability (17 November 2005)

Council Member (Facilitator):
Mr Bernie Geary OAM

Participants:

Name	Position	Organisation
Ms Brenda Boland	Director, Community and Individual Support	Disability Services, Department of Human Services
Ms Anne Condon	Disability Coordinator	Melbourne Magistrates' Court
Ms Georgina Connelly	Senior Lawyer	Criminal Law Division, Victoria Legal Aid
Ms Beppie Hedditch	Consultancy Services	Arbias
Mr John Morkham	Executive Officer	ACROD Victoria
Ms Liesl Oliver	Program Policy Adviser, Legal and Forensic Policy	Mental Health Branch, Department of Human Services
Ms Vivienne Topp	Coordinator	Mental Health Legal Centre

Drug and Alcohol Roundtable (22 November 2005)

Council Members (Facilitators):
Ms Thérèse McCarthy and Ms Carmel Benjamin AM

Participants:

Name	Position	Organisation
Ms Jo Beckett	Credit Bail Coordinator	Melbourne Magistrates Court
Mr Damon Brogan	Manager	VIVAIDS Inc (Victorian Drug Users Organisation)
Mr Arthur Burmeister		Corrections Portfolio, Alcoholics Anonymous, Victorian Central Services Office
Major Michael Coleman	Territorial Consultant Drug & Alcohol Services	Salvation Army
Mr Robin Francis	Drug Court Case Manager	Drug Court
Mr Bernard Hanson	Acting Program Manager	COATS—Australian Community Support Association
Ms Ann Jorgensen	Drug Outreach Lawyer	St Kilda Legal Service
Ms Vi Lotter	Assistant Manager	COATS—Australian Community Support Association
Mr David Murray		Youth Substance Abuse Service (YSAS)
Ms Carol Nikakis	CEO	The Windana Society
Ms Maria Papadontas	Coordinator Clinical & Forensic Services	Turning Point Alcohol and Drug Centre
Ms Marion Simmonds	Manager Forensic Drug Treatment Operations	Department of Human Services
Ms Loretta Zeeck	Team Leader	Anglicare—Greater Eastern Drug and Alcohol Service

Young Offenders Roundtable (30 November 2005)

Council Members (Facilitators):
Mr Bernie Geary OAM and Mr David Grace QC

Participants:

Name	Position	Organisation
His Honour Judge John Barnett	Judge Chair	County Court of Victoria Youth Parole Board and Youth Residential Board
Her Honour Judge Elizabeth Curtain	Judge Alternate Chair	County Court of Victoria Youth Parole Board and Youth Residential Board
Ms Helen Dimopoulos	Youth Support Manager	BAYSA Youth Services
Ms Anatolie Dwyer	Senior Policy Officer	Strategic Policy and Diversity Unit, Corrections Victoria
Mr Rowan Fairbairn		Youth Substance Abuse Service (YSAS)
Mr Greg Levine	Magistrate	Magistrates' Court of Victoria
Mr Rick Loos	Bridging the Gap Program	The Brosnan Centre
Ms Francine McCabe	Manager	Policy and Practice, Juvenile Justice, Department of Human Services
Ms Ros Porter	Coordinator	Youth Legal Service, Victoria Legal Aid
Ms Anna Radonic	Principal Solicitor	Youthlaw Victoria
Mr Danny Sandor	Past President	Defence for Children International
Ms Donna Scott	Manager	Strategic Policy and Diversity Unit, Corrections Victoria

Legal Issues Roundtable (8 December 2005)

Council Member (Facilitator):
Professor Arie Freiberg

Participants:

Name	Position	Organisation
Mr Greg Byrne	Director, Criminal Law Justice Statement	Department of Justice
Mr Andrew Closey	Policy Officer	Law Institute of Victoria
Mr Tom Danos	Treasurer	Criminal Bar Association
Ms Lisa Hannon	Magistrate	Magistrates' Court of Victoria
Mr Callum Ingram	Assistant Director, Criminal Law Policy	Department of Justice
Mr Anthony Kelly	Policy Officer	Federation of Community Legal Centres
Mr Ed Lorkin	Barrister	
Mr Simon Moglia	Associate Public Defender	Victoria Legal Aid
Mr Tony Parsons	Managing Director	Victoria Legal Aid
Ms Sarah Spencer	Policy Officer	Department of Justice
Professor John Willis	La Trobe Law	La Trobe University

Appendix 2—List of Submissions

No.	Name	Position	Organisation
1	Confidential		
2	Confidential		
3	Confidential		
4	Mr Paul Smith	Director, Drugs Policy and Services Branch	Department of Human Services
5	Ms Therese McAllister		
6	Mr Bandula Abeysinghe	Attorney-at-Law	
7	Mr Anthony Avery		
8	Mr Graeme Leech		
9	Mr Richard Thomas		
10	The Honourable Alastair Nicholson AO RFD QC	Honorary Professorial Fellow, Department of Criminology	University of Melbourne
	Mr Danny Sandor	Past President	Defence for Children International
11	Ms Victoria Strong	President	Law Institute of Victoria
12	Mr Tony Parsons	Managing Director	Victoria Legal Aid
13	Ms Lorna Payne	Acting Director, Mental Health	Mental Health Branch, Department of Human Services
14	Mr Jason Chen		
15	Mr Robin Inglis	Executive Officer, Research, Planning and Development	Victorian Aboriginal Legal Service
16	Chief Commissioner Christine Nixon APM	Chief Commissioner	Victoria Police
17	Ms Kate McMillan	Chairman	The Victorian Bar
18	Ms Sarah Westwood	Vice-President	Criminal Defence Lawyers' Association
18	Mr Yehudi Blacher	Secretary	Department for Victorian Communities
20	Ms Paula Grogan	Director	Youthlaw
21	Mr Stephen Shirrefs SC	Vice Chairman	Criminal Bar Association
22	Mr Stan Winford	Solicitor/Policy and Project Officer	Fitzroy Legal Service Inc
23	Mr Anthony Kelly	Policy Officer	Federation of Community Legal Centres (Vic) Inc
24	Ms Vivienne Topp	Lawyer/Policy Worker	Mental Health Legal Centre Inc
25	Ms Wendy Tabor	Acting Director, Legal Services Branch	Department of Human Services

Appendix 3—Use of Suspended Sentences for 'Serious Offences' under Section 3 of the *Sentencing Act 1991* (Vic)

'Serious offences' as defined by section 3 of the *Sentencing Act 1991* (Vic) accounted for 19 per cent of all suspended sentences handed down in the higher courts over the period 1999–2000 to 2003–04 (see Table 12 below).

Table 12: Suspended sentences handed down 1999–2000 to 2003–04 (higher courts) for 'serious offences' as defined in s 3 *Sentencing Act 1991* (Vic)[(a)]

Offence	Maximum penalty	Suspended Sentences					Total persons sentenced
		Wholly	Partially	Total	As proportion of all suspended sentences	As proportion of all sentences for this offence	
Murder	Life	0	0	0	0%	0%	140
Manslaughter	20 years	5	2	7	<1%	7%	99
Causing serious injury intentionally	20 years	67	37	104	4%	25%	415
Threats to kill	10 years	10	2	12	<1%	24%	50
Rape	25 years	10	9	19	1%	12%	165
Assault with intent to rape	10 years	1	0	1	<1%	10%	10
Incest	25 years	8	7	15	1%	12%	122
Sexual penetration of a child under 16	10 years	35	8	43	2%	30%	143
Sexual relationship with a child under 16	25 years	3	1	4	<1%	19%	21
Abduction or detention	10 years	0	0	0	0%	0%	0
Abduction of child under 16	5 years	0	0	0	0%	0%	0
Kidnapping	25 years	7	1	8	<1%	19%	42
Armed robbery	25 years	148	42	190	7%	13%	1,449
Sexual penetration of child under 10	25 years	7	1	8	<1%	17%	46
Sexual penetration of child between 10 and 16 (under care or supervision of accused)	15 years	33	11	44	2%	42%	104
Conspire to commit, incitement to commit or attempting to commit any of the above offences	na	41	14	55	2%	22%	252
Total		**375**	**135**	**510**	**19%**	**17%**	**3,058**

(a) The definition of 'serious offences' includes offences under provisions of the *Crimes Act 1958* (Vic) that have since been repealed or amended.