



Sentencing Council
Attorney General & Justice

Suspended Sentences

A background report by the NSW Sentencing Council

December 2011

NSW Sentencing Council

www.lawlink.nsw.gov.au/sentencingcouncil
Phone: 02 8061 9333
Email: sentencingcouncil@agd.nsw.gov.au
GPO Box 6
SYDNEY NSW 2001

Copyright permissions

© New South Wales Sentencing Council, Sydney, 2011

You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the owner. However, you must obtain permission if you wish to (a) charge others for access to the work (other than at cost), (b) include the work in advertising or a product for sale, or (c) modify the work.

Disclaimers

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council – Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).

This document has been prepared by the NSW Sentencing Council for general information purposes and while every care has been taken in relation to its accuracy, no warranty is given or implied. Recipients should obtain their own independent advice before making any decisions that rely on this information.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Translating and Interpreter Service

If you need an interpreter ring 131 450 and ask the operator to contact us on the above number.

For alternative formats (audio tape, electronic or Braille versions) of this publication contact the NSW Sentencing Council or Diversity Services:

email: diversityservices@agd.nsw.gov.au,
phone: 02 8688 7507
fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

ISBN 978-1-921590-91-7...(Print)
978-1-921590-92-4...(Online)

TABLE OF CONTENTS

CONTRIBUTORS	iii
TABLE OF ACRONYMS	iv

Chapter 1: Introduction

Terms of Reference.....	1
Background to this review	2
Scope of the review and relationship with NSW Law Reform Commission Sentencing Reference	3
Methodology.....	3
Consultation process	3
Judicial survey on suspended sentences	4

Chapter 2: Operation of suspended sentences

Policy background.....	6
Nature of suspended sentences	7
Imposition of suspended sentences	9
Conditions which may be imposed as part of a suspended sentence.....	12
Application of suspended sentences when offender is subject to another sentence of imprisonment.....	13
Breach of suspended sentence and revocation of section 12 bond	14

Chapter 3: Use of suspended sentences

Introduction	17
Background	17
Summary of the use of suspended sentences in the Local and Higher Courts	19
Breach rates and incarceration rates following breach.....	22
Recidivism rates of offenders given suspended sentences	25
Regional and remote offenders	26
Appeals	27
Relationship between the use of suspended sentences and other sentencing options and 'net-widening'	28

Chapter 4: Stakeholder views

Introduction	30
Stakeholder views.....	31
Perceptions of suspended sentences.....	31
<i>Perceptions of the utility of suspended sentences</i>	31
<i>Community perceptions of suspended sentences</i>	31
<i>Perceptions of net-widening and why it might be occurring</i>	34
Potential reform of s 12	36
Reform of the three-step approach.....	36
Reintroduction of partially suspended sentences	37

Reform nature of conditions that may attach to suspended sentences	39
Increase or decrease the term which may be suspended.....	39
Increase the operational period of the bond	40
Exclude the availability of suspended sentences for certain serious offences.....	41
Further legislative or other guidance in relation to the circumstances in which it may be appropriate to suspend the execution of a sentence.....	42
<i>Further legislative guidance generally</i>	42
<i>Application for a guideline judgment</i>	44
Reform of breach provisions	45
Extension of good behaviour bond or variation of its terms	46
Other intermediate sentencing options to be made available	46
Review of the meaning of a failure that was ‘trivial in nature’	46
Review of what constitutes ‘good reasons to excuse the breach’	47
Other procedural issues.....	48
‘Credit for street time’	49
Appeal against revocation	49
Specification of a Non-Parole Period.....	50
Other alternatives.....	50
Extending accessibility to intermediate sentencing options	50
Phasing out of suspended sentences.....	54
Suspended sentences in the Children’s Court.....	54

Appendices

APPENDIX 1: BOCSAR Paper	57
APPENDIX 2: Table of Submissions	62
APPENDIX 3: Judicial Perceptions of Suspended Sentences – Survey Results.....	63
APPENDIX 4: Suspended sentences imposed in the Local Court	72
APPENDIX 5: Suspended sentences imposed in the higher courts	76
APPENDIX 6: Penalties for breach of suspended sentences	78

CONTRIBUTORS

The Council

Hon Jerrold Cripps QC, Chairperson

Hon James Wood AO QC, Deputy Chairperson

His Honour Acting Judge Paul Cloran

Mr David Hudson APM, NSW Police

Professor David Tait, Justice Research Group, University of Western Sydney

Mr Howard Brown OAM, Victims of Crime Assistance League

Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement

Mr Nicholas Cowdery AM QC, Former Director of Public Prosecutions

Mr Mark Ierace SC, Senior Public Defender

Ms Martha Jabour, Homicide Victims Support Group

Ms Megan Davis, Indigenous Law Centre, University of NSW

Ms Penny Musgrave, Department of Attorney General and Justice

Hon Roderick Howie QC, Representative with expertise in criminal law¹

Ms Jennifer Mason, Department of Family and Community Services²

Mr Harrold Hunt, Community Representative³

The Council also acknowledges the contribution of Mr Luke Grant, Corrective Services NSW

Officers of the Council

Executive Officer Sarah Waladan

Policy and Research Officer Bridget O'Keefe

Acknowledgements

The Council acknowledges the assistance of the Bureau of Crime Statistics and Research and the NSW Judicial Commission in providing the Council with the data presented in this report.

-
1. Resigned June 2011.
 2. Resigned May 2011. Mr John Hubby of Juvenile Justice NSW was appointed in November 2011 as the Council member with experience in juvenile justice.
 3. Resigned December 2010. Ms Karin Abrams was appointed in November 2011 as a community representative.

TABLE OF ACRONYMS

Acronym	Meaning
AVO	Apprehended Violence Order
BOCSAR	NSW Bureau of Crime Statistics and Research
CSPA	<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW)
CSO	Community Service Order
DPP	Director of Public Prosecutions
GBH	Grievous Bodily Harm
HPLS	Homeless Persons Legal Service
HDO	Home Detention Order
ICO	Intensive Correction Order
MERIT	Magistrates Early Referral Into Treatment
NSW	New South Wales
NSWCCA	NSW Criminal Court of Appeal
NSWLRC	NSW Law Reform Commission
NSWSC	NSW Supreme Court
ODPP	Office of the Director of Public Prosecutions
PCA	Prescribed Concentration of Alcohol
SNPP	Standard Non-Parole Period

1. INTRODUCTION

Terms of Reference	1
Background to this review	2
Scope of the review and relationship with NSW Law Reform Commission Sentencing Reference	3
Methodology	3
Consultation process	3
Judicial survey on suspended sentences	4

Terms of Reference

1.1 The NSW Sentencing Council ('the Council') has been asked to examine the use of suspended sentences under s 12 of the *Crimes (Sentencing Procedure) Act 1999* ('CSPA') in accordance with the following terms of reference:

1. An analysis of whether the use of suspended sentences has had any direct effect on the use of other sentencing options, including custodial and non-custodial options.
2. An examination of the extent to which the imposition of suspended sentences has exposed persons to the risk of imprisonment who would not otherwise have been sentenced to imprisonment.
3. An analysis of the primary reasons behind judicial decisions to impose suspended sentences in preference to other sentencing options, including:
 - (a) judicial attitudes to alternative sentences;
 - (b) availability of other options; and
 - (c) increased maximum penalties.
4. The identification of current community attitudes and expectations in relation to the use of suspended sentences.
5. An examination of recorded breaches; including the nature of the breach and the response.
6. An examination of whether the issues identified in relation to the above matters require reform.
7. An exploration of any options for reform.
8. Any other relevant matter.

Background to this review

- 1.2 In 2010 the NSW Bureau of Crime Statistics and Research ('BOCSAR') released a paper '*Trends in the Use of Suspended Sentences in NSW*' (attached at Appendix 1)¹ that constituted a study in relation to the extent to which suspended sentences have replaced custodial and non-custodial penalties between 1994–2008. The study found that the use of suspended sentences in both the local and higher criminal courts in NSW increased immediately following their introduction. In the Local Court, this increase gradually stabilised following the first year of introduction. However, in the higher courts, the use of suspended sentences continued to gradually increase.² The study also showed that the use of suspended sentences in both local and higher courts led to a correlative decrease in custodial sentences, and to a more substantial correlative decrease in the use of non-custodial penalties, mainly Community Service Orders ('CSOs') in Local and Higher Courts, and good behaviour bonds in Higher Courts.³
- 1.3 As highlighted by BOCSAR, the risk of imprisonment is higher for breaching the conditions of a bond attached to a suspended sentence than it is for breaching a good behaviour bond or a CSO. This raises questions, firstly in relation to whether or not suspended sentences are being used appropriately, and secondly in relation to the implications for imprisonment rates over the longer term, and in particular whether a greater number of offenders may be drawn into the prison population as a result of the breach of the conditions of the bond.⁴
- 1.4 As a result of the issues raised in BOCSAR's paper, the Council has been asked to undertake a review of the use of suspended sentences in NSW courts. Broadly, the key issues for consideration in this review include:
- whether suspended sentences in their current form are being used appropriately as a sentencing option;
 - if suspended sentences in their current form are not being used appropriately, what options exist to ensure their imposition in appropriate cases; and
 - whether measures are available that could lead to an increase in public confidence in their use.

1. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47 (2010).

2. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47 (2010), 2, 3, 4.

3. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47 (2010), 2, 3.

4. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47 (2010), 4.

Scope of the review and relationship with NSW Law Reform Commission Sentencing Reference

- 1.5 On 23 September 2011, the Attorney General asked the NSW Law Reform Commission ('NSWLRC') to review sentencing law in NSW and in particular the CSPA.
- 1.6 The terms of reference ('the Sentencing Reference') given to the NSWLRC are as follows:
- Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to review the *Crimes (Sentencing Procedure) Act 1999*. In undertaking this inquiry, the Commission should have regard to:
1. current sentencing principles including those contained in the common law
 2. the need to ensure that sentencing courts are provided with adequate options and discretions
 3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency
 4. the operation of the standard minimum non-parole scheme; and
 5. any other related matter.
- 1.7 By reason of the overlap between the terms of reference given to the Council; and the general responsibility of the Council to review and report on sentencing trends and practices, the Attorney General has invited the two agencies to work in collaboration with each other in relation to the Sentencing Reference.
- 1.8 As such, this report functions primarily as a background paper to assist the broader review to be conducted by the NSWLRC. Accordingly, the report will not make any specific recommendations, such matters being deferred to be dealt with as part of the NSWLRC's review. It will, however, identify some relevant issues and options for consideration. Additionally it will summarise the submissions received.

Methodology

Consultation process

- 1.9 The Council published its *Suspended Sentences Consultation Paper* on 29 June 2011 and invited written submissions from stakeholders by 29 July 2011. The Council received 13 submissions in response to its Consultation Paper. A list of submissions received by the Council is contained in Appendix 2. Both the Consultation Paper and the written submissions received are available on the Council's website.⁵

5. See: <<http://www.lawlink.nsw.gov.au/sentencingcouncil>>.

Suspended Sentences

- 1.10 The Council has engaged in a consultation with the NSW Victims of Crime Interagency Forum; a forum of government and non-government agencies that work with, and on behalf of, victims of crime in NSW,⁶ in relation to issues that arise in connection with the use of suspended sentences.

Judicial survey on suspended sentences

- 1.11 In the course of its research the Council conducted a survey of NSW magistrates and judges of the District and Supreme Courts, with the support of heads of jurisdiction, in order to obtain information in relation to the circumstances in which magistrates and judges use suspended sentences, and to gather their views as to the worth of such sentences as a sentencing option.
- 1.12 The survey questions were produced by the Council with the advice and assistance of the NSW Judicial Commission and BOCSAR. The questions were grouped into the following sections:
- The decision to impose or not impose a suspended sentence;
 - Perceptions of suspended sentences;
 - Breach provisions in relation to suspended sentences
 - Reform of the operation of suspended sentences; and
 - Intermediate sentencing options.
- 1.13 The survey questions required respondents to provide their answers in three different formats, by:
- selecting a response from a number of options provided;
 - selecting the most appropriate response on a scale; and
 - commenting on open-ended questions in the spaces provided.
- 1.14 Respondents were advised that no analysis would be performed that would identify individual magistrates or judges.
- 1.15 The survey was sent to all magistrates and judges of both the District and Supreme Courts on 30 September 2011 by email. The survey closed at midnight on 23 October 2011.
- 1.16 A total of 105 magistrates and judges provided completed survey responses ('the survey respondents'), giving an overall response rate of 36.7%. The response rate was much higher in the Local and District Courts, reflecting the higher use of suspended sentences in those courts.⁷

6. The Forum meets quarterly. The aim of the Interagency Forum is to share information and develop systemic responses to issues relating to victims of crime to assist in ensuring the successful implementation of the *Victims Support And Rehabilitation Act 1996* (NSW).

7. The response rate was 47.4% in the Local Court, 44.8% in the District Court and 0.5% in the Supreme Court.

- 1.17 The survey results are contained in Appendix 3 and are incorporated in Chapters 3 and 4 of this report.

2. OPERATION OF SUSPENDED SENTENCES

Policy background	6
Nature of suspended sentences	7
Imposition of suspended sentences	9
Conditions which may be imposed as part of a suspended sentence.....	12
Application of suspended sentences when offender is subject to another sentence of imprisonment.....	13
Breach of suspended sentence and revocation of section 12 bond	14

Policy background

- 2.1 In NSW, suspended sentences were abolished in 1974 and reintroduced in 2000. Prior to 1974, the court's power to suspend a sentence of imprisonment arose under ss 558 – 562 of the *Crimes Act 1900*. It was removed following a report of the Criminal Law Committee, on the basis that the bond system was operating more effectively. In its report the Committee noted:

We are convinced that the 'common law bond' system of dealing with convicted persons is superior in many ways to the suspended sentence. The present s 558, even though it applies only to first offenders, frequently has a harsher operation than does a 'common law bond', and is much less flexible in its provisions respecting breaches of recognizance. We recommend that s 558 be replaced by a section extending the bond system to all courts.¹

- 2.2 In 1996, by which time suspended sentences had not been available in NSW for over 20 years, NSWLRC recommended their reintroduction, on the basis that suspended sentences would be a useful addition to the range of sentencing options available to the courts, in situations where the seriousness of the offence calls for a custodial sentence to denounce the offence, but where:
- strong mitigating circumstances exist to justify the offender's conditional release;² or
 - the threat of imprisonment upon breach would act as an effective specific deterrent for the individual offender, and general deterrence is not a paramount consideration;³ or
 - there is no need to incapacitate the offender and a suspended sentence would promote the offender's rehabilitation.⁴

- 2.3 The NSWLRC noted:⁵

1. NSW Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (September 1973), 19.
2. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [4.22].
3. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [9.62].
4. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [9.62].
5. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [4.20], Recommendation 20.

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.⁶

- 2.4 As a result, suspended sentences were reintroduced as a sentencing option in NSW on 3 April 2000. The Government essentially adopted the NSWLRC's rationale for the use of suspended sentences. In the second reading speech to the CSPA, the Honourable Mr Bob Debus MP observed:

The primary purpose of suspended sentences is to denote the seriousness of the offence and the consequences of re-offending, whilst at the same time providing an opportunity, by good behaviour, to avoid the consequences. Their impact on the offender is, however, weightier than that of a bond. Suspended sentences will only apply to sentences of not more than two years imprisonment.⁷

Nature of suspended sentences

- 2.5 In NSW, s 12 of the CSPA provides:

- (1) A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:
 - (a) Suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as the court may specify in the order, and
 - (b) Directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.⁸
- (2) An order under this section may not be made in relation to a sentence of imprisonment if the offender is subject to some other sentence of imprisonment that is not the subject of such an order.

- 2.6 While a suspended sentence imposed on an offender does not require immediate detention, it constitutes a form of imprisonment⁹ rather than a non-custodial alternative. It is the execution of the sentence that is suspended not its imposition, and it can convert to full-time detention where a breach of the conditions of the bond leads to its revocation.¹⁰

- 2.7 This is the case notwithstanding the fact that s 12 is contained in Division 3 of Part 2 of the Act under the heading 'Non-custodial alternatives'.¹¹ A suspended sentence

6. NSW Law Reform Commission, *Sentencing*, Report 79 (1996), 4.22.

7. NSW, Parliamentary Debates, Legislative Assembly, 28 October 1999, 2326 (B Debus).

8. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 12.

9. *R v JCE* [2000] NSWCCA 498, (2000) 120 A Crim R 18, [15]; *R v Zamagias* [2002] NSWCCA 17, [25].

10. *R v Zamagias* [2002] NSWCCA 17, [25].

11. *R v Zamagias* [2000] NSWCCA 17, [25].

Suspended Sentences

has been classified as giving rise to a heavier sentence than a non-custodial order,¹² but ranks below intensive corrections orders (ICOs), home detention orders ('HDOs) and full-time imprisonment in the sentencing hierarchy. It should not be imposed if a non-custodial sentence, for example, a good behaviour bond or a CSO, is appropriate for the case at hand.¹³

- 2.8 Despite being a 'sentence of imprisonment', the offender is allowed to remain in the community, on certain conditions, and the detention is suspended unless and until triggered by a breach of one or more of the conditions.
- 2.9 The NSW Court of Criminal Appeal ('NSWCCA') has emphasised that a suspended sentence is 'a significant and effective punishment' despite the suspension of its execution,¹⁴ and has significant general and specific deterrent effects:

A sentencing court must approach the imposition of a sentence that is suspended on the basis that it can be a sufficiently severe form of punishment to act as a deterrent to both the general public and the particular offender. Of course, it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of its effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment. The question of whether any particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender. It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation for the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.¹⁵

- 2.10 In NSW, suspended sentences are available for all types of offenders and for all classes of offences. This is in contrast to the position in Victoria, where suspended sentences are not available in relation to certain serious offences,¹⁶ to the position with respect to HDOs,¹⁷ for which certain serious offences are excluded and to the position with respect to ICOs,¹⁸ for which certain serious sexual offences are also excluded.
- 2.11 In accordance with usual practice, the Court is required to supply reasons for the sentence that is imposed. If a suspended sentence is imposed in relation to a SNPP offence, then the court is required by s 54C of the CSPA to make a record of the reasons and to identify each of the mitigating factors that were taken into

12. *R v JCE* [2000] NSWCCA 498, (2000) 120 A Crim R 18, [16]

13. *R v JCE* [2000] NSWCCA 498, (2000) 120 A Crim R 18, [16]; *R v Zamagias* [2000] NSWCCA 17 [31].

14. *R v Foster* [2001] NSWCCA 215, 33 MVR 565, [36]. See also *R v JCE* [2000] NSWCCA 498, (2000) 120 A Crim R 18, [15], [25]; *R v Zamagias* [2002] NSWCCA 17, [31].

15. *R v Zamagias* [2002] NSWCCA 17, [32]. See also *R v Niass* [2004] NSWCCA 149.

16. *Sentencing Act 1991* (Vic).

17. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 76.

18. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 66.

account. For the purpose of this provision a suspended sentence is treated as a non-custodial sentence.¹⁹

- 2.12 In contrast to the position in relation to Commonwealth offences,²⁰ there is no power to partially suspend a sentence of imprisonment in NSW; the section requires that the suspension relate to the whole of the sentence.²¹
- 2.13 A non-parole period in relation to a suspended sentence is not set at the time when the sentence is initially imposed. It is only in the event that a breach occurs, resulting in revocation of the good behaviour bond giving rise to cessation of the suspension order, that the Court is required to determine whether to set a non-parole period.²²
- 2.14 In the event that the s 12 bond attached to the suspended sentence is revoked, bringing an end to the suspension, the sentence of imprisonment that then comes into effect does not commence on the date of imposition of the suspended sentence, but rather on the date of the revocation of the bond.²³ Accordingly, it is not until that time that a commencement date is set.²⁴
- 2.15 It is not possible for the court to backdate or post-date the commencement of a suspended sentence,²⁵ or to impose consecutive or partly consecutive suspended sentences.²⁶

Imposition of suspended sentences

- 2.16 In essence three steps are involved in the process of imposing a suspended sentence;²⁷ although in some cases which have referred to a two stage process, the first two steps have been elided, for example *Dinsdale v R*²⁸ and *R v Zamagias*.²⁹ They are as follows:

1. Firstly (or as a preliminary step), determining that no sentence other than imprisonment is appropriate;³⁰

19. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54C.

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

21. Previously, a sentence of imprisonment in NSW was able to be partially suspended: *R v Gamgee* [2001] NSWCCA 251, (2001) 51 NSWLR 707, [15].

22. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(1)(c), which attracts the application of Part 4 of the Act, including the provisions contained in s 44.

23. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(1)(c)(ii). This provision was amended by virtue of Schedule 1 of the *Crimes and Courts Legislation Amendment Act 2006* (NSW) following the lack of clarity that had previously existed in relation to whether revocation of a s 12 bond resulted in reactivation of the entire term of the sentence or only reactivation of the unexpired period of the bond. See discussion in *R v Tolley* [2004] NSWCCA 165, per Howie J.

24. *R v JW* [2010] NSWCCA 49, (2010) 77 NSWLR 7, [218].

25. *Abdullah v DPP* (unreported, 11/10/04), NSWSC; *R v Croaker* [2004] NSWCCA 470, [22].

26. *R v JW* [2010] NSWCCA 49, (2010) 77 NSWLR 7, [218].

27. *Douar v R* [2005] NSWCCA 455, [70] – [72]; *Amado v R* [2011] NSWCCA 197, [5].

28. *Dinsdale v R* [2000] HCA 54, (2000) 202 CLR 321, [79].

29. *R v Zamagias* [2002] NSWCCA 17, [25]-[29].

30. In accordance with the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1).

Suspended Sentences

2. Secondly, determining the appropriate term of imprisonment, without reference to the manner in which that term will be served;³¹ and
3. Thirdly, where the term is not more than two years, deciding whether to suspend the execution of the sentence.³²

2.17 It has been suggested that the three-step process involved in suspending a sentence is conceptually flawed.³³ The Victorian Sentencing Advisory Council in its report *Suspended Sentences Final Report Part 1*,³⁴ noted that:

The community, quite legitimately in our view, questions the logic of a decision that a prison sentence is, and then is not, appropriate.³⁵

The Victorian Sentencing Advisory Council noted additionally that:

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.³⁶

2.18 In NSW, in the recent case of *Ismael Amado v R*,³⁷ Basten J considered this conceptual issue that arises when imposing a suspended sentence:

If, after earnestly making the determination required at steps one and two, the Court, as step three, then suspends the execution of the sentence, so the person is under no immediate liability to serve the specified period in custody, the result appears incongruous. Even such an appearance tends to undermine the purposes of sentencing set out in s 3A of the Sentencing Procedure Act. The incongruity, however, is not merely an appearance, but a reality. Furthermore, it is unrealistic to suppose that the Court actually reaches its conclusion by proceeding mechanically from step one to step three.³⁸

2.19 The application of the three-step process involved in suspending a sentence, and the public and judicial perceptions in relation to this sentencing option, are considered in further detail in Chapters 3 and 4. The issue that arises is of some importance in relation to the maintenance of confidence in the criminal justice system.

31. *R v Zamagias* [2002] NSWCCA 17, [26].

32. *R v Zamagias* [2002] NSWCCA 17, [28]. See also, *R v Foster* [2001] NSWCCA 215, 33 MVR 565; and *Dinsdale v The Queen*, [2000] HCA 54, (2002) 202 CLR 321, [79].

33. See for example: L. Bartels, The use of suspended sentences in Australia, (2007) 31 *Crim LJ* 113; A. Frieberg and V. Moore, *Suspended sentences and public confidence in the justice system* (Paper presented at the National Judicial College of Australia Sentencing Conference, ANU College of Law, February 2008).

34. Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Options*, Final Report Part 2 (2008).

35. Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders*, Final Report Part 1, (2006), xvi.

36. Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders*, Final Report Part 1, (2006), vx.

37. [2011] NSWCCA 197.

38. *Ismael Amado v R* [2011] NSWCCA 197, per Basten J at [5]

- 2.20 In the light of the potential incongruity that attaches to the imposition of a sentence of imprisonment that does not result in actual imprisonment it is important that a sentencing judge explain the decision, including some reference to the reasons why other sentencing options were not adopted. A failure to record the manner in which the sentencing exercise was conducted, or the reasons for suspending the sentence may lead to the decision being carefully examined by the NSWCCA for any errors.³⁹
- 2.21 The length of the sentence should be determined before the decision is made to suspend the sentence. In this respect it is clearly impermissible for a judge to shorten the length of a sentence of imprisonment that has been determined to be appropriate in order to allow it to qualify for suspension.⁴⁰ Nor is it permissible to lengthen the duration of a suspended sentence because of the perception of its leniency compared with a sentence requiring full-time imprisonment.⁴¹
- 2.22 Howie J cautioned in *R v Zamagias* :⁴²

the appropriateness of an alternative to full time custody will depend on a number of factors, one of importance being whether such an alternative would result in a sentence that reflects the objective seriousness of the offence and fulfils the manifold purposes of punishment. The court in choosing an alternative to full time custody cannot lose sight of the fact that the more lenient the alternative the less likely it is to fulfill all the purposes of punishment.

While noting additionally:

The question of whether any particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender. It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.

- 2.23 In *Dinsdale v The Queen*, Kirby J observed that, in deciding whether to impose a suspended sentence, the focus should not be confined to the rehabilitation of the offender. Rather it is appropriate for consideration to be given to all the circumstances of the case – such as the nature of the offence, the likelihood of re-offending, the impact full-time custody would have on the offender and his or her family, and the ‘social stigma’ of conviction.⁴³

39. *R v Zamagias* [2002] NSWCCA 17, [30]. See also *R v Foster* [2001] NSWCCA 215, 33 MVR 565, [33], [35].

40. *R v Ryan*; *R v McPherson* [2006] NSWCCA 394; (2006) 167 A Crim R 241 at [2].

41. *R v Stephen* [2003] NSWCCA 377, [23]; *R v NGO* [2005] NSWCCA 107 at [28].

42. [2002] NSWCCA 17, [28].

43. *Dinsdale v The Queen* [2000] HCA 54, (2000) 202 CLR 321, [88] (Kirby J, Gaudron and Gummow JJ agreeing [26]).

Conditions which may be imposed as part of a suspended sentence

- 2.24 Part 8 (ss 94 – 100) of the CSPA deals with sentencing procedures for good behaviour bonds, whether imposed under s 9, s 10 or s 12 of the CSPA.⁴⁴ While there is a broad discretion to impose conditions attaching to a good behaviour bond, that discretion is not unlimited. In *R v Bugmy*, Kirby J summarised the principles that apply to the fixing of bond conditions as follows:

First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for the crime, including deterrence and rehabilitation.

Secondly, the conditions must each be certain, defining with reasonable precision conduct which is proscribed.

Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.⁴⁵

- 2.25 Section 95 of the CSPA requires that a good behaviour bond contain conditions that the person will appear before the court if required to do so during the term of the bond; and that he or she will be of good behaviour during that term.⁴⁶ The bond may contain other conditions, for example, conditions requiring the offender to: participate in an intervention program and to comply with any intervention plan arising out of the program;⁴⁷ be supervised by a probation officer; attend drug or alcohol counselling; or reside at a particular rehabilitation centre.⁴⁸
- 2.26 A court cannot make both a CSO and impose a good behaviour bond for the same offence,⁴⁹ and such a bond may not contain a condition requiring the person to perform community service work.⁵⁰ Additionally the bond may not contain a

44. *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 8.

45. *R v Bugmy* [2004] NSWCCA 258, [61].

46. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95(a)-(b)

47. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95A(1). This condition may not be imposed unless the court is satisfied: '(a) that the offender is eligible to participate in the intervention program in accordance with the terms of the program, and (b) that the offender is a suitable person to participate in the intervention program, and (c) that the intervention program is available in the area in which the offender resides or intends to reside, and (d) that participation by the offender would reduce the likelihood of the offender committing further offences by promoting the treatment or rehabilitation of the offender': s 95A(2). Before imposing such a condition, the court may refer the offender for assessment as to his or her suitability to participate in an intervention program under s 95B. After the imposition of a bond containing such a condition, the offender may decide not to participate, or not to continue to participate, in the intervention program or the intervention plan, in which case, the sentencing court (or any court of like jurisdiction) may call on the offender to appear before it: s 99A(1), (3). Failure to appear in those circumstances may result in the issue of a warrant for the offender's arrest: s 99A(4). When the offender appears before the court, the court may vary the conditions of, or impose further conditions, on the bond, or it may revoke the bond and re-sentence the offender for the offence for which the bond was imposed: s 99A(5)–(6).

48. Judicial Commission of NSW, *Sentencing Bench Book* (online edition, 2009) [4-740].

49. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 13.

50. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95 (c)(i)

condition requiring the offender to make payments, whether by way of a fine, compensation or otherwise.⁵¹

- 2.27 A fine may, however, be imposed in addition to a good behaviour bond, provided that the offender was convicted and the offence is one for which the penalty that may be imposed includes a fine.⁵² The court may also, in addition to a bond, direct a convicted person to pay compensation, not exceeding \$50,000, to any aggrieved person for injury sustained through or by reason of the offence.⁵³

Application of suspended sentences when offender is subject to another sentence of imprisonment

- 2.28 The CSPA provides that:

An order under this section may not be made in relation to a sentence of imprisonment if the offender is subject to some other sentence of imprisonment that is not the subject of such an order.⁵⁴

- 2.29 This has been interpreted to mean that a sentence cannot be suspended where the offender is subject to release on parole in relation to a sentence of imprisonment imposed for some other offence, as well as in relation to the case where the offender is in custody for that offence.⁵⁵

- 2.30 However, the question of whether s 12 (2) of the CSPA prohibits the imposition of a suspended sentence before (and in addition to) the imposition of any other sentence of imprisonment, was reserved in *R v Finnie*, where Howie J observed:⁵⁶

[81] The Terms of the section do not, themselves, prevent such a course from being adopted. While the matter has not been fully argued before us, I am not aware of anything in the Act which would prohibit such a course being adopted or give rise to any practical difficulties in enforcement of the suspended sentence. Certainly, the problems referred to in *Edigarov* would not arise.

[82] I can envisage a case where a court might believe it to be appropriate to impose a suspended sentence for one offence, and at the same time impose a short sentence for another offence even if that sentence were to be served in a custodial situation. Provided that the custodial sentence is imposed after the suspended sentence, section 12 would not appear to prevent such a course.

51. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95 (c)(ii)

52. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 14.

53. *Victims Support and Rehabilitation Act 1996* (NSW) s 71(1). An 'aggrieved person' is defined in s 70 as: '(a) in relation to an offence other than an offence in respect of the death of a person, a person who has sustained injury through or by reason of: (i) an offence for which the offender has been convicted, or (ii) an offence taken into account (under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*) when sentence was passed on the offender for that offence, or (b) in relation to an offence in respect of the death of a person, a member of the immediate family of the person'.

54. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 12(2).

55. *R v Edigarov* [2001] NSWCCA 436, [27]–[32].

56. *R v Finnie* [2002] NSWCCA 533, Howie J, with whom Spigelman CJ agreed.

Suspended Sentences

[83] Nor is there anything of which I am aware at the present time, which would prohibit a court from imposing a custodial sentence on an offender who was serving a suspended sentence at the time of sentencing by a second court. Whether the order of suspension in such a situation would be revoked would depend upon whether the bond attached to the suspended sentence had been breached by the commission of the offence which gives rise to the second sentence.⁵⁷

Breach of suspended sentence and revocation of section 12 bond

2.31 Section 98 of the Act deals with proceedings for breaches of a good behaviour bond, including bonds referred to in s 12. It provides:

- (2) If it is satisfied that an offender appearing before it has failed to comply with any of the conditions of a good behaviour bond, it may:
 - (a) may decide to take no action with respect to the failure to comply, or
 - (b) may vary the conditions of the bond or impose further conditions on the bond, or
 - (c) may revoke the bond.
- (3) In the case of a good behaviour bond referred to in section 12, a court must revoke the bond unless it is satisfied:
 - (a) that the offender's failure to comply with the conditions of the bond was trivial in nature, or
 - (b) that there are good reasons for excusing the offender's failure to comply with the conditions of the bond.

2.32 Section 99 (1)(c) of the CSPA provides that, upon revocation of a s 12 bond:

- (i) 'the order under s 12 (1)(a) ceases to have effect in relation to the sentence of imprisonment suspended by the order, and
- (ii) Part 4 applies to the sentence, as if the sentence were being imposed by the court following revocation of the good behaviour bond, and section 24 applies in relation to the setting of a non-parole period under that Part.⁵⁸

2.33 In the case of *DPP (NSW) v Burrow*, Hidden J observed that the legislature intended that the court should have less discretion in dealing with the breach of a s 12 bond compared with the breach of a s 9 bond. The wording of s 98 (3), makes revocation of a s 12 bond mandatory in the event of breach, unless it is satisfied

57. *R v Finnie* [2002] NSWCCA 533, [82]-[84]. Spigelman CJ agreed with Howie J's observations on this point, while Dunford J considered that the wording of s 12(2) of the *Crimes (Sentencing Procedure) Act* and the reasoning in *Edigarov* applied equally 'irrespective of which sentences are imposed first in a single sentencing process and irrespective of whether the suspended sentences are longer in point of time than the non-suspended sentences': [41]

58. The *Crimes and Courts Legislation Amendment Act 2006* (NSW) amended ss 12 and 99 of the CSPA to remove any doubt that the suspended sentence of imprisonment commences on the date of the revocation of the bond.

that the offender's circumstances fall within the exceptions to the provision.⁵⁹ Hidden J further noted that:

unless a significant breach of a s 12 bond normally leads to its revocation, the suspended sentence would be deprived of its salutary quality and of its viability as a sentencing option for serious offences.⁶⁰

2.34 The guidance in relation to the kind of failure to comply with the conditions of a bond that can be treated as 'trivial in nature' has been limited; however the limited case law suggests that only very minor or technical failures would qualify as such.

2.35 In *DPP (NSW) v Cooke*,⁶¹ the NSWCCA held that, when deciding whether there are 'good reasons' for excusing the offender's failure to comply with the bond conditions within the terms of s 98(3)(b) of the Act:

The court does not determine the existence of good reasons in a vacuum. It does so in the context of the policy and purpose behind the suspended sentence regime and by recognising that by excusing the breach the implicit threat made to the offender at the date of the imposition of the suspended sentence will not be carried out. If the realisation of this threat is avoided in inappropriate cases, it can only result in the lowering of respect for the orders of the court by the offender and the public in general.⁶²

2.36 It was also held by the Court that a principal consideration will be the conduct giving rise to the failure,⁶³ and that:

The determination under s 98 (3)(b) should be made firmly bearing in mind that generally a breach of the conditions of the bond will result in the offender serving the sentence that was suspended.⁶⁴

2.37 Additionally it was noted that the subjective features of the offender that existed at the time of the breach proceedings were irrelevant to the decision whether or not to revoke the bond, although they may still have a relevance for the form of imprisonment that is imposed consequential upon the revocation, including the setting of any non-parole period.⁶⁵

2.38 Where the offender is called up under s 98 and an order is made to revoke the bond, then the court will sentence the offender for the offence that gave rise to the suspended sentence before imposing a sentence for any offence that gave rise to the breach.⁶⁶

2.39 Once a s 12 bond is revoked however, s 99(2) of the CSPA allows the court to consider making an order directing that the sentence be served by way of an

59. *DPP (NSW) v Burrow* [2004] NSWSC 433, [23]. See also, *Edwards v R* [2009] NSWCCA 199, [15]; *R v Dinh* [2010] NSWCCA 74; (2010) 199 A Crim R 573, [83]-[84]; and *R v Nicholson* [2010] NSWCCA 80, [16].

60. *DPP (NSW) v Burrow* [2004] NSWSC 433, [23].

61. *DPP (NSW) v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379.

62. *DPP (NSW) v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379, [25].

63. *DPP (NSW) v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379, [16].

64. *DPP (NSW) v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379, [21].

65. *DPP (NSW) v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379, [15], [31] and [34].

66. *DPP (NSW) v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379, [18].

Suspended Sentences

Intensive Correction Order or a HDO.⁶⁷ It cannot, however impose a further suspended sentence or community order.

- 2.40 At that point the court can backdate the sentence (the non-parole period, or the term of the sentence if it is a fixed term without the specification of a non-parole period), to take into account any time that the offender has spent in custody (but only if time in custody was not taken into consideration when the sentence was initially fixed).⁶⁸
- 2.41 In fixing the non-parole period, it can take into account anything that was done in compliance with the bond.⁶⁹
- 2.42 Appeals against s 12 bond revocations are subject to appeal in the same way as any other sentence.⁷⁰

67. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(2).

68. *Pulitano v R* [2010] NSWCCA 45, [9]; *White v R* [2009] NSWCCA 118.

69. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(1)(c)(ii) in conjunction with s 24(c).

70. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(5).

3. USE OF SUSPENDED SENTENCES

Introduction	17
Background	17
Summary of the use of suspended sentences in the Local and Higher Courts	19
Breach rates and incarceration rates following breach.....	22
Recidivism rates of offenders given suspended sentences	25
Regional and remote offenders	26
Appeals	27
Relationship between the use of suspended sentences and other sentencing options and ‘net-widening’	28

Introduction

3.1 In this chapter, the Council examines:

- the way in which suspended sentences are being used in the Local and Higher Courts;
- breach rates and the incidence of incarceration consequent upon the revocation of good behaviour bonds attached to suspended sentences;
- the recidivism rates of offenders given suspended sentences;
- the use of suspended sentences for regional and remote offenders compared with their use for offenders sentenced in metropolitan courts; and
- the extent to which the use of suspended sentences has led to any identifiable ‘net-widening’.

Background

3.2 In its publication ‘*Trends in the use of suspended sentences in NSW*’, BOCSAR stated that:

Since their re-introduction, the proportion of people receiving suspended sentences has tripled in NSW Local Courts (from 1.7% of all people convicted in 2000 to 5.1% in 2008). Similarly, the proportion of people receiving suspended sentences has more than doubled in the Higher Courts in NSW (from 6.9% to 16.8%).¹

3.3 This trend is illustrated in Figures 1 and 3 of BOCSAR’s publication, which are replicated below:

1. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47 (2010), 1.

Suspended Sentences

Figure 1. Trends in custodial, suspended custodial and non-custodial penalties in NSW Local Courts, 1994-2008

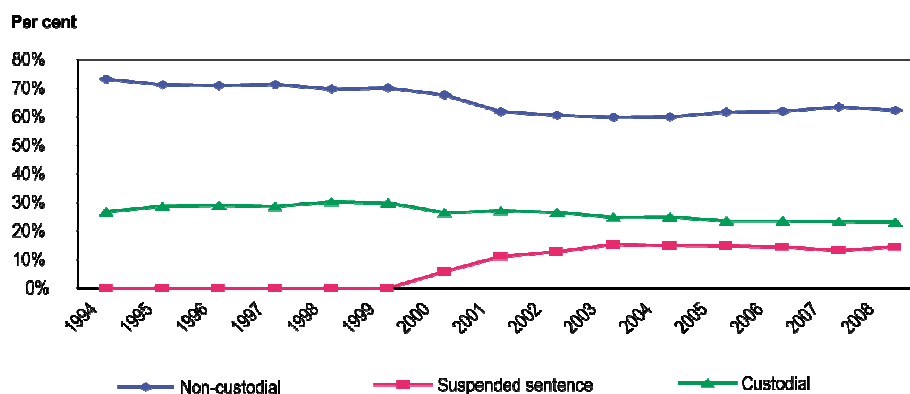
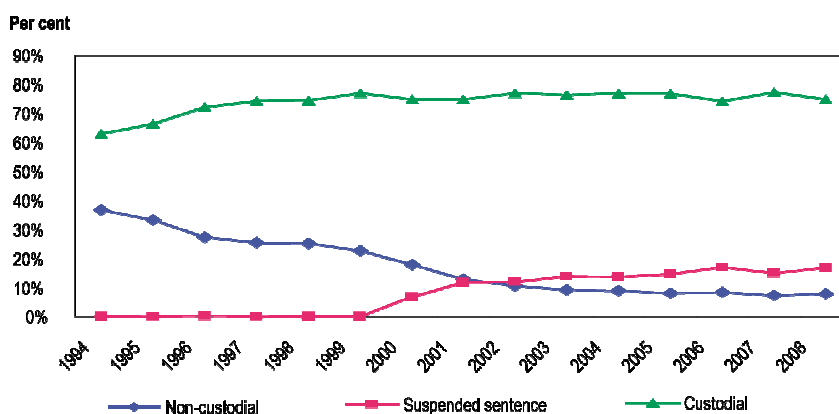


Figure 3. Trends in custodial, suspended custodial and non-custodial penalties in NSW Higher Courts, 1994-2008



3.4 As indicated by BOCSAR, these Figures show that while the decrease in the proportion of people receiving a full-time prison sentence in the period surveyed was small, (from 23.5% to 20.2% in the Local Court and from 77.1% to 74.9% in the higher courts), the decrease in the proportion of people receiving CSOs and Good Behaviour bonds was more significant. In 1999, 20.4% of people convicted of an offence in the NSW Local Court received a CSO compared to only 11.5% in 2008. Similarly, in the higher courts in 1999, 9.1% of people receiving penalties more serious than a fine received a CSO and 13.9% received a good behaviour bond. In contrast in 2008 only 1% received a CSO and 7.1% received a good behaviour bond.²

3.5 In its conclusions BOCSAR discussed the respective increases in the use of suspended sentences across NSW Courts and noted that:

This increase has replaced custodial sanctions to some extent but it is equally clear that suspended sentences have been used where non-custodial sanctions

2. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47, (2010), 3.

would otherwise have been employed. This is particularly true for CSOs in both court jurisdictions, but also for good behaviour bonds in the Higher Criminal Courts.³

- 3.6 BOCSAR noted that the imposition of suspended sentences on offenders who would otherwise have received a non-custodial sanction has potentially serious implications for imprisonment rates over the longer term, because the risk of imprisonment is probably higher for breaching the conditions of a suspended sentence than it is for breaching a good behaviour bond or a CSO. An unintended consequence is that a greater number of offenders may be drawn into the prison population.⁴

Summary of the use of suspended sentences in the Local and Higher Courts

- 3.7 The Judicial Commission of NSW has provided the Council with the following tables, indicating the twenty most common offences for which suspended sentences are used in the NSW Local Court and the NSW Higher Courts.

Table 1: Most common principal offences where a s 12 suspended sentence was imposed, NSW Local Court: 2010⁵

Rank	Offence	Legislation	Number of cases	% of cases
1	Drive Whilst disqualified	<i>Road Transport (Driver Licensing) Act 1998, s 25A(1)</i>	824	17.4
2	Assault occasioning actual bodily harm	<i>Crimes Act 1900, s 59(1)</i>	472	9.9
3	High range PCA	<i>Road Transport (Safety and Traffic Management) Act 1999</i>	343	7.2
4	Knowingly contravene AVO	<i>Crimes (Domestic and Personal Violence) Act 2007, s 14(1)</i>	327	6.9
5	Common assault	<i>Crimes Act 1900, s 61</i>	316	6.7
6	Larceny	<i>Crimes Act 1900, s 117</i>	232	4.9
7	Stalk or intimidate with intent to cause fear of physical or mental harm	<i>Crimes (Domestic and Personal Violence) Act 2007, s 14(1)</i>	180	3.8
8	Supply less than commercial quantity of prohibited drug*	<i>Drug Misuse and Trafficking Act 1985, s 25(1)</i>	148	3.1
9	Break, etc, and commit serious indictable offence	<i>Crimes Act 1900, s 112(1)</i>	140	2.9
10	Assault with intent to commit serious indictable offence on certain offences	<i>Crimes Act 1900, s 58</i>	140	2.9

3. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47, (2010), 4.
4. NSW Bureau of Crime Statistics and Research, *Trends in the Use of Suspended Sentences*, Bureau Brief 47, (2010), 4.
5. Data provided by the Judicial Commission of NSW.

Suspended Sentences

Rank	Offence	Legislation	Number of cases	% of cases
11	Mid-range PCA	<i>Road Transport (Safety and Traffic Management) Act 1999, s 9(3)</i>	131	2.8
12	Affray	<i>Crimes Act 1900, s 93C(1)</i>	107	2.3
13	Being armed with intent to commit indictable offence	<i>Crimes Act 1900, s 114(1)</i>	105	2.2
14	Destroy or damage property	<i>Crimes Act 1900, s 195(1)(a)</i>	83	1.7
15	Unlawful possession of property	<i>Crimes Act 1900, s 527C(1)</i>	69	1.5
16	Obtaining money, etc, by deception	<i>Crimes Act 1900, s 178BA(1) repealed</i>	63	1.3
17	Recklessly wound	<i>Crimes Act 1900, s 35(4)</i>	53	1.1
18	Assault, etc, police officer in execution of duty	<i>Crimes Act 1900, s 60(1)</i>	51	1.1
19	Assault occasioning actual bodily harm in company	<i>Crimes Act 1900, s 59(2)</i>	49	1.0
20	Cultivate, etc, less than commercial quantity of prohibited plant**	<i>Drug Misuse and Trafficking Act 1985, s 23(1)</i>	48	1.0
Total for top twenty offences			3,881	81.7
All remaining offences			867	18.3
Total			4,748	

* Includes knowingly take part in supply and deemed supply.

** Includes knowingly take part in cultivate, etc.

3.8 Table 1 above shows that suspended sentences were imposed for a wide range of offences in 2010. The offence of drive whilst disqualified attracted the highest number of suspended sentences (17.4%), followed by assault occasioning actual bodily harm (9.9%) and high range PCA (7.2%).

Table 2: Most common principal offences where a s 12 suspended sentence was imposed, NSW Higher Courts: July 2009- June 2010⁶

Rank	Offence	Legislation	Number of cases	% of cases
1	Supply less than commercial quantity of prohibited drug*	<i>Drug Misuse and Trafficking Act 1985, s 25(1)</i>	148	31.8
2	Aggravated break, etc, and commit serious indictable offence	<i>Crimes Act 1900, s 112(2)</i>	68	14.6
3	Robbery, etc, being armed or in company	<i>Crimes Act 1900, s 97(1)</i>	32	6.9
4	Robbery or steal from the person	<i>Crimes Act 1900, s 94</i>	16	3.4

6. Data provided by the Judicial Commission of NSW.

Chapter 3 Use of suspended sentences

Rank	Offence	Legislation	Number of cases	% of cases
5	Supply prohibited drug on an ongoing basis	Drug Misuse and Trafficking Act 1985, s 25A	13	2.8
6	Recklessly wound	Crimes act 1900, s 35(4)	12	2.6
7	Break, etc, and commit serious indictable offence	Crimes Act 1900, s 112(1)	11	2.4
8	Assault occasioning actual bodily harm in company	Crimes Act 1900, s 59(2)	10	2.1
9	Cultivate, etc, less than commercial quantity of prohibited plant**	Drug Misuse and Trafficking Act 1985, s 23(2)	8	1.7
10	Aggravated break, etc, with intent to commit serious indictable offence	Crimes Act 1900, s 113(2)	7	1.5
11	Assault occasioning actual bodily harm	Crimes Act 1900, s 59(1)	6	1.3
12	Cultivate, etc, less than commercial quantity of prohibited plant^	Drug Misuse and Trafficking Act 1985, s 23(1)	5	1.1
13	Dangerous driving occasioning death	Crimes Act 1900, s 52A(1)	5	1.1
14	Sexual assault	Crimes Act 1900, s 611	5	1.1
15	Aggravated indecent assault	Crimes Act 1900, s 61M(1)	5	1.1
16	Robbery with arms, etc, and cause wounding or GBH	Crimes Act 1900, s 98	5	1.1
17	Aggravated enter dwelling-house and commit serious indictable offence	Crimes Act 1900, s 111(2)	5	1.1
18	Being armed with intent to commit indictable offence	Crimes Act 1900, s 114(1)	5	1.1
19	Recklessly cause GBH in company	Crimes Act 1900, s 35(1)	4	0.9
20~				
Total for top twenty offences			370	79.4
All remaining offences			96	20.6
Total			466	

* Includes knowingly take part in supply and deemed supply

** Includes knowingly take part in cultivate, etc. Does not include one case involving a large commercial quantity

^ Includes knowingly take part in cultivate, etc.

~ There were seven offences with three cases that received a s 12 suspended sentence.

3.9 Table 2 above similarly shows that in the Higher Courts, suspended sentences are imposed for a wide range of offences in 2010. The offence of supply less than a commercial quantity of a prohibited drug attracted the highest number of suspended sentences (31.8%), followed by aggravated break-in, etc, and commit serious indictable offence (14.6%), and robbery, etc, being armed or in company (6.9%).

3.10 In accordance with data provided to the Council by the Judicial Commission of NSW, the median duration of suspended sentences in the NSW Local Court in 2010 was 9 months. The most common duration was 12 months, imposed on 26.2% of

Suspended Sentences

offenders. The next most common duration was 9 months, imposed on 17.5% of offenders. Only 1.8% of suspended sentences were 24-month sentences and only 0.4% of suspended sentences were 20-month sentences. There were no cases with terms of 21, 22 or 23 months. Just over half (54.5%) of the suspended sentences were subject to a supervision condition in the bond. There was no significant difference in the duration of terms between supervised and unsupervised suspended sentences.⁷

- 3.11 In the Higher Courts, the median duration of suspended sentences was 18 months. The most common duration in the higher courts was 24 months, imposed on 32.2% of offenders. The next most common duration was 18 months, imposed on 23.4% of offenders. Only 5.4% of suspended sentences were 20-month sentences, 2.8% were 21-month sentences and 4.1% were 22-month sentences. Around 70.2% were subject to a supervision condition. Almost half (49.8%) of supervised orders were for longer than 18 months, compared with just over a third (34.5%) of unsupervised orders.⁸
- 3.12 Tables 5 and 6 (contained in appendices 4 and 5 respectively) show the number and trend of persons who were given suspended sentences, in the Local Court and Higher Courts respectively, for their principal offence (being the offence which received the most serious penalty if the person was found guilty of more than one offence), by Court, throughout 2006 – 2010. They also indicate if the suspended sentence was imposed with or without supervision.
- 3.13 Tables 5 and 6 show significant upward or downward trends in the number of persons over a 5-year period, using Kendall's rank-order correlation test. Significant upward trends are highlighted in blue and have occurred at Mount Druitt Local court, Wyong Local Court, Orange Local Court, Nowra Local Court, Taree Local Court, Kogarah Local Court, Manly Local Court, Sydney District Court and Parramatta District Court. Significant downward trends are highlighted in pink and occurred at Parramatta Local Court, Tweed Heads Local Court, Sutherland Local Court, Wagga Wagga Local Court, Gosford Local Court, Port Macquarie Local Court, Penrith District Court, Lismore District Court and Newcastle District Court. The results in respect of 34 Local Court locations were 'stable', indicating non-significant test results; and the results in respect of the remaining 95 Local Court locations were not able to be determined due to the number of persons recorded being too small for a reliable trend test result to be performed. In the District Court, the results in respect of 28 District Court locations were not able to be determined due to the number of persons recorded being too small for a reliable trend test result to be performed.⁹

Breach rates and incarceration rates following breach

- 3.14 The Judicial Commission of NSW in its publication *Successful Completion Rates for Supervised Sentencing Options* found that in 2003–2004, 83.8 per cent of

7. Data provided by the Judicial Commission of NSW, 2011.

8. Data provided by the Judicial Commission of NSW, 2011.

9. Data provided by the NSW Bureau of Crime Statistics and Research, 2011.

supervised suspended sentences were completed successfully while 16.2 per cent were revoked. This success rate included supervised suspended sentences imposed in the Local and higher courts.¹⁰

- 3.15 The following table shows NSW Local Court data indicating the number and percentage of cases finalised in the NSW Local Court in relation to offenders who were given suspended sentences in 2008 but later breached their suspended sentences during the operational period of their sentence.¹¹

Table 3: NSW Re-offending Database to December 2010, Number and percentage of cases finalised in NSW Local Court who were given suspended sentences in 2008 but later breached their suspended sentence during their sentence time by type of penalty^{*12}

Type of penalty received in 2008	Did NOT commit an offence during the period of suspension of their sentence		Did commit an offence during the period of suspension of their sentence		Total	
	Number	%	Number	%	Number	%
Suspended Sentence with Supervision	2213	73.3%	807	26.7%	3020	100.0
Suspended sentence without supervision	2149	77.9%	608	22.1%	2757	100.0
Total	4362	75.5%	1415	24.5%	5777	100.0

* Where more than one type of penalty was imposed, the most serious is reported

Source: NSW Bureau of Crime Statistics and Research

- 3.16 This table shows the number of offenders who were given suspended sentences in the Local Court in 2008 that either committed or did not commit an offence during the period of suspension of their sentence.
- 3.17 Of the 3020 offenders given supervised suspended sentences as their most serious penalty in 2008, 73.3% did not commit an offence during the period of suspension of their sentence while 26.7% did. Of the 2757 offenders given suspended sentences without supervision, 77.9% did not commit an offence during the period of suspension of their sentence while 22.1% did. Overall, 75.5% of offenders given

10. Judicial Commission of NSW, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues 33 (2005), 5.

11. This is the most recent data available that tracks offenders through the period of their sentence to determine breaches in respect of those sentences / offenders. The maximum follow-up period was the end of December 2010.

12. Source: NSW Bureau of Crime Statistics and Research, NSW Reoffending database to December 2010. This data does not include offenders given a suspended sentence who breach the conditions of their suspended sentence by some means other than commission of a further offence. The data has been provided without regard for the seriousness of the 'further' offence(s).

Suspended Sentences

suspended sentences in 2008 did not commit an offence during the period of suspension of their sentence while 24.5% did.

- 3.18 Table 3 shows the most recent data available that tracks offenders through the period of their sentence to determine whether any breaches of suspended sentences occurred. The Council also obtained data from BOCSAR showing the number of offenders who received suspended sentences, CSOs and s 9 bonds during Jan – Jun 2010, as well as the number of offenders who breached those penalty types, from the time of their sentence (when the penalty was imposed) until June 2011 ('the follow-up period').¹³
- 3.19 This data indicates that 76.6% of those issued with supervised suspended sentences did not breach a penalty during the follow-up period; 87.4% of those issued with suspended sentences without supervision did not breach a penalty during the follow-up period; 80.4% of those issued with CSOs did not breach a penalty during the follow-up period; 78.5% of those issued with s 9 bonds with supervision did not breach a penalty during the follow-up period; and 90.6% of those issued with bonds without supervision did not breach a penalty during the follow-up period.
- 3.20 The Council was not able to obtain data in relation to breach rates of suspended sentences imposed in NSW Higher Courts in 2010–2011.
- 3.21 The Table at Appendix 6 shows the number of people with proven offences whose principal offence was breach of a suspended sentence, by penalty type imposed, from 2000–2010.¹⁴ This Table indicates that:
- the percentage of people who are imprisoned (i.e. full-time custody) in the Local Court following breach of a suspended sentence during the period 2001–2010 has ranged between 69 – 79%; and
 - the number of people who received a further suspended sentence following a breach of a suspended sentence has remained at less than 1% each year in the Local Court between 2001–2010.
- 3.22 The Judicial Survey of Suspended Sentences, contained in Appendix 3, also indicates judicial perceptions of the extent to which breaches of suspended sentences result in revocation. 89% of survey respondents said that they had heard at least one revocation application for a s 12 bond. Of that 89%, 70% said that the revocation applications that they heard 'often' result in revocation and a further 7% said that revocation applications always result in revocation; 18% said that they 'sometimes' result in revocation; 4% said that they 'rarely' result in revocation and 1% said that they 'never' result in revocation.

13. Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts data 2010 to June 2011, Local and Children's court matters where persons were found guilty by penalty and by whether or not they breached a penalty.

14. Data provided to the Sentencing Council by the NSW Bureau of Crime Statistics and Research, derived from the NSW Criminal Court Statistics (available at <http://www.bocsar.nsw.gov.au/>), 2000–2010.

Recidivism rates of offenders given suspended sentences

3.23 In 2009, BOCSAR undertook a study that considered the effectiveness of suspended sentences in terms of specific deterrence, compared with full-time imprisonment; that is, whether offenders who receive a suspended sentence are less likely to re-offend than a comparable group of offenders who receive a sentence of full-time imprisonment. In its concluding remarks BOCSAR noted that:

Our results provide no evidence to support the contention that offenders given imprisonment are less likely to re-offend than those given a suspended sentence. Indeed, on the face of it, the findings in relation to offenders who have previously been in prison are inconsistent with the deterrence hypothesis. After the prison and suspended sentence samples in this group were matched on key sentencing variables, there was a significant tendency for the prison group to re-offend more quickly on release than the suspended sentence group.¹⁵

3.24 In making this finding BOCSAR noted three possible explanations for its findings:

- that the experience of prison exerts a criminogenic effect;¹⁶
- that the test groups differed in some variable that was not measured or controlled for, and that this artificially inflated the risk of re-offending amongst those given a prison sentence;¹⁷ and
- that offenders in the two groups may have differed in time spent in prison and this may have impacted on measuring propensity to re-offend because they were incapacitated for much of the measurement period.¹⁸

3.25 BOCSAR also noted that full-time prison sentences are much more expensive to administer than suspended sentences, and therefore, from the vantage point of specific deterrence, suspended sentences are more cost-effective than full time imprisonment.¹⁹

3.26 In another study, BOCSAR considered the effectiveness of supervised bonds in reducing recidivism compared with non-supervised bonds, and found that offenders placed on supervised bonds are no less likely to re-offend than a matched group of offenders placed on non-supervised bonds, and that offenders placed on supervised bonds generally re-offend at the same speed as those placed on bonds without supervision.²⁰ BOCSAR suggested that this might be explained by reason of an inadequacy in the level of supervision and/or types of treatment and support

15. NSW Bureau of Crime Statistics and Research, *The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment*, Crime and Justice Bulletin 136 (2009), 10.

16. NSW Bureau of Crime Statistics and Research, *The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment*, Crime and Justice Bulletin 136 (2009), 10.

17. NSW Bureau of Crime Statistics and Research, *The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment*, Crime and Justice Bulletin 136 (2009), 10.

18. NSW Bureau of Crime Statistics and Research, *The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment*, Crime and Justice Bulletin 136 (2009), 11.

19. NSW Bureau of Crime Statistics and Research, *The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment*, Crime and Justice Bulletin 136 (2009), 12.

20. NSW Bureau of Crime Statistics and Research, *Community supervision and rehabilitation: Two studies of offenders on supervised bonds*, Crime and Justice Bulletin 112 (2008), 10.

Suspended Sentences

provided to offenders placed on supervised bonds not adequately reducing the risk of re-offending. BOCSAR further found that this could also be due to the fact that a large number of offenders placed on supervised bonds are not receiving the services, support and supervision required for effective rehabilitation, particularly in country areas.²¹ The Council notes that, while this study considered supervision in the context of s 9 bonds rather than s 12 bonds, the findings may be similarly applicable to s 12 bonds, where the same types of supervision options are available.²²

Regional and remote offenders

- 3.27 The Council has given some consideration to whether there are any issues in relation to the operation of suspended sentences that might disproportionately affect, or lead to discrimination in the treatment of, regional and remote offenders.
- 3.28 In BOCSAR's 2008 study, '*Does a lack of alternatives to custody increase the risk of a prison sentence?*' it found that, when considering all sentences of imprisonment (whether suspended or not), 'offenders in regional and remote areas are less likely to be imprisoned compared with offenders in inner metropolitan areas when other factors are held constant'.²³ BOCSAR suggested that the most likely explanation for this was that courts in regional and remote areas are sensitive to the shortage of community-based sentencing options in these areas and react to this shortage by being more sparing in their use of imprisonment.²⁴
- 3.29 Similarly, in BOCSAR's 2011 paper '*The profile of offenders receiving suspended sentences*', it also found that in terms of location, there was a slight increase in percentage of offenders in inner metropolitan areas and a decrease in percentage of offenders in outer regional areas, receiving suspended sentences.²⁵
- 3.30 The Council discusses the issue of accessibility to intermediate sentencing options by regional, rural and remote courts, and the subsequent effects on the use of suspended sentences, in further detail in Chapter 4.²⁶

21. NSW Bureau of Crime Statistics and Research, *Community supervision and rehabilitation: Two studies of offenders on supervised bonds*, Crime and Justice Bulletin 112 (2008), 18.

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 95, 95A.

23. NSW Bureau of Crime Statistics and Research, *Does a lack of alternatives to custody increase the risk of a prison sentence?* Crime and Justice Bulletin 111 (2008), 3.

24. NSW Bureau of Crime Statistics and Research, *Does a lack of alternatives to custody increase the risk of a prison sentence?* Crime and Justice Bulletin 111 (2008), 3. Odds ratios: Inner regional vs. Inner Metropolitan – 0.732; Outer regional vs. Inner Metropolitan: 0.716; Remote or very remote vs. Inner Metropolitan: 0.644.

25. NSW Bureau of Crimes Statistics and Research, *The profile of offenders receiving suspended sentences*, Bureau Brief 63 (2011), 4.

26. See Chapter 4, paragraphs 4.79 – 4.94.

Appeals

- 3.31 Table 4 below shows the number and percentage of appeal cases finalised in the District Court for persons who received at least one suspended sentence (including supervised and unsupervised) between January – December 2010.

Table 4: Higher Criminal Courts January to December 2010, Number of appeal cases finalised in the District Courts for persons who had received at least one suspended sentence* by outcome of appeal and type of appeal

	Type of Appeal							
	Appeals against severity of sentence		Appeals against conviction and sentence		Appeals against inadequacy of sentence		TOTAL	
Outcome of appeal	No.	%	No.	%	No.	%	No.	%
Appeal upheld for all matters	482	83.4	-	-	3	100.0	485	73.8
Appeal dismissed / withdrawn all matters	46	8.0	69	90.8	-	-	115	17.5
Appeal upheld for some matters	50	8.7	7	9.2	-	-	57	8.7
TOTAL	578	100.0	76	100.0	3	100.0	657	100.0

*Includes both with and without supervision

Source: NSW Bureau of Crime Statistics and Research

- 3.32 Table 4 indicates that appeals to the District Court against severity of sentence between January – December 2010, (of which there have been 578), by offenders who received at least one suspended sentence, were successful in 83.4% of cases (482 cases). Appeals by offenders against conviction and sentence were significantly less in number and of the 76 appeals lodged, only 7 (9.2%) were upheld. By contrast, there have only been 3 appeals to the District Court against inadequacy of sentence, all of which were upheld.
- 3.33 In addition, appeals by the Office of the Director of Public Prosecutions ('ODPP') to the NSWCCA have also been few. The ODPP's submission to this review that the higher courts are not being 'overly lenient' in their application of suspended sentences is discussed in Chapter 4.²⁷

27. Chapter 4, paragraph 4.61.

Relationship between the use of suspended sentences and other sentencing options and ‘net-widening’

- 3.34 Despite the legislative requirement that prison sentences should be suspended only after determining that no sentence other than imprisonment is appropriate,²⁸ the evidence tends to suggest that suspended sentences are being used in some cases as substitutes for non-custodial options. Since the reintroduction of suspended sentences, the decrease in the proportion of people receiving a full-time prison sentence has been small, while the decrease in the proportion of people receiving CSOs and Good Behaviour Bonds has been more significant. This raises a question in relation to the extent to which suspended sentences contribute to ‘net-widening’ or ‘penalty escalation’, or in other words, the extent to which offenders who are unlikely to have initially received a prison sentence, receive suspended sentences and subsequently enter into full-time imprisonment as a result of a breach of the bond attached to the suspended sentence.²⁹
- 3.35 This is of particular concern, given that research by BOCSAR has found that the proportion of people receiving suspended sentences has significantly increased – from 1.7% of all people convicted in 2000 to 5.1% in 2008, and from 6.9% to 16.8% in the higher courts during the same period, thus potentially exposing a greater number of people to the risk of full-time custody, and potentially pushing prison numbers upwards.³⁰
- 3.36 As discussed in the Council’s Suspended Sentences Consultation Paper, a number of factors may have contributed to the increased use of suspended sentences across NSW Courts, including:
- a drift away from non-custodial options as part of a longer-term trend towards increased punitiveness, which might have occurred without the re-introduction of suspended sentences;
 - diversion of some high level offenders away from the use of full-time custodial sentences through an increased use of suspended sentences; and
 - the unavailability of alternative community based sentencing options.³¹
- 3.37 It has not been possible for the Council to obtain statistics that indicate why suspended sentences are being imposed instead of other community-based options, or to ascertain the extent to which various contributing factors may have affected their increased use. The anecdotal evidence presented to the Council however suggests that suspended sentences are being imposed for offences which

28. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1).

29. See for example, Judicial Commission of NSW, *Suspended sentences in NSW*, Sentencing Trends and Issues 29 (2003).

30. NSW Bureau of Crime Statistics and Research, *Trends in the use of suspended sentences in NSW*, Bureau Brief 47 (2010), 1.

31. See D Tait, ‘The Invisible Sanction: Suspended Sentences in Victoria 1985–1991’ (1995) 28 *Australian and New Zealand Journal of Criminology* 143. See also, R Sparks, ‘The Use of Suspended Sentences’ (1971) *Criminal Law Review*, 384.

may not warrant a term of imprisonment in a wide range of circumstances. This anecdotal evidence is discussed further in Chapter 4.³²

3.38 In summary, while it has not been possible for the Council to reach a conclusion, at this time, in relation to the extent to which the imposition of suspended sentences has exposed offenders to imprisonment where that would not otherwise have been the case, it is able to draw the following preliminary conclusions from the statistics presented in this chapter:

- The number of people who are receiving suspended sentences is increasing, and therefore an increased number of people are being potentially exposed to the risk of imprisonment, with the result that this is likely to put upwards pressure on the prison population;³³ and
- In terms of any increases in full-time imprisonment following a breach of a suspended sentence over time, the absolute numbers appear to be increasing (from 19 in 2001 to 536 in 2010); however, as a proportion of all people with proven offences where breach of a suspended sentence was the principal offence,³⁴ it has remained relatively stable, between 69–79%, during the period 2000–2010, receiving a prison sentence each year.³⁵

32. Chapter 4, paragraphs 4.79–4.94.

33. See Appendix 6.

34. See Appendices 4 and 5.

35. Data provided to the Sentencing Council by the NSW Bureau of Crime Statistics and Research, derived from the NSW Criminal Court Statistics (available at <http://www.bocsar.nsw.gov.au/>), 2000–2010.

4. STAKEHOLDER VIEWS AND OPTIONS FOR REFORM

Introduction	30
Stakeholder views	31
Perceptions of suspended sentences.....	31
<i>Perceptions of the utility of suspended sentences</i>	31
<i>Community perceptions of suspended sentences</i>	31
<i>Perceptions of net-widening and why it might be occurring</i>	34
Potential reform of s 12	36
Reform of the three-step approach.....	36
Reintroduction of partially suspended sentences	37
Reform nature of conditions that may attach to suspended sentences	39
Increase or decrease the term which may be suspended.....	39
Increase the operational period of the bond	40
Exclude the availability of suspended sentences for certain serious offences.....	41
Further legislative or other guidance in relation to the circumstances in which it may be appropriate to suspend the execution of a sentence.....	42
<i>Further legislative guidance generally</i>	42
<i>Application for a guideline judgment</i>	44
Reform of breach provisions	45
Extension of good behaviour bond or variation of its terms	46
Other intermediate sentencing options to be made available	46
Review of the meaning of a failure that was 'trivial in nature'	46
Review of what constitutes 'good reasons to excuse the breach'	47
Other procedural issues.....	48
'Credit for street time'.....	49
Appeal against revocation	49
Specification of a Non-Parole Period.....	50
Other alternatives	50
Extending accessibility to intermediate sentencing options	50
Phasing out of suspended sentences.....	54
Suspended sentences in the Children's Court	54

Introduction

- 4.1 The Council gathered stakeholder views in relation to the terms of reference in the manner described in Chapter 1.
- 4.2 This Chapter outlines the key issues that were identified as a result of that exercise, and notes various options for reform that may need to be considered by the NSWLRC.

Stakeholder views

Perceptions of suspended sentences

Perceptions of the utility of suspended sentences

- 4.3 The stakeholder views gathered by the Council in relation to the availability of suspended sentences as a sentencing option revealed support for their retention, notwithstanding the recognition that they might be regarded by the community as unduly lenient.
- 4.4 The NSW Bar Association, NSW Law Society, Australian Lawyers Alliance, the ODPP and the Chief Judge of the District Court, submitted that suspended sentences represent an established, effective and useful intermediate sentencing option;¹ In particular, for those cases 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.²
- 4.5 The Homeless Persons' Legal Service ('HPLS') submitted that suspended sentences are a useful sentencing option in helping to 'keep homeless people out of the prison system'.³
- 4.6 Amongst the respondents to the survey of judicial officers, 81% considered that suspended sentences are a useful sentencing option (40% considered them 'useful' and another 41% considered them 'very useful'); 16% considered them 'somewhat useful' and only 3% considered them 'not useful at all'.
- 4.7 The Chief Judge of the District Court and the Victims of Crime Interagency Forum suggested that the high rate of successfully completed suspended sentences in 2003–2004, as recorded by the Judicial Commission in its report '*Successful completion rates for supervised sentencing options*',⁴ provided evidence of their value as a sentencing option.⁵

Community perceptions of suspended sentences

- 4.8 The Council was asked to identify current community attitudes and expectations in relation to the use of suspended sentences. In order to address this term of reference, the Council sought the views of stakeholders, and made reference to the various studies that have given consideration to this issue. It has not, to this point,

-
1. Submission 1: Chief Judge of the District Court, 1–2; Submission 5: NSW Bar Association, 1; Submission 7: NSW law society, 3; Submission 11: Australian Lawyers Alliance, 1, 3; Submission 12, ODPP, 1.
 2. The NSW Law Society and the ODPP noted their support for the observations to this effect by the NSWLRC in its 1996 Report: NSW Law Reform Commission, *Sentencing*, Report 79, 1996, 91.
 3. Submission 3: Homeless Persons' Legal Service, 3–4.
 4. Judicial Commission of NSW, *Successful completion rates for supervised sentencing options*, Sentencing Trends and Issues 33, (2005), 5.
 5. Submission 1: Chief Judge of the District Court, 1; NSW Victims of Crime Interagency Forum held on 13 September 2011 at the Office of the Department of Public Prosecutions.

Suspended Sentences

engaged in any form of direct community consultation although the views of those members of the Council who represent victims groups have been taken into account.

- 4.9 The Chief Magistrate of the Local Court suggested that the public perception of suspended sentences as a lenient option does present a problem. In particular, this perception was seen to be exemplified by the fact that some legal practitioners, appearing before the Local Court, treat suspended sentences as giving rise to a more favourable outcome than a non-custodial option such as a CSO. It was noted that magistrates have reported receiving submissions on sentence, from legal practitioners, inviting the imposition of a suspended sentence in circumstances where the objective seriousness of the offending was such that a custodial sentence was not within contemplation by the magistrate. The Chief Magistrate submitted that such an approach is usually abandoned when the magistrate asks whether the practitioner is submitting that a finding should be made that no sentence other than one of imprisonment is appropriate. This was seen as suggesting that the principles on which suspended sentences are based is confusing and poorly understood.⁶
- 4.10 The survey showed that, 53% of the respondents felt that suspended sentences were perceived as 'too lenient' by the public; 35% of respondents said they did not know what the public perception was; and 8% felt that the public perceived suspended sentences as an appropriate sentencing option. Their response in relation to the perception of victims was broadly in line with these figures.⁷ 76% of the survey respondents considered that the position that suspended sentences occupy in the sentencing hierarchy is correct, suggesting that the legislative intention following their reintroduction has been met.
- 4.11 Victims Services submitted that in its view, the community generally sees suspended sentences as a more lenient sentence than a custodial sentence, largely because they do not understand the implications for the offender and because they see the offender 'walk free' from court. However, Victims Services submitted that their callers have not expressed widespread concern in relation to the use of suspended sentences. Rather, they have expressed a need for the relevant sentence to be explained to them, and for the process to be made transparent. Additionally, they submitted that the perceptions of victims are likely to be dependant on the nature of the crime and on their general experience of the criminal justice system, including the level of support that they received throughout the process, the explanations given about the process and whether or not they ultimately consider that they were sufficiently heard by prosecution authorities. They submitted that if such issues are addressed, then the imposition of the suspended sentence in a particular case might be seen by the victim as reasonable.⁸
- 4.12 Similarly, while the Victims of Crime Interagency Forum noted that victims can regard a suspended sentence as one which allows the offender to walk away

6. Submission 2: Chief Magistrate of the Local Court, 1–2.

7. 53% of Survey Respondents said that they felt that suspended sentences were perceived as 'too lenient' by victims, 36% of survey respondents said they did not know how suspended sentences were perceived by victims; and 11% advised that they felt that victims perceived suspended sentences as an appropriate sentencing option.

8. Submission 4: Victims Services, Department of Attorney General and Justice, 1–2.

‘without a penalty’ and as an outcome that is less severe than a supervised community orders, their greater concern was whether suspended sentences are being used in the ‘right types of cases’. The Forum noted that the high completion rate, as noted by the NSW Judicial Commission, seems to indicate that they are being appropriately used.⁹

- 4.13 Very many studies have been conducted in relation to the perception of the community in relation to sentencing decisions. In general they have suggested that caution should be exercised in relation to any claimed lack of public confidence in sentencing decisions.¹⁰ For example, evidence from the joint study conducted by this Council and BOCSAR in 2008, of public perceptions of the criminal justice system, indicated that in NSW community expectations are not, in fact, well-informed, but are driven by distorted media portrayal about crime and justice. It was there noted:

This study also supports previous research showing that the NSW public is generally poorly informed about crime and criminal justice (Indermaur 1987; Indermaur & Roberts 2005; Weatherburn & Indermaur 2004). More than 80 per cent of NSW residents mistakenly believe that property crime has been increasing or has remained stable over the last five years. NSW residents significantly over-estimate the proportion of crimes that involve violence, over-estimate imprisonment rates for assault, under-estimate conviction rates for assault and burglary and under-estimate imprisonment rates for burglary.

This is due in no small measure to the way that crime and criminal justice issues are portrayed in the media. ... All too often, media reporting of crime and justice is distorted, selective and sensationalist. This distorted portrayal of crime and criminal justice issues in the media may not always be deliberate. Violent or unusual acts tend to gain media attention because they are more newsworthy and interesting than non-violent or volume crimes. Similarly, acquittals that are perceived to be unwarranted or sentences that are perceived to be unduly lenient tend to make the news more so than expected convictions or sentences that might be seen to be in line with community expectations. However, the net effect of public reliance on the media for information on crime and justice is a set of misconceptions that tends to undermine public confidence in the criminal justice system.¹¹

- 4.14 In a paper by the Victorian Sentencing Advisory Council, ‘*More myths and misconceptions*’, which was the culmination of a year-long project that was designed to examine and critically evaluate the current state of knowledge about public opinion on sentencing, and to examine the methodological issues concerning the measurement of public opinion, the Advisory Council found that:

-
9. Victims of Crime Interagency Forum held on 13 September 2011 at the Office of the Department of Public Prosecutions.
10. See for example: NSW Bureau of Crime Statistics and Research and the NSW Sentencing Council, *Public confidence in the New South Wales criminal justice system*, Crime and Justice Bulletin 118 (2008), 13; A Doob, and J Roberts, *Sentencing: An analysis of the public's view of sentencing*, Department of Justice, Canada (1983); A Doob, and J Roberts, ‘Public punitiveness and public knowledge of the facts: Some Canadian surveys’ (1988); Australian Institute of Criminology, *Public Judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study*, Trends and Issues in Crime and Criminal Justice 407 (2011).
11. NSW Bureau of Crime Statistics and Research and the NSW Sentencing Council, *Public confidence in the New South Wales criminal justice system*, Crime and Justice Bulletin 118 (2008), 13.

Suspended Sentences

There is substantial evidence that the public's lack of knowledge about crime and justice is related to the high levels of punitiveness reported as a response to a general, abstract question about sentencing. Based upon the conclusion that increasing the provision of information will decrease levels of punitiveness, many researchers have moved from traditional survey questions to those that provide much more information to people before asking for a response.

- 4.15 The Victorian Sentencing Advisory Council drew attention to a study by Doob and Roberts,¹² in which 80% of respondents who received a brief description of the facts of a manslaughter case felt that the sentence was too lenient. In comparison, 15% of those who received a more detailed description with information on incident and offender characteristics, considered that the sentence was too lenient. The Advisory Council noted that 'were the public to form opinions from court-based information instead of through the lens of the mass media, there would be fewer instances of calls for harsher sentences'.¹³
- 4.16 This highlights the fact that any adverse public perception of suspended sentences may be potentially misguided through lack of information, and also affected as a result of wider public misperceptions of the criminal justice process. This Council notes that its functions were enlarged in February 2007 to include the education of the public on sentencing matters.¹⁴ It has since undertaken a number of initiatives to provide the public with more information and to address some of the common misconceptions about crime and sentencing. In particular, during 2009 – 2010, the Council participated in a series of public justice forums across NSW.¹⁵ The forums involved a panel of guest speakers presenting on different aspects of the criminal justice process followed by a Q&A session with the audience. In 2010 during Law Week the Council also presented a number of seminars about the sentencing process to secondary school students.

Perceptions of net-widening and why it might be occurring

- 4.17 The Council was specifically asked to consider the extent to which the imposition of suspended sentences has exposed persons to the risk of imprisonment who would not otherwise have been sentenced to imprisonment. As noted in Chapter 3, it is not possible at this time for the Council to reach a conclusion in relation to this.¹⁶ However, a number of written submissions provided some insight into the possibility of net-widening occurring as a result of judicial officers imposing suspended sentences in those cases where they would not otherwise have imposed a prison sentence.¹⁷
- 4.18 The ODPP submitted that:

12. Victorian Sentencing Advisory Council, *More Myths and Misconceptions* (2008), 7; A. Doob and J. Roberts, *Sentencing: An analysis of the public's view of sentencing*, Department of Justice, Canada (1983).

13. Victorian Sentencing Advisory Council, *More Myths and Misconceptions* (2008), 6–7.

14. NSW Sentencing Council, *Annual Report on Sentencing Trends and Practices 2006–2007*, 8; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 100J(1)(e).

15. NSW Sentencing Council, *Annual Report on Sentencing Trends and Practices 2010*, 9.

16. See Chapter 3, paragraphs 3.34 – 3.38.

17. NSW Bureau of Crime Statistics and Research, *Trends in the use of suspended sentences in NSW*, Bureau Brief 47 (2010).

Statistical information indicating that there is an increase in the use of suspended sentences and they are being imposed in circumstances where previously a non-custodial sentence would have been imposed, needs to be considered in the wider context of sentencing patterns over the last 10 years, where there has been a campaign to toughen up on sentencing, which has included for instance, the introduction of standard non-parole periods and guideline judgments.¹⁸

- 4.19 The Chief Judge of the District Court similarly confirmed in his submission that there has been an increase in the length of sentences in the higher courts, particularly since the introduction of the SNPP scheme.¹⁹ Upon that basis, consistently with current sentencing patterns, it is not necessarily the case that offenders, who are now receiving suspended sentences, are being inappropriately sentenced, or that net widening is occurring.
- 4.20 The HPLS submitted that there are a wide range of circumstances in which suspended sentences are imposed for offences that may not warrant a term of actual imprisonment; namely, where an offender is not suitable for a community based order due to their homelessness, drug or alcohol dependence, disability, mental illness, or other chronic illness. It submitted that in such circumstances, suspended sentences are the only appropriate and available option, despite the fact that the offending in question does not warrant a term of imprisonment. It also suggested that in such circumstances, s 9 bonds are inappropriate if the offender has a significant history of prior offending.²⁰ An alternative approach that it advanced might be for courts to increase their use of s 11 treatment bonds, which allow a court, where it finds a person guilty of an offence, to adjourn the matter for the purposes of:
- assessing the offender's capacity for and prospects of rehabilitation; or
 - allowing the offender to demonstrate that rehabilitation has taken place; or
 - assessing the offender's capacity for and prospects of participation in an intervention program; or
 - allowing the offender to participate in an intervention program; or
 - for any other purpose the court considers appropriate in the circumstances.
- 4.21 The Chief Magistrate submitted that net widening also occurs where a judicial officer increases the length of a sentence to compensate for the fact that it is to be suspended, instead of imposing a shorter sentence that the offender is required to serve in custody. This was commonly said to occur in matters taken on appeal from the Local Court to the District Court.²¹ The Council notes that, by reason of s 46 of the CSPA, if the sentence of imprisonment imposed constitutes a term of 6 months or less, the court cannot, upon revocation of the bond, set a non-parole period. As a

18. Submission 12: ODPP, 1. The submission refers to; NSW Bureau of Crime Statistics and Research, *Trends in suspended sentences in NSW*, Bureau Brief 47 (2010) and NSW Bureau of Crime Statistics and Research, *The profile of offenders receiving suspended sentences*, Bureau Brief 63 (2011).

19. Submission 1: Chief Judge of the District Court, 1.

20. Submission 3: Homeless Persons' Legal Service, 3, 8.

21. Submission 2: Chief Magistrate of the Local Court, 2.

Suspended Sentences

consequence the offender will upon revocation, serve the entire term in custody, regardless of the subjective circumstances or of the extent of the offender's compliance prior to revocation.

- 4.22 This may provide some explanation as to why longer suspended sentences are being imposed in some cases; that is, to give the court greater discretion over the amount of time the offender may have to spend in full-time custody in the event that the s 12 bond is revoked. However, the Council notes that more research would need to be done to determine whether this is the case and / or the extent to which it occurs. It might also be necessary to analyse the extent to which the potential problem is overcome, in these cases, by the courts stretching to categorise the breach as trivial, or alternatively finding that there were good reasons for excusing the breach.

Potential reform of s 12

Reform of the three-step approach

- 4.23 As noted in Chapter 2, there have been a number of criticisms of the 3-step approach involved in suspending a sentence.²² The Council accordingly sought the views of those directly involved in the criminal justice system in relation to the operation of that process, particularly in so far as it requires disclosure of a finding that no penalty other than imprisonment is appropriate (step 1) and then after fixing the term (step 2), suspending execution of the sentence held to be justified.
- 4.24 The Chief Magistrate in his submission to the Council noted that
- The resultant effect of this [three-step] process is that a suspended sentence is widely perceived, not only by the public but also by legal practitioners, as a more lenient outcome than non-custodial options such as a CSO. This may be because an offender who receives a suspended sentence is perceived as avoiding punishment by simply being of good behaviour like any other member of the community, whereas an offender subject to a CSO is punished by being required to do something further in performing the community service.
- 4.25 However the Chief Magistrate also acknowledged the difficulty involved in this reasoning; in that offenders who receive a suspended sentence risk more than other members of the community in the event that they commit a further offence.²³
- 4.26 The Deputy Senior Public Defender submitted that:
- the requirement that a sentencing magistrate or judge must initially determine that an offender should be sentenced to imprisonment before imposing a suspended sentence (or other alternative to full-time custody, such as a HDO or an ICO) is wrong and should be removed;

22. Chapter 2, paragraphs 2.17 – 2.19.

23. Submission 2: Chief Magistrate of the Local Court, 1.

- there will be many cases in which a sentencing magistrate or judge might wish to impose a suspended sentence or one of the other alternatives to full-time custody, without remotely wishing the offender to go to jail; and
 - the whole range of sentencing options, including suspended sentences, should be available without fettering preconditions of this kind; just as with a CSO, a suspended sentence should be able to be imposed without the need for an initial finding that the offender should be sentenced to imprisonment.²⁴
- 4.27 The Deputy Senior Public Defender further submitted that, even if, as a result of such a change there is some degree of net widening, this would be substantially outweighed by the advantage of having a more flexible and rational approach to alternatives to full-time imprisonment.²⁵
- 4.28 Despite the concerns that have been entertained in relation to the conceptual flaws involved in suspending a sentence of imprisonment,²⁶ 79% of the survey respondents considered the three-step process useful (41% considered it ‘useful’ and 38% considered it ‘very useful’); 14% considered it ‘somewhat useful’ and only 7% thought that it was ‘not useful at all’. The Chief Judge of the District Court submitted that the concept of suspending a sentence is easy to understand and not confusing.²⁷

Reintroduction of partially suspended sentences

- 4.29 When suspended sentences were reintroduced in NSW in April 2000, the legislation did not explicitly require that the execution of the whole of the term of the sentence be suspended. Consequently, in *R v Gamgee*,²⁸ the NSWCCA held that there was no reason for the words in s 12(1)(a) to be restricted to exclude the power to suspend part of the sentence. It was held that the section permitted a partially suspended sentence in the form of suspending the execution of either an initial portion of the sentence (for example, to allow completion of a pregnancy or course of study), or the balance of the term (in which case it would serve as a form of de fact parole period).
- 4.30 In response to this decision, s 12 was amended in July 2003 to provide that only the execution of ‘the whole of the sentence’ could be suspended, thus excluding the option of partially suspended sentences. The Second Reading Speech explained that this was done because partially suspended sentences were considered difficult to administer and because suspension of an initial portion of the sentence followed by a later entry into custody might cause hardship to the offender.²⁹ There would appear to be some force in that view since it could be potentially harsh and counterproductive to send an offender to prison who has successfully complied with

24. Submission 13: Deputy Senior Public Defender, 1–2.

25. Submission 13: Deputy Senior Public Defender, 1–2.

26. *Dinsdale v The Queen* [2000] HCA 54, (2000) 202 CLR 321 [74]; *Amado v R* [2011] NSWCCA 197 [5]–[6].

27. Submission 1: Chief Judge of the District Court, 1.

28. *R v Gamgee* [2001] NSWCCA 251; (2001) 51 NSWLR 707.

29. NSW, Parliamentary Debates, Legislative Council, 25 June 2003, 2039 (J Hatzistergos, Minister for Justice), 2041. See also *Crimes Legislation Amendment Act 2003* (NSW), assented to on 8 July 2003. Schedule 6 commenced on the same day.

Suspended Sentences

the conditions of the bond and who has shown rehabilitation during the initial period of suspension.

- 4.31 This Council in its report '*Abolishing prison sentences of 6 months or less*'³⁰ recommended the reintroduction of partially suspended sentences, at least in relation to suspension of the latter portion of the sentence. This it suggested should not occasion undue hardship, and would bring NSW into line with Federal sentencing law.³¹ On the other hand, the Council in its *Suspended Sentences Consultation Paper* noted that a question arises as to whether partial suspension of the later portion of the sentence adds anything that cannot be achieved by the availability of a period of potential release on parole. On that basis, the setting of a non-parole period would allow the offender the opportunity of release prior to the expiry of the term, subject to satisfying the NSW Parole Authority that release is appropriate.
- 4.32 A majority of written submissions received by the Council opposed the reintroduction of partially suspended sentences.³²
- 4.33 The key issues identified in opposition to the reintroduction of partially suspended sentences, were that this might increase the trend towards their use in place of community-based options;³³ and that the availability of parole provides a sufficient means for the supervision of offenders in the community.³⁴
- 4.34 However, the NSW Young Lawyers identified as a reason for the reintroduction of partially suspended sentences the fact that, in contrast to a sentence that sets a non-parole period, they offer an end date for release that does not require the involvement of or a decision by the Parole Board.³⁵ They argued that if reintroduced, the suspension period should be limited to the latter part of the term of imprisonment.
- 4.35 Perhaps surprisingly, there was significant support amongst survey respondents for the reintroduction of partially suspended sentences, with 72% of survey respondents in favour of their reintroduction and only 28% opposed. Of the 72% in support of partial suspension, 38% considered that it should be capable of application to either the first or the latter part of the sentence; 22% considered that suspension should only be capable of application to the latter part of the sentence; and 12% considered that it should be able to apply only to the first part of the sentence.

30. NSW Sentencing Council, *Abolishing prison sentences of 6 months or less* (2004), 4.

31. NSW Sentencing Council, *Abolishing prison sentences of 6 months or less* (2004), 27.

32. Submission 1: The Chief Judge of the District Court, 2; Submission 5: NSW Bar Association, 1; Submission 7: NSW Law Society, 1; Submission 12: ODPP, 1; Submission 11: Australian Lawyers Alliance, 1.

33. Submission 5: NSW Bar Association, 1; Submission 11: Australian Lawyers Alliance, 1.

34. Submission 5: NSW Bar Association, 1; Submission 11: Australian Lawyers Alliance, 1.

35. Submission 10: NSW Young Lawyers Criminal Law Committee, 3.

Reform nature of conditions that may attach to suspended sentences

- 4.36 As discussed in Chapter 2, in NSW, s 95 of the CSPA makes provision in respect of the conditions that may be imposed on suspended sentence orders.³⁶ The Council invited the views of stakeholders as to whether any reform is required in relation to the conditions that may attach to a suspended sentence.
- 4.37 The majority of the submissions received did not identify any need for reform in this respect.³⁷ This was also the view of a significant majority (87%) of survey respondents.³⁸
- 4.38 Among the minority submissions was a recommendation that a component of community service should be introduced,³⁹ on the basis that this might enhance the deterrent effect of suspended sentences, particularly for young offenders.⁴⁰ This would require an amendment of s 95(c)(i) of the CSPA.
- 4.39 The Police Association in its submission emphasised the need for courts to have an unfettered discretion to apply conditions that fit the circumstances of the case. It submitted that any conditions should not be mandatory,⁴¹ and by implication favoured repeal of ss 95(c)(i) and (ii).
- 4.40 The ODPP emphasised that if there was to be reform of the nature of conditions then it would be necessary to ensure that the court give consideration to the consequences of breach, and not impose conditions that risk setting the offender up to fail.⁴²

Increase or decrease the term which may be suspended

- 4.41 As outlined in Chapter 2, a term of imprisonment may be suspended only where it is for 2 years or less.⁴³
- 4.42 A majority of the submissions did not identify any reason for change in this respect.⁴⁴
- 4.43 A slight majority (52%) of survey respondents agreed that there was no need for a change. A significant minority (43%) considered that the term should be increased, while 5% considered that the term should be decreased.

36. Chapter 2, paragraphs 2.24 – 2.27.

37. Submission 1: Chief Judge of the District Court, 2; Submission 7: NSW Law Society, 1; Submission 10: NSW Young Lawyers Criminal Law Committee, 3; Submission 12: ODPP, 1.

38. Only 12.7% suggested that reform is required.

39. Submission 5: NSW Bar Association, 2; Submission 11: Australian Lawyers Alliance, 2.

40. Submission 11: Australian Lawyers Alliance, 2.

41. Submission 8: NSW Police Association, 2.

42. Submission 12: ODPP, 1–2.

43. Chapter 2, paragraph 2.5.

44. Submission 1: Chief Judge of the District Court, 2; Submission 5: NSW Bar Association, 2; Submission 10: NSW Young Lawyers Criminal Law Committee, 4; Submission 11: Australian Lawyers Alliance, 2; Submission 12: ODPP, 1–2.

Suspended Sentences

- 4.44 An analysis of the statistics based on jurisdiction indicates that there is a clear discrepancy between the views of magistrates on the one hand, and the views of judges in the higher courts on the other: of District Court respondents, 83.3% agreed that the term of imprisonment that may be suspended should be increased; while only 13.3% of judges in that jurisdiction disagreed. By contrast, 70.3% of magistrates considered that the term of imprisonment that may be suspended should not be increased; while 23.4% of magistrates considered that the term should be increased, and 6.3% considered that the term should be decreased. These views may, however, have been affected by the current jurisdictional limit of the Local Court.
- 4.45 Both the ODPP and the NSW Law Society submitted that, while the maximum term of 2 years for a suspended sentence is appropriate in the Local Court (consistent with its jurisdictional limit), consideration should be given to whether the maximum term for such a sentence in the higher courts should be increased to 3 years.⁴⁵ It is noted that the Tasmanian *Sentencing Act* does not impose any limit on the period for which a suspended sentence of imprisonment may be imposed, although that Act permits partial suspension.⁴⁶
- 4.46 Although there was limited support, in the submissions or survey responses, for a reduction in the period for which a sentence of imprisonment can be suspended, for example to 1 year, it is noted that this might ensure that this sentencing option is reserved for less serious forms of offending. It might also assist in alleviating concerns as to its inappropriate use and as to any community perceptions concerning its leniency.

Increase the operational period of the bond

- 4.47 An issue was identified as to whether it might be appropriate to amend ss 12(1)(a) and (b) of the CSPA so as to allow the court to impose a bond that would exceed the term of the sentence of imprisonment, the execution of which was suspended. This would permit severance of the link between the bond and the term of the sentence, so that the period for which an offender must be of good behaviour is increased, without increasing the term of imprisonment that would be activated should the good behaviour bond be breached.
- 4.48 In general, a number of stakeholders submitted that the maximum duration of the operational period should remain at 2 years.⁴⁷
- 4.49 While the NSW Law Society and the ODPP did not consider that the operational period should be increased in the Local Court, the NSW Law Society submitted that the maximum operational period should be increased to 3 years in the District

45. Submission 12: ODPP, 2; Submission 7: NSW Law Society, 1.

46. *Sentencing Act 1997* (Tas), ss 7(b), 24.

47. Submission 1: Chief Judge of the District Court, 2; Submission 5: NSW Bar Association, 2; Submission 10: NSW Young Lawyers Criminal Law Committee, 4; Submission 11: Australian Lawyers Alliance, 2.

Court, and the ODPP similarly submitted there may be an argument for increasing the limit to 3 years in the higher courts only.⁴⁸

- 4.50 The NSW Police Association submitted that it is not necessary to link the operational period of the bond to the term of the sentence, and suggested that the period of time that an offender might be supervised or required to engage in rehabilitation pursuant to a bond should not be limited. It suggested that such an approach might counter any temptation for courts to inflate sentences to allow for an appropriate period of supervision.⁴⁹
- 4.51 In contrast to the submissions, 82 % of all survey respondents supported severance of this connection to allow for the imposition of a good behaviour bond that is longer than the term of imprisonment. Only 18% of survey respondents did not consider that the connection between the term of imprisonment and the duration of the good behaviour bond should be severed.

Exclude the availability of suspended sentences for certain serious offences

- 4.52 As outlined in the Council's Consultation Paper, the Victorian Sentencing Advisory Council in its review of suspended sentences under the *Sentencing Act 1991 (Vic)*, recommended restricting the use of suspended sentences for certain 'serious offences' to cases in which there are 'exceptional circumstances' and in which their use is in the 'interests of justice'.⁵⁰ This recommendation was implemented in Victoria by the *Sentencing (Suspended Sentences) Act 2006*. The *Sentencing Amendment Act 2010* then amended this position by removing the discretion to impose suspended sentences for 'serious offences' altogether.⁵¹ This was followed by the *Sentencing Further Amendment Act 2011* that removed the availability of suspended sentences for the additional offences that were termed 'significant offences'.⁵²
- 4.53 The NSW Police Association and Victims Services supported an approach of this kind.⁵³ They submitted that, suspended sentences should not be available in the case of 'serious offences', unless there are 'exceptional circumstances' and it is in

48. Submission 7: NSW Law Society, 2; Submission 12: ODPP, 2.

49. Submission 8: NSW Police Association, 3.

50. Sentencing Advisory Council, *Suspended Sentences*, Final Report Part 2, Summary (2008), 2. Offences listed as 'serious offences' under s 3 include: Murder, manslaughter, child homicide, defensive homicide, causing serious injury intentionally, threats to kill, rape, assault with intent to rape, incest, sexual penetration of a child under the age of 16, abduction or detention.

51. *Sentencing Amendment Act 2010 (Vic)*, s 12.

52. *Sentencing Further Amendment Act 2011 (Vic)*, s 4. Offences listed as 'significant offences' under s 3 include: Recklessly causing serious injury (unless heard and determined summarily); Aggravated burglary (unless heard and determined summarily); Arson (unless heard and determined summarily); Arson causing death; Trafficking in large commercial quantities of drugs; Trafficking in commercial quantities of drugs.

53. Submission 8: NSW Police Association, 4; Submission 4: Victims Services, Department of Attorney General and Justice, 1.

Suspended Sentences

the ‘interests of justice’ to impose a suspended sentence.⁵⁴ The NSW Police Association noted that:

This type of limitation does not prevent the use of this option, however, it demands of the court that in these most serious offences the court can only utilise this position in the most exceptional circumstances and where the interests of justice are served.⁵⁵

- 4.54 The survey respondents generally did not support restricting the use of suspended sentences in respect of any specific offences. Of the survey respondents only 8% considered that there were some offences for which suspended sentences should be restricted. Furthermore, 55% of survey respondents considered that the existing restrictions on the use of alternatives to full-time imprisonment should be removed or amended (26% removed, 29% amended).
- 4.55 The Council notes that, Table 1 in Chapter 3 indicates that in NSW, the top 20 offences for which suspended sentences were imposed in the Local Court in 2010 are not offences that would have been defined as ‘serious offences’, or ‘significant offences’, under the Victorian Sentencing Act.⁵⁶ Table 2 in Chapter 3 however indicates that, in the Higher Courts, the top 20 offences for which suspended sentences have been imposed include the offences of armed robbery and aggravated burglary, the equivalents of which have been defined as either ‘serious’ or ‘significant’ offences under the Victorian Sentencing Act.⁵⁷

Further legislative or other guidance in relation to the circumstances in which it may be appropriate to suspend the execution of a sentence

- 4.56 As discussed in the Council’s Consultation Paper, further guidance in relation to the circumstances in which it may be appropriate to suspend a sentence could be provided in a number of ways, including: by limiting the offences for which a sentence can be suspended, such as was done in Victoria;⁵⁸ by restricting the use of suspended sentence orders to instances where ‘exceptional circumstances’ exist; by way of a guideline judgment; or by amending the CSPA to incorporate a more detailed set of factors that a court must consider before imposing a suspended sentence. A summary of the options, as they were considered by stakeholders, follows.

Further legislative guidance generally

- 4.57 The Chief Judge of the District Court, the NSW Bar Association, the NSW Law Society and the Australian Lawyers Alliance each submitted that additional legislative guidance is not required in relation to the circumstances in which

54. Both submissions made reference to serious offences as they are defined in Victoria under s 3 of the *Sentencing Act 1991* (Vic).

55. Submission 8: NSW Police Association, 4.

56. *Sentencing Act 1991* (Vic), s 3.

57. *Sentencing Act 1991* (Vic), s 3.

58. See paragraphs 4.52– 4.55 above.

sentences of imprisonment can be suspended.⁵⁹ A slight majority of survey respondents (57%) similarly considered that sufficient guidance already exists in this respect and that further legislative direction is unnecessary.

4.58 Of the written submissions that favoured the supply of additional legislative guidance, different views were put forward as to the form that it should take:

- The Police Association considered that the development of comprehensive sentencing guidelines coupled with legislative guidance would assist the courts and address community concerns. It favoured legislative amendment modelled on s 27 (1A) of the *Sentencing Act 1991 (Vic)*, which provides:

(1A) In considering whether it is desirable in the circumstances to make an order suspending a sentence of imprisonment, a court must have regard to-

- (a) the need, considering the nature of the offence, its impact on any victim of the offence and any injury, loss or damage resulting directly from the offence, to ensure that the sentence-
 - (i) adequately manifests the denunciation by the court of the type of conduct in which the offender engaged; and
 - (ii) adequately deters the offender or other persons from committing offences of the same or a similar character; and
 - (iii) reflects the gravity of the offence; and
- (b) any previous suspended sentence of imprisonment imposed on the offender and whether the offender breached the order suspending that sentence; and
- (c) without limiting paragraph (b), whether the offence was committed during the operational period of a suspended sentence of imprisonment; and
- (d) the degree of risk of the offender committing another offence punishable by imprisonment during the operational period of the sentence, if it were to be suspended.

In particular the Police Association considered that NSW courts should be required to take into consideration in addition to the nature of the offence and its impact on the victim; whether the sentence adequately denounces the conduct; whether the sentence is an adequate deterrent and whether it reflects the gravity of the conduct.⁶⁰

- While the ODPP did not support a 'check-list approach', it noted that, if further guidance is considered appropriate, it should be modelled on s 10 (3) of the CSPA, which specifies the matters that a court is required to take into account when determining whether to impose a dismissal or conditional discharge:

(3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:

59. Submission 1: Chief Judge of the District Court, 2; Submission 5: NSW Bar Association, 2–3; Submission 7: NSW Law Society, 2; Submission 11: Australian Lawyers Alliance, 2.

60. Submission 8: NSW Police Association, 3.

Suspended Sentences

- (a) the person's character, antecedents, age, health and mental condition,
- (b) the trivial nature of the offence,
- (c) the extenuating circumstances in which the offence was committed,
- (d) any other matter that the court thinks proper to consider.⁶¹

- NSW Young Lawyers submitted that the first limb of the 2-step approach (that is, determining the sentence of imprisonment, without reference to the manner in which it is to be served) should be enshrined in s 12, and that courts should be required to take into account the number of occasions on which the offender has previously received a suspended sentence, whether the offender has any prior breaches of suspended sentences and the risk of re-offending.⁶²

4.59 Of the survey respondents that considered that further guidance of some kind is desirable; 41% (or 23.8% of all) considered that this should be provided by way of a guideline judgment; 43.3% (or 24.8% of all survey respondents) considered it should be by way of Sentencing Bench Book information; and 15% (or 8.6% of all survey respondents) considered it should be by way of legislative amendment to s 12.

Application for a guideline judgment

4.60 The Chief Judge of the District Court, the ODPP, the NSW Bar Association, the Australian Lawyers Alliance and NSW Young Lawyers submitted that there was no need for a guideline judgment.⁶³ The NSW Bar Association submitted that the applicable principles in relation to suspended sentences are reasonably clear following *Dinsdale v The Queen*⁶⁴. Similarly, the ODPP submitted that; while views within the ODPP were divided when it considered the merits of applying for a guideline judgment in 2003, the law in relation to the operation of suspended sentences appears to now be settled.⁶⁵

4.61 The ODPP further submitted that, current NSWCCA cases do not indicate that the higher courts are being overly lenient in their application of suspended sentences. The ODPP referred particularly to the 8 appeals lodged by the ODPP between July 2010 and June 2011, which involved the imposition of a suspended sentence. Of those 8 matters in which the Crown appealed, the NSWCCA allowed the Crown appeals in only 2 cases,⁶⁶ and dismissed the Crown appeals in 4 cases. The judgment in the remaining case is not available.⁶⁷

61. Submission 12: ODPP, 2.

62. Submission 10: NSW Young Lawyer's Criminal Law Committee, 7.

63. Submission 1: Chief Judge of the District Court, 2; Submission 12: ODPP, 2; Submission 5: NSW Bar Association, 2; Submission 11: Australian Lawyers Alliance, 2; Submission 10: NSW Young Lawyers, Criminal Law Committee, 5.

64. [2000] HCA 54, (2000) 202 CLR 321.

65. Submission 12: ODPP, 2.

66. Submission 12: ODPP; Attachment 1.

67. Submission 12: ODPP, Attachment 1.

- 4.62 The Australian Lawyers Alliance submitted that greater guidance and direction should be considered in relation to the guideline judgment that already exists for high range PCA offences,⁶⁸ to take into account the possibility of the use of a s 12 suspended sentence in such a case. It submitted that this would assist in encouraging a greater consistency in their use.⁶⁹
- 4.63 The Council notes that, the feasibility of a guideline judgment application for suspended sentences under s 100J(1)(b) of the CSPA was considered in the Sentencing Council's 2006 report '*Seeking a guideline judgment on suspended sentences*'.⁷⁰ At the time of that report, the Council considered that whilst there were strong arguments in support of a guideline judgment, it concluded that an application at that time would have been premature. However, it noted that there were two particular issues that the Court could re-emphasise in a guideline judgment:
1. The need for sentencers to adhere to the two-step process in arriving at a suspended sentence in order to avoid:
 - a) Sentencing escalation; and
 - b) Arriving at a term of two years or less in order to suspend the sentence.
 2. The need for sentencers, in the second step, to look again at all matters relevant to the circumstances of the offence, and to caution sentencers against allowing subjective factors to obscure the objective seriousness of the offence.
- 4.64 The Council does not propose to re-examine in detail the merits of a guideline judgement application in this background report, however it notes that this is an issue that the NSWLRC is likely to consider in further detail in the context of the Sentencing Review, and by reference to current sentencing practice.

Reform of breach provisions

- 4.65 The Council has previously recommended that the courts should have a wider discretion when addressing a breach of a suspended sentence.⁷¹ As noted earlier, unless the failure to comply with the conditions of the s 12 bond is 'trivial in nature' or there are 'good reasons for excusing the failure', breach of the bond will lead to a restoration of the sentence of imprisonment although that sentence can be ordered to be served by way of an Intensive Corrections Order or an HDO.⁷²

68. *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) A Crim R 546.

69. Submission 11: Australian Lawyers Alliance, 2.

70. NSW Sentencing Council, *Seeking a guideline judgment on suspended sentences* (2006).

71. See NSW Sentencing Council Report, *Abolishing prison sentences of six months or less* (2004), Summary of recommendations, 4.

72. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99.

Suspended Sentences

- 4.66 There was significant support, in the submissions, and from survey respondents, for allowing greater flexibility in relation to the sentencing options that are available following breach.⁷³ The President of the Children's Court also supported reform of the breach provisions relating to suspended sentences that apply to juveniles in accordance with the *Children (Criminal Proceedings) Act 1987*.⁷⁴
- 4.67 The submissions identified a number of possible options:

Extension of good behaviour bond or variation of its terms

- HPLS submitted that the current breach provisions place homeless people at a higher risk of receiving a full-time custodial sentence compared with other offenders and proposed amending the CSPA in order to allow a court, upon breach, to vary a s 12 bond rather than revoking it.⁷⁵
- The NSW Law Society and the Shopfront Youth Legal Service similarly noted their support for the provision of an alternative sanction to revocation, including the extension of the term of the good behaviour bond or a variation of its terms.⁷⁶
- The Shopfront Youth Legal Centre also supported extending the options on breach to include extension of the term of the bond.⁷⁷

Other intermediate sentencing options to be made available

- HPLS submitted additionally that, for the same reason identified above, in order to address the issue of the current breach provisions placing homeless people at a higher risk of full-time custody compared with other offenders, courts should be able, upon breach, to impose intermediate sentencing options in addition to those currently available, or to make use of the existing diversionary programs.⁷⁸

Review of the meaning of a failure that was 'trivial in nature'

- The NSW Law Society submitted that the term 'trivial in nature' is unhelpful and should be deleted.⁷⁹
- The ODPP also submitted that there is not consistency among courts in relation to how s 98 (3)(a), and the phrase 'trivial in nature', is being interpreted. It submitted that s 98(3)(a) should be removed and that s 98(3)(b) should instead elaborate what constitutes 'good reasons'.⁸⁰

73. Submission 3: Homeless Persons' Legal Service, 5–6; Submission 7: NSW Law Society, 2; Submission 6: Shopfront Youth Legal Service, 3; Submission 2: Chief Magistrate of the Local Court, 3; Submission 9: President of the Children's Court, 1–2; Submission 8: NSW Police Association, 4–5; and Submission 12: ODPP, 3.

74. Submission 9: President of the Children's Court, 1–2.

75. Submission 3: Homeless Persons' Legal Service, 5–6.

76. NSW Law Reform Commission, *Sentencing*, Report 79 (1996), 4.22.

77. Submission 6: Shopfront Youth Legal Centre, 4.

78. Submission 3: Homeless Persons' Legal Service, 2–6.

79. Submission 7: NSW Law Society, 2.

80. Submission 12: ODPP, 3.

- Only 41% of the survey respondents considered the term 'trivial in nature' either useful or very useful (15% considered the term 'very useful', and 26% considered the term 'useful'); 36% considered the term somewhat useful, and 23% considered the term not at all useful.

Review of what constitutes 'good reasons to excuse the breach'

- The NSW Law Society considered that the expression 'good reasons to excuse the breach' should be expanded so as to expressly allow the court to take into account matters that go to the nature of the breach, the consequences of the breach, matters preceding and post-dating the breach, the circumstances of the offender and any other subjective matters that a court considers relevant.⁸¹ It submitted that there should be a distinction between breaches for non-compliance with a condition of the bond and breaches caused by further offending. It suggested that courts should have the power to deal with breaches of a condition by varying, removing or imposing conditions in addition to revocation. In relation to breaches caused by further offending, it suggested that revocation should not be mandatory and that courts should have the power to vary or impose conditions in addition to the option of revocation.
- The Shopfront Youth Legal Service similarly considered that the definition of 'good reasons to excuse the breach' should be broadened.⁸²
- The ODPP submitted that the consequences of breach need to remain rigid, but suggested that s 98(3)(b) should be amended to prescribe what constitutes 'good reasons'.⁸³
- Of the survey respondents, 69% considered that, as interpreted by the court in *DPP v Cooke*,⁸⁴ the exception based on the presence of 'good reasons' provides a sufficient basis for determining whether or not a bond should be revoked (only 31% of survey respondents indicated that they did not think the exception provided a sufficient basis for determining whether or not a bond should be revoked).

4.68 The survey respondents were, on the whole, relatively supportive of reform to the breach provisions to provide for increased flexibility in relation to the sentencing options that may be available to a court upon breach:

- 64% agreed that upon breach, courts should be able to vary the conditions of the s 12 bond without revocation, while 25% disagreed and 10% neither agreed nor disagreed. When the results are considered by jurisdiction, 58.7% of Local Court respondents either agreed (46%) or strongly agreed (12.7%); 30.2% either disagreed (17.5%) or strongly disagreed (12.7%) and 11.1% neither agreed nor disagreed. Amongst District Court respondents, 86.7% either agreed (50%) or strongly agreed (36.7%), while only 6.6% disagreed (3.3%) or strongly disagreed (3.3%) and only 6.7% neither agreed nor disagreed.

81. Submission 7: NSW Law Society, 2.

82. Submission 6: Shopfront Youth Legal Service, 3.

83. Submission 12: ODPP, 3.

84. *DPP v Cooke* [2007] NSWCA 2, (2007) 168 A Crim R 379.

Suspended Sentences

- 48% agreed that upon breach, courts should be able to impose a pecuniary penalty without revocation of the existing bond, while 31% disagreed and 16% neither agreed nor disagreed. The only clearly identifiable disparity between Local Court respondents and District Court respondents was that there was slightly more support amongst District Court respondents (58.6%) compared with Local Court respondents (50%).
 - 49% agreed that upon breach, courts should be able to re-sentence the offender for the original offence, while 42% disagreed and 8% neither agreed nor disagreed. When the results are considered by jurisdiction; 47.6% of Local Court respondents either disagreed (20.6%) or strongly disagreed (27%) with this option; 44.5% either agreed (30.2%) or strongly agreed (14.3%) and 7.9% neither agreed nor disagreed. In the District Court, 60% of respondents either agreed (30%) or strongly agreed (30%) while 30% either disagreed (16.7%) or strongly disagreed (13.3%).
- 4.69 The NSW Police Association however did not support the introduction of any increase in the sentencing flexibility upon revocation of the s 12 bond. It submitted that breach of a suspended sentence should result in the imposition of full-time custody in all but the 'most exceptional circumstances'. In this regard it submitted that the current exceptions that are dependent on proof that the failure to comply was 'trivial in nature' or that there are 'good reasons for excusing' the failure, are too broad. It acknowledged that its proposed formula, dependent on the presence of 'most exceptional circumstances' would require definition.⁸⁵

Other procedural issues

- 4.70 The Chief Magistrate raised two procedural issues in relation to the breach provisions:
- Firstly, the fact that orders cannot be breached whilst 'stayed', pending an appeal, nullifies the effect of the bond for the period of the stay, potentially resulting in effective reduction of the length of the suspended sentence by a substantial period. This, it was suggested, arguably encourages appeals as a matter of course for the purpose of limiting the effect of the bond;⁸⁶ and
 - Secondly, s 98 of the CSPA does not allow the Local Court to deal with breaches of suspended sentences that were imposed in the District Court, with the effect that the Local Court has to defer sentencing in relation to the commission of any new offence that gives rise to the breach until the District Court deals with the breach.
- 4.71 In relation to this second issue, the Chief Magistrate referred to the judgment of Howie J in *DPP v Cooke & Anor [2007] NSWCA*:

It is clearly preferable that, wherever possible, the one court should consider both the breach and the sentence for the offence causing the breach: there may be overlapping findings of fact to be made in the two proceedings and questions of totality would arise if the bond were revoked and a further term of imprisonment imposed for the offence. But it is of crucial importance that the breach proceedings be resolved before the sentence is imposed for the offence.

85. Submission 8: NSW Police Association, 4–5.

86. Submission 2: Chief Magistrate of the Local Court, 3.

This is because, as I have indicated the result of the breach proceedings can affect the sentence to be imposed for the offence but the sentence for the offence is irrelevant to a determination of whether there are good reasons to excuse the breach.⁸⁷

- 4.72 The same point was made in *R v Nicholson*,⁸⁸ where attention was drawn to the consequences that arose where an offender, who was subject to a suspended sentence of imprisonment that had been imposed in the Local court, was sentenced in the District Court for a further offence, before the breach in relation to the suspended sentence was dealt with in the Local Court. The consequent inability of the Local Court following revocation of the bond, to direct that the suspended sentence be served cumulatively upon the sentence imposed in the District Court, it was observed, risked devaluing the former sentence in the eyes of the offender and of the general community.
- 4.73 The Chief Magistrate submitted that s 98(1)(c) should be reviewed to consider the possibility of allowing an offender to consent to a breach of a s 12 bond (or a s 9 bond) imposed by the District Court, to be dealt with in the Local Court when the breach is established by the commission of a subsequent offence within the sentencing jurisdiction of the Local Court, and the offence to which the s 12 bond applies was also within the sentencing jurisdiction of the Local Court or was a bond that was imposed by the District Court following an appeal against an original decision of the Local Court.⁸⁹

‘Credit for street time’

- 4.74 Both the NSW Law Society and the Shopfront Youth Legal Service submitted that, where a s 12 bond is revoked, and a sentence of imprisonment imposed, the offender should only be required to serve the portion of the sentence that is remaining at the time of the breach.⁹⁰

Appeal against revocation

- 4.75 An issue that was raised in discussion with Council Members, but was not mentioned in the submissions, is the possibility of limiting the right of an offender to appeal against the revocation of a suspended sentence.
- 4.76 If adopted, this would still permit the court to make any necessary factual findings in relation to the circumstances of the breach, as is currently required under s 98 (3) but would lend finality to that exercise of the statutory discretion. It would not affect the right of the offender to appeal against the sentence that was initially imposed.

87. At [28].

88. [2010] NSWCCA 80 [13]-[14].

89. Submission 2: Chief Magistrate of the Local Court, 4; Letter of the Chief Magistrate to the Hon. John Hatzistergos MLC, Attorney General, dated 23 October 2009.

90. Submission 7: NSW Law Society, 2; Submission 6: Shopfront Youth Legal Service, 3; This issue is also discussed in Chapter 2 at paragraph 2.40.

Specification of a Non-Parole Period

- 4.77 As the CSPA currently provides, a non-parole period is not set at the time of the initial sentencing determination. It is only set, in accordance with s 99(1)(c) when as a consequence of revocation of the s 12 bond, the suspension order ceases to take effect. On one view this sits uncomfortably with the objective of transparency in sentencing which otherwise requires the offender and the community to be aware of the consequences of the sentence, from the time of the initial sentencing determination.
- 4.78 If the court, at the time of the initial decision to impose a sentence and to suspend its execution, was to announce not only the term of the sentence but also an appropriate non-parole period, then the offender and the community would be aware from the outset of the consequences of any breach. Such an approach might go some of the way to alleviating any community misperception of the consequences of the sentencing order, and also have a deterrent effect so far as the offender is concerned. Again, this is not a matter that was canvassed in the submissions or survey and is more appropriately left for consideration of the NSWLRC.

Other alternatives

Extending accessibility to intermediate sentencing options

- 4.79 The issue of extending the use of, and accessibility to, appropriate intermediate sentencing options was raised in the submissions and survey responses, by way of an alternative approach to the use of suspended sentences. Submissions were received to the effect that, the availability of alternative workable intermediate sentencing options, or the lack thereof, is a key factor in determining when and to what extent courts use suspended sentences.
- 4.80 The Chief Magistrate, HPLS, Children's Court President, and NSW Young Lawyers each submitted that the current intermediate sentencing options require reform.⁹¹
- 4.81 HPLS submitted that the current rehabilitative orders available in lieu of imprisonment, (CSOs, ICOs and HDOs), are often inappropriate for people affected by mental illness, drug or alcohol dependency, or other chronic disability or health condition, because the onerous nature of such orders means that such people are incapable of complying. It submitted that these orders risk setting up the offender for failure, and that additional intermediate sentencing orders are required that would:
- allow flexibility with respect to supervision and treatment;
 - be adaptable to the capabilities and needs of offenders;

91. Submission 2: Chief Magistrate of the Local Court, 4; Submission 3: HPLS, 9–12; Submission 9: President of the Children's Court, 1–2; Submission 10: NSW Young Lawyers Criminal Law Committee, 9.

- be accompanied by appropriate support services; and
 - place greater emphasis on therapeutic and remedial outcomes.⁹²
- 4.82 HPLS submitted that reform in this respect should include the possibility of:
- allowing mandated treatment for a short time, without necessitating a return to court or entry into an undertaking to be of good behaviour;
 - deferring the imposition of a sentence subject to the offender undertaking an expanded and adequately resourced program of treatment or intervention (such as a s 11 treatment bond); and
 - extending the reach of MERIT across NSW, and including within that scheme offenders with other addictive problems, including alcohol and gambling.⁹³
- 4.83 The Shopfront Youth Legal Service reported that it was yet to have any client assessed as suitable for an ICO, and suggested that the current suitability assessments will generally exclude people with serious mental health problems, unresolved substance abuse problems or lack of stable housing.⁹⁴
- 4.84 The Australian Lawyers Alliance also noted a concern that intermediate sentencing orders such as CSOs and HDOs are not available for some offenders such as homeless offenders.⁹⁵
- 4.85 The Chief Magistrate submitted that the current custodial sentencing options would benefit from review and rationalisation and suggested that there is a lack of consistency between the various alternatives to imprisonment, in terms of the maximum permissible lengths of sentence, the eligibility criteria, the fixing of the non-parole period; and the time of fixing the sentence. Additionally the Chief Magistrate submitted that the Local Court has experienced particular difficulties with ICOs, including:
- Operational issues in relation to offenders, who would otherwise appear suitable for an ICO, being assessed as unsuitable for reasons such as the unavailability of work in a particular region that the offender could complete; and
 - A lack of availability of rehabilitation programs for an offender with an unresolved drug or alcohol problem, notwithstanding that ICOs were specifically designed to address these issues.⁹⁶
- 4.86 The NSW Law Society submitted that there is a disparity between courts in relation to the use of intermediate sentencing options due to the slow rollout of ICOs and the limited availability of home detention statewide.⁹⁷

92. Submission 3: Homeless Persons' Legal Service, 3–4.

93. Submission 3: Homeless Persons' Legal Service, 9–12.

94. Submission 6: Shopfront Youth Legal Service, 2.

95. Submission 11: Australian Lawyers Alliance, 3.

96. Submission 2: Chief Magistrate of the Local Court, 5.

97. Submission 7: NSW Law Society, 3.

Suspended Sentences

- 4.87 The ODPP submitted that there are disparities between metropolitan courts and country areas in relation to the availability of ICOs and HDOs, and indicated that there is some anecdotal evidence to suggest that suspended sentences are being imposed because HDOs or ICOs are not available.⁹⁸
- 4.88 Survey respondents raised similar concerns in the comments that they provided to the Council.
- 4.89 Overall, the survey respondents identified availability as the biggest issue in relation to intermediate sentencing options:⁹⁹
- 54% considered that while no additional or new intermediate sentencing options are required, the existing options need to be made available in more localities; while only 30% considered that additional or new intermediate sentencing options are required;
 - 33% considered that they had rarely imposed a suspended sentence in circumstances where an alternative intermediate sentencing option that was not available to them, would have been more appropriate. 37% considered they had sometimes done so while 7% considered they had often done so. 23% however reported that they had never done so.
 - 42% considered that ICOs require reform;
 - 26% considered that CSOs require reform;
 - 24% considered that Home Detention requires reform; and
 - 20% considered that supervised bonds require reform.
- 4.90 Corrective Services NSW has advised the Council that the Community Compliance and Monitoring Group (CCMG) is now operating at 12 locations across NSW. These are Bathurst, Blacktown, Broken Hill, Campbelltown, Dubbo, Goulburn, Grafton, Newcastle, Tamworth, Wagga Wagga and Wollongong. Each of these locations has a capacity to supervise offenders on ICOs within a 200km radius. Corrective Services NSW further advised the Council that, as at 14 December 2011, there are 564 offenders subject to an active Intensive Correction Order, and that the total number of offenders subject to an Intensive Correction Order on any day continues to increase. Intensive Correction Orders have been utilised thus far at 65 Local Court and 18 District Court locations across NSW.¹⁰⁰
- 4.91 A number of survey respondents dealt with the issue of accessibility of intermediate sentencing options in their comments to the Council. For example, one respondent said that, during a 3-year period sitting in an outer regional area, CSOs became increasingly unavailable and, as a consequence, resulted in an increased use of s 12 suspended sentences. In response to the question '*How often have you imposed a suspended sentence in circumstances where an intermediate sentencing option that was not available to you in NSW would have been more appropriate?*' survey responses included the following:

98. Submission 12: ODPP, 3.

99. NSW Sentencing Council, *Judicial Survey on Suspended Sentences*, 2011, Question 31.

100. Data provided by Corrective Services NSW, December 2011.

Once you are over the mountains, intermediate sentencing options are not available and the only [alternative] option to fulltime custody is a suspended sentence. Until the Government makes the intermediate options available, I will often impose suspended sentences in the country, where on the same facts, I would not do so in the city.¹⁰¹

...

I sit ...on a circuit where Home Detention is only available in one of [the] places. ICOs are not available anywhere on the circuit, although they may be available soon. CSOs are not available in two of the places. I frequently suspended sentences that would have otherwise been dealt with by way of Home Detention or ICO, especially for younger and non-violent offenders.¹⁰²

...

CSOs, Home Detention and ICOs are not available in rural areas, and bonds and fines are not appropriate.¹⁰³

...

The problem is well known, and properly so, as justice by postcode.¹⁰⁴

- 4.92 The Sentencing Council has made a number of recommendations in relation to the need to ensure that sentencing options, including rehabilitative programs, are available consistently in all courts throughout NSW.¹⁰⁵ The results of Council's survey, *Judicial Survey on Suspended Sentences*, indicate that accessibility to sentencing options across the State remains an issue.
- 4.93 The Council notes that the Sentencing Reference may not examine obstacles to access and availability across the State. It will however be examining the nature of, and legislative provisions for, intermediate sentencing options under the *Crimes (Sentencing Procedure) Act*. The Council notes at this juncture, that promoting equality of access, particularly in regional and remote NSW is an issue that should be considered in formulating and responding to any recommendations made by the Sentencing Reference.
- 4.94 The Council also notes that further information will be available in early 2011 regarding the use of Intensive Correction Orders, as the Council will be reporting on their use since they were introduced in October 2010. The report will form part of the Council's annual *Report on Sentencing Trends and Practices*.

101. NSW Sentencing Council, *Judicial Survey on Suspended Sentences*, 2011, Question 31.

102. NSW Sentencing Council, *Judicial Survey on Suspended Sentences*, 2011, Question 31.

103. NSW Sentencing Council, *Judicial Survey on Suspended Sentences*, 2011, Question 31.

104. NSW Sentencing Council, *Judicial Survey on Suspended Sentences*, 2011, Question 31.

105. For example: NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, (2011) at [5.6]–[5.16] and Recommendation 1; NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW*, Volume 3 (2009), Recommendation 3; NSW Sentencing Council, *Abolishing Prison Sentences of 6 months or less*, (2004), 4.

Phasing out of suspended sentences

- 4.95 As outlined in the Council's Suspended Sentences Consultation Paper,¹⁰⁶ the Victorian Sentencing Advisory Council in its Final Report Part 1 recommended that suspended sentences should be phased out in Victoria. It recommended that there be a 'move to a range of intermediate sanctions that were transparent, conceptually coherent and understandable to victims, offenders and the broader community'.¹⁰⁷ In its Final Report Part 2,¹⁰⁸ it modified this recommendation, recommending that any final decision in relation to whether or not to abolish suspended sentences should be deferred until there had been an evaluation of the reforms that were implemented in response to its Final Report.
- 4.96 The majority of submissions did not support adopting an approach similar to Victoria by phasing out suspended sentences.¹⁰⁹ This sentiment was echoed in the survey results; only 5% of survey respondents considered that suspended sentences should be abolished; while 32% considered that they should remain as they are. However, 63% of survey respondents considered that suspended sentences should be reformed.¹¹⁰
- 4.97 The Chief Magistrate supported adopting an approach similar to Victoria, by phasing out suspended sentences in the context of a holistic assessment of current sentencing options, and resolution of a number of anomalies in the availability and use of other sentencing options.¹¹¹
- 4.98 HPLS considered that the Victorian approach should not be followed until there is a significant expansion of intermediate sentencing options for people who are homeless, have a history of drug or alcohol dependency, or have a disability, a mental health issue or other chronic health issues. It submitted that, as intermediate sentencing options such as CSOs, ICOs and HDOs are often unavailable for such offenders, suspended sentences are usually the only sentencing alternative to full-time custody.¹¹²

Suspended sentences in the Children's Court

- 4.99 While the Council's terms of reference specifically referred to suspended sentences in accordance with s 12 of the CSPA, the Council also received some submissions in relation to the operation of suspended sentences under s 33(2) of the *Children (Criminal Proceedings) Act 1987*.

106. NSW Sentencing Council, *Suspended Sentences*, Consultation Paper (2011).

107. Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders*, Final Report Part 1 (2008), xvi.

108. Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders*, Final Report Part 2 Summary, (2008).

109. Submission 1: Chief Judge of the District Court, Submission 3: HPLS, Submission 5: NSW Bar Association, Submission 7: NSW Law Society, Submission 10 NSW Young Lawyers' Criminal Law Committee, Submission 11: Australian Lawyers Alliance, Submission 12: ODPP.

110. NSW Sentencing Council, *Judicial Survey on Suspended Sentences*, 2011, Question 30.

111. Submission 2: Chief Magistrate of the Local Court, 4.

112. Submission 3: Homeless Persons' Legal Service, 3–4.

- 4.100 The President of the Children’s Court made three key submissions, namely that:
- there should be alternatives available for juveniles to serve a control order other than by way of full-time custody, in the event that a good behaviour bond attached to a suspended control order is terminated, and in particular, that an alternative similar to an Intensive Correction Order, but tailored to the special needs of juveniles, should be made available;¹¹³
 - with respect to juveniles, wider considerations should be able to be taken into account by the court when determining whether there are ‘good reasons’ for excusing the person’s failure to comply with the condition of a bond under s 41A(2)(b), than those identified in *DPP v Cooke [2007] NSWCA 2*. In particular, he submitted that, a court should be able to have regard to considerations in relation to the subjective circumstances of the offender at the time of the breach proceedings, and to the consequences of revoking the bond;¹¹⁴ and that
 - the Attorney General should be required to provide a Children’s Impact Statement with respect to any proposed criminal law legislation that may impact on children and young people.¹¹⁵
- 4.101 The Shopfront Youth Legal Service noted that a significant number of its clients had received suspended Control Orders in circumstances where a custodial sentence would not otherwise have been imposed, and where the offender would have received a bond or CSO if a suspended sentences had not been available;¹¹⁶
- 4.102 It submitted accordingly that suspended sentences are inappropriate for children and should be abolished as a sentencing option under the *Children (Criminal Proceedings) Act*; it instead argued that the available sentencing options, combined with the diversionary options under the *Young Offenders Act* are sufficient.¹¹⁷
- 4.103 It also noted that there are issues with young people appealing suspended sentences; arising from the fact that typically they are relieved that their court proceedings have finalised without their being taken into custody, and from the fact that they will often over-estimate their capacity to comply with the conditions of the bond.¹¹⁸
- 4.104 The ODPP similarly observed that:
- it has seen a number of cases where suspended sentences have been inappropriately imposed in the Children’s Court;¹¹⁹ and that
 - young people do not appeal their sentence within the 3-month period allowed by the *Crimes (Appeal and Review) Act*, ‘because presumably they have not fully

113. Submission 9: President of the Children’s Court, 2.

114. Submission 9: President of the Children’s Court, 2.

115. Submission 9: President of the Children’s Court, 2.

116. Submission 6: Shopfront Youth Legal Centre, 2.

117. Submission 6: Shopfront Youth Legal Centre, 1.

118. Submission 6: Shopfront Youth Legal Centre, 2.

119. Submission 12: ODPP, 3.

Suspended Sentences

appreciated the differences between a suspended sentence and another type of bond'.¹²⁰

- 4.105 It accordingly submitted that suspended sentences in the Children's Court jurisdiction should be reviewed.¹²¹
- 4.106 The Council notes that the NSW Department of Attorney General and Justice is currently undertaking a review of the *Children (Criminal Proceedings) Act 1987* and the *Young Offenders Act 1997*. The Council has referred the issues raised in this part to the Department for the purposes of its review.

120. Submission 12: ODPP, 3.

121. Submission 12: ODPP, 3.

APPENDIX 1: BOCSAR Paper

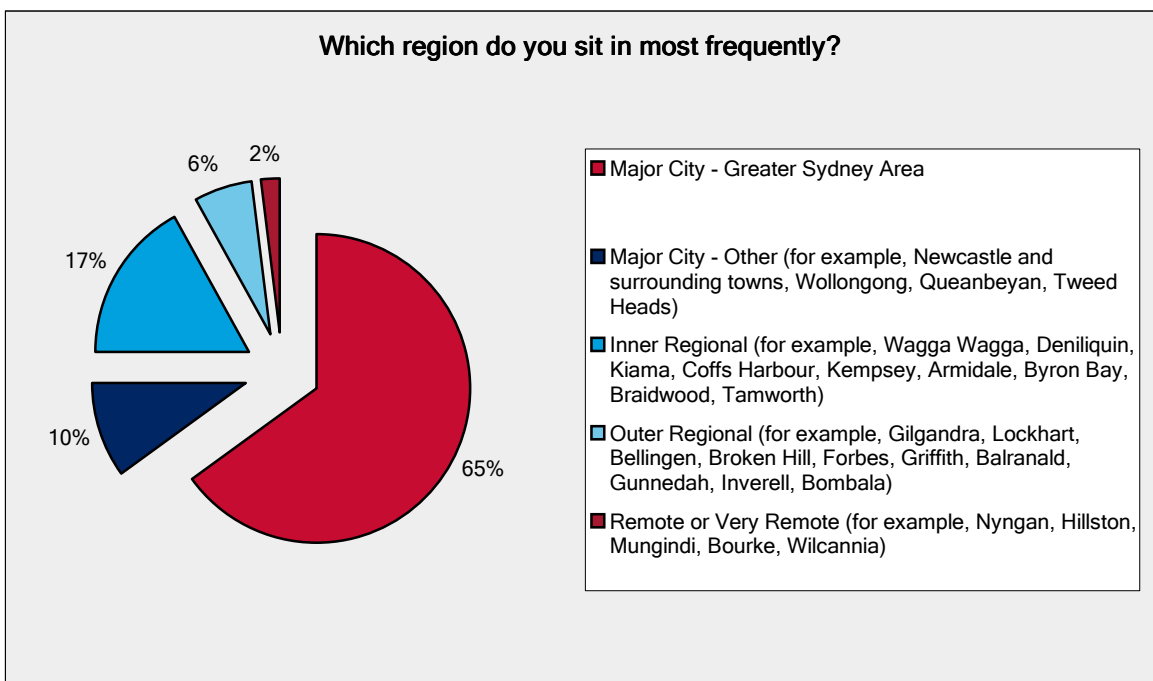
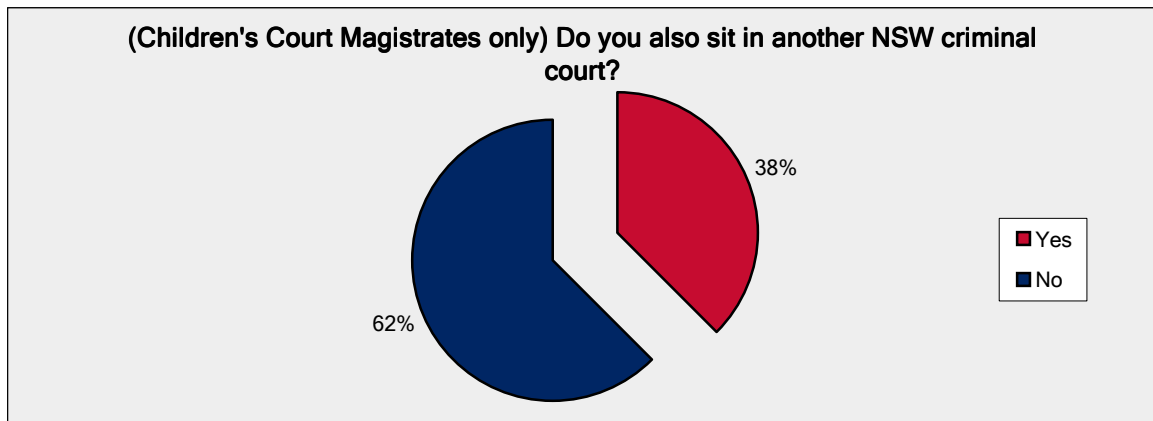
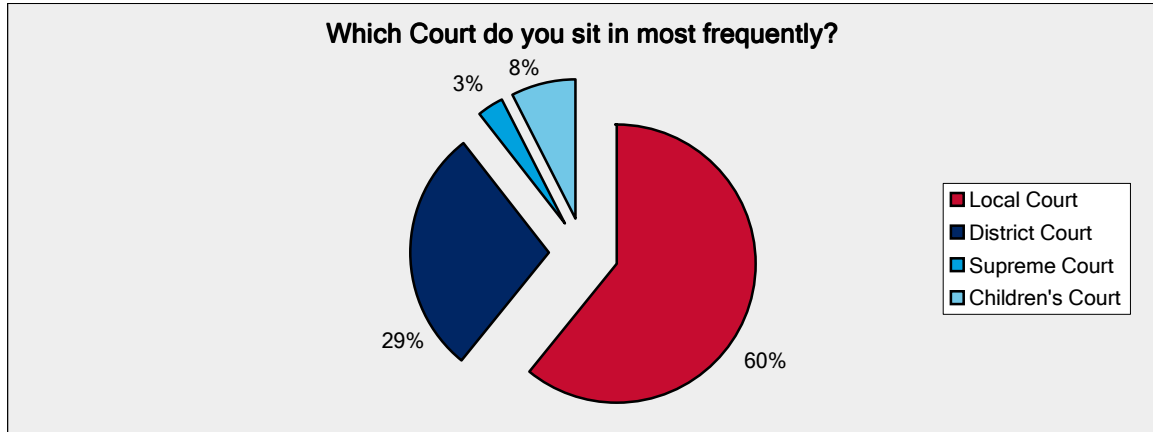
Suspended Sentences

Suspended Sentences

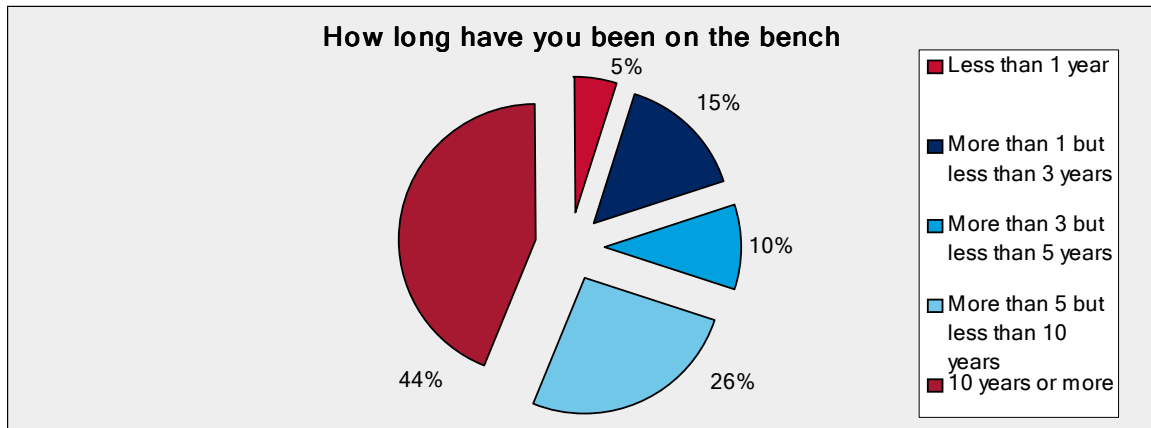
APPENDIX 2: Table of Submissions

Submission number	Stakeholder
SS01	The Hon Justice RO Blanch, Chief Judge, District Court of NSW
SS02	His Honour Magistrate Graeme Henson, Chief Magistrate, Local Court of NSW
SS03	Homeless Persons' Legal Service
SS04	Victims Services
SS05	NSW Bar Association
SS06	Shopfront Youth Legal Centre
SS07	NSW Law Society
SS008	NSW Police Association
SS09	His Honour Judge Mark Marien SC, President of the Children's Court of NSW
SS10	NSW Law Society, Young Lawyers Criminal Law Committee
SS11	Australian Lawyers Alliance
SS11	Director of Public Prosecutions and Office of the Director of Public Prosecutions, NSW
SS13	Mr Richard Button SC, Deputy Senior Public Defender

APPENDIX 3: Judicial Perceptions of Suspended Sentences – Survey Results



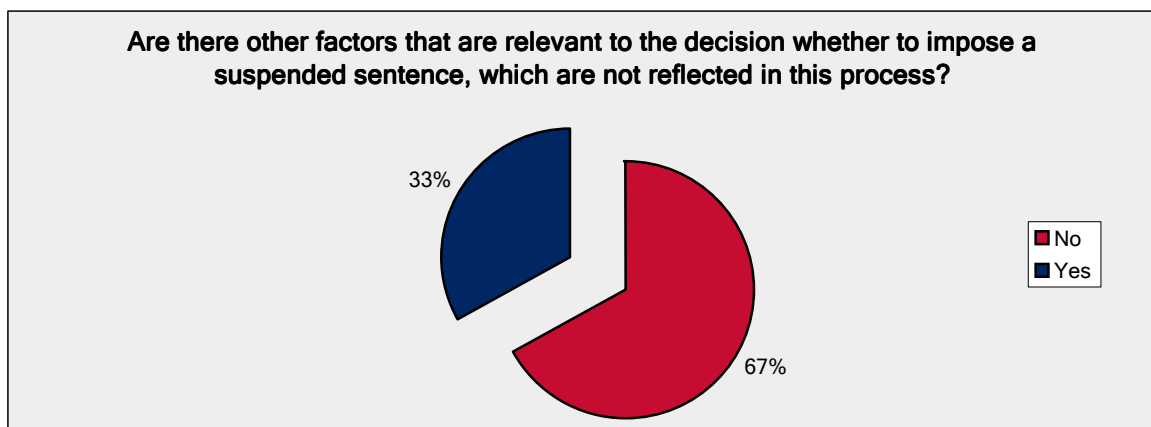
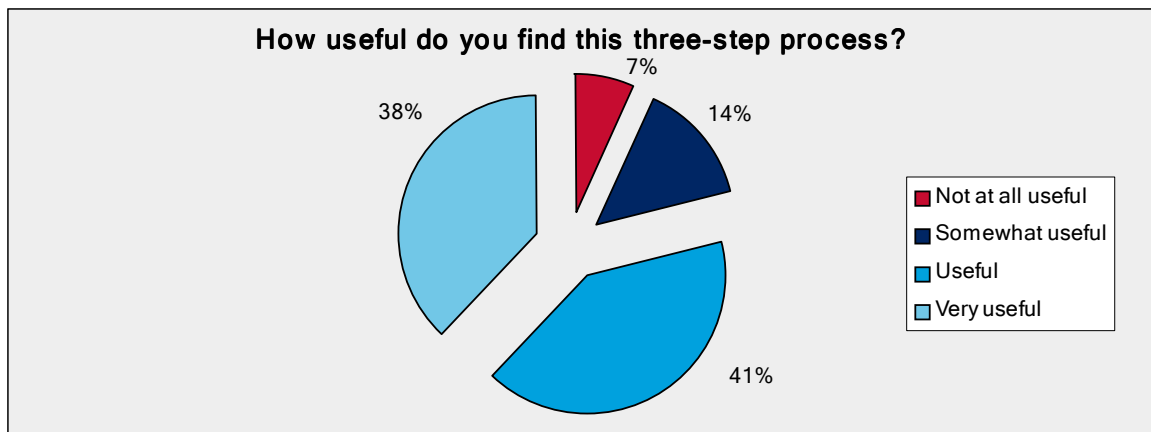
Suspended Sentences

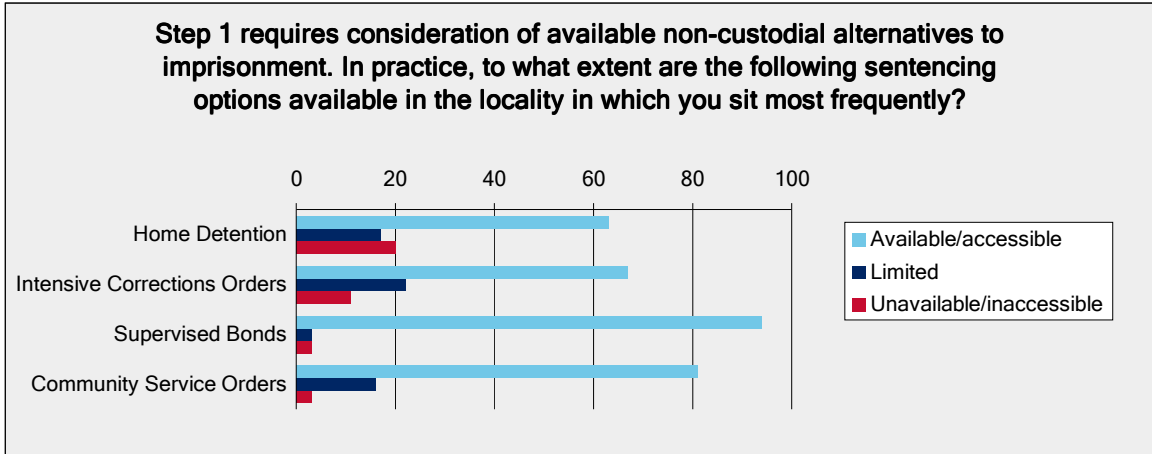


A number of cases have emphasised the steps involved in the suspension of a sentence. For example, see *R v Zamagias* [2002] NSWCCA 17, *Douar v R* [2005] NSWCCA 455 and *Ismael Amado v R* [2011] NSWCCA 197.

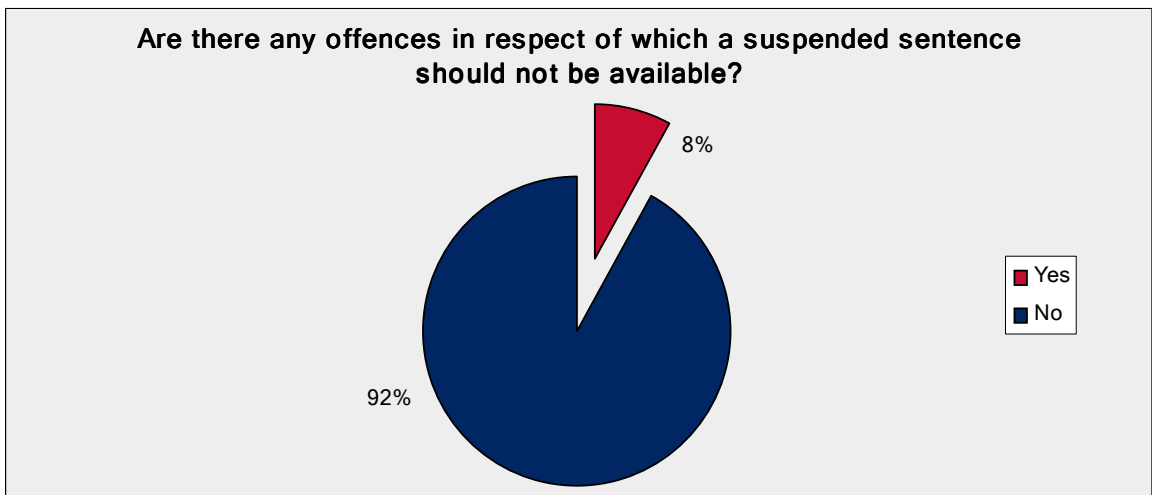
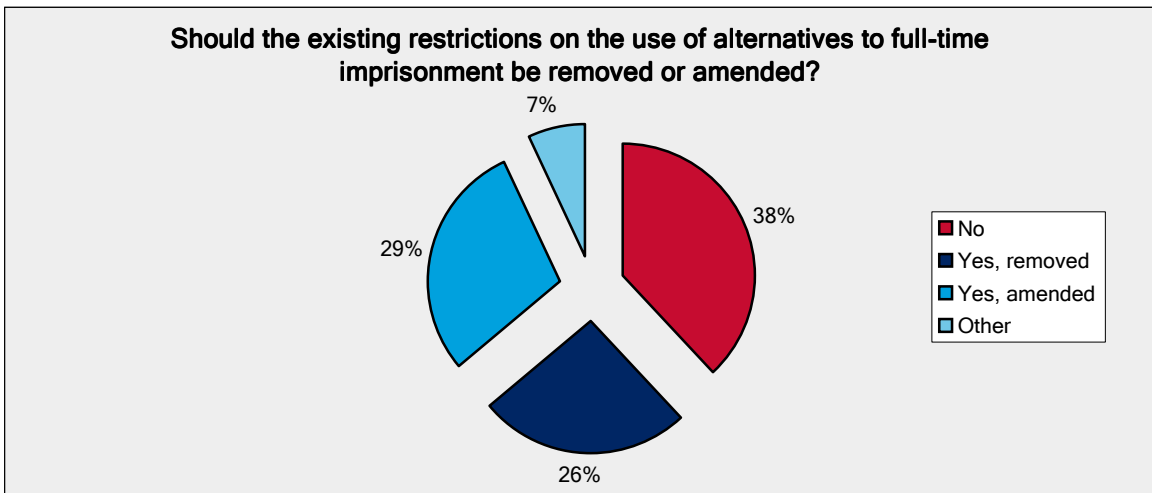
Essentially, the steps for imposing a suspended sentence are described in the case law as follows:

1. Firstly (or as a preliminary step), determining under s 5 of the Crimes (Sentencing Procedure) Act 1999, that no sentence other than imprisonment is appropriate;
2. Secondly, determining the appropriate term of imprisonment, without reference to the manner in which that term will be served; and
3. Thirdly, where the term is not more than two years, deciding whether to suspend the execution of the sentence of imprisonment



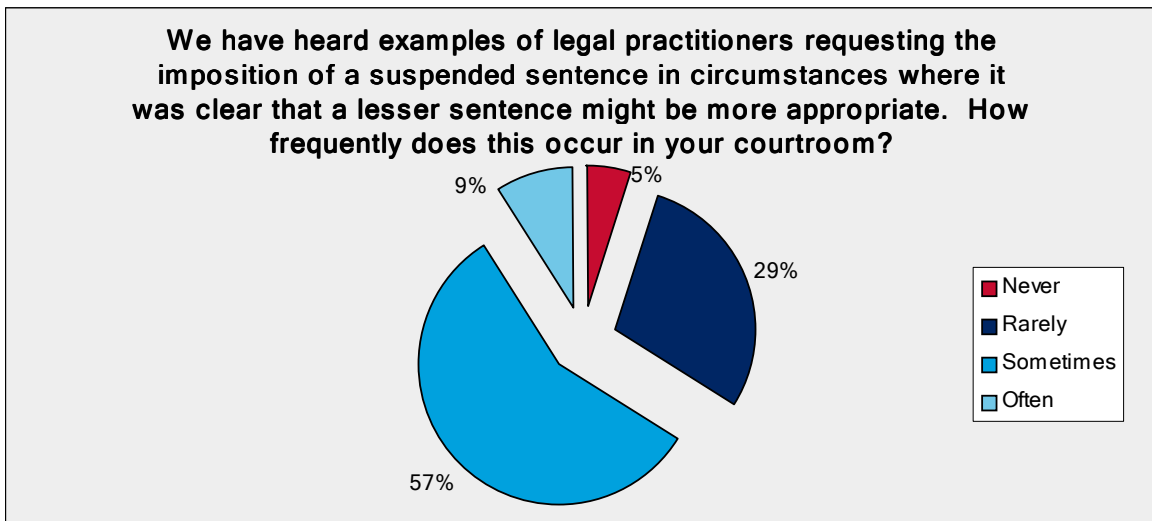
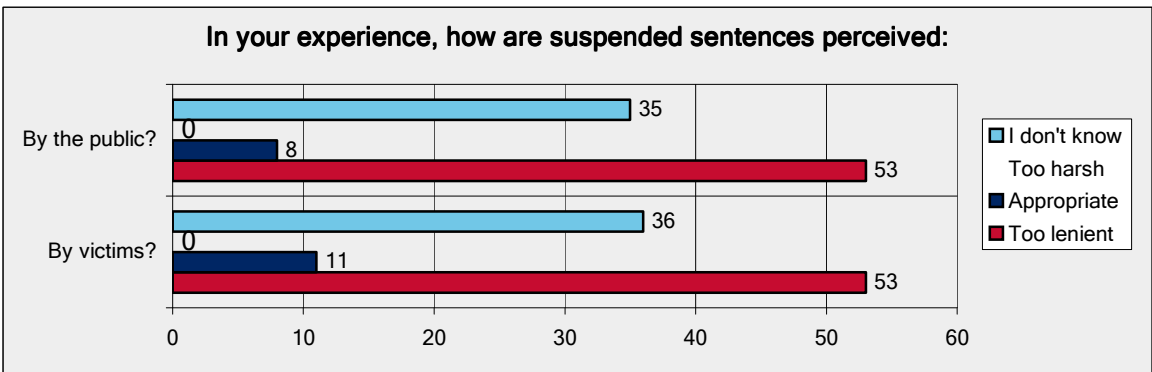
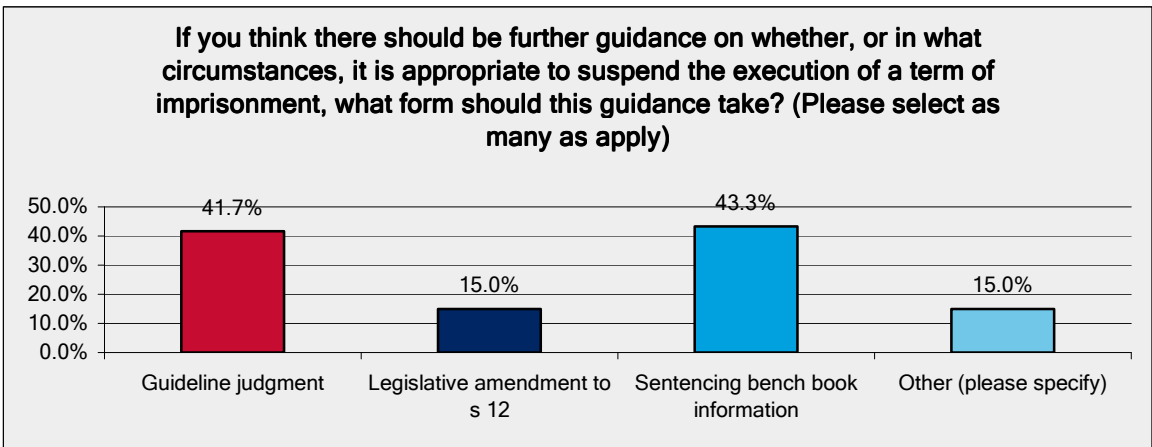
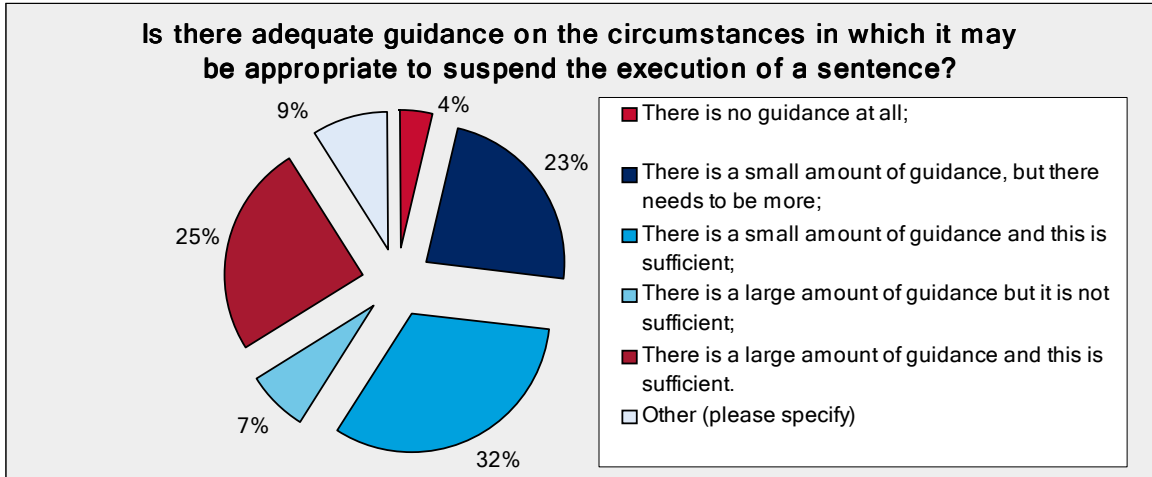


There are legislative restrictions on the use of some alternatives to imprisonment in relation to certain offences, for example, home detention and ICOs are not available for certain sexual offences.

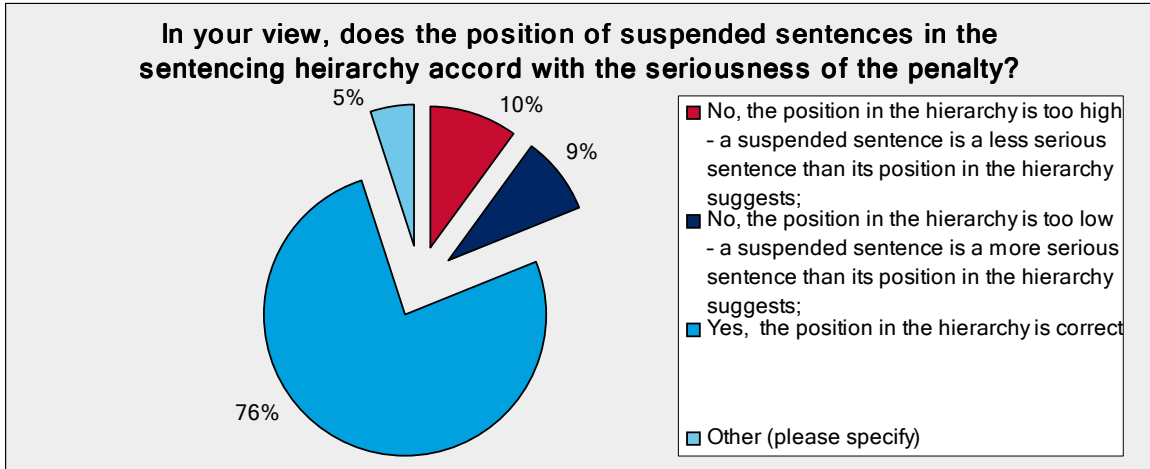


Step 3 above requires the Court, having determined that no sentence other than imprisonment is appropriate, and having determined the term, to decide whether it is appropriate to suspend the execution of that term.

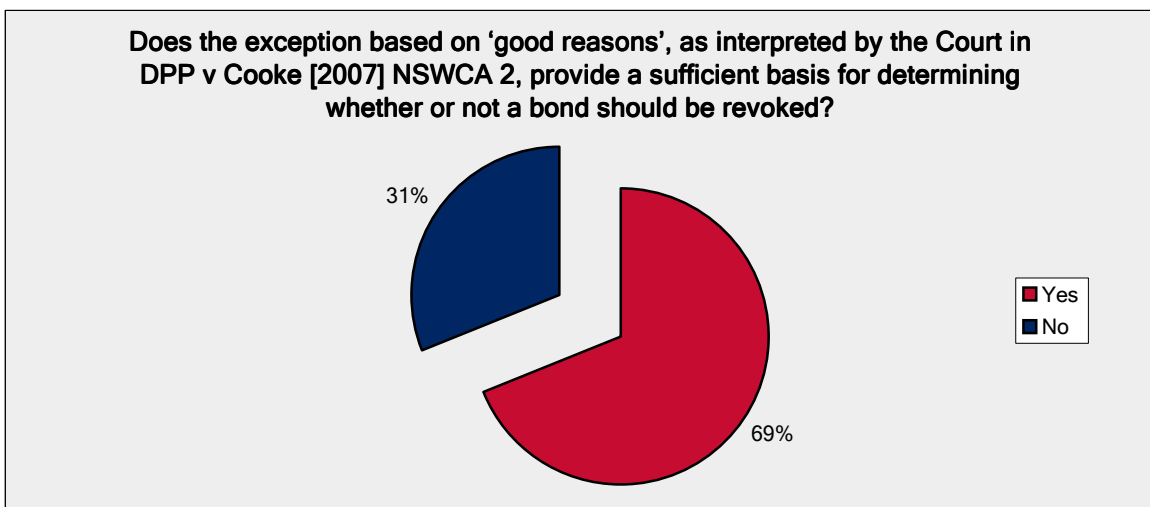
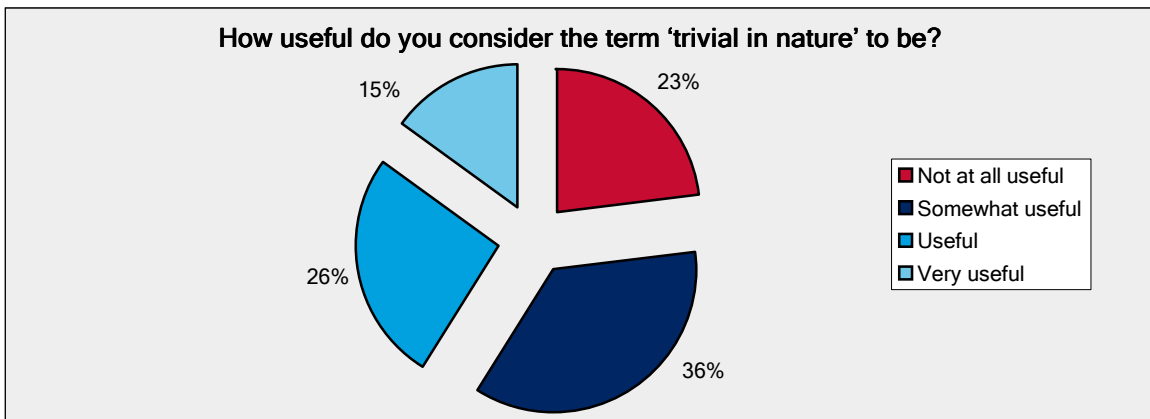
Suspended Sentences



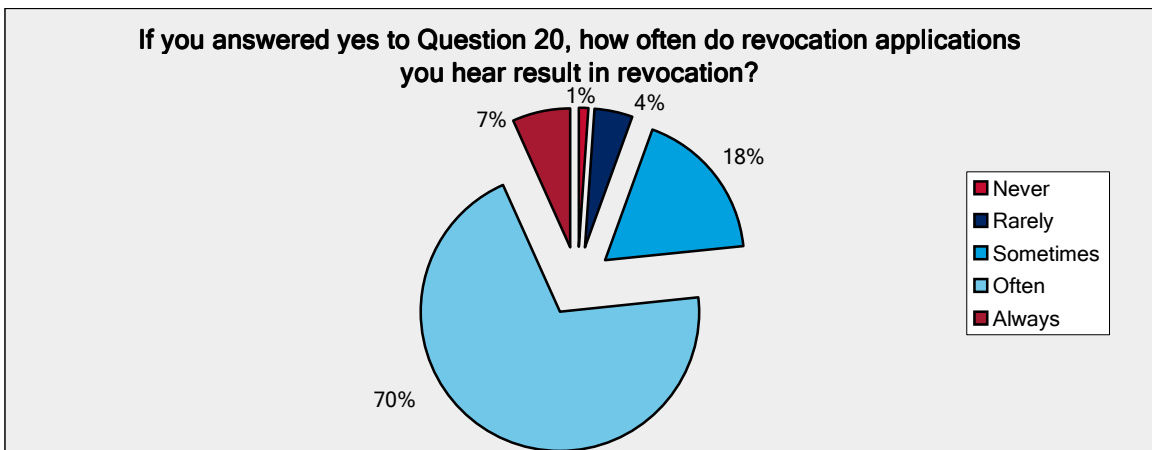
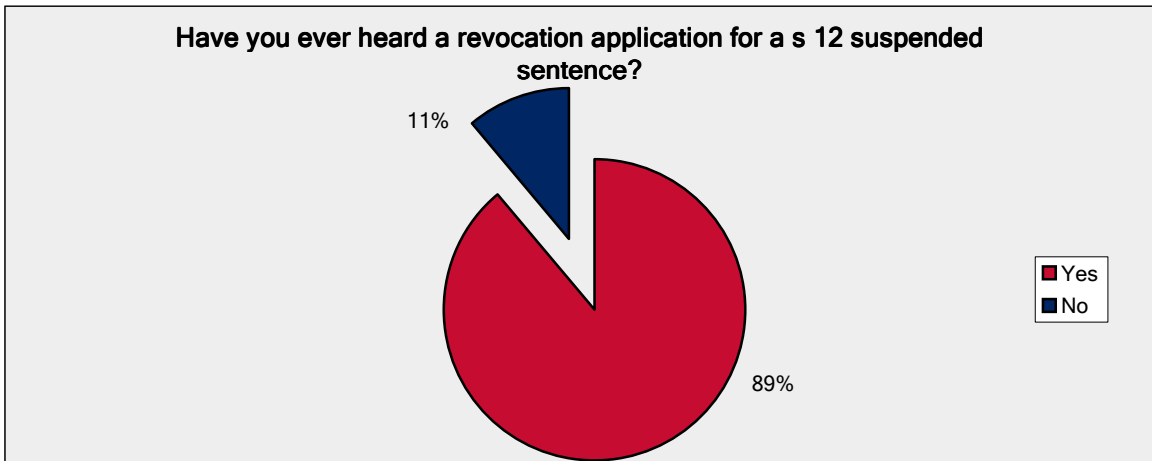
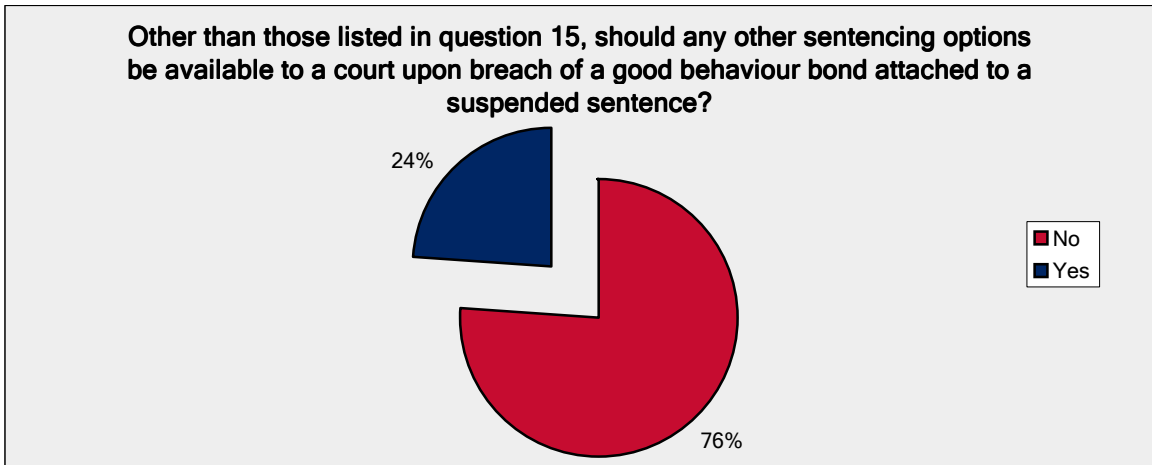
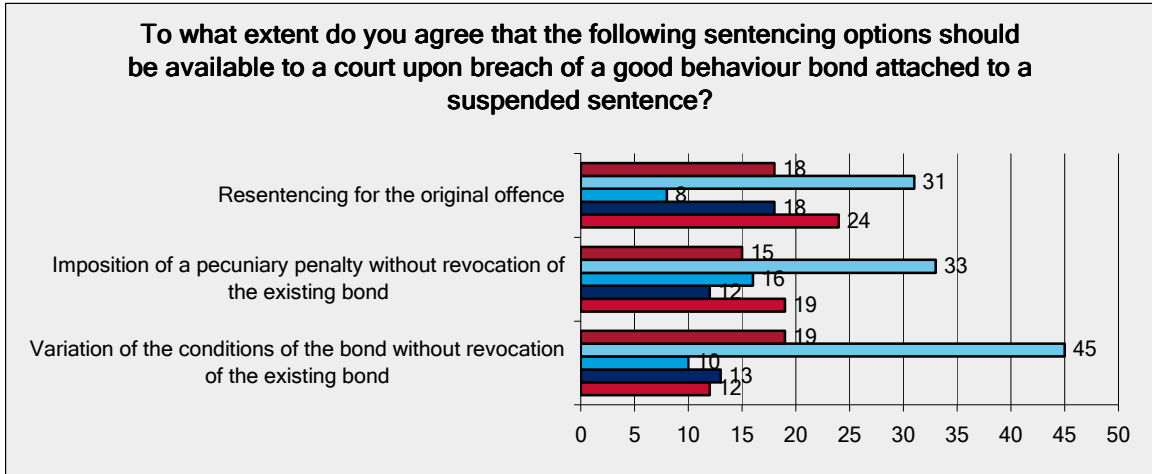
In the sentencing hierarchy, a suspended sentence sits above non-custodial sanctions such as community service orders and bonds; and below intensive correction orders and home detention.

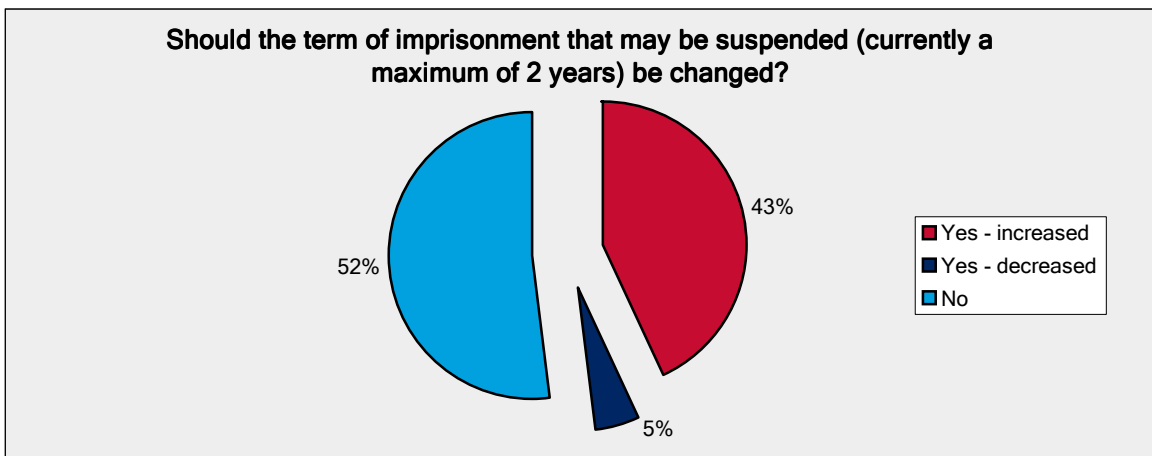
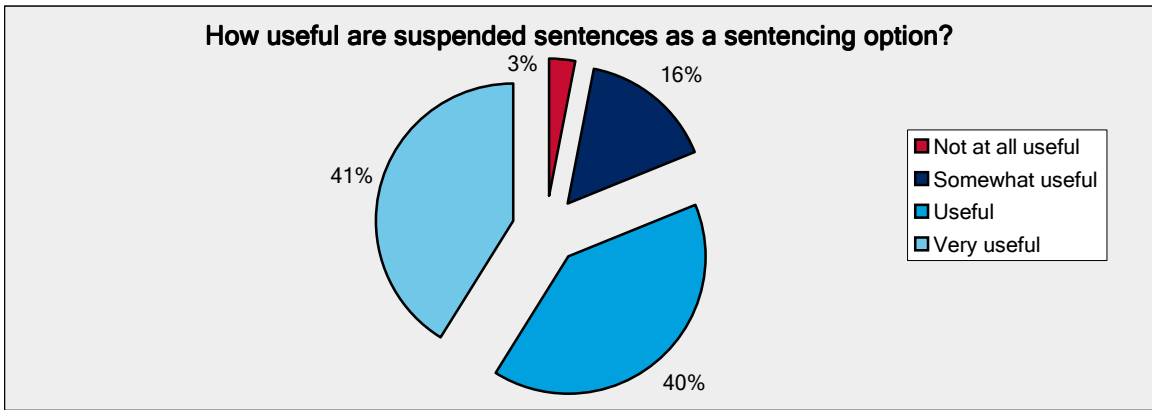


Section 98(3) of the CSPA provides that, upon breach of a s 12 bond, a court must revoke the bond unless it is satisfied:
 § that the offender’s failure to comply with the conditions of the bond was trivial in nature, or
 § that there are good reasons for excusing the offender’s failure to comply with the conditions of the bond.

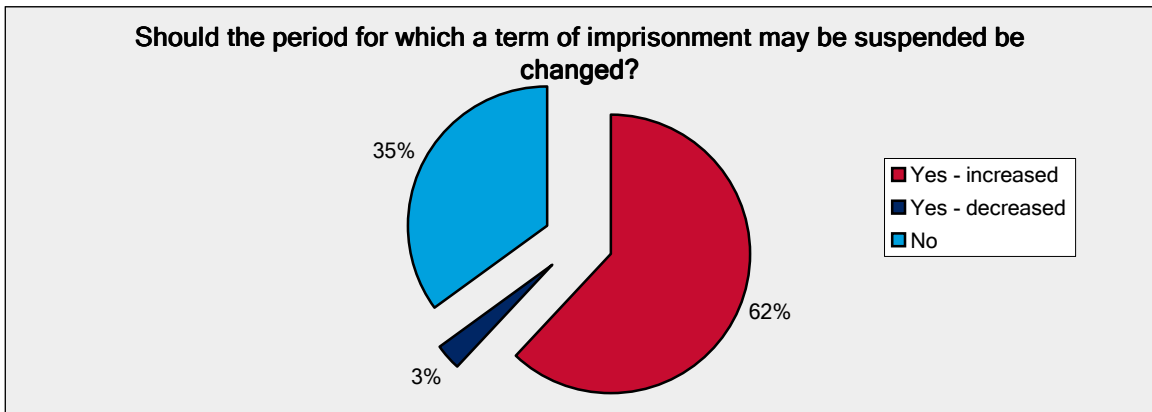


Suspended Sentences



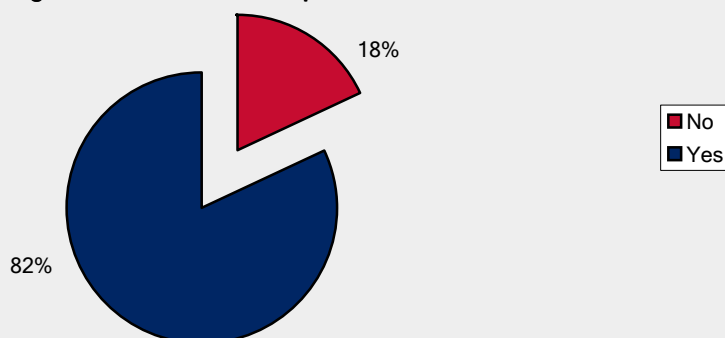


Currently, the period for which a sentence may be suspended under s 12(1)(a); and the length of the good behaviour bond which attaches to the suspended sentence under s 12(1)(b); cannot exceed the term of imprisonment imposed; and therefore cannot be longer than 2 years.

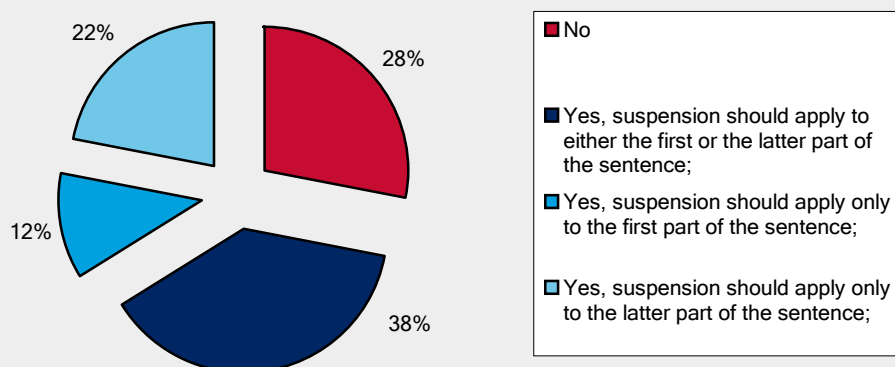


Suspended Sentences

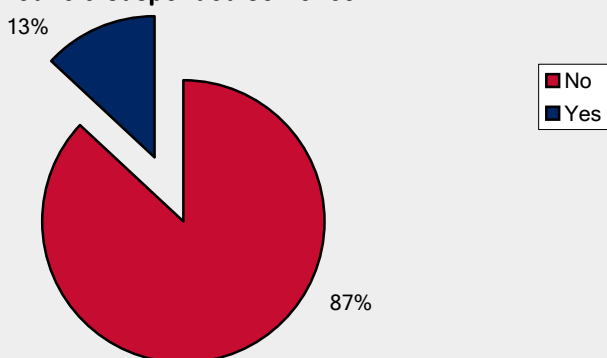
Should the connection between the duration of a good behaviour bond imposed under s 12 and the term of imprisonment suspended under s 12 be severed to allow for the imposition of a good behaviour bond that is longer than the term of imprisonment?



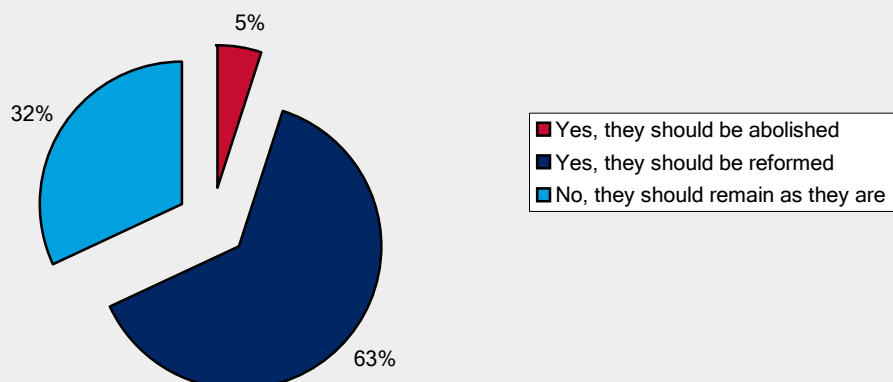
Do you think that partially suspended sentences should be reintroduced?



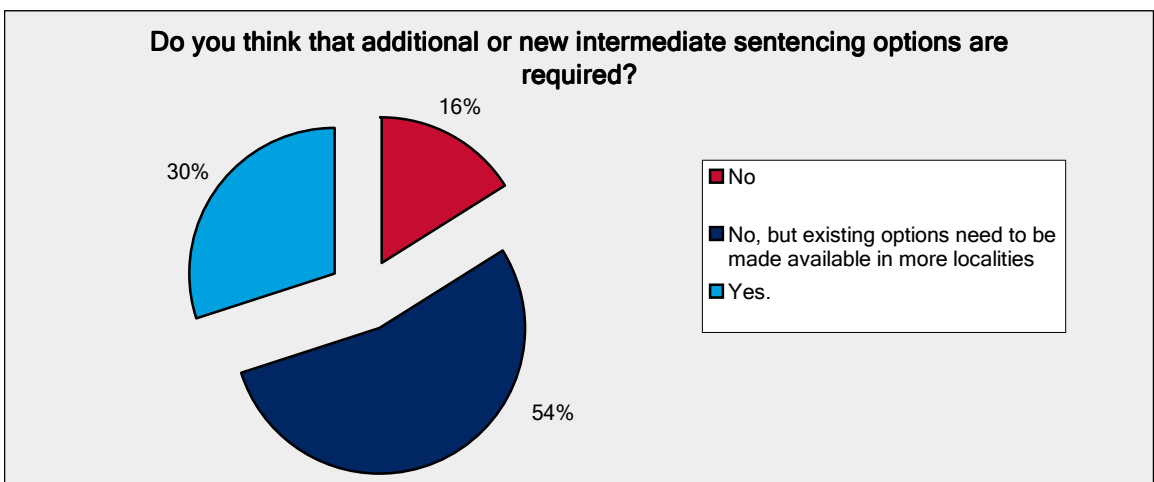
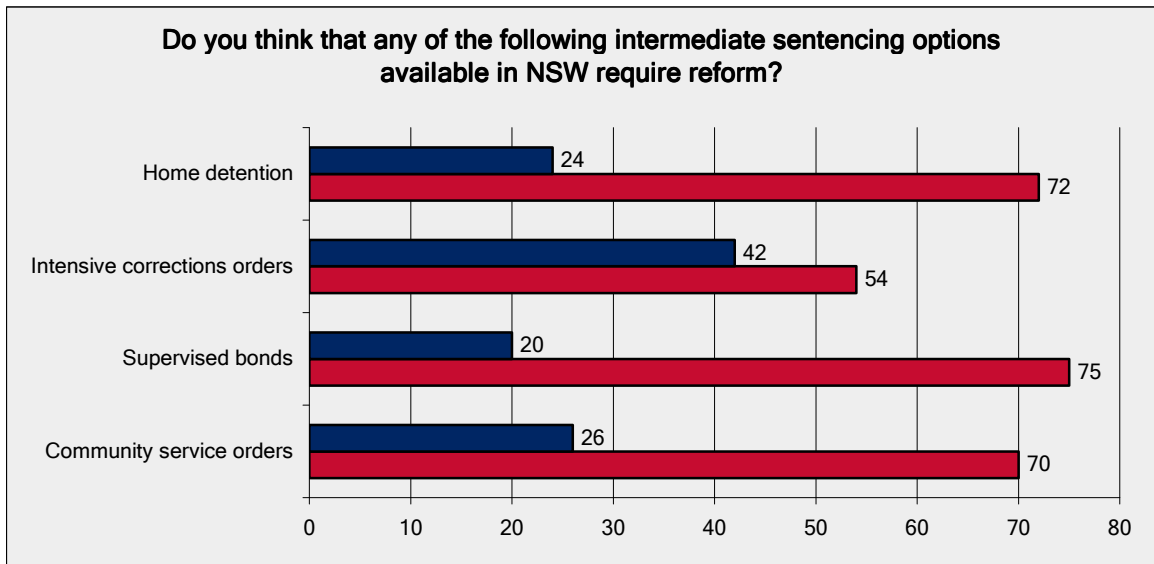
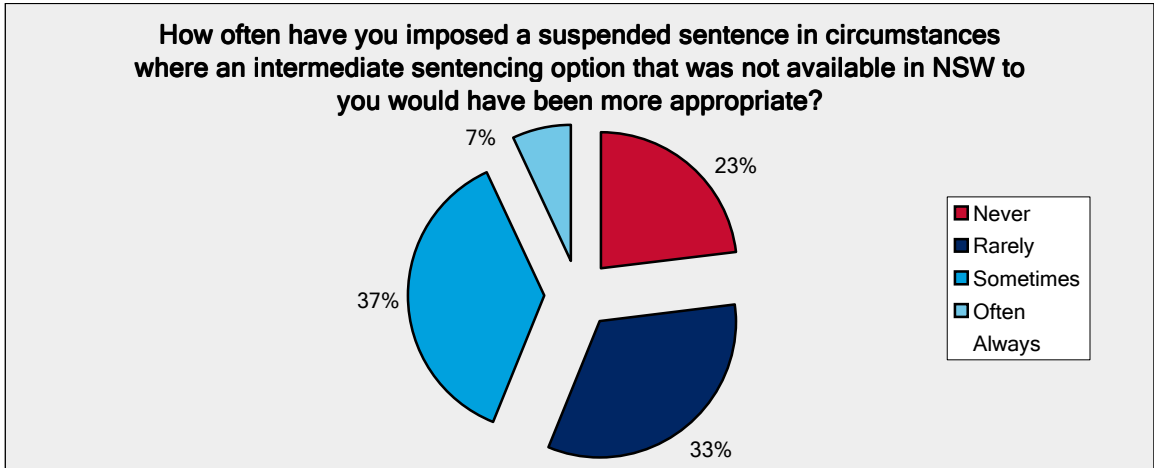
Is reform required in relation to the nature of the conditions that may be attached to a suspended sentence?



Do you think suspended sentences should be reformed in any other way?



Intermediate sentencing options are those that are more serious than a discharge, dismissal or adjournment, but less serious than an immediate term of full-time imprisonment. Other than suspended sentences, the current intermediate sentencing options in NSW are home detention, intensive correction orders, community service orders, good behaviour bonds and fines.



Suspended Sentences

APPENDIX 4: Suspended sentences imposed in the Local Court

Table 5: Number and trend[^] of persons sentenced to suspended sentences (with or without supervision) for their principal offence* by Court

Court location	2006		2007		2008		2009		2010		5 year trend [^] and average annual % change	5 year trend [^] and annual % change
	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision		
Albion Park	0	1	2	1	0	5	0	3	1	6	nc	nc
Albury	63	20	65	9	32	23	40	23	39	20	Stable	Stable
Armidale	12	2	15	4	21	1	11	2	25	30	nc	nc
Ballina	19	28	21	20	16	29	20	30	10	29	Stable	Stable
Balmain	6	13	10	12	13	12	11	12	4	14	nc	nc
Balranald	4	3	3	1	5	3	6	2	7	5	nc	nc
Bankstown	28	49	65	84	45	73	60	71	36	64	Stable	Stable
Batemans Bay	7	3	10	3	2	8	3	1	3	4	nc	nc
Bathurst	16	8	9	6	14	7	24	4	30	7	nc	nc
Bega	6	1	4	3	8	3	1	1	3	2	nc	nc
Bellingen	0	2	0	0	1	0	9	11	8	2	nc	nc
Belmont	11	28	8	15	1	2	29	19	11	20	nc	nc
Blacktown	87	59	81	64	103	73	91	77	78	79	Stable	Stable
Blayney	0	0	1	0	0	0	1	0	2	2	nc	nc
Boggabilla	6	3	3	4	3	2	8	6	6	7	nc	nc
Bombala	1	1	0	0	0	1	0	0	0	0	nc	nc
Bourke	12	2	8	1	4	0	12	10	10	11	nc	nc
Brewarrina	7	2	5	2	4	4	7	5	7	6	nc	nc
Broken Hill	26	49	34	14	33	9	32	25	47	19	Stable	Stable
Burwood	104	108	68	78	98	69	75	102	85	156	Stable	Stable
Byron Bay	12	18	9	26	12	25	14	6	15	16	Stable	Stable
Camden	3	10	5	7	8	16	14	4	6	14	nc	nc
Campbelltown	73	119	86	114	153	129	138	110	74	105	Stable	Stable
Casino	23	15	29	4	27	9	21	37	11	7	nc	nc
Central	18	66	29	57	28	91	17	90	8	54	Stable	Stable
Cessnock	15	12	21	18	57	20	20	43	11	29	Stable	Stable
Cobar	6	1	6	0	6	1	5	4	3	3	nc	nc

Appendix 4 Suspended sentences imposed in the Local Court

Coffs Harbour	38	9	29	21	26	24	34	14	46	21	Stable	Stable
Condobolin	4	1	7	1	14	0	11	3	8	0	nc	nc
Cooma	8	5	4	1	13	0	2	4	5	4	nc	nc
Coonabarabran	4	1	9	2	8	5	5	0	2	3	nc	nc
Coonamble	4	8	5	2	10	9	8	0	3	4	nc	nc
Cootamundra	16	2	7	3	22	4	4	1	9	6	nc	nc
Corowa	4	2	6	1	1	1	2	2	2	1	nc	nc
Cowra	29	5	20	5	21	3	20	7	8	6	nc	nc
Crookwell	1	0	1	1	0	0	1	1	1	0	nc	nc
Deniliquin	11	15	8	10	11	12	14	8	12	2	nc	nc
Downing Centre	140	156	125	129	129	148	125	180	121	160	Stable	Stable
Dubbo	84	21	87	21	77	28	84	15	98	31	Stable	Stable
Dunedoo	0	0	0	0	1	0	0	1	2	1	nc	nc
Dungog	0	1	0	1	0	3	0	0	3	0	nc	nc
Eden	1	3	0	0	0	0	1	0	1	2	nc	nc
Fairfield	67	47	20	11	100	46	65	38	20	29	Stable	Stable
Finley	7	0	8	0	4	2	1	1	2	1	nc	nc
Forbes	3	3	7	3	10	6	9	6	14	8	nc	nc
Forster	7	6	13	11	17	22	6	13	15	16	nc	nc
Gilgandra	7	1	5	2	4	4	8	2	4	2	nc	nc
Glen Innes	6	0	6	0	4	0	1	0	6	3	nc	nc
Gloucester	1	2	0	1	1	0	2	1	2	1	nc	nc
Gosford	85	20	89	16	73	20	28	19	19	14	-23.5	-65.7
Goulburn	19	4	25	19	23	13	31	16	22	14	Stable	Stable
Grafton	21	35	19	24	17	45	20	67	16	41	Stable	Stable
Grenfell	6	1	5	0	4	0	3	1	0	1	nc	nc
Griffith	25	37	15	29	30	26	42	30	45	11	Stable	Stable
Gulgong	0	0	0	0	0	1	1	0	1	1	nc	nc
Gundagai	0	0	4	0	3	0	2	2	5	0	nc	nc
Gunnedah	5	6	7	6	10	3	7	1	8	2	nc	nc
Hay	6	7	3	0	3	4	6	2	7	4	nc	nc
Hillston	1	0	1	0	1	2	0	0	1	0	nc	nc
Holbrook	0	0	1	0	0	1	0	0	1	0	nc	nc
Hornsby	23	9	14	11	37	52	31	65	1	12	nc	nc
Inverell	21	9	15	11	14	22	25	26	22	23	Stable	Stable
Junee	4	0	5	0	5	1	3	1	1	1	nc	nc
Katoomba	12	7	13	6	4	5	7	9	18	4	nc	nc
Kempsey	100	16	102	10	109	13	112	10	89	13	Stable	Stable
Kiama	7	2	3	0	1	1	0	1	0	0	nc	nc
Kogarah	10	27	1	27	5	47	20	40	8	36	5.6	24.3
Kurri Kurri	3	2	6	4	16	1	0	0	5	4	nc	nc

Suspended Sentences

Kyogle	5	1	10	0	10	0	5	5	2	2	nc	nc
Lake Cargelligo	5	0	6	2	5	4	5	2	3	0	nc	nc
Leeton	9	9	6	8	14	7	10	5	22	2	nc	nc
Lightning Ridge	3	0	3	2	5	3	10	4	11	2	nc	nc
Lismore	75	42	63	29	67	40	61	57	46	27	Stable	Stable
Lithgow	16	5	19	7	10	3	21	2	25	6	nc	nc
Liverpool	94	173	93	178	115	163	144	175	126	134	Stable	Stable
Macksville	5	0	12	3	3	3	52	8	44	5	nc	nc
Maclean	7	12	13	13	7	21	11	33	5	13	nc	nc
Maitland	18	96	15	96	16	140	2	6	26	24	nc	nc
Manly	9	12	6	17	14	35	16	22	16	19	13.6	66.7
Milton	8	3	3	3	2	4	5	0	4	6	nc	nc
Moama	2	6	2	9	6	9	8	4	4	6	nc	nc
Moree	39	17	22	23	33	19	31	29	31	20	Stable	Stable
Moruya	1	0	3	1	3	1	3	1	2	1	nc	nc
Moss Vale	11	17	8	9	4	26	4	29	3	11	nc	nc
Mount Druitt	50	28	80	70	84	92	92	102	111	71	23.3	130.8
Mudgee	3	4	6	2	16	3	13	3	14	2	nc	nc
Mullumbimby	3	13	3	8	4	8	4	2	1	7	nc	nc
Mungindi	2	3	1	2	0	0	3	0	1	0	nc	nc
Murwillumbah	7	15	10	13	3	16	4	2	11	5	nc	nc
Muswellbrook	4	4	15	8	19	16	11	23	14	30	nc	nc
Narooma	1	1	1	0	2	2	2	1	0	0	nc	nc
Narrabri	5	4	10	8	12	2	12	0	11	3	nc	nc
Narrandera	7	10	6	4	5	4	9	1	3	2	nc	nc
Narromine	7	2	6	1	12	3	7	1	4	4	nc	nc
Newcastle	71	75	70	88	25	17	87	40	64	48	Stable	Stable
Newtown	18	14	20	11	30	25	21	32	8	17	Stable	Stable
North Sydney	3	3	5	1	3	13	1	1	2	6	nc	nc
Nowra	14	23	17	13	25	24	22	27	52	30	22.7	127.0
Nyngan	4	3	5	2	5	1	5	0	7	2	nc	nc
Oberon	2	1	1	0	0	2	0	0	0	0	nc	nc
Orange	28	9	28	18	51	36	38	66	47	58	29.8	183.8
Parkes	10	0	12	2	16	4	13	5	16	6	nc	nc
Parramatta	90	99	61	102	57	98	46	70	55	65	-10.5	-36.0
Peak Hill	0	0	2	0	4	1	1	1	3	0	nc	nc
Penrith	127	68	75	77	105	81	108	84	105	56	Stable	Stable
Picton	0	8	6	5	2	13	3	9	3	12	nc	nc
Port Kembla	8	13	8	11	1	0	11	11	11	11	nc	nc
Port Macquarie	126	15	119	11	131	12	37	10	26	9	-28.9	-74.5
Queanbeyan	19	36	11	21	23	16	38	20	33	13	Stable	Stable

Appendix 4 Suspended sentences imposed in the Local Court

Quirindi	4	0	2	0	0	0	1	1	1	1	nc	nc
Raymond Terrace	30	11	28	17	54	17	46	16	15	15	Stable	Stable
Ryde	16	15	13	12	12	19	15	21	9	21	Stable	Stable
Rylstone	1	0	1	0	0	0	3	1	1	1	nc	nc
Scone	0	1	2	1	1	2	0	8	2	3	nc	nc
Singleton	5	19	4	15	6	35	8	23	8	19	nc	nc
Sutherland	45	92	36	97	50	84	63	91	25	44	-14.6	-46.7
Tamworth	20	35	22	11	38	10	21	8	26	10	Stable	Stable
Taree	28	21	32	15	31	17	33	23	35	35	8.9	40.8
Temora	12	0	6	0	5	1	4	3	2	4	nc	nc
Tenterfield	3	2	0	0	3	0	1	3	3	11	nc	nc
Toronto	49	39	30	24	35	44	25	61	22	39	Stable	Stable
Tumbarumba	3	0	0	0	1	0	3	0	2	1	nc	nc
Tumut	22	4	15	1	14	4	12	9	5	9	nc	nc
Tweed Heads	23	92	28	125	36	116	44	32	34	51	-8.7	-30.4
Wagga Wagga	35	53	41	49	64	29	61	14	45	10	-10.7	-36.4
Walcha	3	0	1	0	3	1	1	0	0	1	nc	nc
Walgett	16	4	15	9	10	2	20	14	24	10	nc	nc
Warialda	0	0	0	1	0	1	0	0	0	0	nc	nc
Warren	3	2	6	2	2	0	2	0	2	1	nc	nc
Wauchope	5	2	5	0	6	3	1	1	3	4	nc	nc
Waverley	34	90	24	59	28	108	38	87	50	43	Stable	Stable
Wee Waa	0	0	6	6	3	2	4	0	0	3	nc	nc
Wellington	11	0	18	3	12	2	10	18	15	11	nc	nc
Wentworth	10	7	9	5	17	5	13	10	16	9	nc	nc
West Wyalong	6	1	4	0	4	1	4	2	1	1	nc	nc
Wilcannia	1	5	5	1	3	1	1	6	13	1	nc	nc
Windsor	21	13	9	14	8	17	29	21	7	27	Stable	Stable
Wollongong	131	113	132	94	101	95	125	101	129	102	Stable	Stable
Woy Woy	12	19	25	23	13	14	17	14	11	20	Stable	Stable
Wyong	44	35	39	34	25	28	133	32	108	48	18.7	98.7
Yass	4	1	6	4	7	3	12	4	6	0	nc	nc
Young	22	3	13	5	16	2	16	4	9	8	nc	nc

*Where a person has been found guilty of more than one offence, the offence that received the most serious penalty is the principal offence.

^This table shows the results of a statistical test for significant upward or downward trends in the number of persons of interest over a 5 year period. The trend test used is Kendall's rank-order correlation test. Where the trend is significant (i.e $p < 0.05$) the average annual percentage change and the annual percentage change over the period is shown. Significant upward trends are highlighted in blue; significant downward trends are highlighted in red. A non-significant test result is denoted by 'stable' and 'nc' indicates that the number of persons recorded was too small for a reliable trend test to be performed.

Source: NSW Bureau of Crime Statistics and Research, *Unpublished statistics (2011)*.

Suspended Sentences

APPENDIX 5: Suspended sentences imposed in the higher courts

Table 6: Number and trend[^] of persons sentenced to suspended sentences (with or without supervision) for their principal offence* by Court

Court	2006		2007		2008		2009		2010		5 year trend [^] and average annual % change	5 year trend [^] and annual % change
	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision	Suspended sentence with supervision	Suspended sentence without supervision		
Albury District Court	5	0	2	1	3	2	3	1	2	2	nc	nc
Armidale District Court	1	0	1	0	5	1	5	0	0	0	nc	nc
Bathurst District Court	4	1	1	0	0	6	4	0	4	0	nc	nc
Bega District Court	5	0	1	2	3	0	4	1	1	1	nc	nc
Bourke District Court	3	0	2	0	0	1	1	0	2	1	nc	nc
Broken Hill District Court	4	1	2	0	4	4	3	3	6	2	nc	nc
Campbelltown District Court	26	14	18	15	21	16	18	15	12	7	nc	nc
Coffs Harbour District Court	7	1	7	0	10	2	3	1	4	5	nc	nc
Coonamble District Court	0	1	1	0	0	0	0	0	1	0	nc	nc
Dubbo District Court	6	4	1	3	2	3	6	2	10	4	nc	nc
East Maitland District Court	1	3	5	0	5	0	9	2	11	3	nc	nc
Gosford District Court	16	2	14	3	9	10	14	6	16	11	nc	nc
Goulburn District Court	4	1	3	2	7	2	3	1	1	2	nc	nc
Grafton District Court	2	0	1	0	7	2	3	2	3	0	nc	nc
Griffith District Court	5	1	4	0	2	6	5	1	4	2	nc	nc
Inverell District Court	0	0	3	0	0	0	0	0	0	0	nc	nc
Lismore District Court	9	16	11	15	12	14	6	15	7	13	-5.4	-20.0
Moree District Court	0	1	4	0	0	1	2	1	1	0	nc	nc
Newcastle District Court	19	10	17	3	13	7	24	3	16	5	-8.9	-31.0
Nowra District Court	3	2	1	1	0	2	2	2	5	0	nc	nc
Orange District Court	2	2	5	0	2	2	0	4	5	0	nc	nc
Parkes District Court	0	2	0	0	1	1	1	0	4	0	nc	nc
Parramatta District Court	47	11	36	8	33	13	38	19	43	20	1.3	5.2
Penrith District Court	39	5	21	4	16	16	17	6	22	9	-8.4	-29.5
Port Macquarie District Court	3	3	8	7	7	2	9	3	3	3	nc	nc
Queanbeyan District Court	5	0	6	0	1	1	8	2	1	0	nc	nc
Sydney District Court	99	57	93	32	54	72	103	62	100	81	2.5	10.3

Appendix 5 Suspended sentences imposed in the higher courts

Tamworth District Court	2	1	1	1	2	7	4	0	5	0	nc	nc
Taree District Court	10	1	11	1	6	2	2	0	8	5	nc	nc
Wagga Wagga District Court	9	2	4	5	9	5	2	1	12	0	nc	nc
Wollongong District Court	15	4	22	9	21	8	22	14	17	12	nc	nc
Central Criminal Court	1	2	0	0	0	0	0	0	0	0	nc	nc
Supreme Court	0	0	0	0	0	1	0	0	0	0	nc	nc

*Where a person has been found guilty of more than one offence, the offence that received the most serious penalty is the principal offence.

^This table shows the results of a statistical test for significant upward or downward trends in the number of persons of interest over a 5 year period. The trend test used is Kendall's rank-order correlation test. Where the trend is significant (i.e $p < 0.05$) the average annual percentage change and the annual percentage change over the period is shown. Significant upward trends are highlighted in blue; significant downward trends are highlighted in red. A non-significant test result is denoted by 'stable' and 'nc' indicates that the number of persons recorded was too small for a reliable trend test to be performed.

Source: NSW Bureau of Crime Statistics and Research, *Unpublished statistics (2011)*.

APPENDIX 6: Penalties for breach of suspended sentences

Table 7: Number of people with proven offences in NSW courts whose principal offence^A was breach of a suspended sentence, by penalty, 2000 to 2010

Year	Penalty	Jurisdiction			
		Children's Court	Local Court	Higher courts	TOTAL
2000	Bond without supervision	0	1	0	1
2001	Imprisonment	0	19	0	19
	Home detention	0	1	0	1
	Periodic detention	0	2	0	2
	Community service order	0	1	0	1
	Bond without supervision	0	1	0	1
2002	Imprisonment	0	153	0	153
	Home detention	0	8	0	8
	Periodic detention	0	33	0	33
	Suspended sentence with supervision	0	1	0	1
	Suspended sentence without supervision	0	4	0	4
	Community service order	0	1	0	1
	Bond with supervision	0	2	0	2
	Fine	0	2	0	2
2003	Imprisonment	0	180	0	180
	Home detention	0	22	0	22
	Periodic detention	0	26	0	26
	Suspended sentence with supervision	0	5	0	5
	Suspended sentence without supervision	0	4	0	4
	Community service order	0	1	0	1
	Fine	0	3	0	3
	Other proven Outcomes	0	1	0	1
2004	Imprisonment	0	339	1	340
	Home detention	0	18	0	18
	Periodic detention	0	62	0	62
	Suspended sentence with supervision	0	11	0	11
	Suspended sentence without supervision	0	6	0	6
	Community service order	0	2	0	2
	Bond with supervision	0	1	0	1

Appendix 6 Penalties for breach of suspended sentences

	Bond without supervision	0	1	0	1
	Fine	0	1	0	1
	Nominal sentence	0	1	0	1
2005	Imprisonment	0	365	0	365
	Home detention	0	24	0	24
	Periodic detention	0	88	0	88
	Suspended sentence with supervision	0	22	0	22
	Suspended sentence without supervision	0	18	0	18
	Community service order	0	2	0	2
	Bond with supervision	0	1	0	1
	Bond without supervision	0	3	0	3
	Fine	0	1	0	1
	Nominal sentence	0	1	0	1
	No conviction recorded	0	1	0	1
	Other proven Outcomes	0	2	0	2
2006	Imprisonment	0	342	0	342
	Control order	2	0	0	2
	Home detention	0	22	0	22
	Periodic detention	0	53	0	53
	Suspended sentence with supervision	0	13	0	13
	Suspended sentence without supervision	0	12	0	12
	Community service order	2	1	0	3
	Probation Order	1	0	0	1
	Bond with supervision	0	1	0	1
	Fine	0	2	0	2
	Nominal sentence	0	1	0	1
	Other proven Outcomes	0	4	0	4
2007	Imprisonment	0	384	0	384
	Control order	1	0	0	1
	Home detention	0	19	0	19
	Periodic detention	0	90	0	90
	Suspended sentence with supervision	0	12	0	12
	Suspended sentence without supervision	0	12	0	12
	Community service order	0	2	0	2
	Bond with supervision	0	2	0	2
	Bond without supervision	0	2	0	2
	Fine	0	3	0	3
	Conviction without penalty	0	1	0	1

Suspended Sentences

2008	Imprisonment	0	385	0	385
	Control order	5	0	0	5
	Home detention	0	27	0	27
	Periodic detention	0	93	0	93
	Suspended sentence with supervision	0	8	0	8
	Suspended sentence without supervision	0	13	0	13
	Community service order	0	1	0	1
	Bond with supervision	0	2	0	2
	Nominal sentence	0	2	0	2
	Other proven Outcomes	0	1	0	1
2009	Imprisonment	1	449	0	450
	Control order	27	0	0	27
	Home detention	0	20	0	20
	Periodic detention	0	76	0	76
	Suspended sentence with supervision	0	5	0	5
	Suspended sentence without supervision	0	7	0	7
	Bond with supervision	0	2	0	2
	Fine	0	3	0	3
	Dismissed with Caution	1	0	0	1
2010	Imprisonment	0	536	0	536
	Control order	81	0	0	81
	Home detention	0	29	0	29
	Periodic detention	0	82	0	82
	Intensive correction order	0	9	0	9
	Suspended sentence with supervision	2	12	0	14
	Suspended sentence without supervision	0	11	0	11
	Community service order	1	2	0	3
	Probation Order	1	0	0	1
	Bond with supervision	0	1	0	1
	Bond without supervision	0	1	0	1
	Fine	0	1	0	1
	Conviction without penalty	0	1	0	1

^ This table shows people whose most serious offence was a breach of a suspended sentence. It is possible that there are people, not appearing on this table, who were also found guilty of these offences.

If a person had a concurrent offence which was more serious than their breach of suspended sentence offence (i.e., the other offence received the more serious penalty) then they will not appear in this table.

Source: NSW Bureau of Crime Statistics and Research, Unpublished statistics (2011).