



The New South Wales Bar Association

10/275

4 August 2011

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

Dear Justice Cripps

Suspended Sentences

Thank you for your email dated 29 July 2011.

The New South Wales Bar Association (Association) appreciates the opportunity to submit its views on this issue.

Part 9 of the Consultation Paper on Suspended Sentences (Paper) invites submissions on 11 questions relating to the use and potential reform of legislative provisions relating to suspended sentences.

Generally, the Association supports the continued availability of suspended sentences and is of the view that the current provisions work well; striking a balance between a deterrent penalty and the creation of an option that, in appropriate circumstances, avoids the need for an offender to be exposed to full-time custody.

As regards the specific questions listed in Part 9 of the Paper, the Association says:

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

No. While such a sentencing option would give sentencing courts greater flexibility, the reintroduction of partially suspended sentences is likely to intensify the apparent trend towards the use of suspended sentences in place of appropriate community-based options. The existing power to reduce the non-parole period in 'special circumstances' is sufficient to ensure that offenders spend a period in full time custody followed by a period of supervision upon release.

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

The introduction of a component of community service (similar to the community service component of an Intensive Corrections Order, but without the home detention aspect of such an order) may enhance the deterrent effect of a suspended sentence and may in certain circumstances make a suspended sentence a more appropriate alternative to full time imprisonment.

If such a reform were enacted, close examination of corresponding breach provisions would also be required. Currently s 98 of the *Crimes (Sentencing Procedure) Act* is narrowly drawn, requiring revocation unless the breach is trivial or there are good reasons for not doing so. More onerous conditions are likely to increase the incidence of breach, which may result in unintended 'net widening' in terms of prison populations. Consideration should be given to conferring greater discretion on courts regarding revocation after breach.

3. *Should the term of imprisonment that may be suspended (currently a maximum of 2 years), be either increased or decreased? If yes, please indicate your reasons.*

No.

4. *Should the operational period, or the period for which a term of imprisonment may be suspended (currently also a maximum of 2 years), be either increased or decreased? If yes, please indicate your reasons.*

No.

5. *Should an application for a guideline judgement be made? Please indicate your reasons.*

No, there is no need for a guideline judgment. The applicable principles in relation to suspended sentences are reasonably clear, including those set out in the High Court in *Dinsdale v The Queen* (2000) 202 CLR 321. There does not need to be any fetter on judicial discretion in circumstances where a Court considers that a suspended sentence is appropriate.

6. *Is further legislative guidance required in relation to the factors that make a case inappropriate for suspension? If yes, what form should such legislative guidance take?*

No. It is submitted that the common law authorities provide sufficient guidance in this area (e.g. supply of prohibited drugs: *Day* (1998) 100 A Crim R 275, *Regina v Gu* [2006] NSWCCA 104 (nothing other than a full-time custodial sentence unless there are truly exceptional circumstances); dangerous driving causing death: *Whyte* (2002) 55 NSWLR 252, *Jurisic* (1998) 101 A Crim R 259, (1998) 45 NSWLR 209, *Carruthers* [2008] NSWCCA 59). If it is suggested by a party that a suspended sentence is not appropriate this can be raised at an appeal. It is noted that the authorities are augmented by the standard non-parole period provisions. However,

even when standard non-parole periods exist, the sentencing discretion may permit a suspended sentence in an appropriate case. See for example *R v NJK* [2011] NSWCCA 151, where in the unusual circumstances of that case a suspended sentence was found to be appropriate for an offence of Aggravated Indecent Assault.

7. *Do the current provisions relating to breaches of suspended sentences require reform? If yes, how? Should the discretion available to a court when addressing a breach of a suspended sentence be widened?*

No. Whilst it is acknowledged that the breach provisions are narrowly drawn, they significantly bolster the deterrent effect of the current suspended sentence regime in New South Wales. The experience of some members of the Bar Association is that minor breaches of the bond suspending the sentence will result in its revocation. However, if reform allowing more onerous conditions to be placed on suspended sentences (such as requiring the completion of community service) occurs, corresponding reform to the breach provisions should be considered.

8. *Is there a disparity between courts in relation to the availability of, and confidence in, intermediate sentencing options? If yes, please indicate:*

- a) The nature of the disparity; and*
- b) The nature of the reforms that you consider would address this disparity.*

The Association does not perceive any marked disparity between courts in relation to the availability of, and confidence in, intermediate sentencing options. However, the statistical trend away from other intermediate sentencing options (such as community service orders and section 9 bonds) and towards suspended sentences is of concern. This appears to be slightly more significant in Local Courts.

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

The Association does not see any clear need to reform the law in relation to intermediate sentencing orders such as supervised bonds and community service orders.

10. *Should NSW adopt a similar approach to Victoria in relation to strengthening available intermediate sentencing orders and gradually phasing out suspended sentences? Please indicate your reasons.*

The Association submits that the Victorian example should not be followed. Suspended sentences now represent an established and effective intermediate sentencing option. They are a valuable additional sentencing alternative to full time imprisonment.

11. Do you have any other comments in relation to the issues raised by the Terms of Reference (outlined at page 5)?

No.

Should you or your officers require any further information, please do not hesitate to contact the Association's Executive Director, Mr Philip Selth, on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



Alastair McConnachie
Deputy Executive Director