

Research on the Judiciary's View of Suspended Sentences

Lorana Bartels

PhD candidate, University of Tasmania; Research Fellow, Criminology Research Council¹

Introduction

In this paper I discuss some of the findings from my recently completed PhD, *Sword or Feather? The use and utility of suspended sentences in Tasmania*. The key questions I sought to answer in my thesis were:

- How are suspended sentences used by judges and magistrates?
- What is the process for imposing a suspended sentence?
- How effective are they as a specific deterrent or rehabilitative measure?
- How are breaches dealt with?

The aspect of my thesis I would like to talk about today is my findings from interviews with the Tasmanian judiciary on their use of suspended sentences. Geraldine Mackenzie pointed out in her presentation two years ago that ‘what judges think about sentencing and how they approach this task are largely missing links in sentencing research’.² To date, there have been only a handful of interviews with Australian judicial officers about sentencing and none specifically canvassing suspended sentences.³

¹ The views expressed in this paper do not necessarily reflect the views of the University of Tasmania or the Criminology Research Council. I am grateful to Professor Kate Warner, Terese Henning, Magistrate George Zdenkowski and Dr Julia Tresidder for their helpful comments on earlier drafts of this paper. For further details on my research, please contact me at lorana.bartels@aic.gov.au.

² Geraldine Mackenzie, *How Judges Sentence*, Federation Press, Sydney (2005), 2.

³ See David Indermaur, *Perceptions of Crime Seriousness and Sentencing*, Criminology Research Council, Canberra (1990); Rohan Bray and Janet Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in NSW*, Monograph Series, No 3, Judicial Commission of New South Wales, Sydney (1991); Ross Homel and Jeanette Lawrence, 'Sentencer Orientation and Case Details: An Interactive Analysis' (1992) 16 *Law and Human Behavior* 509; Austin Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making*, Cambridge University Press, Melbourne (1997); Patrizia Poletti, Donna Spears and David Span, *Magistrates' Attitudes to Drink-Driving, Drug-Driving and Speeding*, Monograph Series, No 14, Judicial Commission of New South Wales, Sydney (1997) and Mackenzie, *ibid*. For questionnaires on sentencing conducted with Australian judicial officers, see Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report 15 (Interim), Canberra (1980), Appendix B; Ivan Potas and Donna Spears, *Alcohol as a Sentencing Factor: A Survey of Attitudes of Judicial Officers*, Monograph Series, No 8, Judicial

I am now able to fill in some of the missing links on this issue, because I was fortunate enough to interview all six Supreme Court judges – and I believe represents the first study of its kind to canvass the views on sentencing of all members of a particular court. I also interviewed ten out of 12 magistrates, giving me a comprehensive view of the Tasmanian magistracy on suspended sentences.⁴

Interview questions

I developed a list of questions for a semi-structured interview with assistance from the Chief Justice of the Supreme Court and the Chief Magistrate, a copy of which is set out in the Appendix. The interviews lasted between 30 and 90 minutes (generally about an hour) and I asked the judges and magistrates their views on the following issues:

- the purposes and objectives of suspended sentences;
- the proper approach to imposing a suspended sentence;
- the application of these principles in practice;
- information and communication with offenders, the court and the public;
- the role of public opinion and the media;
- breaches of suspended sentences;
- partly suspended sentences; and
- recognizance release orders for Federal offenders.

Key interview findings

The following are some key findings from my interviews. At the end I will also discuss some of my other research findings. Firstly, although respondents were not expressly asked about abolishing suspended sentences, there was overwhelming support for their retention.

It emerged that is no single guiding objective for a suspended sentence, with five respondents referring to rehabilitation as the main objective, four referring to deterrence and a further four saying it was a combination of the two. There was strong support amongst both judges and magistrates for the view that a suspended sentence is at least as effective as immediate imprisonment in aiding rehabilitation and

Commission of New South Wales, Sydney (1994) and Katherine McFarlane and Patrizia Poletti, *Judicial Perceptions of Fines as a Sentencing Option – A Survey of NSW Magistrates*, Monograph 1, Sentencing Council, Sydney (2007).

⁴ Note that there is no intermediate court in Tasmania.

specific deterrence but suspended sentences were not considered particularly effective in terms of denunciation or general deterrence. In this context, it is also relevant to note that several judicial officers expressed their reservations about general deterrence as a sentencing objective.

Imposing the sentence

One of the key issues for my interviews was the process for imposing a suspended sentence. The main case on this issue is the High Court case of *Dinsdale*,⁵ where Kirby J, with whom Gaudron and Gummow JJ agreed, laid out the proper approach for imposing a suspended sentence, namely:

The starting point, given emphasis by the terms of s76(2) [of the Sentencing Act 1995 (WA)], is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a “soft option” when the court with the responsibility of sentencing is “not quite certain what to do”.⁶

Justice Kirby also explained that: ‘the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term. This means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender’.⁷

In order to analyse the thought processes involved in applying this test, I asked respondents ‘What is your reasoning process in deciding to impose a suspended sentence?’ It quickly became clear that there is far from universal application of the two-step process laid down in *Dinsdale*. The majority of respondents appeared not to adopt the reasoning in *Dinsdale*, instead relying on a more instinctive approach to determining the correct sentence. For example, one magistrate said, ‘Sometimes you go through an intellectual process, but mostly I think it just hits you. You hear the facts, the circumstances of the offence, and the offender, and it just hits you’.

⁵ *Dinsdale v The Queen* (2000) 202 CLR 321.

⁶ *ibid*, [79].

⁷ *ibid*, [84].

Five sentencers correctly applied the process laid down in *Dinsdale*, although two did not in fact refer to the case on this issue.⁸ One magistrate said:

This conduct requires a jail sentence, actual or suspended, so that's the first step of the reasoning process...And then it's: is a suspended sentence open, taking into account prospects of rehabilitation, the circumstances of the offender and the offence?...And if the answer is no, then I'll move on to – I suppose reluctantly – to finding that I'm left with actual jail.

Three sentencers referred to the High Court or *Dinsdale* when correctly applying the two-stage test, but somewhat intriguingly, appeared to be mistaken or uncertain about the interpretation of the High Court's decision. As one judge said, 'I suspect that I don't quite do a *Dinsdale*, in that I probably still break it up within the first question – is this jailable? Until I've answered that one, I don't go into the suspending'.

Finally, there were two sentencers whose approach could not be said to accord with the orthodox interpretation of *Dinsdale*, with one judge suggesting that 'the most serious crimes would get imprisonment with none of it suspended. Next worst, partially suspended, next worst wholly suspended plus community service order, next worst suspended sentence, about the same level as community service order'. With respect, it would seem that this is not a proper application of the High Court's two-stage test.

The foregoing comments suggest that the decision in *Dinsdale* is not well understood or applied by the Tasmanian judiciary. This finding is not entirely surprising, with my discussion in an earlier article⁹ indicating that courts around Australia have struggled with the paradoxical reasoning process required to impose a suspended sentence.

I also asked the judges and magistrates whether it would be appropriate to have a legislative provision within the Tasmanian *Sentencing Act 1997* which sets out that a suspended sentence may only be

⁸ In this context, it is somewhat surprising to note that in what is described as 'the only book that examines sentencing law in all Australian jurisdictions', Edney and Bagaric also omit any mention of *Dinsdale*. They correctly state the two-stage test, but refer instead to the English case of *R v Trowbridge* [1975] Crim LR 295: Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [13.3.2.1].

⁹ Bartels, Lorana, 'The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles' (2007) 31 *Criminal Law Journal* 113.

imposed if an unsuspended sentence of imprisonment would be appropriate in all the circumstances.¹⁰ This proposal was universally rejected by the judges, as they felt that this was already clear in the case law and there was no need for it to be enunciated in the legislation. The proposal was also regarded as unnecessary by most of the magistrates, with only two magistrates supporting the proposal. Notwithstanding the opposition to this proposal, the judicial comments elicited through my interviews have led the Tasmanian Law Reform Institute to suggest that ‘there is a good case for giving some legislative guidance as to when it is appropriate to impose a suspended sentence’, proposing that that guidance be given about the imposition of suspended sentences in a way that does not interfere with judicial discretion.¹¹

Increasing the term of the sentence

A key issue with suspended sentences is whether they cause net-widening and/or sentence inflation, which refers to the practice of increasing the term of a suspended sentence in order to reflect the fact that it is being suspended. This is precluded under the majority judgment in *Dinsdale*, which stipulates that the court must first set the term of the sentence and only then decide whether to suspend it, but may be implicitly permitted in the minority judgment of Gleeson CJ and Hayne J.

There were three general approaches here. The majority thought it was wrong in principle to extend the sentence. As one magistrate said, ‘I don’t know what you would be trying to achieve there, except to invite more ridicule on your head. To indicate that a suspended term of imprisonment is a feather duster. It’s a feather duster whether it’s 10 months or 30 months – and it’s a bigger feather duster!’ Others thought the key problem with extending the sentence is the risk of having an excessive sentence in the event of activation on breach which would ‘come back to haunt us’.

Finally, a handful of judicial officers acknowledged that they do at times extend the term of a sentence – albeit only to the extent of minor adjustments. One magistrate spoke of giving ‘a little bit around the edges, a little bit longer’, going so far as to say that ‘anyone who says that they haven’t taken [that] approach probably is not being utterly frank’.

Explaining the sentence

¹⁰ For examples of similar provisions, see *Sentencing Act 1991* (Vic), s 27(3), *Sentencing Act 1995* (WA), s 76(2) and *Sentencing Act 1995* (NT), s 40(3).

¹¹ Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008, 28.

When asked to what degree they thought it was necessary in their comments on passing sentence to set out the factors which led them to suspend the sentence, magistrates were more likely than judges to regard it as part of their judicial function to set out these factors in their reasons for sentence. The magistrates also expressed more support for explaining the significance of a suspended sentence to the offender, whereas judges seemed to think this was something that was self-evident. It is also interesting to note that the magistrates were more likely to suggest ways of improving the court's communication with offenders. In my view, in light of the fact that suspended sentences are commonly poorly regarded and understood, it may be appropriate for both courts to review this issue, in order to determine whether there are ways of enhancing the flow of communication with offenders and the public generally, without undermining judicial discretion and independence.

The role of public opinion

The role of public opinion in sentencing generally¹² and in relation to suspended sentences specifically is of course a significant – and complex – issue. There are numerous instances of the media describing suspended sentences as a 'let off', 'walking free', 'getting off' and so on.

The international research on public views of suspended sentences confirms these perceptions, with one study indicating that participants regarded a fine of \$250 as more severe than a six month suspended sentence, while a one year unsuspended sentence was seen as being more severe than a three year wholly suspended sentence.¹³ In a recent South Australian study, victims of crime ranked suspended sentence as the least severe community-based sentencing option, leading the study's authors to suggest

¹² See eg Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers' Bulletin* 1; Julian Roberts, 'Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002) 18, 26; David Indermaur and Lynne Roberts, 'Perceptions of Crime and Justice' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report*, UNSW Press, Sydney (2005) 141, 152; Mackenzie, n 2, Chapter 5; David Green, 'Public Opinion versus Public Judgment about Crime' (2006) 46 *British Journal of Criminology* 131 and Julian Roberts, 'Sentencing Policy and Practice: The Evolving Role of Public Opinion' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 15.

¹³ Leslie Sebba and Nathan Gad, 'Further Explorations in the Scaling of Penalties' (1984) 24 *British Journal of Criminology* 221, 231. The study sought rankings for 36 sentence types from police officers, probation officers, prisoners and students. There was unanimity in the rankings for the most severe and lenient sentences: death (1); imprisonment for life (2); \$50 fine (35); \$10 fine (36).

that ‘comments from victims of crime...provide further indication that suspended sentences are viewed as “no punishment’ at all”’.¹⁴

In their interviews with me, the overwhelming majority of judges and magistrates also felt that suspended sentences were very poorly regarded by the public, but there was a division of opinion between the courts as to whether public opinion influenced their decision-making – eight out of the 10 magistrates were of the view that public opinion was irrelevant to the task before them and did not influence their decision-making. All the judges, by contrast, appeared to consider public opinion of significance to their work in general, although not in individual cases.

The fact that there are differences in considering the relevance of public opinion to judicial decision-making is not entirely surprising, for as the Chief Justice of the High Court of Australia has noted:

What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with? We live in a multicultural society that takes pride in its diversity. That includes diversity of values. Whose values should we know and reflect? If the values to which we respond are known common values, that is one thing. On the other hand, if different judges respond to different values, does that mean that the outcome of a case will depend on which judge is appointed to hear it?¹⁵

It is also relevant to note that although most respondents suggested that there was nothing the court could do to improve suspended sentences’ media image, there was a general call for more accurate media reporting. To this end, some advocated the appointment of a media liaison officer.

Breaches

Another key issue in relation to suspended sentences is the appropriate approach for dealing with breaches. On the one hand, the credibility of the suspended sentence and sentencing as a whole would seem to be dependent on predictability and sentences meaning what they say they mean. On the other hand, there are also powerful arguments for discretion and flexibility on breach. Excessively strict

¹⁴ Jenny Pearson and Associates Pty Ltd, *Review of Community Based Offender Programs: Final Report*, Justice Strategy Unit, Attorney General's Department (SA), Adelaide (1999), 40, discussed in Arie Freiberg, *Pathways to Justice: Sentencing Review*, Department of Justice, Melbourne (2002), 136, fn 139.

¹⁵ Chief Justice Murray Gleeson, 'Out of Touch or Out of Reach?' (2005) 7 *The Judicial Review* 241, 241.

enforcement of the breach process may trigger high numbers of breach hearings, which may in turn undermine sentencers' confidence in the sanction. It emerged from the interviews that there is very little information available on breaches of suspended sentences, and most respondents were keen to see more information of this nature.

Unlike most Australian jurisdictions, there is no presumption of activation on breach. Nevertheless, four judges out of the six, as well as three magistrates, indicated that their general position was that breached suspended sentences would generally be put into effect. When asked whether there should be a broad discretion, narrow discretion or no discretion to order a sentence to take effect in the event of breach, five out of the six judges and nine out of the ten magistrates wanted to retain the current position of broad discretion. However there seemed to be a misconception amongst some magistrates about the state of the law in this regard, with one magistrate erroneously thinking that there is currently a presumption of activation. Notwithstanding the general lack of support expressed for restricting the discretion on breach, the Tasmania Law Reform Institute has recently proposed that there be a statutory presumption in favour of activation unless the court decides it would be unjust to do so.¹⁶

Reform

When asked about any desired legislative, administrative or judicial changes in relation to suspended sentences, respondents indicated a generally high level of satisfaction with the present system. There was support, however, for greater judicial guidance for magistrates, better resourcing and more thorough monitoring and management of orders.

Conclusion

I would like to conclude this discussion by referring to the following quote from Andrew Ashworth:

the social importance of sentencing is a powerful argument in favour of careful research. More ought to be known about the motivation of judges and magistrates. Such knowledge would assist in the formation of sentencing policy, and might also help to extend a form of accountability into this sphere of public decision-making.¹⁷

¹⁶ Tasmania Law Reform Institute, n 11, 31.

¹⁷ Andrew Ashworth, 'Role of the Sentencing Scholar' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford (1995) 251, 263.

The interviews I conducted with Tasmania's judges and magistrates are a significant contribution to lifting the veil on judicial thinking about a particularly controversial sentencing option and reinforce the importance of research of this nature. In particular, several of my findings have already influenced the Tasmania Law Reform Institute in its recommendations and will hopefully thereby contribute to a more effective use of suspended sentences in Tasmania and Australia generally.

Finally, I would like to point to some other aspects of my thesis in order to place my interview findings in their proper context. My thesis also involved:

- A quantitative analysis of all sentences imposed in the Supreme Court over a two-year period and all sentences imposed in the Magistrates' Court in a one-year period, analysing sentencing outcomes by age, gender, offence type, prior criminal record and judicial officer imposing the sentence. Data on frequency of use, the length of sentences and operational periods is presented and the incidence of possible sentence inflation and net-widening examined.
- A qualitative analysis of judges' sentencing remarks in 351 suspended sentence cases to consider the relevance of a range of sentencing factors to the decision to suspend a sentence. In particular, factors relating to the offender; factors relating to the offence; the response to the charges and the effect of the offence and sanction are examined. The importance of reasons for sentence is discussed and cases which suggest an improper reasoning process was applied in exercising the discretion are reviewed.
- A reconviction analysis for offenders originally sentenced in the Supreme Court. This revealed that wholly suspended sentences had the best reconviction rates (42%), shortly followed by partly suspended sentences (44%), when compared with unsuspended sentences (62%) and non-custodial orders (52%). This was maintained even after controlling for sentencing judge, age group, gender, prior record and offence type and seriousness. Changes in the seriousness and frequency of offending are examined and the relevance of pseudo-reconvictions discussed. Reconviction outcomes for suspended sentences imposed in combination with other orders are also considered.
- A breach analysis for 310 offenders on a partly or wholly suspended sentence imposed in the Supreme Court. This study revealed that 126 offenders (41%) who received a suspended sentence breached it by committing one or more imprisonable offences during the operational period of the sentence. Somewhat staggeringly, however, only 7 of these offenders (less than

6%) had breach action taken against them. Furthermore, the sentence was activated in whole or part in only 4 out of the 7 cases, giving an activation rate of only 3%. I also discuss the judicial comments on passing sentence in the cases where breach action was taken in an attempt to develop a clearer understanding of the applicable principles on breach proceedings.

Thank you.

APPENDIX: Questions for interviews with judges and magistrates

[Unless otherwise stated, these questions relate to wholly suspended sentences]

General issues

1. What do you consider to be the most important objective of suspended sentences?
2. Do you think that a suspended sentence can be (as) effective (as immediate imprisonment) in achieving the following sentencing objectives? Why or why not?
 - Denunciation;
 - Deterrence;
 - Rehabilitation; and
 - Proportionality.
3. What is your reasoning process in deciding to impose a suspended sentence?
4. What sort of cases would you regard as most appropriate for the imposition of a suspended sentence? Can you give an example of a case where, in your view, a suspended sentence would be the *only* appropriate penalty?
5. Are there any circumstances that would make a case particularly *inappropriate* for a suspended sentence?

Information and communication

6. To what degree do you think it is necessary in your comments on passing sentence to set out the factors which led you to suspend the sentence?
7. How do you attempt to communicate the significance of a suspended sentence (as a sentence of imprisonment) to an offender? Do you think there are any ways of improving the court's communication with offenders in this regard?

8. Do you receive any information/feedback on the success rate of suspended sentences? If so, what is it and is it adequate? Do you think your use of suspended sentences as a sentencing option would change if you had more information about the efficacy of a suspended sentence *in each case*?

Combination orders

9. How do you regard combination orders, ie attaching CSO, probation, supervision or fines to a suspended sentence? Are there certain types of cases where this is especially appropriate or inappropriate?

Special categories of offenders

10. It has been suggested that suspended sentences can be especially useful for certain offenders, for example, those with substance abuse issues, mental illness or gambling problems. What are your views on this issue? Can you think of any ways the efficacy of suspended sentences could be enhanced in such cases?

Suspended sentences and imprisonment

11. In some jurisdictions, the relevant legislation provides that a suspended sentence may only be imposed if an unsuspended sentence of imprisonment would be appropriate in all the circumstances. Do you think it would be useful to have a statement to that effect in the *Sentencing Act 1997* (Tas)?
12. Some judges have indicated that one of the major reasons they impose a suspended sentence instead of a sentence of immediate imprisonment is in order to minimise offenders' exposure to the adverse effects of prison. How does such thinking play a part in your own sentencing decisions?
13. The majority in *Dinsdale* (2000) 202 CLR 321 held that a sentencer must first determine that a sentence of imprisonment – and not some lesser sentence – is called for, and only then determine whether the term of imprisonment is to be suspended. By contrast, Gleeson CJ and Hayne J in the minority held that the sentencing judge 'must first decide the kind of punishment to be imposed'.

Inferentially, the latter approach would allow a sentencer to increase the term of the sentence to reflect the fact that it has been suspended. What are your views on this division of opinion? Would it sometimes be appropriate to extend the term of the sentence to reflect the fact of its suspension?

Public opinion and the media

14. What do you think public attitudes are to suspended sentences? Do you ever consider the impact a suspended sentence may have on public opinion? If so, does this influence your decision-making?
15. The media have described suspended sentences as ‘walking free’, ‘getting off, and ‘avoiding prison’. What, if anything, do you think can be done to improve the image of suspended sentences in the media? Do you think that the name is part of the problem?

Powers in relation to breaches

16. When an offender is brought back to court for a breach, what factors influence your decision whether to order that the sentence take effect?
17. Should there be a broad discretion, narrow discretion or no discretion to order a sentence to take effect in the event of breach?
18. In some other jurisdictions, the court has the power to initiate action in relation to a suspected breach of its own motion. Do you think it would be beneficial for Tasmanian judicial officers to have such a power?

Partly suspended sentences

19. How useful do you find partly suspended sentences? In what sort of cases are they especially appropriate/inappropriate?
20. In *Hawkins* [2004] TASSC 55, Slicer J commented that ‘The suspension of portion of a sentence allows for certainty in the date of release and enables the Court to retain power for

future transgressions and, to some extent, provide a future form of control.’ Evans J however suggested that ‘When paying regard to matters such as the reform prospects of the recipient of a long sentence, the preferable course is to fix a parole eligibility period’.

How do you see the interaction between non-parole periods and partly suspended sentences? Are there certain cases where you prefer one over the other? Why?

Federal Offenders

21. What comments, if any, do you have regarding the provisions for recognizance release orders for federal offenders in Part IB *Crimes Act 1914* (Cth)?

Reform

22. Finally, what legislative, administrative or judicial changes would you like to see in relation to the use of suspended sentences?