

Suspended Sentences And Public Confidence In The Justice System¹

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This paper examines the ambivalent nature of suspended sentences and public reactions to them. In Australia and elsewhere, they have created confusion, have been in and out of political and judicial favour and have been repeatedly modified. The paper discusses the Victorian Sentencing Advisory Council's Review of suspended sentences, with particular reference to public perceptions of the sentence and the Council's various proposals. It examines in particular four issues relating to this sanction: (1) ostensible vs actual punishment; (2) the severity of punishment; (3) truth in sentencing and the nature of substitutional sanctions; and (4) the appropriateness of the sanction for specific offences. The paper concludes with a discussion as to whether public perceptions matter in the broader sentencing context.

A VOLATILE AND PARADOXICAL SANCTION

Few sanctions have divided communities as strongly as suspended sentences. Suspended sentences polarise opinion and provoke high emotion. Views are widely divergent and strongly held. Unlike sanctions such as imprisonment, fines, probation and community service, suspended sentences have come in and out of favour in many jurisdictions over time, partly for criminological issues (such as their impact upon prison populations), but often because of public perceptions about their role in the sentencing hierarchy.

The suspended sentence is a sentence of imprisonment which is imposed but not executed, served in the community, with or without supervision and with various degrees and levels of conditionality.⁴ It can vary in length, in its operational period,⁵ the options available to a court on breach and as to whether it can be wholly or partly suspended.

¹ This paper is drawn from various Sentencing Advisory Council publications including: Sentencing Advisory Council, *Suspended Sentences: Discussion Paper* (2005); Sentencing Advisory Council, *Suspended Sentences: Interim Report* (2005); and Sentencing Advisory Council, *Suspended Sentences: Final Report Part 1* (2006). The views expressed in this paper are those of the authors alone.

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⁴ We make a distinction here between a suspended sentence of imprisonment and a deferred sentence. In the former case, a conviction has been recorded and the sentence of imprisonment imposed; in the latter, the court does not impose sentence, but can do so at a later date.

⁵ The period over which the sentence is suspended, which may be different from the period actually suspended: for example a six month sentence may be suspended for a two year period, during which the offender is at risk of the sentence being executed.

Dating back to late nineteenth century Europe⁶ it was adopted in various parts of the common law world in different guises, primarily aimed at keeping first, or minor offenders, out of prison. Its purpose was rehabilitative rather than punitive. In various guises, it is available in most European jurisdictions such as Holland⁷, Germany⁸, Finland⁹, the United Kingdom¹⁰, the United States, Australia, and until recently in New Zealand¹¹, as well as Israel¹² and many other countries.

A chequered history

In the United Kingdom, suspended sentences were introduced in 1967, after being rejected by two reviews in 1952 and 1958.¹³ They were modified in 1982 by the introduction of partially suspended sentences,¹⁴ severely restricted in 1992¹⁵ and expanded again in 2003 (though not coming into operation until 2005)¹⁶ and, in the

⁶ Marc Ancel, *Suspended Sentence: A Report Presented by the Department of Criminal Science of the Institute of Comparative Law, University of Paris to the Cambridge Institute of Criminology* (1979) 2-4.

⁷ Introduced in 1915. See Peter J. Tak, 'Sentencing and Punishment in the Netherlands' in Michael Tonry and Richard S. Frase (eds.) *Sentencing and Sanctions in Western Countries* (2001) 162.

⁸ In Germany suspended sentences were introduced in 1953 and currently around two-thirds of all prison sentences are suspended. Bernd Dieter Meier, 'Alternatives to Imprisonment in the German Criminal Justice System' 16 *Federal Sentencing Reporter* 222, 227. See also Thomas Weigend 'Sentencing and Punishment in Germany' in Tonry and Frase (eds.) (2001), above n 7.

⁹ Tapio LappiSeppala, 'Sentencing and Punishment in Finland: The Decline of the Repressive Ideal' in Tonry and Frase (eds.) (2001), above n 7.

¹⁰ See Anthony Bottoms, 'The Suspended Sentence in England, 1967-1978' (1981) 21 *British Journal of Criminology* 1; David Thomas 'Developments in Sentencing 1974-1973' (1974) *Criminal Law Review*, 685.

¹¹ Introduced in 1993. See Mark Brown and Warren Young, 'Recent Trends in Sentencing and Penal Policy in New Zealand' (2000) 10 *International Criminal Justice Review* 1.

¹² Introduced in 1954. See Shlomo Shoham and Moshe Sandberg, 'Suspended Sentences in Israel: An Evaluation of the Preventive Efficacy of Prospective Imprisonment' (1964) *Crime and Delinquency* 74; Leslie Sebba, 'Penal Reform and Court Practice: The Case of the Suspended Sentence,' in Israel Drapkin (ed.) *Scripta Hierosolymitana*, 2 *Studies in Criminology* 133.

¹³ The 1952 report concluded: 'The suspended sentence is wrong in principle and to a large extent impracticable. It should not be adopted, either in conjunction with probation or otherwise': *Advisory Council on the Treatment of Offenders, Alternatives to Short Terms of Imprisonment* (1957) Appendix D, [23(b)].

¹⁴ This new power was introduced by the *Criminal Law Act 1978* (UK), but did not come into force until 1982. This was possibly due to concerns by the Home Office that 'there can be no certainty [it] would achieve any reduction in numbers in custody, and would not confer any advantage in the treatment of individual offenders': Home Office, *Review of Parole in England and Wales* (1981) [58].

¹⁵ The power to partly suspend a prison sentence was removed, while the use of wholly suspended sentences was confined to cases where 'exceptional circumstances' could be shown; *Criminal Justice Act 1991* (UK) s 5(1).

¹⁶ The new *Criminal Justice Act 2003* (UK) suspended sentences provisions (ss 189-194) came into operation on 4 April 2005 (The *Criminal Justice Act 2003* (Commencement No.8 and Transitional and Saving Provisions) Order 2005 (UK), SI 2005/950).

light of serious concerns about their use, the government is now considering removing the power to make a suspended sentence order altogether from magistrates.¹⁷

Canada introduced 'conditional sentences of imprisonment', a form of suspended sentence, in 1996¹⁸ and then passed legislation in December 2007 designed to limit their use in relation to serious offences.¹⁹ New Zealand abolished suspended sentences in 2002²⁰ and considered, and rejected, their re-introduction in 2006–7.²¹

In Australia, suspended sentences are available in all jurisdictions, in a variety of forms. In Victoria, they were introduced in 1915, disappeared in 1958, re-introduced in 1986, modified in 1991 and again in 1997, ordered to be reviewed in 2005, and recommended for abolition and modified in 2006.²²

The suspended sentence is clearly an unusual, volatile and unstable element in the periodic table of sentencing. It has been described as paradoxical²³ and confusing.²⁴ O'Malley's description of contemporary penal policy as 'volatile and contradictory' is particularly apt in this context.²⁵ There are a number of conceptual, legal, criminological and perceptual reasons for this. English sentencing expert, David Thomas observed:

The suspended sentence has clearly caused great confusion to all concerned with it—to the sentencer contemplating its use, the offender often—despite the statutory incantation—unable to grasp its implications, and the population at large puzzled by its intended message.²⁶

¹⁷ Jamie Doward, 'Magistrates' Jailing Powers to be Slashed', *The Observer*, 24 June 2007 <<http://www.guardian.co.uk/prisons/story/0,,2110243,00.html>> at 27 June 2007.

¹⁸ Conditional sentences were introduced by Bill C-41, now S.C. 1995, c. 22, proclaimed in force on 3 September 1996, amending the *Criminal Code*, R.S.C. 1985, c. C-46. Amendments to the conditional sentencing regime were made by Bill C-51, *An Act to amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act*, S.C. 1999, c. 5. The relevant part (clauses 39-42) came into force on 1 July 1999. The conditional sentence is a hybrid of suspended sentences, intensive supervision and probation orders.

¹⁹ Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment), now S.C. 2007, c. 12, assented to on 31 May 2007 and in force in December 2007, amending the *Criminal Code* R.S.C. 1985, c. C-46. The amendments to s 742.1 of the *Criminal Code* remove the possibility of a conditional sentence being imposed for a 'serious personal injury offence' (including sexual offence) as defined in s 752 of the *Criminal Code*, a terrorism offence or a criminal organisation offence (both as defined in s 2 of the *Criminal Code*) prosecuted by way of indictment that carries a maximum term of imprisonment of 10 years or more.

²⁰ *Sentencing Act 2002* (NZ).

²¹ See further New Zealand Parliament, Criminal Justice Reform Bill: Explanatory Note—General Policy Statement <<http://www.knowledge-basket.co.nz/gpprint/docs/bills/20060931.txt>> at 21 January 2008.

²² Sentencing Advisory Council, *Suspended Sentences Final Report Part 1* (2006).

²³ Trevor Sanders and Julian V. Roberts, 'Public Attitudes Toward Conditional Sentencing: Results of a National Survey' (2000) 32 *Canadian Journal of Behavioural Science* 199.

²⁴ Thomas (1974), above n 10.

²⁵ Pat O'Malley, 'Volatile and Contradictory Punishment' (1999) 3(2) *Theoretical Criminology* 1975.

²⁶ Thomas (1974), above n 10, 688.

The legal and conceptual issues relate to whether they are just or proportionate punishment, whether they are equivalent to executed sentences of imprisonment, whether they are appropriate for some categories of offence or offender, and whether they in fact divert people from prison or, conversely, widen the carceral net.²⁷

This paper reports on an inquiry conducted by the Victorian Sentencing Advisory Council into suspended sentences as a result of a public outcry over a suspended sentence of imprisonment for rape (*Sims* [2004] VSCA 129) that resulted in a protest by several thousand people on the steps of the Victorian Parliament House with calls for mandatory minimum sentences and the restriction or abolition of suspended sentences. It explores the relationship between suspended sentences and public opinion and asks whether such sentences undermine public confidence in the justice system. This issue is not one that is only debated in Australia. A Google search of the words ‘suspended; sentences; confidence; justice’ produced 906,000 hits with similar stories about anger, concern, fury or dismay about their imposition in particular cases being found in China, Pakistan, South Africa, the United Kingdom, New Zealand and elsewhere.

The issue is real, endemic and important and concerns not only the relationship between the courts and the public but the relationships between different forms of punishment, between punishment and offenders and between the various purposes of punishment.

PUBLIC PERCEPTIONS, PUBLIC CONFIDENCE AND SENTENCING

The Victorian Sentencing Advisory Council (SAC) was established in 2004 to ‘bridge the gap between the community, the courts and government by informing, educating and advising on sentencing issues’ and was a product of a reformist government which was keen to project itself as responsive to community concerns.²⁸ The Council has a legislative mandate to ‘gauge public opinion’ and involving the community in the development of sentencing policy was one of the reasons that the Council was established. As Sanders and Roberts have noted, public attitudes to sentencing in general, and to specific forms of sentences are crucial for a number reasons, first because one of the fundamental purposes of sentencing is to contribute to respect for the law,²⁹ secondly, because judges are sensitive to public perceptions³⁰ and thirdly, because adverse public opinion can force changes to the law.

Public confidence in the courts is important. Public opinion defines the boundaries of what is possible in public life and a loss of confidence can result in very poor decision-making by legislators. The impact on sentencing law of public opinion, mediated or unmediated, is clearly evident across many jurisdictions where laws such

²⁷ Lorena Bartels, ‘The Use of Suspended Sentences in Australia: Unsheathing the Sword’ (2007) 31 *Criminal Law Journal* 113.

²⁸ Arie Freiberg, ‘The Victorian Sentencing Advisory Council: Incorporating Community Views into the Sentencing Process’ in Arie Freiberg and Karen Gelb (eds.) *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 148.

²⁹ Saunders and Roberts (2000), above n 23. See also Julian V. Roberts, ‘Public Opinion and Sentencing Policy’ in Sue Rex and Michael Tonry (eds.) *Reform and Punishment: The Future of Sentencing* (2002) 18.

³⁰ A Canadian survey of judges found that 80 per cent of the judges stated that they considered the views of the public before imposing a conditional sentence: Julian V. Roberts, Anthony Doob and Voula Marinos, *Judicial Attitudes towards Conditional Sentences of Imprisonment* (2000). See also Roberts in Rex and Tonry (eds) (2002), above n 29, 23.

as sex offender registration and community notification schemes, ‘three strikes and you’re out’ provisions, and increased mandatory minimum and maximum sentences have been introduced as legislative responses to a perceived punitive public.

Sentencing is a process of communication, to offenders, victims and the public.³¹ Amongst the various aims of sentencing—retribution, deterrence, rehabilitation and incapacitation—sits that of ‘denunciation’, either explicitly as in s. 5(1)(d) of the *Sentencing Act 1991* (Vic) or implicitly. It has been described in the following terms:

The purpose of denunciation is a symbolic one, often linked with retributivism, by which the court conveys a message from the community to the offender that the conduct is unacceptable. Denunciation, as an expression of public condemnation, has an important role in public confidence in the criminal justice system: justice being seen to be done.³²

In relation to concerns over suspended sentences, the SAC observed:

Perceptions of sentencing are important not only from a public confidence perspective, but also because of the nature of sentencing. Sentencing is not just about punishment, rehabilitation and community protection, but also performs important symbolic and communicative functions. In sentencing an offender, courts censure the offender’s conduct, signifying the wrongfulness of his or her actions, and through the sentence passed, endeavour to deter the offender and others from committing similar offences in the future. The effectiveness of this symbolic and communicative endeavour depends on offenders and the broader community understanding what the court, in sentencing, is setting out to convey. It could be argued that confusion over what a suspended sentence is, and where it should sit in the sentencing hierarchy, is evidence of the order’s failure to satisfy this central purpose.³³

A PUBLIC OUTCRY

Almost as soon as the SAC had been established a case arose which provoked a public outcry. A young man had been convicted of one count of aggravated burglary, two counts of lingual and digital rape and one count of indecent assault and was given a sentence of two years and nine months’ imprisonment suspended for three years which was decried by the popular press. There was public clamour for a more severe sentence. On appeal against the leniency of the sentence (*Director of Public Prosecutions v Sims* [2004] VSCA 129), the Victorian Court of Appeal upheld the sentence by a 2-1 majority. The political response was a reference to the SAC under s.108C(1)(f) of the *Sentencing Act 1991* (Vic), requesting advice on the current use of suspended sentences and whether ‘reported community concerns about their operation’ indicated a need for reform, and if so, what those reforms might be. The Attorney expressed particular interest in the views of the community, including victims of crime, on this issue. This was significant not only because of the overt reference to the community’s angst over what was perceived by some to be an inadequate sentence, but the reference to the Council was consistent with its role as a

³¹ R A Duff *Punishment, Communication and Community* (2002); Sue Rex, ‘Re-inventing Community Penalties: The Role of Communication’ in Tonry and Rex (eds.) (2002), above n 29.

³² Geraldine Mackenzie, *How Judges Sentence* (2005) 113.

³³ Sentencing Advisory Council (2006), above n 22, [3.13].

mechanism for incorporating community views into the development of sentencing policy.

The political potency of sentencing decisions was also evident in Australia in late 2007 in relation to suspended sentences of six months that were imposed by the Queensland District Court in the Cape York area on three Aboriginal men convicted of rape. A national outcry ensued which received international coverage.³⁴ Public and political concern has resulted in an application for an extension of time to appeal against the leniency of the sentences imposed and has sparked a review of all sentences imposed in Cape York communities over the previous two years.³⁵

The Council's response

The Council's response to the Attorney's reference involved extensive community and professional consultation, including meetings with victims' groups, which resulted in the publication of an Information Paper in February 2005, a Discussion Paper in April 2005 and an Interim Report in October 2005. After extensive community debate on this report, the Council released Part I of its Final Report in May 2006 that dealt with restrictions on the use of suspended sentences but left open the question of wider reforms to the sentencing options currently available to the courts. The Part 1 recommendations were, to a large extent, enacted in the *Sentencing (Suspended Sentences) Act 2006* (Vic). Part 2 of the Final Report is due for release in 2008.

Public perceptions

The Council's extensive consultations provided it with a reasonable, though clearly not perfect, insight into some of the views of the public and the profession in relation to suspended sentences. It is always dangerous and frequently misleading to talk about 'public attitudes' or perceptions. Who is the public? How are they represented? How informed are their views? Should anyone care? In this case, it was clear that the Attorney-General cared, at least enough to refer the matter to the newly established Council.

The Council's strategy in this reference was to provide those members of the community consulted with as much information as was possible about the nature of suspended sentences and their use, in Victoria and elsewhere in the world. It was based on the premise that if decisions were to be made, they should be made on an informed basis, and this applied as much to Council members as to the broader and professional publics.

The public consultation process involved community forums in urban and regional areas, a series of specialist roundtables focusing on legal issues, issues for offenders with a mental illness and/or intellectual disability, offenders with drug and alcohol problems, young offenders, and offenders convicted of a sexual offence, focus groups and workshops with victims of crime and individual meetings. Submissions were also invited from the public.

³⁴ See for example, 'Rape Case Ruling Shock Australia' *BBC News*, 10 December 2007 <news.bbc.co.uk/2/hi/asia-pacific/7136269.stm> at 21 January 2008.

³⁵ 'Cape York Sentences to be Reviewed After Rape Judgement', *ABC News*, 12 December 2007 <www.abc.net.au/news/stories/2007/12/10/2114704.htm> at 21 January 2008.

Interestingly, and despite the views of the tabloid press, the majority of those who made submissions and participated in consultations favoured the retention of suspended sentences. However, a small number of those consulted and those who made submissions supported the abolition of suspended sentences as part of a call for mandatory sentences or harsher punishments or on the basis that other sentencing options could appropriately be used in their place. Despite support for the retention of suspended sentences, it became clear there was a level of dissatisfaction with their current status and operation. Some of the themes emerging from submissions and consultations were:³⁶

- a wholly suspended sentence of imprisonment as a ‘custodial order’ or as a ‘term of imprisonment’ is a fiction— ‘prison’ should mean ‘prison’ (that is, a straight term of immediate imprisonment);
- the gap between an order to serve a straight term of imprisonment and a sentence of an equivalent term of imprisonment which is wholly suspended is too wide—a suspended sentence should have more of a punitive element;
- courts should be permitted to attach conditions to suspended sentence orders;
- courts use suspended sentences inappropriately in some cases—imposing a suspended sentence where a non-custodial penalty, such as a community-based sentence, may have been justified (‘net-widening’); and
- wholly suspended sentences are inappropriate for serious crimes of personal violence, including rape, sexual assault and intentionally or recklessly causing serious injury.

PUNISHMENT PARADOXES AND CONTRADICTIONS

Punishment is a complex concept and process. As Marinos argues, it is multi-dimensional and contextual.³⁷ The idea that a sentence that does not result in immediate custody can be readily substituted for one that does is simplistic and lacks credibility. The idea that a legislative statement of equivalence invests the sanction with the authority it lacks is fatuous. Freiberg has argued that punishment must be understood beyond its legal/rationalist frame and must take into account the affective or emotional dimensions of crime and punishment.³⁸ Thousands of citizens do not march in the streets because they wish to have a calm, cerebral, public debate about the distinctions between different forms of custody, but because they feel strongly that some injustice has occurred:

[S]uccessful penal reform must take account of the emotions people feel in the face of wrongdoing. Further, successful reform must take into account changes

³⁶ There are other issues in the literature and the news in relation to the operation of suspended sentences which can erode public confidence: for example, their use in relieving pressures on over-crowded prison systems when otherwise an executed sentence might have been warranted; their differential use in relation to white- and blue-collar offenders and others (see Celesta A. Albonetti, ‘The Avoidance of punishment: A Legal–Bureaucratic Model of Suspended Sentences in Federal White–Collar Cases Prior to the Federal Sentencing Guidelines’ (1999) 87(1) *Social Forces* 303). These were not the issues detected in Victoria.

³⁷ Voula Marinos ‘Thinking about Penal Equivalents,’ (2005) 7(4) *Punishment and Society* 441.

³⁸ Arie Freiberg, ‘Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice’, 3(2) *Punishment and Society* 265.

in the public ‘mood’ or emotions over time and be sensitive to different political and social cultures.³⁹

In our view, there are four main perceptual issues that render the suspended sentence problematic. First, the sentence is seen as misleading or untruthful; secondly, the gap between legislative/judicial perceptions and community perceptions of the nature of the sanction is too large; thirdly, the punitive content of the sentence is regarded by the public as inadequate; and fourthly, it is regarded as inappropriate for some forms of criminal behaviour.

Truth in sentencing: substitutional sanctions

The term ‘truth in sentencing’ has acquired various meanings over its relatively short life. Originally referring to the difference between the sentence imposed by a court and the time actually served by the offender, and resulting in many jurisdictions in the abolition of either or both remissions and parole,⁴⁰ it can also refer to the gap between statutory maximum penalties and the sentences imposed by the courts and to ‘life’ sentences which allow offenders to be released before their death.⁴¹ However, ‘truth in sentencing’ can also mean that the nature and form of the sentence should be honest and transparent. The suspended sentence is vulnerable on this ground because, while purporting to be a sentence of imprisonment, the public sees the offender ‘walking free’.

In Australia, suspended sentences, like a number of similar orders, are ‘substitutional’ sanctions in that they allow courts to replace different forms of sanction for an imposed sentence of imprisonment. A ‘substitute’ sentence is one where the court which imposes a sentence of imprisonment is empowered to alter the form of imprisonment. A ‘substitutional’ sanction can be distinguished from an ‘alternative’ to imprisonment in that the latter does not require a sentence of imprisonment to be imposed first. Rather, the sentencer is given a choice between a custodial and non-custodial sentence. The difference is subtle but crucial.

The notion of ‘custody’ is itself complex. It may be notional or actual and allows for the possibility of different degrees of physical restraint and control over a person.⁴² In Victoria there are eight different forms of ‘custodial’ sentences available to courts under Part 3, Division 2 of the *Sentencing Act 1991* (Vic) when sentencing adult offenders: (1) imprisonment; (2) indefinite sentences of imprisonment; (3) combined custody and treatment orders; (4) drug treatment orders; (5) home detention orders; (6) intensive correction orders; (7) partially suspended sentences of imprisonment and (8) wholly suspended sentences of imprisonment.

Substitutional sentences are problematic for two reasons. First, they require a nexus between the sanction and imprisonment, and, although legislation effectively treats the two forms of sanction as equal, in both the judicial and the public mind, they are not equivalent. Secondly, because they are not regarded as equal, when they are imposed in place of an executed sentence of imprisonment, the offender is regarded as having ‘escaped’ or ‘avoided’ imprisonment. More tellingly, the law is seen to be

³⁹ Ibid 275.

⁴⁰ Arie Freiberg, ‘Truth in Sentencing?: The Abolition of Remission in Victoria’ 16 *Criminal Law Journal* 165.

⁴¹ Roberts (2002), above n 29, 33.

⁴² Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) [9.101].

mendacious, hypocritical or untruthful.

The SAC took the view that the use of orders substituted for immediate imprisonment should be kept to a minimum. In its view these sentences result in net-widening from other lower-level orders, and, due to their legal status as ‘sentences of imprisonment’ and stringent breach provisions, place offenders who might otherwise have received a less severe sentence at real risk of serving time in prison. In the Council’s view the best response is to break the nexus between imprisonment and the substituted sanction so that the latter becomes a sanction in its own right. Home detention, for example, should be just that, a sentence of home detention, and should not purport to be a form of imprisonment. Though susceptible to the criticism that it might be an inadequate penalty for a particular crime, it is not open to the criticism that it purports to be what it is not, a sentence of imprisonment.

Ostensible vs actual punishment

Sentencing legislation is clear that suspended sentences at law are intended to be equivalent to executed sentences of imprisonment. Judicial perceptions and pronouncements reinforce the view that suspended sentences are intended to constitute a significant punishment. Chief Justice Bray, in taking this view, stated in *Elliott v Harris (No 2)*:⁴³

... far from being no punishment at all, a suspended sentence is a sentence of imprisonment with all the consequences such a sentence involves on the defendant’s record and his future, and it is one which can be called automatically into effect on the slightest breach of the terms of the bond during its currency. A liability over a period of years to serve an automatic term of imprisonment as a consequence of any proved misbehaviour in the legal sense, no matter how slight, can hardly be described as no punishment.⁴⁴

For sentencers, a suspended sentence has the dual advantage of allowing the court to mark the seriousness of the offence, while permitting a more merciful outcome than a term of imprisonment. For this reason, Bottoms has suggested that:

[The suspended sentence] has acquired ... a special psychological attraction to sentencers in that they can feel they are being punitive and passing a severe sentence, while at the same time allowing themselves the warmth of recognising the humanity of their leniency.⁴⁵

A suspended sentence of imprisonment is often described as hanging like the Sword of Damocles over the head of the offender: it will fall if he or she commits another offence during the operational period. A Canadian Court of Appeal has questioned the appropriateness of this metaphor as it relates to conditional sentences:⁴⁶

⁴³ (1976) 13 SASR 516.

⁴⁴ (1976) 13 SASR 516, 527.

⁴⁵ Bottoms (1981), above n 10.

⁴⁶ *R v Brady* [1998] ABCA 7 [46] (Alberta Court of Appeal). Unlike a suspended sentence, a conditional sentence is a sentence of imprisonment served in the community (as opposed to a sentence of imprisonment, the execution of which is suspended for a set period). The reference to the ‘sword’ becoming a ‘butter knife’ is therefore more applicable to a conditional sentence of imprisonment than to a suspended sentence of imprisonment, as on breach of a conditional sentence the offender can only be ordered to serve the unexpired term of the sentence, whereas a breach of a suspended sentence of imprisonment may result in the offender being ordered to serve the whole period of imprisonment originally imposed.

This metaphor exaggerates the severity of a conditional sentence. Even if a conditional sentence could be equated to a sword, it does not hang by a thread, but by a rope. And the only way that this rope can break is if the offender himself cuts it. No one else can do so. This is within the exclusive and sole control of the offender.

While judicial officers may regard suspended sentences as a significant penalty, in the public mind the offender awarded such a sentence is regarded as ‘getting off’, ‘walking free’, or as having received a ‘slap on the wrist.’ Justice Kirby of the Australian High Court has encapsulated the dilemma thus in *Dinsdale v R*.⁴⁷

The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without re-offending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrong-doing or even by offenders themselves. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.⁴⁸

An analysis by the Council of headlines of articles published in the two major Victorian dailies, *Herald Sun* and *The Age* for the period 7 December 2002 to 6 December 2004 found that the representation of offenders as ‘walking free’ when a suspended sentence was imposed was a common one.⁴⁹

A number of articles also described offenders receiving suspended terms of imprisonment as having been ‘spared jail’⁵⁰ and as ‘avoiding’ jail⁵¹ or ‘dodging’

⁴⁷ (2000) 202 CLR 321.

⁴⁸ (2000) 202 CLR 321, 346-347 (Kirby J).

⁴⁹ ‘Cash- spree mum walks from court’, *Herald Sun* (Melbourne), 5 April 2003, 15; ‘As killer son is jailed for 30 years and wife walks free, angry family says...SHE WON’T GET A CENT’, *Herald Sun* (Melbourne), 11 April 2003; ‘Spy affair closes as prostitute walks free’, *Herald Sun* (Melbourne), 5 April 2003, 15; ‘ATM thieves go free’, *Herald Sun* (Melbourne), 6 October 2004; ‘Headbut man walks free’, *Herald Sun* (Melbourne), 24 November 2004, 11; ‘One in 10 rapists walk free’, *The Age* (Melbourne), 16 October 2004; ‘Priest walks free on sex assault charges’ *The Age*, 16 December 2003; ‘Mercy-death husband walks free from court’ *The Age* (Melbourne), 25 July 2003; ‘Tomahawk attack: pensioner walks free’, *The Age* (Melbourne), 25 April 2003. These examples can be multiplied by examples from other jurisdictions: eg ‘Child Porn Sentence is Condemned, BBC News 26 January 2007 (Charities and opposition politicians have attacked a decision not to jail a man who downloaded child pornography, amid the prison overcrowding row); see also Mark Israel, ‘“What Works” with South Australian Newspapers?’ (2000-1) 12 *Current Issues in Criminal Justice* 22.

⁵⁰ ‘Tobacco haul man spared jail’, *Herald Sun* (Melbourne), 3 April 2003, 28; ‘Death race hoon spared’, *Herald Sun* (Melbourne), 14 November 2003, 12; ‘Anorexic twin spared prison Suspended sentence after treatment vow’, *Herald Sun* (Melbourne), 9 November 2004, 3; ‘Sex abuser spared jail’, *Herald Sun* (Melbourne), 30 November 2004, 12.

⁵¹ ‘Racing thief avoids jail’, *Herald Sun* (Melbourne), 10 April 2003, 31; ‘Abalone poacher avoids jail term’, *Herald Sun* (Melbourne), 23 September 2003, 22; ‘Crime mum avoids prison’, *Sunday Herald Sun* (Melbourne), 2 November 2003, 35; ‘Net pirates avoid jail’,

jail'.⁵² As Julian Roberts, an acknowledged expert on sentencing and public opinion, has observed:

Most members of the public (and many criminal justice professionals) regard a suspended sentence as a warning, rather than a sentence *per se*: desist from criminal behaviour, and no sanction will ensue; violate the conditions of the probationary period, and the sentence of imprisonment will be executed. A person on whom a suspended fine was imposed would not be perceived by the public to have been punished, if, after six months the threat of the fine was lifted, leaving the individual with nothing to pay.⁵³

The Council's consultations confirmed the clear disjuncture between the treatment at law of suspended sentences and community perceptions. As one submission observed:

Suspended sentences are not seen by the public as the next best thing to a gaol sentence, they are not seen as a penalty, nor as a deterrent. Particularly by victims of crime against the person, they are seen to be a 'slap on the wrist with a wet tissue paper'.⁵⁴

Another submission stated:

As an ordinary citizen observing the operation of the system I find the use of suspended sentences as the single most abhorrent factor in the administration of justice in Victoria... The community expends time, money and effort in the provision of a police service and justice system. That system investigates crime, presents evidence to the court and the court then finds that an offence punishable by imprisonment has been committed by the defendant. It then lets him or her go free. The community does not consider that to be justice. I do not consider that to be justice...A suspended sentence is not a penalty.⁵⁵

Consultations with victims of crime and various submissions confirmed that the offender's receipt of a suspended sentence in some cases can make victims feel as if the offender has 'gotten off', while the victim and his or her family are left to deal with the consequences of this offending. One submission reported that a suspended sentence could result in 'considerable distress' for a victim of sexual assault and lead victims to regard the legal system as 'unsupportive and a waste of time'. A strong theme that emerged from all consultations held with victims of crime was the need for the impact of the offence on the victim to be properly understood and taken into

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

⁵² 'Barber dodges locks', *Herald Sun* (Melbourne), 9 October 2004, 14; 'Woman dodges jail term: teacher sex fury', *Herald Sun* (Melbourne), 11 November 2004, 1.

⁵³ Julian V. Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (2004) 6.

⁵⁴ Sentencing Advisory Council (2006), above n 22, 27.

⁵⁵ *Ibid.*

account at sentencing.⁵⁶

Studies that have invited respondents to rank sanctions in terms of their perceived severity have confirmed a high level of disagreement concerning the punitive weight of a suspended sentence. For example, a South Australian study found that victims of crime ranked suspended sentences as the least severe community-based sanction, in contrast to judicial officers, who ranked them as the next most severe after home detention.⁵⁷ Other research suggests that offenders also view a suspended sentence as less punitive than probation or some form of financial penalty.⁵⁸

A New Zealand Ministry of Justice survey of 387 people sentenced to periodic detention found that of all the types of sentences respondents were asked to rank, there was the greatest variation among respondents in the ranking of suspended sentences. Overall, the nine-month suspended sentence with an operational period of 18 months was given a mean ranking of 6, suggesting that most offenders considered it more severe than a fine of \$200, a fine of \$500, 12 months supervision, 100 hours community service, or four months periodic detention, but less severe than a six-month residential community program, a fine of \$1,000, 12 months periodic detention, or terms of imprisonment between three months and three years. However, close to one in three (30 per cent) ranked it in the four 'least tough' positions and 16 per cent ranked it more severe than three months in prison.⁵⁹

Degrees of punishment

In Victoria, offenders who have their terms of imprisonment suspended have a conviction recorded against their names and face having the suspended prison term activated if they commit another offence during the operational period. However, in contrast to orders such as community-based orders (CBOs), no conditions apply to a person under a suspended sentence. Provided the offender does not commit an offence during the operational period, there are no restrictions placed on his or her time or resources. While a suspended sentence is intended to be a harsher punishment than non-custodial orders, such as CBOs and fines, many in the community questioned whether this is the case, as suspended sentences in some respects seem to be less punitive.

A possible response to this might be to argue that the punitive weight of the suspended sentence is only of secondary importance. The real purpose of a suspended sentence, it might be suggested, is not punitive, but to provide for an offender's rehabilitation in the community while symbolically marking the seriousness of the offence. This problem remains, however, of why a suspended sentence, which places offenders under no greater obligation than other community members not to break the law, should be treated at law as a more severe form of sanction than community sentences which generally place a number of positive obligations on offenders, such

⁵⁶ Ibid 5.

⁵⁷ Pearson and Associates, Justice Strategy Unit, Attorney-General's Department, South Australia, *Review of Community-Based Offender Programs: Final Report* (1999), 40.

⁵⁸ Leslie Sebba and Gad Nathan, 'Further Exploration in the Scaling of Penalties', (1984) 23(3) *The British Journal of Criminology* 221, 231. They reported the findings of a study which found that offenders ranked suspended sentences of 6 months, 12 months and 3 years below a fine of \$500 and below 3 years' probation. These results need to be interpreted with caution due to the small number of respondents (15 prisoners).

⁵⁹ Wendy Searle, Trish Knaggs and Kiri Simonsen, *Talking about Sentences and Crime: The Views of People on Periodic Detention* (2003) 24 (Table 4.1), 29.

as reporting and supervision requirements. The existence of a prison sentence on the offender's criminal record and the threat of imprisonment on breach may be regarded by many as insufficient alone to justify its positioning.

Another answer to this might be to add some punitive and rehabilitative content to the sanction (as there is in most other jurisdictions)⁶⁰ and indeed, those who defended suspended sentences endorsed their rationale and current positioning in the hierarchy of sentencing orders on this basis. It was argued that the order could be improved by allowing courts to attach conditions and providing them with more flexibility in handling breaches of suspended sentences. Sanders and Roberts' research into public attitudes to conditional sentencing in Canada found that public support for the sanction increased dramatically when optional conditions were added to the sentence.⁶¹ In other words, ensuring that there was a sufficiently punitive element to the sentence was crucial to public confidence in the sanction.

The dangers of introducing a conditional form of order have been manifested in England and Wales. Preliminary research has found that courts are much more likely to attach two or more conditions to a suspended sentence than to a community order, contrary to Sentencing Guidelines Council advice that the requirements on a suspended sentence should be 'less onerous than those imposed as part of a community sentence'.⁶² Between April 2005 and July 2006, only 36 per cent of suspended sentence orders had a single requirement compared to 49 per cent of community orders.⁶³ There are also said to be 'growing concerns about the numbers of people on Suspended Sentence Orders who are going to prison as a result of small technical breaches'.⁶⁴ According to the Home Office, 800 people were imprisoned for breach between January and August 2006, compared to only 132 in the whole of 2005. Three quarters of orders breached were issued in the Magistrates' Court, and nearly half were imposed for summary offences.⁶⁵

Appropriateness

Many members of the public consulted by the Council were concerned about the use of suspended sentences for violent crimes, including rape and other forms of sexual assault. Support was expressed for restricting the availability of the order where more serious offences are concerned.

⁶⁰ This was the purpose behind the introduction of the 'custody minus' sanction in the UK which aimed to make the suspended sentence more onerous: A new suspended sentence that will be much more demanding than the existing suspended sentences and more widely available. An offender will have requirements to fulfil in the community, just like in a community sentence. If an offender breaches the requirements the presumption will be that the suspended prison sentence is activated; see *Delivering Justice for All—Criminal Justice Bill Receives Royal Assent* (2003) Home Office Press Office <www.press.homeoffice.gov.uk/press-releases/Delivering_Justice_For_All_-Crim?version=1> at 14 March 2008.

⁶¹ Sanders and Roberts (2000), above n 23.

⁶² Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003 Guideline* (2004) 25.

⁶³ Enver Solomon and Max Rutherford, *Community Sentences Digest* (2007) 19.

⁶⁴ *Ibid* 37.

⁶⁵ Jamie Doward, 'Magistrates' Jailing Powers to be Slashed', *The Observer*, 24 June 2007 <<http://www.guardian.co.uk/prisons/story/0,,2110243,00.html>> at 27 June 2007.

Of those who attended community forums and victims' focus groups, a high proportion expressed the view that suspended sentences should not be available for serious sexual and other violent crimes, or should be available only in exceptional cases. Most respondents believed that the power to suspend should be removed completely in the case of serious sexual offences (such as rape). Others felt that only in exceptional cases is the power to suspend appropriate for the most serious sexual offences. Opinion was more divided on the question of whether suspended sentences should be available for the most serious violent (non-sexual) offences (such as culpable driving or intentionally/recklessly causing serious injury). Opinion was similarly divided in the case of other (non-rape) sexual offences.

Research on public attitudes indicates that independent of questions concerning severity, different forms of sanctions are viewed as having different functions depending on the nature of the offence. For example, a Canadian study found that the level of support for the use of conditional sentences varied significantly depending on the specific circumstances and nature of the offence. While 77 per cent of respondents supported the use of a conditional sentence for a scenario involving an assault causing bodily harm, only 25 per cent supported its use over imprisonment for a case of impaired driving causing bodily harm, while just three per cent supported its use in the case of an offender convicted of sexual assaults perpetrated on his five-year old stepdaughter.⁶⁶

In its Final Report Part 1,⁶⁷ the Council recommended the introduction of guidelines in the legislation as to the factors that might make the suspension of a prison sentence inappropriate (such as the gravity of the offence and its impact on the victim, the risk of the offender re-offending while on a suspended sentence and whether the offender committed the offence while on a suspended sentence). It also recommended that the suspended sentence only be allowed to be used in exceptional circumstances for serious violent and sexual offences such as murder, manslaughter and rape.

The Council was conscious that much of the apparent community concern about the use of suspended sentences had resulted from their use in particular types of cases. Such cases had often, though not exclusively, concerned sexual offences and other violent offences, where the level of harm caused to a victim has been high. Although these offences account for only a tiny proportion of the total number of suspended sentences handed down annually the Council was of the view that once a court has determined that a gaol sentence is appropriate for such offences, there should be a presumption that the sentence will be served.

The changes recommended were broadly consistent with the existing principles guiding the use of suspended sentences in Victoria, but gave express recognition to the importance of these factors to the decision whether or not to suspend a prison sentence through their inclusion in legislation.

⁶⁶ Sanders and Roberts (2000), above n 23. The description of the offences was as follows: 'Assault occasioning bodily harm: A 23-year-old man has been convicted of assault causing bodily harm. He hit and broke the nose of a man that he had a disagreement with in a local bar'; 'Impaired driving causing bodily harm: After drinking heavily, the offender stole a car and drove at a high rate of speed through the city. He eventually lost control of the car and crashed. Two people were seriously injured. One person suffered permanent injuries that have had a devastating impact on her life'; 'Sexual assault: A man was convicted of several sexual assaults against his five-year-old stepdaughter. The crimes were committed over a period of several years': Ibid.

⁶⁷ Sentencing Advisory Council (2006), above n 22.

The *Sentencing (Suspended Sentences) Act 2006* (Vic), which came into operation on 1 November 2006, restricts the use of suspended sentences in relation to ‘serious offences’ (including murder, manslaughter, intentionally causing serious injury, rape, sexual penetration of a child under 16 years and armed robbery) to cases where there are ‘exceptional circumstances’ and where it is in the ‘interests of justice’ to do so.

In deciding whether to suspend a sentence, the court must consider ‘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 adequately manifests the denunciation by the court of the type of conduct in which the offender engaged, adequately deters the offender or other persons from committing offences of the same or a similar character and reflects the gravity of the offence.

In late 2007 the Canadian government passed legislation that removed the possibility of a conditional sentence being imposed for a ‘serious personal injury offence’ (including sexual offence), a terrorism offence or a criminal organisation offence that carries a maximum term of imprisonment of 10 years or more.⁶⁸

The impetus for these reforms has been described in similar terms to that which led the Council to recommend that the availability of suspended sentences in Victoria should be restricted in the case of serious violent (including sexual) offences:

While allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed serious or violent crime, to serve their sentence in the community is widely believed to be beneficial, it has also been argued that sometimes the very nature of the offence and the offender require incarceration. The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that appear to justify incarceration.⁶⁹

In introducing the Bill, the Parliamentary Secretary to the Minister of Justice and Attorney General pointed to community expectations as an important consideration on introducing the legislation:

Bill C-9 flows from the government's clear commitment to Canadians to ensure that house arrest is no longer available for those who commit serious or violent crimes. As stated in section 718 of the Criminal Code, the fundamental purpose of sentencing is “to contribute... to respect for the law and the maintenance of a just, peaceful and safe society”.

Conditional sentences were never intended for serious offences... However, in recent years we have witnessed far too many instances of improper use of this type of sentence. The public has had a great deal of concern about cases in which persons convicted of very serious offences have been permitted to serve their sentences in the community, often in the luxury of their own homes and with minimal safeguards to ensure compliance with the conditions of their

⁶⁸ Bill C-9: *An Act to Amend the Criminal Code* (Conditional Sentence of Imprisonment), now S.C. 2007, c. 12, assented to on 31 May 2007 and in force in December 2007, amending the *Criminal Code* R.S.C. 1985, c. C-46.

⁶⁹ Law and Government Division, Parliamentary Information and Research Service, Legislative Summary: Bill C-9: *An Act to amend the Criminal Code* (conditional sentence of imprisonment) (2006) LS-526E.

sentence. Canadians find it hard to understand how such sentences comply with the fundamental purpose and principles of sentencing.

... The bill is based on the principle that conditional sentences ought to be used only in situations for which they were originally intended. This is for relatively minor cases, cases deserving of lenience and cases which do not offend the community's sense of justice.⁷⁰

EDUCATING THE PUBLIC OR EDUCATING THE PROFESSION?

Despite public concerns over suspended sentences, the legal profession (and probably most offenders) is strongly supportive of the sanction because it keeps offenders in the community, it provides opportunities for rehabilitation and, if used properly, it can divert offenders from increasingly overcrowded prisons.

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

The Council did not believe that the problems with suspended sentences lay only with the public and through its recommended reforms, it sought achieve not only a better sentencing system, but one that was more easily understandable to the broader community. The Council has specifically rejected the view that community concerns about suspended sentences are solely a product of a lack of understanding about the nature and purpose of these orders, and suggests that it is important to improve the language and structure of sentencing to make it more logical, transparent and coherent.⁷¹

As Julian Roberts, in suggesting how to explain the concept of prison alternatives, such as community custody, has suggested:

First, the concept needs to make sense; the criminal justice system needs to have a good 'product' to sell to the community in place of prison.⁷²

ENHANCING COMMUNITY SENTENCES

Another response is to create a range of intermediate sanctions that will be used in place of suspended sentences and remedy their defects. This strategy attempts to move the denunciatory and punitive work ostensibly done (badly, we suggest) by the suspended sentence (a quasi-or faux-imprisonment option) to a non-imprisonment option which can be regarded as both severe and appropriate for the types of offences now receiving suspended sentences.

Critical to the greater acceptance of intermediate sanctions as substitutes for imprisonment is a 'de-coupling' of denunciation from sentences of imprisonment and its 're-coupling' to community sentences.⁷³ The search for ways to invest community sanctions with the same kind of denunciatory power as imprisonment recognises that

⁷⁰ Ibid 1621.

⁷¹ Roberts (2002), above n 29, 33.

⁷² Roberts (2004), above n 53, 181.

⁷³ Marinos (2005), above n 37, 450.

in order to gain support for community alternatives, what has been termed the 'emotional' or 'affective dimension' of punishment cannot be ignored.⁷⁴

One means suggested to engender greater confidence in these alternatives is through the use of conditions that are intrusive or restrict an offender's liberty (in a similar way to imprisonment), or which involve some other condemnatory component (such as requiring an offender convicted of offences to speak about the consequences of this behaviour).⁷⁵ For example, some forms of intensive supervision and parole involve high levels of face-to-face contacts, drug testing, curfew and electronic monitoring conditions. These characteristics, together with the more severe response to breach of these orders, have been suggested as evidence of their intrinsically punitive value.⁷⁶

Research on other conditional intermediate orders suggests that these orders are experienced by offenders as punitive. A study of 100 offenders in Victoria on intensive corrections orders found that while 58 per cent of offenders agreed that ICOs were better than going to prison, 60 per cent disliked ICOs on the basis that they were too demanding and time consuming. Most (88%) did not view ICOs as a soft option.⁷⁷

CONCLUSION

The problem of lack of confidence or legitimacy in the courts is probably chronic rather than acute. It appears that public confidence in the courts has been consistently lower than levels of confidence in the police, prisons or the criminal justice system as a whole for many decades. The status of judges and the courts has gradually been eroded by constant media polls and reports that the courts are 'soft on crime' and therefore failing to protect the community.⁷⁸

The problem of public confidence in the courts is, of course, wider than the problems of sentencing. A conference held in Canberra, Australia in February 2007 on this topic⁷⁹ identified other factors that also contribute to what is perceived to be a major issue for the modern judiciary. These included: issues of judicial appointment, demeanour and accountability; perceptions of outcome and process expressed by victims of crime; the role of the media; the adversarial nature of the process; and the ability of courts to explain themselves to the public.

If no steps are taken to maintain public confidence in the criminal justice system generally, and the courts in particular, there is the risk that there will be a further shift in sentencing power away from courts through the use of such mechanisms as

⁷⁴ Freiberg (2001), above n 38; David Garland, *The Culture of Crime and Control: Crime and Social Order in Contemporary Society* (2001); David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990).

⁷⁵ Marinos (1995), above n 37, 450.

⁷⁶ Betsy Fulton, Edward Latessa, Amy Stichman and Lawrence Travis, 'The State of ISP: Research and Policy Implications' (1997) 61(4) *Federal Probation* 65.

⁷⁷ John Tomaino and Andreas Kapardis, 'A Criminological Study of the Use of Intensive Corrections Orders in Victoria, Australia,' (1996) 40(1) *International Journal of Offender Therapy and Comparative Criminology* 63.

⁷⁸ Freiberg and Gelb (eds.) (2008), above n 28; David Indemaur, 'Dealing the Public In: Challenges for a Transparent and Accountable Sentencing Policy' in Freiberg and Gelb (eds.) (2008), above n 28, 45; John Pratt, 'Penal Populism and Penal Scandal in New Zealand' in Freiberg and Gelb (eds.) (2008), above n 28, 31.

⁷⁹ For more information on the issues covered at this conference, see http://law.anu.edu.au/nissl/courts_prog.pdf.

mandatory and minimum sentences and strict sentencing guidelines.

The constant criticisms and reforms of suspended sentences in many jurisdictions is evidence of the contradictions inherent in this sanction, in the notions of custody, in the difficulties in understanding the affective dimensions of various offences and sanctions, the complexity of penal equivalence or substitution and the dynamics of public attitudes, moods and perceptions. Their problem is not necessarily that they are not effective in reducing crime, or do not have low rates of breach or recidivism, but that they fail to sufficiently 'denounce' or publicly condemn certain types of behaviour about which the public feels strongly.

The SAC's past and proposed reforms to suspended sentences are not going to restore public confidence but the recognition that they are a problem that requires a sincere, thoughtful and inclusive response may enhance confidence in the process of public policy making. In the long term, it may well be that it is the process of reform rather than the punishment which is the most important factor in maintaining confidence in the justice system.⁸⁰

⁸⁰ With apologies to Malcolm Feeley; Malcolm Feeley, *The Process is the Punishment* (1979).

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