AN EXAMINATION OF THE ARGUMENTS FOR AND AGAINST THE USE OF SUSPENDED SENTENCES

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ABSTRACT

This paper examines the arguments for and against suspended sentences. The principal argument for such sentences include that they have a symbolic effect and provide a useful sentencing option; are an effective deterrent; enable offenders to avoid short terms of imprisonment and reduce the size of the prison population. The case against suspended sentences is that they are not real punishment and are seen as a 'let off' by offenders, the media and the public; there are theoretical difficulties in imposing the sentence and dealing with breaches; they cause net-widening ad violate the proportionality principle and they favour middle-class offenders. The article evaluates these arguments against the background of in-depth recent research, especially in Tasmania and considers the practical and policy implications of qualitative and quantitative analyses of sentencing outcomes, reconviction and breach analyses and interviews with judicial officers.

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I INTRODUCTION

A suspended sentence is a fixed term of imprisonment, the execution of which has been partly or wholly suspended. The imposition of a suspended sentence involves two key steps: imposing a fixed term of imprisonment and then ordering that all or part of the term be held in suspense for a specific period (the 'operational period'), subject to certain conditions.[1] It has been described as a Sword of Damocles hanging over the offender's head[2] and is seen by some as confusing in its nature:

> What, then, is the suspended sentence? Is it a let-off, or is it the most serious penalty available to the courts, technically held in abeyance? Is it a custodial or non-custodial sentence? Is it only appropriate for 'extremely carefully selected' cases or is it of much more general application? There are no very clear answers to these questions in the everyday practice of the criminal courts.[3]

In 2008, the Victorian Sentencing Advisory Council (VSAC) completed a lengthy review of suspended sentences which explored whether reported community concerns were indicative of a need for reform of any aspect of suspended sentences, the current use of suspended sentences and whether the operation of suspended sentences can be improved in any way. After an earlier recommendation that such sentences should be phased out,[4] the

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1 The test for imposing a suspended sentence is set out in *Dinsdale v The Queen* (2000) 202 CLR 321. For discussion of the test for imposing such sentences and their use in Australia, see Lorana Bartels, 'Unsheathing the Sword of Damocles: The Use of Suspended Sentences in Australia' (2007) 31 *Criminal Law Journal* 113.

2 See, eg, *R v Locke and Paterson* (1973) 6 SASR 298, where Bray CJ remarked, 'Anyone released under a suspended sentence therefore knows, or ought to know, that the sword of Damocles hangs over his head and that only his continued good behaviour and observance of the bond can prevent his automatic incarceration under the suspended sentence': 301.

3 Anthony Bottoms, 'The Suspended Sentence in England: 1967-1978' (1981) 21 *British Journal of Criminology* 1, 16.

4 Victorian Sentencing Advisory Council, *Suspended Sentences: Final Report – Part 1* (2006) (VSAC Final Report 1), Recommendation 1.

VSAC concluded in the final stage of its reference that the decision to abolish suspended sentences be deferred 'until the [recommended] reforms to other intermediate sentencing orders...have been made and fully tested'.[5]

In May 2010, the VSAC released a monitoring report which indicated that for the three offences for which there were sufficient data, there was no statistically significant change to the use of suspended sentences following legislative amendments in 2006, as discussed further below.[6] Drawing on these findings, the Attorney-General announced it would abolish suspended sentences. By doing so, the Government has now essentially mirrored the Opposition Leader's announcement in January that if elected at the upcoming Victorian election, the Coalition would abolish such sentences.[7] Accordingly, it would seem that it is merely a matter of time before an Australian jurisdiction moves to abolish suspended sentences, for the first time since New South Wales did so in 1973.

The Tasmania Law Reform Institute (TLRI) also recently completed its comprehensive sentencing review.[8] The TLRI recommended the retention of suspended sentences, but, based in large part on the research reported in this article, also made several recommendations for changes to their use in Tasmania.[9] In 2009, the Tasmanian Government legislated to adopt some of these recommendations, although the relevant provisions of the *Justice and Related Legislation (Further Miscellaneous Amendments) Act 2009* (Tas) are yet to take effect.

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[5] Victorian Sentencing Advisory Council, *Suspended Sentences: Final Report – Part 2* (2008) (VSAC Final Report 2), Recommendation 2-1.

[6] Victorian Sentencing Advisory Council, *Suspended Sentences in Victoria: Monitoring Report* (2010).

[7] Reid Sexton, 'Brumby in Backflip on Suspended Sentences', *The Age* (Melbourne), 14 May 2010.

[8] Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) (TLRI).

[9] Ibid Recommendations 9-18.

Furthermore, the first reference for the recently formed Australian Capital Territory (ACT) Law Reform Advisory Council is to inquire into and report on suspended sentences, which is currently underway. The terms of reference are to inquire into and report on:

1. recent trends in the imposition of suspended sentences in the ACT;
2. any relevant factors behind the rates of imposition of suspended sentences in the ACT;
3. recent legislative reforms in other Australian jurisdiction in relation to suspended sentences;
4. what policy changes, if any, are needed to modify the way in which suspended sentences operate in the ACT, and
5. any other relevant matter.[10]

In light of these reviews and the ongoing 'ambivalent nature of suspended sentences of imprisonment and public reactions to them',[11] it is timely to revisit and critically evaluate the key arguments for and against this often misunderstood sentencing disposition.

The key arguments for such sentences are that they have a symbolic effect and provide a useful sentencing option; they are an effective deterrent; they enable offenders to avoid short prison sentences and may therefore reduce the size of the prison population.

The case against suspended sentences is that they are not real punishment and are seen as a 'let off' by the public, the media and offenders; there are theoretical difficulties in imposing a suspended sentence; they cause net-widening, favour middle-class offenders

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10 'Current inquiries', ACT Department of Justice and Community Safety. <http://www.justice.act.gov.au/?/page/view/565/title/current-inquiries> 14 July 2010. I have been engaged to carry out research on the project.

11 See, eg, Arie Freiberg and Karen Gelb, 'Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System' (2009) 42 *Australian and New Zealand Journal of Criminology* 101.

and violate the proportionality principles and there are difficulties in dealing with breaches. In considering these arguments, the article draws on the findings of the author's extensive recent research in this area.[12]

II THE CASE FOR SUSPENDED SENTENCES

In this section, the main arguments in support of suspended sentences and some responses to these arguments are presented. I approach this discussion on the basis of the possible effect of abolishing suspended sentences in a jurisdiction where they are already in use, rather than considering whether such sentences ought to be introduced in a jurisdiction where they have not previously been available. It should also be noted that although partly suspended sentences are currently available in all Australian jurisdictions except New South Wales (NSW),[13] the literature primarily examines wholly suspended sentences and this article will therefore also focus mainly on such sentences.

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12 See Lorana Bartels, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania* (2008) (Sword or Feather), available at <http://eprints.utas.edu.au/7735/>. For publications based on this research, see Bartels, above n 1; Don Weatherburn and Lorana Bartels, 'The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia' (2008) 48 *British Journal of Criminology* 667; Lorana Bartels, 'The Weight of the Sword of Damocles: A Reconviction Analysis of Suspended Sentences in Tasmania' (2009) 42 *Australian and New Zealand Journal of Criminology* 72 (*ANZJC*); Bartels, 'Suspended Sentences: A Judicial Perspective' (2009) 9 *Queensland University of Technology Law and Justice Journal* 122 (*QUTLJJ*); Lorana Bartels, *Suspended Sentences in Tasmania: Key Research Findings*, Trends and Issues in Criminal Justice No 377 (2009) (*T&I*); Lorana Bartels, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21 *Current Issues in Criminal Justice* 219 (*CICJ*); Lorana Bartels, 'To Suspend or Not to Suspend – A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania', (2009) 28 *University of Tasmania Law Review* 23 (*UTasLR*); Rohan Lulam, Don Weatherburn and Lorana Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-time Imprisonment*, Crime and Justice Bulletin No 136 (2009). For earlier discussion, see Lorana Bartels, 'Suspended Sentences in NSW' (2001) 8 *Criminal Law News* 81.

13 For discussion, see Bartels, above n 1.

A *Suspended Sentences have a Symbolic Effect*

Denunciation of a crime performs an important symbolic function in conveying society's condemnation of the offence.[14] The VSAC recently presented as one of the main arguments for retaining suspended sentences that they:

> [P]erform an important symbolic function by allowing the seriousness of the offence to be recognised and denunciation of the offender's behaviour to take place through the formal imposition of a term of imprisonment, while allowing the court to deal with the offender in a merciful way.[15]

Similarly, when the NSW Law Reform Commission recommended the reintroduction of suspended sentences, it considered them to be appropriate in circumstances where other forms of conditional release did not allow for a sufficient element of denunciation of the offence.[16] Shortly after suspended sentences were reintroduced in NSW in 2000, Wood J controversially imposed a wholly suspended sentence on radio broadcaster John Laws for contempt. In doing so, Wood J observed that the purposes of such sentences are to convey:

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14 Andrew Ashworth, 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems' (Paper presented at the Sentencing: Problems and Prospects Seminar, Australian Institute of Criminology, Canberra, 18-21 March 1986); Victorian Sentencing Committee, *Sentencing* (1988) [3.8]; Anthony Doob and Voula Marinos, 'Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishment' (1995) 2 *University of Chicago Law School Roundtable* 413; Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112; Kate Warner, *Sentencing in Tasmania* (2002) [3.213]. It has even been suggested that denunciation 'underlies almost every sentence': Geraldine MacKenzie, *How Judges Sentence* (2005) 114.

15 Victorian Sentencing Advisory Council, *Suspended Sentences in Victoria – A Preliminary Information Paper* (2005), 12-13. See also Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (1978) [268]; Keith Soothill, 'The Suspended Sentence for Ex-Prisoners Revisited' [1981] *Criminal Law Review* 821, 827; Bottoms, above n 3, 20.

16 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) [4.22] (NSWLRC Report). See also New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) (NSWLRC DP).

> [T]he seriousness of the offence and the consequences of re-offending to the offender, while also providing him or her with an opportunity to avoid the consequences by displaying good behaviour and by not repeating the relevant breach of the law or any similar breach of the law.[17]

In certain circumstances a suspended sentence may be an appropriate means of expressing denunciation, but the strength of this argument rests in large part on acceptance of the premise that suspended sentences truly are the second most serious penalty which can be imposed by the courts, and can be fairly compared with an immediate custodial sentence. This may, however, be something of a legal fiction. As was acknowledged in one submission to the VSAC, the 'denunciatory effect will most often be blunted once someone appreciates that the offender is not actually in custody'.[18] Furthermore, this approach appears to privilege prison as the only means of recognising the seriousness of an offence.[19]

In 2006-7, the author conducted interviews with 16 out of 18 then sitting members of the Tasmanian judiciary on their use of suspended sentences. It emerged from these interviews that denunciation was not regarded as being a key objective of suspended sentences, although judges regarded it more highly in this context than magistrates.[20] Nevertheless, judicial officers were strongly

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[17] *R v Laws* (2000) 116 A Crim R 70, 79 (Wood J). The following cases are where it has been held that only an immediate custodial sentence will serve to adequately denounce certain types of offending: see, eg, *R v Sugg* (Unreported, Tas CCA, Neasey, Cosgrove and Brettingham-Moore JJ, 3 June 1985); *R v Whelan* (2004) 42 MVR 541; *Sumner v Police* [2004] SASC 158.

[18] Victorian Sentencing Advisory Council, *Suspended Sentences: Interim Report* (2005) [2.46] (VSAC Interim Report).

[19] As has been noted, it is 'a mistake to take imprisonment as the *paradigm* of punishment, if this means regarding it either as the most *usual* mode of punishment, or as the presumptively appropriate punishment for most offences, so that non-custodial punishments must be justified as "alternatives"': Anthony Duff et al (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (1994) 8 (emphasis in original).. See also Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (1999) 107.

[20] Bartels, Sword or Feather, above n 12, [3.4.1], (Q2); Bartels, *QUTLJJ*, above n 12, 126.

opposed to the abolition of suspended sentences and cited examples where they would impose such a sentence as a message to both the offender and the community, thereby supporting the view that suspended sentences have a symbolic effect.

B Suspended Sentences Provide a Useful Sentencing Option

When the availability of suspended sentences in England was restricted to cases involving 'exceptional circumstances', a Stipendiary Magistrate lamented their demise, stating that sentencers had now lost 'a very valuable tool'.[21] Similarly, Freiberg's suggestion in 2001 that suspended sentences be abolished in Victoria was met with resounding opposition from the Attorney-General, who declared that sentencers should have more, not fewer, sentencing options.[22] The Magistrates' Court of Victoria argued in its submission to the VSAC for the retention of suspended sentences on the basis that 'the removal of suspended sentences or the limiting of their availability for imposition would remove an important arrow from the quiver of sentencing dispositions available to the Court'.[23]

On the other hand, there may also be difficulties with creating too many sentencing options. Although Ashworth suggests that 'courts are likely to use imprisonment less frequently if they have a wide range of non-custodial alternatives than if they have only a few non-custodial measures to choose from',[24] greater choice of sentence may also be 'a source of confusion, not least because of the inherent difficulties of understanding the relative leniency or harshness of

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

22 'Sentencing in the Dock', *Lawyers Weekly*, 24 August 2001, 1. See also NSWLRC DP, above n 16, [4.22]; NSWLRC Report, above n 16, Recommendation 33.

23 VSAC Interim Report, above n 18, [2.4].

24 Andrew Ashworth, *Sentencing and Penal Policy* (1983), 437. This quote does not appear to have been reproduced in subsequent editions. Note however the argument that it is flawed to place sentencing dispositions along a continuum, because punishments serve a variety of functions: Doob and Marinos, above n 14, 414. See also Voula Marinos, 'Thinking about Penal Equivalents' (2005) 7 *Punishment and Society* 441.

different disposals in relation to one another'.[25] The English Advisory Council on the Treatment of Offenders opposed the introduction of suspended sentences, warning that 'to justify any new form of penal treatment there must be strong reasons to show that the suggested innovation would be likely to be a positive improvement on existing methods'.[26]

The situation is clearly different in jurisdictions where the use of suspended sentences is well-established and entrenched to those where there suspended sentences have only been available for a short time or there is a broad range of other sentencing option. In Tasmania, for example, suspended sentences have been continually in use for over 80 years and there are also fewer alternative sentencing options available than in most Australian jurisdictions. The TLRI recently concluded that 'Notwithstanding criticisms of the suspended sentence...the suspended sentence is a useful sentencing option that should be retained'.[27] The TLRI's decision was informed in part by the author's quantitative analysis, which demonstrated that suspended sentences are rarely imposed in Tasmania for very serious offences or for lengthy periods.[28] Current research also indicates that suspended sentences are commonly used and generally well received by the public in the context of euthanasia cases,[29] further supporting the place of such sentences in the sentencing hierarchy.

C Suspended Sentences are an Effective Deterrent

It is widely asserted that suspended sentences are an effective *specific* deterrent against the further commission of crime.[30]

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[25] Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing* (1987) 6.

[26] Advisory Council on the Treatment of Offenders, *Suspended Sentence* (1952) [9].

[27] TLRI, above n 8, Recommendation 9.

[28] Ibid [3.3.27]-[3.3.31]. For discussion, see Bartels, *T&I*, above n 12, 2.

[29] Lorana Bartels and Margaret Otlowski, 'A Right to Die? Euthanasia and the Law in Australia', (2010) 17 *Journal of Law and Medicine* 532.

[30] Ancel described the 'vivid memory of the sanction pronounced on his past offence and the feeling of the threat which hangs over him should he return to crime': Marc Ancel, *Suspended Sentence* (1971), 37. See also Alec Samuels, 'The Suspended Sentence: An Appraisal' (1974) 138 *Justice of the Peace* 400; Billy Strachan, 'The Suspended Sentence and Its Application - I' (1977) 121(41) *Solicitor's Journal* 669; Soothill, above n 15; Campbell, above n 21.

As Tait suggests:

> Durkheim recognised the most effective form of social control was not supervision by armed men in uniforms but internal restraint resulting from proper education and socialisation. A threat of punishment is therefore just as 'real' as any of the other fears, expectations, obligations and duties which populate the social world. However it depends for its credibility not on physical objects like walls, guns and occasional beatings, but on the consent and compliance of the individual free citizen. To some extent everyone lives under the shadow of imprisonment (if you murder someone you will go to prison); but the threat is more individualised and immediate when a court imposes such a sentence.[31]

The so-called Sword of Damocles is said to carry:

> [A] clear warning to the offender which he disregards at his peril. He knows exactly what is likely to happen if he is convicted of a further offence committed during the operational period of the suspended sentence, and he must adjust his behaviour accordingly or face the consequences.[32]

This proposition has a certain intuitive appeal, for as Ashworth has observed, it is 'surely a commonsense notion' to suggest that a suspended sentence, 'with a specific term of imprisonment prescribed in case of breach, is much more likely to impress some offenders than the vague possibility of a custodial sentence on breach of a conditional discharge, probation order or community service order'.[33] This assumption also acknowledges the 'early lesson of the research literature…that deterrence is a subjective

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[31] David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143, 145.

[32] Ashworth, above n 24, 243. This quote was omitted from subsequent editions of the text. See also Ancel, above n 30, 30. Note that partly suspended sentences are considered by some to be a more effective deterrent because it provides the offender with the actual 'clang of the prison gates' followed by a 'short sharp and... nasty taste of prison': James Dignan, 'The Sword of Damocles and the Clang of the Prison Gates: Prospects on the Inception of the Partly Suspended Sentence' (1984) 23(3) *Howard Journal of Criminal Justice* 183, 191.

[33] Ashworth, above n 24, 244. Note this model generally compares suspended sentences with non-custodial orders, not sentences of immediate imprisonment: Bottoms, above n 3, 3. Although Bottoms considers that there is nothing illogical about supporting both this theory and the 'avoiding prison' theory simultaneously, he submits that only the latter theory has been endorsed in England: 4.

phenomenon; offender perceptions are therefore critical'.[34]

However, this approach treats the offender as a responsible moral agent, fully in control of his or her behaviour.[35] In reality, it is 'arguable that some offences are the product of an overwhelming combination of circumstances which lead a person to react under stress in a criminal way', which is neither wholly within the offender's control or necessarily a signal for a deterrent response.[36] Furthermore, this approach is underpinned by an assumption that the sentencing judge has some sort of knowledge of the offender and the potential effect of a suspended sentence on that individual, whereas in all likelihood,

> [o]n the information available to a court when passing sentence it would seldom be possible for the court to assess whether, in a particular case, a suspended sentence of known severity would be likely to be a more powerful deterrent than probation or conditional discharge with its liability to punishment of a degree of severity not then known.[37]

The author has conducted three analyses examining offenders' recidivism following the imposition of a suspended sentence, albeit with conflicting results. The first study compared 1,399 offenders given a suspended sentence with 4,957 offenders given supervised bonds in NSW. After controlling for offence type, offence seriousness, plea, bail status, number of concurrent offences, legal representation, number of prior conviction episodes, age, gender, Indigenous status, offender location and whether the offender had previously received a sentence of full-time imprisonment, there was no difference in the time to the next proven offence.[38]

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[34] Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (2004), 55. See also Andrew von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) 2.

[35] See, eg, Ancel, above n 30, 31, where he stated that the 'man for whom the ordinary suspended sentence was conceived was the "rational man who is the master of himself" in the Declaration of Rights, 1789'.

[36] Ashworth, above n 24, 243.

[37] Advisory Council on the Treatment of Offenders, above n 26, [9].

[38] Weatherburn and Bartels, above n 12.

A separate study followed up 588 offenders convicted in the Supreme Court of Tasmania for two years. Offenders who received a wholly suspended sentence had the lowest reconviction rates (42 percent), followed by 44 percent for partly suspended sentences, compared with 62 percent for offenders who received full-time imprisonment, after controlling for offender age, gender and prior criminal record; offence type and seriousness and sentencing judge.[39]

Most recently, Lulham, Weatherburn and Bartels compared 8,094 offenders in receipt of a full-time prison sentence in NSW with 6,107 who received a wholly suspended sentence and found no evidence to support the contention that offenders given imprisonment are less likely to re-offend than those given a suspended sentence. After cases were matched on key sentencing variables, there was a small but significant tendency for the prison group to re-offend more quickly than the suspended sentence group.[40]

It follows from these research findings that suspended sentences appear to perform better than actual custodial sentences and may therefore perform an effective specific deterrent function. The findings also reinforce the need for information on reconviction rates to be gathered on a regular basis to maintain a current awareness of the performance of sentencing outcomes.

It is worth noting that suspended sentences are not regarded as being an effective medium for *general* deterrence, which has recently been described as 'the most frequently invoked justification for penalties in sentencing decisions'.[41] Indeed, the courts appear to be sceptical of the efficacy of suspended sentences in this context. In the Tasmanian case of *Percy*, Neasey J considered a suspended sentence to be 'virtually of no value as a deterrent to others who might be disposed to commit similar offences',[42] while Chambers J

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39 Bartels, *ANZJC*, above n 12.

40 Weatherburn, Lulhum and Bartels, above n 12.

41 Kate Warner, 'The Effectiveness of Sentencing Options: What Works?' (Paper presented at the Local Courts of NSW Annual Conference, Sydney, 2 August 2007), 3.

42 *R v Percy* [1975] Tas SR 62, 74 (Neasey J).

suggested that:

> [I]mprisonment as a deterrent is easily comprehended by the ordinary man, but a suspended sentence is unlikely to produce the same effect. An effective sentence of imprisonment cannot be shrugged off but, certainly in the case of a person who has consistently been in trouble with the law on previous occasions…a suspended sentence might be regarded as something in the nature of a 'paper tiger'.[43]

A number of more recent Australian cases have also suggested that suspended sentences are incapable of meeting the requirements of general deterrence.[44]

D Suspended Sentences Enable Offenders to Avoid Short Prison Sentences

One of the classic arguments for suspended sentences is the so-called 'avoiding prison' theory, which posits that suspended sentences enable offenders to avoid exposure to prison, especially for short terms of imprisonment, thereby ensuring that they are not exposed to the notoriously corrupting influences of prison. This view underpinned the decision to introduce suspended sentences in England, with the then Home Secretary suggesting it to be a 'great mistake to acclimatise people to prison whenever it is unnecessary to do so', which 'get[s] them used to prison and to accepting prison as a feature of their lives', as well as 'fritter[ing] away the deterrent effect of prison, thereby doing harm to the individual and to society.[45]

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43 *R v Percy* [1975] Tas SR 62, 82 (Chambers J). See also *R v Causby* [1984] Tas R 54.

44 See, eg, *Vartzokas v Zanker* (1989) 51 SASR 277; *R v Wacyk* (1996) 66 SASR 530; *R v Taylor* [2000] NSWCCA 442; *Ryan v The Queen* (2001) 206 CLR 267; *Nicholls v Police* [2003] SASC 303; *R v Lappas* (2003) 152 ACTR 7; *Sumner v Police* [2004] SASC 158 and *R v Dutton* [2005] NSWCCA 248; *Western Australia v Marchese* [2006] WASCA 153; *Assaf v The Queen* [2007] NSWCCA 122; *R v Baldetti* [2008] SASC 232.

45 Dignan, above n 32, 189. See also Ancel, above n 30, 11; Terence Morris, *Deviance and Control: The Secular Heresy* (1976) 136.

Keeping offenders out of prison is also expected to have a protective effect against re-offending, by maintaining offenders' links with their community, as well as minimising the disruption to offenders' families, accommodation and employment. Research has found that even a short period of custody may lead to loss of accommodation[46] and the deleterious impacts of prison are seen as particularly acute in respect of short prison sentences. Furthermore, offenders who serve sentences of 12 months or less may have a higher rate of reconviction.[47] Short-term prisoners may also have greater difficulties accessing rehabilitative programs while in custody and are less likely to be subject to post-release supervision by way of parole,[48] which may further increase their chances of re-offending.

Short prison sentences significantly increase the prison population,[49] potentially leading to prison overcrowding. They are

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46 See, eg, Eileen Baldry et al, *Ex-prisoners and Accommodation: What Bearing Do Different Forms of Housing Have on Social Integration?: Final Report* (2003); Roberts, above n 34, 54; Maria Borzycki, *Interventions for Prisoners: Returning to the Community* (2005), 38-40; Victorian Sentencing Advisory Council, *Suspended Sentences: Discussion Paper* (2005) 9 ('VSAC DP'), 13.

47 National Association for the Care and Resettlement of Offenders, *The Forgotten Majority: The Resettlement of Short Term Prisoners* (2000), cited in VSAC Interim Report, above n 18, 83. See also Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison* (2003). For discussion of the relevance of length of sentence to reconviction rates, see Bartels, *ANZJC*, above n 12.

48 For a summary of the custodial programs available in Australian prisons, see Kevin Howells et al, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) 102-4. See also Maria Borzycki and Eileen Baldry*, Promoting Integration: The Provision of Prisoner Post-release Services*, Trends and Issues in Crime and Criminal Justice No 262 (2003); Borzycki, above n 46, 53; VSAC Interim Report, above n 18, [2.37]; NSW Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30, (2006) [2.70].

49 Kate Warner, 'Sentencing Review 2002-2003' (2003) 27 *Criminal Law Journal* 325; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less Discussion Paper* (2004), 10-11; Roberts, above n 34, 29 and Australian Law Reform Commission, *Same Crime, Same Time*, Report 103 (2006) (ALRC), [7.67]. The position that short prison sentences are a necessary part of the sentencing continuum is supported in Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002) 136.

also costly and pose organisational problems for corrections staff.[50] Research indicates that if all sentences of six months or less in NSW were replaced with non-custodial penalties, there would be savings of $33-$47 million in recurrent costs.[51] On this basis, suspended sentences may be regarded as a cost-effective disposition. At the time of sentencing, in the absence of additional supervision by a probation officer, the offender need not cost the State another cent while 'serving' his or her sentence.

On the other hand, should the offender breach the suspended sentence and be committed to prison, the costs to the State rise significantly, possibly far beyond what would have been incurred had the offender received a true non-custodial order in the first place. If suspended sentences are imposed inappropriately, this may in fact expose additional offenders to its dangers, thereby contradicting any supposed efficiency gains in reducing admissions to prison.[52]

This issue was explored in judicial interviews, with comments indicating that minimising offenders' exposure to the adverse effects of prison is a relevant consideration for the majority of judicial

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50 Alison Liebling, 'The Uses of Imprisonment' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing* (2002) 105, 126. Note that the same admission process must be undertaken for each offender, whether they are admitted for a week or several years.

51 Bronwyn Lind and Simon Eyland, *The Impact of Abolishing Short Prison Sentences*, Crime and Justice Bulletin No 73 (2002). See also NSW Sentencing Council, above n 49; TLRI, above n 8, [3.2.6]-[3.2.14]. Sentences of three months or less were abolished in Western Australia in 1995 and in 2004 this was extended to sentences of up to six months. Note however the suggestion that 'attempts to compare the cost-effectiveness of imprisonment and community-based options, or the often starkly dissimilar types of offenders serving them, is [sic] misguided': John Tomaino and Andreas Kapardis, 'Sentencing Theory' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice* (2004) 80, 99. The authors suggest that community based options are often not as cheap as they appear because the capital costs of prison are present whether the prisons are full or empty.

52 Note that Dignan has suggested that 'the connection between administrative convenience and the basic penal philosophy underlying the new formulation of the "avoiding prison theory" is decidedly more tenuous' than the arguments for suspended sentences on the basis of humanitarianism or fear of contamination: see Dignan, above n 32, 190.

officers when imposing a suspended sentence. The extent to which offenders are exposed to short prison sentences is also dependent in part on the prosecution of breaches. A breach analysis of sentences imposed in the Tasmanian Supreme Court indicated that only 5 percent of offenders apparently in breach of their sentence were prosecuted for breach, while a mere 3 percent of such offenders were ultimately sentenced to custody,[53] results which the TLRI has described as 'startling' and 'unacceptable'.[54] It follows that any change in prosecution practices in this regard would have a significant effect on the number of offenders exposed to prison, especially for short periods.

E *The Use of Suspended Sentences may Reduce the Prison Population*

As a corollary of the previous argument, it has been suggested that the availability of suspended sentences may reduce the size of the prison population. Tait has described the prison population as 'the bottom line',[55] while Freiberg and Ross consider it the 'ultimate measure of the impact of suspended sentences'.[56] On the other hand, Bagaric argues that 'the effect on the prison population is not a weighty, far less the sole, consideration by which the success of a criminal sanction may be assessed'.[57] Ashworth has also suggested that the 'level of sentencing ought to be determined on wider social and philosophical arguments rather than upon what buildings are available'.[58]

Although the size of the prison population should again not be the sole consideration for sentencing policy – after all, abolishing prison sentences altogether would obviously reduce prison numbers, but would be politically, socially and legally unacceptable – it is

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53 See Bartels, *CICJ* and *T&I,* above n 12, 5.
54 TLRI, above n 8, [3.3.12]; [3.3.40].
55 Tait, above n 31, 158.
56 Freiberg and Ross, above n 19, 126. See also Tait, above n 31, 158.
57 Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *UNSWLJ* 535, 543.
58 Ashworth, above n 14, 41.

indeed a valid consideration. The use of suspended sentences is however only a minor factor impacting on this issue. Some of the main factors said to affect the size of the prison population include law enforcement practices, legislative amendments, prison sentence lengths, crime rates, changes in offence seriousness, and the offending background of offenders and parole practices.[59]

While some of these issues may themselves influence the use of suspended sentences,[60] the availability and use of suspended sentences has little or no impact on these issues themselves, and it is the interplay of all these factors which determines the final prison population. It is also important to remember that it is 'the *ultimate* impact on the prison population of the whole effect of a suspended sentence, not just the apparent immediate impact, which really matters for penal analysts'.[61] The impacts of net-widening, sentence inflation, length of sentence and operational period and possibly increased penalties for subsequent offending, as well as policies for activation on breach are not always readily visible but will dramatically affect the size of prison populations.

Arguably, jurisdictions which maintain data before and after the use of suspended sentences should provide a clearer answer to the role played by such sentences in reducing the use of immediate imprisonment and/or the size of the prison population; however the research on this issue is not very compelling. New South Wales reintroduced suspended sentences in 2000 and subsequently saw an increase in the proportionate use of imprisonment in the higher

[59] Arie Freiberg, *Sentencing Review: Discussion Paper,* Department of Justice, Melbourne (2001) (Freiberg DP), 34. Other factors may include community tolerance of crime, changes in attitudes on the part of police, prosecutors, judges and jurors and a rise in economic and social dislocation: 30.

[60] For example the use of suspended sentences fell for certain offence types following the introduction of standard non-parole periods in NSW, but rose for drink-driving offences following a guideline judgment on this issue: Patrizia Poletti and Sumitra Vignaendra, *Trends in the Use of Section 12 Suspended Sentences*, Sentencing Trends and Issues No 34 (2005) 9.

[61] Anthony Bottoms, 'The Advisory Council and the Suspended Sentence' [1979] *Criminal Law Review* 437, 439.

courts, while it remained constant for the Local Courts.[62] Victoria, by contrast, experienced a decrease in prison population following the introduction of suspended sentences,[63] which led Tait to conclude that:

> [T]hey are still something of a mystery. Suspended sentences threaten future pain to ensure present compliance. They depend for their success on the avoidance of certain behaviours rather than the performance of activities. They appear to be inconsistent with other forms of penalty which extract money, work or reporting behaviour or loss of liberty. In a system which prides itself on proportionality and consistency, it is hard to make a case for an invisible, intangible, but frequently irresistible sanction. Except that it works.[64]

Tait appears to have derived his belief that the suspended sentence 'works' largely from their apparently beneficial effect on the prison population.[65] He conceded that this would be minimised or even nullified in the event of extending the maximum operational period or reducing the court's discretion on breach, both of which occurred in 1997.[66]

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[62] The use of suspended sentences in NSW increased from 3percent to 5percent in the Magistrates' Court and 12percent to 15percent in the higher courts between 2001 and 2007. The use of imprisonment remained constant in the Local Courts, at 7percent and rose in the higher courts from 67percent to 70percent: NSW Bureau of Crime Statistics and Research, NSW Court Statistics. See <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats>. See also Georgia Brignell and Patrizia Poletti, *Suspended Sentences in New South Wales*, Sentencing Trends and Issues No 29 (2003) and Jason Keane, Patrizia Poletti and Hugh Donnelly, *Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*, Sentencing Trends and Issues No 30 (2004). Brignell and Poletti were 'unable to conclude that but for suspended sentences the rate of imprisonment would be even higher than it is. On the other hand, the relatively small use of the suspended sentence penalty may suggest there is scope for increasing its use, and perhaps then a noticeable impact on imprisonment may be discerned': 16.

[63] The introduction of suspended sentences in Victoria corresponded with a reduction of 340 prison places: Tait, above n 31, 143. See also Freiberg and Ross, above n 19.

[64] Tait, above n 31, 159.

[65] For a discussion of how suspended sentences 'work' in terms of reconviction, see Bartels, *ANZJC*, above n 12.

[66] See *Sentencing and Other Acts (Amendment) Act 1997* (Vic).

Data analysed by the VSAC indicate that in 1981, before the introduction of suspended sentences, '53 per cent of defendants convicted in the higher courts were sentenced to imprisonment. Following the reintroduction of suspended sentences, imprisonment rates fell to a low of 43 per cent in 1997, and then returned to 53 per cent in 2004'.[67] It therefore seems that the beneficial impact of suspended sentences on the Victorian prison population was only temporary and strongly influenced by provisions as to the length of the operational period and judicial discretion on breach.[68]

Amendments in Victoria in 2006 restricted the availability of suspended sentences for specified 'serious offences'. In its analysis, the VSAC acknowledged that although many offenders sentenced in 2006-7 would have been sentenced for offences committed before the new provisions came into force, 'the data suggest there has already been a shift in sentencing practices for these offences'.[69] These data do not indicate, however, whether the decreased use of suspended sentences was accompanied by an increase in the use of immediate imprisonment.[70]

Research in New Zealand suggested that 'there may be little or no benefit from suspended sentences in terms of reducing the number of prison inmates, and that it is possible that the use of this sentence may in fact cause an increase in the number of prison inmates'.[71] Spier concluded that:

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67 VSAC DP, above n 46, [5.6].

68 For further discussion of the different provisions in Australia, see Bartels, above n 1.

69 VSAC Final Report 2, above n 5, [2.50].

70 It should be noted, however, that the imprisonment rate for 2008 was slightly lower than in 2007 (103.7 per 100,000 in 2008, compared with 104.6 in 2007: Australian Bureau of Statistics, *Prisoners in Australia* 4517.0 (2007); *Prisoners in Australia* 4517.0 (2008).

71 Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996* (1997), [7.1]. Spier had earlier found that 'it appears that the net effect may be a recovery, or even an increase, in the level of the New Zealand prison muster': Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1985 to 1994* (1995). See also Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (2004) Table 4.9.

> The net effect of a large number of suspended sentences being imposed, of which only a minority replace actual prison sentences, together with a relatively high activation rate, is that the number of receptions due to activated suspended sentences may be similar to, if not higher than, the estimated drop in receptions due to the imposition of suspended sentences in the first place.[72]

These findings were influential in the decision to abolish suspended sentences in 2002. Somewhat ironically, there was then a further increase in prison population, and it was suggested that it was 'likely that the abolition of suspended sentences contributed to the higher number of prison sentences imposed in 2003'.[73]

The English data on this issue are inconclusive: although some research indicated that the introduction of suspended sentences in 1967 reduced the prison population,[74] other reports indicated the opposite. Sparks suggested that 'a measure which was intended (*inter alia*) to reduce the prison population has resulted in an increase in that population'[75] and that the overall effect 'could well be to increase the prison population by as much as 25-30 per cent'.[76] The English Advisory Council on the Penal System also concluded that the accumulated evidence was 'not very encouraging. If the main object of the suspended sentence was to reduce the prison population, there are considerable doubts as to whether it has achieved this effect. It may even have *increased* the size of the prison population'.[77] Bottoms in turn considered that the Advisory Council's 'analysis of suspended sentences lacks depth and

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72 Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1989 to 1997* (1998) [8.1]. References omitted. It was estimated that the overall effect of suspended sentences on the daily prison population was an increase of approximately 100 to 330 inmates: [8.6].

73 Spier and Lash, above n 71, [4.2].

74 Ella Oatham and Frances Simon, 'Are Suspended Sentences Working?' (1972) 21 *New Society* 233, who suggested there had been a decrease of between 850 and 1,900 prison places: 235.

75 Richard Sparks, 'The Use of Suspended Sentences' [1971] *Criminal Law Review* 384, 385. See also Advisory Council on the Penal System, above n 15, [265].

76 Sparks, above n 75, 393.

77 Advisory Council on the Penal System, above n 15, [265].

coherence'[78] and purported to resolve the issue by stating that for 'technical reasons the true effect cannot be precisely calculated, but even if we take the most optimistic view, it is still clear that the Act had not had the reductive effect on prison population which had been intended'.[79]

The position is complicated further by the fact that in 1991, suspended sentences were restricted to cases involving 'exceptional circumstances'. It was expected that the result of the effective disappearance of suspended sentences would be 'enormous',[80] as courts would be required to impose many more unsuspended sentences.[81] However it is not clear that this did occur, even though the use of suspended sentences in the higher courts declined from 30 percent to 1 percent. Between 1991 and 1996, the daily average male prison increased by more than 22 percent, from 28,551 to 34,856.[82]

This led Thomas to conclude that 'there can be little doubt' that restricting the availability of suspended sentences 'has been a major factor in the rise in the prison population'. He went on to say that although 'there are undoubtedly other factors in the equation, there

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[78] Bottoms, above n 61, 440.

[79] Bottoms, above n 3, 8. See also Ashworth, above n 24, 248; Roger Tarling, 'Sentencing Practice in Magistrates' Courts Revisited' (2006) 45 *Howard Journal of Criminal Justice* 29, 30.

[80] David Thomas, 'Commentary' [1993] *Criminal Law Review* 224, 226. See also Ian McLean, Peter Morrish and John Greenhill, *Magistrates' Court Index* (13th ed, 2003); Nigel Walker, *Aggravation, Mitigation and Mercy in Criminal Justice* (1999); Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the mid-1990s*, Home Office Research Study 180 (1998); Martin Wasik, 'The Suspended Sentence: "Exceptional Circumstances"' (1998) 162 *Justice of the Peace* 176; Campbell, above n 21; Nigel Stone, 'The Suspended Sentence since the *Criminal Justice Act 1991*' [1994] *Criminal Law Review* 399; David Foot, 'The Use of Suspended Sentences' (1993) 157 *Justice of the Peace* 565.

[81] Flood-Page and Mackie suggested that offenders whose cases 'would have attracted a suspended sentence have...moved to immediate custody': ibid, 125. Ashworth similarly suggested that '[s]ome courts *may well* have gone on to impose immediate custody because of the restrictions of the power to suspend, rather than moving to a community sentence': Andrew Ashworth, *Sentencing and Criminal Justice* (3rd ed, 2000), 298.

[82] David Thomas, 'Commentary' [1998] *Criminal Law Review* 515.

appears to be a strong case for arguing that the repeal of [the restriction] might be a significant step in the direction of controlling the growth of the prison population'.[83] However, Thomas does not appear to have sufficiently acknowledged that the effect on the number of men admitted to prison was in fact minimal: 66,801 adult men were sentenced to prison in 1991, compared with 67,381 in 1996, an increase of only 580, or less than 1 percent. Thomas appears to have confused prison 'stock', the number of offenders in custody at a given time , with prison 'flow', that is, the number of offenders sentenced to custody. Thomas' stock figures on the daily prison population are in fact more likely to be a reflection of other factors, such as the length of sentences imposed or the abolition or reduction of parole or remissions.[84] Indeed, one study found that 'most of those previously receiving a suspended sentence [now] seem to be receiving community sentences',[85] suggesting that restricting the availability of suspended sentences to cases where there are exceptional circumstances did not in fact play a significant role in increasing the size of the prison population.

There is also conflicting evidence about the effect of conditional sentences, which are similar in many key respects to suspended sentences, on Canada's prison population. Roberts initially reported the imprisonment rate as essentially remaining stable following the introduction of conditional sentences,[86] but has elsewhere suggested that between 1993-1994, before the introduction of conditional sentences, and 2000-2001, rates of admission to custody dropped by

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83 Thomas, above n 82, 516.

84 For discussion of prison stock and flow, see Lind and Eyland, above n 51; Hough, Jacobson and Millie, above n 47, 13.

85 Sue Rex, 'Applying Desert Principles to Community Sentences: Lessons from Two Criminal Justice Acts' [1998] *Criminal Law Review* 381, 388.

86 Julian Roberts, 'Reforming Sentencing and Parole in Canada' in Michael Tonry (ed), *Penal Reform in Overcrowded Times* (2001) 227, 229. See also Allan Manson, 'The Conditional Sentence: A Canadian Approach to Sentencing Reform or, Doing the Time-Warp, Again' (Paper presented at the Changing Face of Conditional Sentencing Symposium, Ottawa, 27 May 2000), 8; Kent Roach, 'Conditional Sentences, Restorative Justice, Net-Widening and Aboriginal Offenders' (Paper presented at the Changing Face of Conditional Sentencing Symposium, Ottawa, 27 May 2000), 26.

13 percent.[87] The latter figures led Roberts to conclude that the experience there has been a positive one, 'at least in terms of reducing the number of admissions to custody'.[88]

It follows from the foregoing discussion that the ability of suspended sentences to reduce the prison population cannot be easily disentangled from policies affecting its use and other sentencing policies. It is also difficult to place too much reliance on comparative research which makes claims about reductions in prison numbers due to the opacity of the information available.[89] Comprehensive Australian research should therefore be undertaken to determine the number of prison places 'saved' by the imposition of suspended sentences, taking into account the effect of breach proceedings. Overall, it cannot currently be said with confidence that suspended sentences achieve much in terms of reducing the prison population. As Freiberg has pointed out, '[w]e should not give up on attempts to change the mix of sanctions and to try to influence the Courts, but realistically, alternatives to imprisonment will only remove a very small proportion of the prison population'.[90]

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87 Roberts, above n 34, 123 (table 6.1).

88 Roberts, above n 34, Foreword by Andrew Ashworth, xi. See also Canadian Centre for Justice Statistics, *Highlights of the Conditional Sentencing Special Study: Bulletin* (2002); Julian Roberts, 'Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales' (2003) 42 *Howard Journal of Criminal Justice* 229, 233.

89 For example, Tait, above n 31, claims that the introduction of suspended sentences in Victoria resulted in a reduction of 340 prison places. He cites the imprisonment rate per 100,000 of population and reports Victoria's prison population as having risen 'dramatically' and being at an 'acute level', but fails to mention the total prison population in Victoria at the time. Other research indicates the prison population of Victoria at the time is likely to have been in the order of 2,250: see Freiberg and Ross, above n 19, 194. Similar issues arise in respect of the English data on prison population, so that it is difficult to obtain a clear picture of the effect of suspended sentences on the prison population.

90 Arie Freiberg, 'The Politics of Sentencing and Imprisonment' (Paper presented at the Beyond Imprisonment Conference, Hobart, 21 September 2000), 27.

III THE CASE AGAINST SUSPENDED SENTENCES

A *A Suspended Sentence is Not Real Punishment*

Under the original model of suspended sentences, one could not add any additional conditions, other than that the offender not commit any further offences during the operational period.[91] The basic premise that the offender is able to walk free from the courtroom after their sentence is imposed has led the VSAC to conclude that those who claim suspended sentences are not really custodial in nature are justified in their critique.[92] Bagaric also suggests that 'there is good reason for offenders' enthusiasm towards suspended sentences: they do not constitute a recognisable form of punishment at all'.[93] He argues that:

> [D]espite continuing unresolved issues about the nature of punishment, one settled feature is that punishment involves an unpleasantness imposed on the offender. This incontrovertible and seemingly innocuous truth is fatal to the continuation of the suspended sentence as a sentencing option.[94]

In Bagaric's analysis, the imposition of the term of imprisonment cannot be said to constitute 'a form of unpleasantness since by the

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[91] Ancel, above n 30, 34.

[92] VSAC Interim Report, above n 18, [2.42]. It is in this context interesting to note the recent suggestion that 'after sentence, all defendants who are found guilty should leave the dock by the same exit i.e. not through the front door'. It was therefore recommended that 'Offenders receiving community sentences should be "sent down" in the same way as those receiving custodial sentences to reinforce the message that they have not been acquitted': *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison* (2004) 59-60.

[93] Bagaric, above n 57, 536; Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (2007) [13.3.1].

[94] Bagaric, above n 93, 547. Note that these arguments of course do not apply in respect of partly suspended sentences: although the portion of the sentence to be served immediately may be shorter, there is an undeniable 'unpleasantness' to be experienced by the offender.

very nature of the sanction it is suspended precisely in order to avoid its effective operation'. He further submits that the fact that a period of imprisonment *may* ensue is also not tantamount to punishment, even though 'a real unpleasantness is imposed since the people undergoing it face the *risk* of activation in the event of a breach' because:

> [T]he natural and pervasive operation of the criminal law casts a permanent Sword of Damocles over all our heads: each action we perform is subject to the criminal law. Despite this it has never been seriously asserted that we are all undergoing some type of criminal punishment. It follows logically that the risk of imprisonment in the event of a future commission of a criminal offence is not a criminal sanction; it is a nullity in terms of punitive effect.[95]

Bagaric's line of reasoning has been criticised as 'simplistic', due to its failure to recognise as 'punishment' that the offender has been prosecuted, convicted and has faced the sentencing process with the real threat of going to prison, as well as the stigma attached to a sentence on his or her record which is regarded as equivalent to a sentence of imprisonment.[96] As noted by Tait, a threat of punishment which depends merely on internal restraint is no less 'real' as a consequence.[97] Furthermore, in the event of breach, the offender also faces a real risk of going to prison for the original offence, as well as potentially having the penalty for the new offence increased as a result of the failure to respond positively to the suspended sentence. Others therefore argue that the Damocles sword image is not to be taken lightly, with Roberts observing that:

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95 Bagaric, above n 93, 547-8. Note that Bagaric appears to have contradicted himself, having earlier stated that '[e]ven where an offender does not breach a suspended sentence he or she has still undergone a significant punishment: the *risk* of imprisonment in the event of breach': Mirko Bagaric and Tanya Lakic, 'Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after *Kable*' (1999) 23 *Criminal Law Journal* 145, 147.

96 Brignell and Poletti, above n 62, 7-8.

97 Tait, above n 31, 146. Note also that acceptance of Bagaric's reasoning would lead to the conclusion that good behaviour bonds, deferred sentences and probation orders also do not amount to punishment.

> Damocles was a courtier forced to remain motionless while sitting under a sharp sword that was hanging by a horsehair. One careless movement would result in rather unpleasant consequences for the man. He was obliged to endure this punishment by his ruler, to illustrate what it was like to live under constant threat of death.[98]

In the oft-cited case of *Elliott v Harris (No 2)*, Bray CJ of the Supreme Court of South Australia observed that:

> So 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.... 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. [99]

This statement continues to be endorsed in courts across Australia.[100] It should also be noted that in most Australian jurisdictions, the court may increase the punitive bite of the sentence, by imposing additional conditions or combining the sentence with some other order, for example, community service,[101] although data on how often such orders are imposed are not routinely reported.

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98 Roberts, above n 34, 4.

99 *Elliott v Harris (No 2)* (1976) 13 SASR 516.

100 See, eg, *R v JCE* (2000) 120 A Crim R 18 (NSW CCA); *Latham v The Queen* (2000) 117 A Crim R 74 (WA CCA); *Humphrey v Police* [2000] SASC 391; *R v Foster* (2001) 33 MVR 565; *R v Zamagias* [2002] NSWCCA 17; *R v Y* (2002) 36 MVR 328; *R v Temby* [2003] SASC 230; *Peart v Police* (2003) 229 LSJS 194; *R v Whelan* (2004) 42 MVR 541; *R v Suri* [2004] SASC 80; *Sumner v Police* [2004] SASC 158; *DPP (Vic) v Oversby* [2004] VSCA 208; *DRI (a child) v Read* (2004) 42 MVR 566 (WA CCA); *R v Errigo* (2005) 92 SASR 562, [27]; *DPP (Vic) v Gany* (2006) 163 A Crim R 322. See *R v Brady* (1998) 121 CCC (3d) 504, cited in *R v Tolley* [2004] NSWCCA 165.

101 See discussion in Bartels, above n 1, 124-128. See also the English model, which, since 2005, has required at least one condition to be attached to the suspended sentence order. For discussion, see Bartels, Sword or Feather, above n 12, [2.3.3] and note especially the Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (2004), <http://www.sentencing-guidelines.gov.uk/docs/New_sentences_guideline1.pdf>, Section 2, Part 2.

Quantitative analysis of sentences imposed in the Tasmanian Supreme Court indicated that combination orders were imposed in over two-thirds of wholly sentences, with almost a quarter of offenders subject to some form of supervision, whether as a condition of sentence or a separate order. A community service order was imposed in 11 percent of partly and 20 percent of wholly suspended sentences and in 13 percent of cases, the offender received more than one additional order. In the Magistrates' Court, probation orders were imposed in 21 percent of partly and 16 percent of wholly suspended sentences, while a fine was imposed in a third of all wholly suspended sentences.[102]

Interviews with the Tasmanian judiciary indicated general support for the use of combination orders, although there was concern about the utility of attaching a fine. The interview comments also yielded a broad range of views about the appropriateness of imposing a suspended sentence on offenders with special needs, for example, gambling, while analysis of judicial remarks on sentence suggests that it may be desirable to link supervision or participation in a rehabilitation program more frequently with suspension of the sentence for offenders with substance abuse issues. Further research is required to examine the use and impact of measures designed to increase the punitive component of a suspended sentence.

B *Suspended Sentences are Seen as a 'Let Off'*

1 *Public and Media Perceptions*

The foregoing section examines whether suspended sentences amount to real punishment *at law*. There is also what Ancel described as a 'threat to the suspended sentence', 'that uncontrollable factor, public opinion and its panic reaction to certain

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[102] See Bartels, Sword or Feather, above n 12, [4.3.4]. It should be noted, however, that supervision, whether in combination with a suspended sentence or as a condition of suspension, appeared to be associated with higher reconviction rates and reconviction for more serious offences: see [6.4.4].

types of offence'.[103] Suspended sentences appear to be regarded by the media, members of the public and victims,[104] as a 'let-off', while the offender is commonly perceived as 'walking free' or having received a slap on the wrist.[105] Tonry has commented that the perceived leniency of intermediate sanctions is 'the most difficult obstacle' to their greater implementation.[106]

This poor public image is sometimes acknowledged by the courts. Over 30 years ago, the South Australian Court of Criminal Appeal observed:

> If, as has been suggested, persons convicted and members of the public take a light-hearted view of a sentence which is suspended then time will, we believe, prove them to be wrong. If the convicted person does not take seriously the warning that any breach of his recognizance during its term will lead to the serving of the suspended sentence, he is likely to appreciate its truth if he is convicted of even a minor offence. The public will learn the truth about suspended sentences only if it takes the trouble to inquire what a suspended sentence really means. In this connection the news media could be of assistance.[107]

More recently, Perry J suggested that 'it is abundantly clear that many members of the public do not regard a suspended sentence as any sort of a penalty at all'.[108] Justice Parker of the Western

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103 Ancel, above n 30, 24.

104 Michael Dawson, 'Sentencing: The Victims' Verdict' (2002) 23(2) *Victims' Voice* 1, 1; VSAC Interim Report, above n 18, [2.10]; [2.28]; Julian Roberts and Kent Roach, 'Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis' (2005) 9 *Queen's Law Journal* 560, 567-8. Roberts and Roach found great confusion amongst victims about the meaning of conditional sentences. The victims in their study were also 'unanimous' in their desire to have a copy of the reasons for sentence and the conditional sentence order imposed and several were also keen to have the sentence 'interpreted' by a lawyer or victims' representative as it was 'full of legal jargon'.

105 Freiberg DP, above n 59, 60; Freiberg, above n 49, 120. See also Morris, above n 45, 139; Kate Warner, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355, 362.

106 Michael Tonry, *Sentencing Matters* (1996) 4.

107 *R v Weaver* (1973) 6 SASR 265, 267.

108 *Nicholls v Police* [2003] SASC 303, [39]. See also *R v Lord* [2001] NSWCCA 533, [35]; *Whelan v Police* (2003) 229 LSJS 93, [21].

Australian Court of Criminal Appeal similarly observed in *Latham*[109] that because in 'most cases a suspended sentence involves neither custodial nor coercive consequences', it is understandable 'that the community's perception and the reality of this sentencing option is quite different from that of a sentence of a term of imprisonment to be served immediately'.

Recent examples of suspended sentences being imposed to the indignation of the media and the community include NSW radio broadcaster John Laws' sentence for contempt.[110] One commentator described the sentence as the equivalent of being thrashed with a feather,[111] while another described Laws as '[t]oo prominent for prison and too flush to fine'.[112] In Victoria, the imposition of a wholly suspended sentence on an offender convicted of sexual assault in rather unusual circumstances[113] led to public condemnation, with a demonstration of some 10,000 protesters held on the steps of the Victorian Parliament and speakers calling for an end to the fiction of prison when the offender remained free. The outcry resulted in the issue of suspended sentences being referred to the then newly established Victorian Sentencing Advisory Council.

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109 *Latham v The Queen* (2000) 117 A Crim R 74, [31].

110 *R v Laws* (2000) 116 A Crim R 70 (NSWSC).

111 Richard Ackland, 'Thrashed with a Legal Feather', *Sydney Morning Herald* (Sydney), 8 September 2000. See also Warner, above n 105, 362; 'Separate Law for Laws', *Courier Mail*, Brisbane, 9 September 2000. It is in this context interesting to note Roberts' suggestion that wealthy offenders be required to serve conditional sentences in a residential halfway house instead of in their own homes: Roberts, above n 34, 166.

112 Mick O'Regan, 'Media Report', *Radio National*, ABC Radio, 7 September 2000.

113 See *DPP (Vic) v Sims* [2004] VSCA 129. For discussion, see Thérèse McCarthy, 'A Perspective on the Work of the Victorian Sentencing Advisory Council and its Potential to Promote Respect and Equality for Women' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy* (2008) 165, 174.

Shortly thereafter, a female school teacher who had had a consensual sexual relationship with one of her male students also received a wholly suspended sentence, which caused a 'strong reaction' in Melbourne newspapers and on talkback radio.[114] The Victorian Attorney General was also recently required to defend the decision of a County Court judge who had imposed a three year wholly suspended sentence after calls that the judge be 'sacked because the sentence showed his priorities were out of step with the community's'.[115] The judge imposed the wholly suspended sentence on a former refugee who drove into the wall of a primary school while under the influence of alcohol, injuring five children, commenting that 'I defy anyone to regard your past without a twinge of sadness'. Perhaps unusually, the following comments by the sentencing judge were also reported in the media:

> A suspended sentence is not always the soft option as it is characterised by the media and others. Indeed, for some it is a very hard, demanding and controlling sentence. A man convicted of a suspended sentence does not 'go free'. No, he goes away bearing a considerable burden. He may walk out of the court but he does not leave behind the embrace of the law.[116]

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[114] Marc Moncrief, 'Media Blamed in Teacher Sex Case', *The Age* (Melbourne), 11 November 2004. The sentence was increased on appeal to a sentence of two years and eight months, suspended after six months: *DPP (Vic) v Ellis* (2005) 11 VR 287. Special leave to appeal to the High Court was refused: *Ellis v DPP (Vic)* [2005] HCATrans 751. See also 'Teacher Escapes Jail for Sex with Student', *Sydney Morning Herald* (Sydney), 1 March 2006, which reported on a female teacher who had sex three times with a 15-year-old male student. Barnett J took into account 'the extent of shame' the offender had already suffered and imposed a wholly suspended sentence for two years and four months. The sentence caused the South Australian Premier to call for a report on the sentence: see 'Anger at Sex Teacher's Light Sentence', *Sydney Morning Herald* (Sydney), 2 March 2006; Andrew Hough, 'Family's Torment: Judge Lets Sex Teacher Go Free', *The Advertiser* (Adelaide), 2 March 2006.

[115] Julia Medew, 'Mercy for Drink-driver Outrages Families', *The Age* (Melbourne), 11 February 2006.

[116] Christine Caulfield, 'Mum's Anger as Drink-driver Walks', *Herald Sun* (Melbourne), 11 February 2006. See also Carly Crawford, 'Jail this Drunk', *Herald Sun* (Melbourne), 12 February 2006; Andrew Dowdell, 'Senior Judge Defends Use of Suspended Sentences', *The Advertiser* (Adelaide), 18 December 2007.

In another high-profile case, a wholly suspended sentence was imposed on a 19-year-old member of a prestigious South Australian family who had been convicted of endangering life.[117] The circumstances of the offence were somewhat unusual, in that the offender shot at the victim because he erroneously believed the latter had been following two young women, who were allegedly in fear of being raped. The victim, a newsagent delivering papers, lost an eye as a result. The sentence gave rise to significant public outcry, condemnation of the sentence by the Premier, and a successful Crown appeal.[118] Furthermore, even though the Premier did not call for his resignation, the then DPP ultimately resigned his position as a result of the controversy.[119]

It is beyond the scope of this article to explore the role of public opinion in sentencing, the rise of penal populism, fear of crime and the role of the media in accurately reporting sentencing outcomes,[120] but the research suggests that suspended sentences have both a high public profile and negative public image. In the 1996 British Crime Study, for example, participants were asked to identify non-custodial sentencing options. Fines were nominated by 58 percent, probation by 35 percent and suspended sentences by 30 percent of respondents. This is surprising, however, given they were 'virtually unused' at the

[117] *R v Nemer* (2003) 87 SASR 168. The Director of Public Prosecutions accepted a plea to the offence of endangering life, instead of attempted murder, which had originally been preferred.

[118] Notwithstanding the fact that the DPP had not objected to the imposition of a suspended sentence, the sentence was increased on appeal and an unsuspended sentence substituted. Special leave to appeal to the High Court was refused: *Nemer v Holloway; Nemer v The Queen* [2004] HCATrans 24.

[119] For discussion, see Anne Johnson, 'Stateline (South Australia)', *ABC Television*, 1 August 2003; Chris Finn and Ryan Maguire, 'Nemer and the DPP' (2004) 26(3) *Bulletin* 20; Karen Earle, Rick Sarre and John Tomaino, 'Introduction: The Criminal Justice Process' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice* (2004) 1, 7-8; Michael Jacobs, 'Conduct Unbecoming', *Adelaide Review*, December 2003; Michael Jacobs, 'Public Prosecution', *Adelaide Review*, May 2004.

[120] For a detailed discussion, see Bartels, Sword or Feather, above n 12, [1.5.2.1], especially 173-187. See also Craig Jones, Don Weatherburn and Katherine McFarlane, *Public Confidence in the New South Wales Criminal Justice System*, Crime and Justice Bulletin No 118 (2008).

time in England, accounting for only 1 of all sentences.[121]

In Sebba's seminal study, participants regarded a fine of $250 as more severe than a six month suspended sentence,[122] while a three year suspended sentence was regarded as less severe than a one year unsuspended sentence. A follow-up study found that 'a suspended sentence involving the prospect of a *possible* prison sentence for a specified term is less burdensome than the *immediate* inconvenience of probation supervision or a financial penalty'.[123] In that study, suspended sentences of one and three years were rated 30th and 26th respectively out of 36 sentencing options, while a one year suspended sentence combined with a $1,000 fine was rated 23rd, thereby supporting the view above that adding some form of immediate punishment to a suspended sentence may make it more palatable in the eyes of the public. In another English study, a suspended sentence was regarded as the most lenient sentencing disposition of the choices given; the remaining sentences were ranked in the following ascending order of severity: probation, community service, fine ($40; $100), immediate imprisonment (1 month; 12 months).[124] These findings are in contrast with a study of magistrates, who ranked a six month suspended sentence immediately below a six month unsuspended sentence,[125] thereby highlighting the differences between public perception and the doctrinal position.

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[121] Mike Hough and Julian Roberts, 'Public Knowledge and Public Opinion of Sentencing' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society* (2002) 157, 161.

[122] Leslie Sebba, 'Some Explorations in the Scaling of Penalties' (1978) 15 *Journal of Research in Crime and Delinquency* 247, 260. It is conceded that at the time of the study, $250 was worth more than today.

[123] 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 most severe and lenient sentences: death (1); imprisonment for life (2); $50 fine (35); $10 fine (36).

[124] Nigel Walker and Catherine Marsh, 'Does the Severity of Sentences Affect Public Disapproval?' in Nigel Walker and Mike Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries* (1988) 56, 60. The length of the sentence was not stated.

[125] Andreas Kapardis, *Sentencing by English Magistrates as a Human Process* (1985) 176.

In a South Australian study, the only Australian research to date to systematically examine victims' views on suspended sentences, victims of crime ranked suspended sentence as the least severe community-based sentencing option, leading the study's authors to suggest that 'comments from victims of crime…provide further indication that suspended sentences are viewed as "no punishment' at all"'.[126] This is particularly relevant, given international research indicating that victims are no more punitive than the general public.[127]

The public opinion research on Canadian conditional sentences of imprisonment is also relevant in this context, although there are significant differences from the suspended sentence.[128] Research after such sentences which had been available for four years demonstrated that many respondents did not understand what a conditional sentence is. When given the choice between the correct definition and the definitions for bail and parole, only 43 percent correctly identified a conditional sentence.[129] Perturbingly, a follow-up study three years later yielded similar results.[130] Other research in Canada has shown that when respondents were given detailed information about the conditions attaching to offenders' sentences,

[126] Jenny Pearson and Associates Pty Ltd, *Review of Community Based Offender Programs: Final Report* (1999) 40, discussed in Freiberg, above n 49, 139.

[127] See, eg, Mike Hough and Julian Roberts, 'Sentencing Trends in Britain: Public Knowledge and Public Opinion' (1999) 1 *Punishment and Society* 11; Candace McCoy and Patrick McManimon, 'Harsher is not Necessarily Better: Victim Satisfaction with Sentences Imposed under a "Truth in Sentencing" Law' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society* (2002) 197.

[128] It is important to note, however, that there are significant differences between Australian suspended sentences and the Canadian conditional sentence, as the latter is a sentence of imprisonment actually served in the community. For further discussion, see Bartels, Sword or Feather, above n 12, [2.5].

[129] Trevor Sanders and Julian Roberts, 'Public Attitudes Toward Conditional Sentencing: Results of a National Survey' (2000) 32 *Canadian Journal of Behavioural Science* 1999. See also Rethinking Crime and Punishment, *What Does the Public Think About Prison?* (2002).

[130] Trevor Sanders and Julian Roberts, 'Exploring Public Attitudes to Conditional Sentencing' in John Winterdyk, Linda Coates and Scott Brodie (eds), *Quantitative and Qualitative Research Methods: A Canadian Orientation* (2005), Ch 14.

support for such sentences rose significantly. All respondents were aware that conditions would be imposed on the offender, but support rose to 64 percent in the group where the conditions were made explicit, compared with 27 percent in the control group, leading the authors to conclude:

> This finding sheds some important light on the source of public opposition to conditional sentencing. It suggests that it is not the presence of the offender in the community to which members of the public object, but rather the perception that the offender is merely spending the time at home, without being expected to do more than refrain from further offending. Simply making the conditions explicit to participants resulted in an almost complete reversal of support for the two sanctions (conditional and conventional imprisonment).[131]

Perhaps surprisingly, doubling the length of sentence only increased support by 8 percent, suggesting that people are after appropriate conditions, not simply longer sentences. Accordingly, the authors suggest that in order to make community-based sentences:

> [A]cceptable to the public, the court must ensure that significant conditions are imposed which have a real impact on the offender's life. In this way the sentence is not simply a 'warning' to the offender. If this can be accomplished, the public will support the imposition of a conditional sentence over a term of imprisonment, even for a serious personal injury offence.[132]

Another study sought respondents' views on the ability of prison and community custody to meet the traditional sentencing objectives of deterrence, denunciation and rehabilitation in respect of manslaughter, sexual assault and drug possession for the purposes of trafficking. There were few differences between the penalty types, and where statistically significant differences did emerge, they were in favour of community custody, which was regarded as more effective for all three objectives in respect of the drug offence, and more effective for rehabilitation in respect of sexual assault. Roberts

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[131] Sanders and Roberts, above n 129, 204.
[132] Ibid 205. See also Roberts, above n 34, 148.

concluded that 'in the eyes of the public, community custody can achieve the objectives of sentencing to the same degree as imprisonment, if the sanction carries conditions that restrict the lifestyle of the offender, and these conditions are made clear'.[133] These findings conform with other research on victims' support for conditional sentences, where Roberts and Roach found that 'to the victims, the conditions imposed on offenders serving conditional sentences are critical',[134] with several participants feeling that a conditional sentence could be effective if it was tough enough and if it was adequately enforced'.[135]

There is also Canadian research examining the popularity of conditional sentences on the basis of offence type. In one study, respondents were asked to choose between a conditional sentence and prison for various offence types.[136] Conditional sentences were most favoured over prison for assault causing bodily harm (77 percent), followed by assault (62 percent). It was less popular in respect of fraud by a lawyer involving a breach of trust (29 percent), and impaired driving causing bodily harm (25 percent). Although only 3 percent of respondents preferred a conditional sentence to prison in respect of sexual assault, support rose once the conditions attached to the order were made salient.

Later research[137] showed conditional sentences to be favoured by 81 percent of respondents in a case of an assault resulting in a broken nose, while two-thirds of respondents preferred it in respect of domestic violence assaults. It would be of great interest and

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133 Roberts, above n 34, 34; 149-150. Interestingly, the public in this study showed more confidence in community custody than judges who were asked similar questions in a separate study: see Julian Roberts, Anthony Doob and Voula Marinos, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey, Report 2000-10e* (2000).

134 Roberts and Roach, above n 104, 587.

135 Ibid 584.

136 Ibid.

137 Sanders and Roberts, above n 130. See also Voula Marinos and Anthony Doob, 'Understanding Public Attitudes Toward Conditional Sentences of Imprisonment' (1999) 21 *Criminal Reports* 31.

assistance to have similar research conducted in Australia in order to better understand the public's views on the use of suspended sentences in various contexts.[138]

A significant part of the suspended sentence's poor public image appears to stem from confusion about the effect of a suspended sentence. Judge Hassett of the Victorian County Court has recommended suspended sentences as one of three areas in which he considered that the executive and the media could improve public confidence in the courts by better informing and educating the public. He stated:

> There is much public confusion about this area. Endeavours should be made to profitably communicate to the public the point that such sentences are sentences of imprisonment because, clearly, a court must not impose a sentence of imprisonment unless satisfied that a non-custodial sentence is inappropriate.[139]

The judicial interviews explored the role of public opinion and the media. There was a division of opinion between the courts as to whether public opinion influenced their decision-making, with judges more likely to see it as part of their function to reflect public opinion. 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. The need for effective communication about suspended sentences was a key theme considered in the interviews, with magistrates were

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[138] A national survey funded by the Australian Research Council which commenced in 2008 will measure confidence in courts, punitiveness, perceptions of crime and sentencing, and fear of crime: see Kate Warner, 'Sentencing Review 2006-2007' (2007) 31 *Criminal Law Journal* 359, 361. It is to be hoped that the study will reveal findings on attitudes to suspended sentences.

[139] Judge John Hassett, 'Sentencing and Public Perception of the Courts' (1997) 9 *Judicial Officers' Bulletin* 57, where it was suggested that there be more information about the daily realities of prison life, with the belief that a 'better understanding of these matters would bring home to the public the extent of the punishment involved in the service of a sentence of imprisonment'. See also Gerry Johnstone, 'Penal Policy Making: Elitist, Populist or Participatory?' (2004) 2 *Punishment and Society* 161, 168.

more likely than judges to regard it as part of their judicial function to set out the factors leading them to the suspend the sentence and explain the significance of a suspended sentence to the offender.

2 *Offenders' Perceptions*

Indermaur has decried the 'dearth of literature directly on offenders' perceptions of sentencing',[140] suggesting that there is a real risk that 'sentencing may have little effect on the very population (potential offenders) it is intended for'.[141] Wood and Grasmick have also observed that punishments 'devised by legislators and practitioners are rarely (if ever) based on experiential data; they depend almost exclusively on guesswork by persons with no direct knowledge of serving various sanctions', and have likened this to a film critic rating a film without seeing it.[142]

There appears to be a generally accepted notion that offenders in receipt of a suspended sentence should consider themselves lucky, reflected in the observation that they are 'obviously more likely to be out celebrating than dashing to the Court of Appeal'.[143] In

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[140] David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 16. See also Roberts, above n 34, 92. For examples of sentencing research with offenders, see Dan Waldorf and Sheilagh Murphy, 'Perceived Risks and Criminal Justice Pressures on Middle Class Cocaine Sellers' (1995) 25 *Journal of Drug Issues* 11; Lucia Benaquisto, *The Non-Calculating Criminal: Inattention to Consequences in Decisions to Commit Crime* (1997).

[141] Indermaur, above n 140, 17.

[142] Peter Wood and Harold Grasmick, 'Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison' (1999) 16 *Justice Quarterly* 19.

[143] Campbell, above n 21, 294. See also Catherine Dengate, *The Use of Suspended Sentences in South Australia* (1978) 16; Nick Boyden, 'Butter Knives into Swords: Section 12 Bonds (Suspended Sentences) and their Revocation' (June 2005) *Law Society Journal* 73, 73. Home Office research indicates that only 2percent of suspended sentence recipients from the Crown Court in 1992 appealed against their sentence, although no comparison of appeal rates for other sentence types is provided: see Stone, above n 80, 408.

Graham,[144] the NSW Court of Criminal Appeal suggested that it 'would not be unusual for an accused person, the subject of a suspended sentence…not to appeal. The full implication of such a sentence might not have come home to such a person until faced with the reality of gaol'. Dengate similarly found that 'many offenders did not understand their obligations under the suspended sentence when it was imposed'.[145] Indeed, the Tasmanian DPP reports overhearing an offender, when asked what sentence he received, responding, 'Nothing! Suspended sentence.'[146] Similarly, Bottoms and McClean discuss an offender who had been given a suspended sentence. When asked why he did not appeal, he responded that he 'feared that the appeal court might give him a worse sentence, a fine'.[147]

Some of the studies discussed above also explored offenders' views of suspended sentences. Offenders in the Pearson study, for example, regarded suspended sentences as 'moderately severe'.[148] In a New Zealand study, suspended sentences were the sentencing disposition about which there was least consensus amongst offenders. While 30 percent of respondents ranked a nine month wholly suspended sentence in the bottom four (out of 13) positions, 11 percent ranked it in the top four positions.[149] The Sebba and

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144 *R v Graham* (2004) 62 NSWLR 252, [29] (Beazley JA, Wood CJ at CL and Hulme J agreeing). Note that this in turn has implications in the event of breach – having declined to appeal, the severity of the sentence cannot be reviewed; accordingly, the breach arguments and the basis for revocation becomes paramount: see *R v Tolley* [2004] NSWCCA 165; *DPP (NSW) v Cooke* (2007) 168 A Crim R 379. See also discussion in Bartels, above n 1, 128-131.

145 Dengate, above n 143, 13.

146 Tasmania Law Reform Institute (ed), *Responses to the Sentencing Issues Paper No 2* (2002) Submission 6: Tim Ellis SC.

147 Anthony Bottoms and John McClean, *Defendants in the Criminal Process* (1976) 253. In its Discussion Paper, the VSAC said it would consider the suggestion that some offenders may be actively seeking suspended sentences on the basis that they are less punitive than probation or fines: VSAC DP, n 46, [7.10]. The issue was unfortunately not discussed further in the Interim or Final Reports.

148 Pearson, above n 126.

149 Wendy Searle, Trish Knaggs and Kiri Simonson, *Talking about Sentences and Crime: The Views of People on Periodic Detention* (2003) 29.

Nathan study asked 15 prisoners to rank 36 penalties.[150] Although a one year suspended sentence was somewhat perversely rated as more severe than a three year suspended sentence, both of these sentences (ranked as 25th and 26th respectively), were regarded as less severe than three years of probation (23rd) or one year of immediate imprisonment (19th). The fact that a one year suspended sentence combined with a $1,000 fine was ranked directly below an 18 month unsuspended sentence suggests that offenders regard an immediate 'price' as significantly increasing the punitive effect of a suspended sentence.[151]

A Canadian study of offenders on conditional sentences involved focus groups with 25 offenders subject to such sentences, almost all of whom had house arrest imposed as a condition of sentence.[152] One of the key findings to emerge was the offenders' perception that the conditional sentence required much more active involvement by the offender, compared with the inherent passivity of prison. Respondents made comments to the effect that on such a sentence 'you're not useless and can prove to everybody that you can change and be a better person', 'you use it to straighten out the issues that brought you into system' and 'you have to think about what you did and what you are doing'.[153] When respondents were asked to compare the conditional sentence with prison, it was generally regarded as being a better alternative, but a quarter found it was in fact more severe than prison.

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150 Sebba and Gad, above n 123, 240.

151 On this point, the TLRI has observed that requiring a wholly suspended sentence to include at least one condition that requires some positive action on behalf of the offender would make it 'a more demanding sentence and make the place of suspended sentences in the sentencing hierarchy more plausible': TLRI, above n 8, [3.3.34].

152 Julian Roberts, Lana Maloney and Robert Vallis, *Coming Home to Prison: A Study of Offender Experiences of Conditonal Sentencing* (2003).

153 Ibid 8.

As one respondent said:

> 'I didn't like being behind bars, but being out is harder than being in jail'.[154]

Respondents also commented on the impact of the conditions on other people, especially those living with the offender. Children were likely to be significantly affected, with some parents having to make up excuses why they couldn't take their children out. One family member remarked that 'I don't think the judges understand when they hand down this sentence, that they're handing down the same sentence to the family.'[155] Although suspended sentences in Australia are not generally subject to such restrictive conditions as appear to be routinely applied in Canada, these comments are instructive in the context of suspended sentences subject to stringent conditions, for example, drug treatment requirements.

C *There are Theoretical Difficulties in Imposing a Suspended Sentence*

As set out in *Dinsdale*, in order for the court to impose a suspended sentence, it must first sentence the offender to a fixed term of imprisonment and only then determine whether to suspend the

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154 Roberts, Maloney and Vallis, above n 152, 12, 16. For research suggesting that offenders may sometimes prefer prison to community alternatives, especially when the latter are longer or required to be served in a small community where it would be commonly known the offender is serving a sentence at home, see Ben Crouch, 'Is Incarceration Really Worse? Analysis of Offenders' Preferences for Prison over Probation' (1993) 10 *Justice Quarterly* 67; Roberts, above n 34, 49; 96-100. One study reported that 'Several inmates…said that the brief term they were sentenced to serve would allow them to have some dental work done at state expense. Others appreciated the regular meals and shelter, and a chance to "chill out" and see old friends': Wood and Grasmick, above n 142.

155 Roberts, Maloney and Vallis, above n 152, 13. The authors of the report referred to the provisions in the NSW and New Zealand home detention schemes which require the consent of co-habitants before a home detention order can be imposed and raised as an issue for future research whether more should be 'done to ensure that the families (and spouses or partners) are comfortable with the prospect of sharing a residence with someone whose freedom has been highly restricted': 18.

sentence. The reasoning process required to impose a suspended sentence has seen it dubbed the 'penological paradox'.[156] The paradox lies in the requirement that the court must first determine that no sentence other than imprisonment is appropriate, in order to embark upon the second step, namely, the decision to suspend the execution of the sentence. It has been suggested that 'the intellectual agility required to put suspension out of mind at the outset is very considerable, and to a degree artificial'.[157] In undertaking these 'mental gymnastics',[158] the sentencing court must revisit the very factors which it considered in arriving at the decision that imprisonment was the only appropriate sentence.

According to Bagaric, once all other sentences have been deemed too mild, it is farcical to claim that a suspended sentence is appropriate, when there are no new variables to tip the scales further in favour of a more lenient option.[159] One commentator said the two-stage process 'can only give the message to a bemused observer that the court has decided to pass an unjustifiable sentence'.[160] The complexity of the process is further compounded by the fact that 'the task of sentencing an offender, already hard, [is] made much harder by the knowledge that the sentence might never operate or, if it did operate, would operate at an unknown future date and in circumstances which could not be foreseen'.[161]

Analysis of the Australian case law reveals some difficulties in imposing the two-stage test,[162] while an examination of Tasmanian sentencing remarks indicates some instances where suspended sentences were imposed on made on an improper basis.[163] Furthermore, some Tasmanian judicial officers appear to have

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156 Jack Gemmell, 'The New Conditional *Sentencing* Regime' (1997) 39 *Criminal Law Quarterly* 334, 336. See also Bagaric, n 57, 538; Freiberg, above n 49, 120.

157 Samuels, above n 30, 400.

158 Eric Stockdale and Keith Devlin, *Sentencing* (1987) [9.23].

159 Bagaric, above n 57, 539. See also Edney and Bagaric, above n 93, [13.3.2.1].

160 Campbell, above n 21, 295.

161 Advisory Council on the Treatment of Offenders, above n 26, [10].

162 Bartels, above n 1.

163 Bartels, *UTasLR*, above n 12.

misunderstood the effect of the *Dinsdale* two-stage test,[164] which is not entirely surprising, given that this it is a difficult test to apply.

D *Suspended Sentences Cause Net-Widening*

Some critics argue that any positive benefit suspended sentences may have on prison population is likely to be outweighed by net-widening, which occurs when sentencers use a more severe sentencing option in lieu of otherwise appropriate more lenient alternatives. Ashworth, for example, suggests that:

> [S]ince its earliest days the suspended sentence has had no great impact in reducing the imprisonment rate, since those who would have been imprisoned immediately but received a suspended sentence were counterbalanced by those who were given a suspended sentence when they would never have received immediate imprisonment.[165]

Net-widening, also known as penalty escalation, has been described as 'the bane of many alternative sanctions introduced over the past twenty years',[166] and may be difficult to detect because the penalty imposed often seems more humane than the nominally more lenient alternative it replaces.[167] Suspended sentences at first blush appear more lenient in their effect than, for example, fines or community service orders, but may ultimately artificially elevate offenders further up the 'sentencing ladder' towards an unsuspended sentence.

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164 Bartels, *QUTLJJ*, above n 12.

165 Andrew Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995) 294. This quote does not appear in subsequent versions of the text. See also Bottoms, above n 61, 439; Bottoms, above n 3, 5; Stephen Stanley and Mary Baginsky, *Alternatives to Prison* (1984) 77; Richard Fox and Arie Freiberg (eds), *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 228; NSW Legislative Council Standing Committee on Law and Justice, above n 48, [5.78]-[5.85].

166 Roberts, above n 34, 117.

167 Stanley Cohen, 'Community Control: A New Utopia' (1979) 47 *New Society* 609, 611. See also Stanley Cohen, 'Crime and Politics: Spot the Difference' (1996) 47 *British Journal of Sociology* 1.

Other Australian jurisdictions have found net-widening occurring upon the introduction of suspended sentences. Tait, for example, compared the use of various penalties before and after the introduction of suspended sentences in Victoria and found that 40-50 percent of suspended sentences represented net-widening:[168] in other words, up to half of the offenders who received a suspended sentence would previously have received a sentence lower in the sentencing hierarchy. Research by the NSW Judicial Commission following the reintroduction of suspended sentences indicates that the Local Court subsequently saw a decrease of 0.5 percent in penalties more severe than suspended sentences, compared with a decrease of 3.6 percent in less severe penalties,[169] meaning that 88 percent of suspended sentences represented net-widening.

A similar, though less pronounced, trend was observed in the higher courts. More recent research indicates that the increased use of suspended sentences in NSW appears to have been wholly at the expense of non-custodial penalties, as the use of unsuspended sentences, periodic detention and home detention has either risen or remained constant since suspended sentences were reintroduced.[170]

The results from New Zealand also indicate net-widening, with figures suggesting that only 8 percent to 22 percent of offenders in receipt of a suspended sentence would otherwise have been sentenced to immediate custody.[171] On the other hand, Canada is reported to have experienced little net-widening upon the introduction of conditional sentences.[172] This may be because the conditions attached to the sentence make it more onerous in its impact than most suspended sentences, thereby potentially causing sentencers to think more carefully before imposing it.

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168 Tait, above n 31, 149.

169 Brignell and Poletti, above n 62, 11.

170 Poletti and Vignaendra, above n 60, 9-10.

171 The Ministry of Justice reported 2,938 suspended sentences in 1994, the year after suspended sentences were introduced, but this was accompanied by a 'drop in the total number of new prison receptions of just 643. However, more dramatically, the number of prison receptions in the sentence range of six months to two years fell by only 227': Spier (1995), above n 71.

172 Roberts, above n 88, 233; Roberts, above n 34: Foreword by Andrew Ashworth, xi.

When suspended sentences were first introduced in England, Bottoms asserted that there was 'widespread use of suspended sentences in place of fines and probation'.[173] It appears that only about 40 percent of suspended sentences were estimated to represent diversion from prison.[174] When partly suspended sentences were briefly available, there was once again evidence of net-widening, with Home Office data showing that about half of all partly suspended sentences would previously have been given wholly suspended sentences or non-custodial orders.[175] Legislative amendments which took effect in 2005 were designed to increase the use of suspended sentences and recent figures indicate that this sanction has once again been widely embraced.[176] A report by Mair, Cross and Taylor which involved interviews with probation officers suggests that it is 'certainly not always used as an alternative to a custodial sentence; indeed in some Crown Courts it was thought to be displacing the Community Order', with one probation officer likening it to magistrates 'playing with a new toy'.[177] The authors also referred to an unpublished Home Office note which asserted that suspended sentence orders were not being used appropriately and that many of those in receipt of such an order would have previously been sentenced to a community sentence'.[178]

As noted in the previous section, analysis of Tasmanian sentencing remarks pointed to some instances of inappropriate use of

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173 Bottoms, above n 3, 8.

174 Ibid 5. See also Sparks, above n 75, 387.

175 Data cited in Anthony Bottoms, 'Limiting Prison Use: Experience in England and Wales' (1987) 26 *Howard Journal of Criminal Justice* 171, 196.

176 There were 158 suspended sentences imposed in the Magistrates' Court in the first quarter of 2005, before the new provisions came into effect, compared with 1,570 in the final quarter of 2005; the increase in the Crown Court in the corresponding period was from 401 to 978: National Offender Management Service, *Sentencing Statistics Quarterly Brief: England and Wales, October to December 2005* (2006) Table 3. More recent figures indicate that 13,667 suspended sentence orders were imposed in the first six months of 2006: George Mair, Noel Cross and Stuart Taylor, *The Use and Impact of the Community Order and Suspended Sentence Order* (2007), 17.

177 Mair, Cross and Taylor, above n 176, 29.

178 Ibid 26.

suspended sentences, but there was no clear evidence of significant net-widening. Although some judicial officers acknowledged in the interviews that they increase the term of a sentence to reflect the fact of its suspension, it was suggested that this would be only to a small extent.[179] This was confirmed by a quantitative analysis of sentencing outcomes, which did not indicate any significant sentence inflation in either the Tasmanian Supreme or Magistrates' Courts.[180] The quantitative analysis did, however, reveal extensive use of wholly suspended sentences for young and first offenders, seemingly at the expense of true non-custodial penalties. The problems associated with widening the net for such offenders are compounded by analysis which revealed that a prior wholly suspended sentence significantly increases the severity of any subsequent sentence, which may thereby prematurely push first and young offenders up the sentencing ladder.[181]

The incidence of net-widening, where it exists, does not mean that suspended sentences should not be used at all, but rather that their use needs to be more carefully considered and refined. Sarre's comments in relation to diversionary practices are equally apposite in the context of suspended sentences:

> Was Cohen accurate in his foreshadowing of the possibility of diversionary practices merely hastening an ever-widening circle of social control? Perhaps. But one should not abandon the *idea* of diversion simply because of the risks associated with its poor implementation. Indeed, the risks of *ignoring* the value of 'destructuring' may be just as great.[182]

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[179] Bartels, Sword or Feather, above n 12, [3.4.2] (Q13).
[180] Bartels, above n 12, [4.3.2.1].
[181] Bartels, *T&I*, above n 12, 3.
[182] Rick Sarre, 'Destructuring and Criminal Justice Reforms: Rescuing Diversionary Ideas from the Wastepaper Basket' (1999) *Current Issues in Criminal Justice* 259, 267. References omitted.

E *Suspended Sentences Favour Middle-Class Offenders*

It has been said that suspended sentences 'are used largely as a means of appearing tough on those who are normally treated leniently anyway: middle class offenders and those with a settled life style'.[183] Certainly, the two-step process would seem more likely to benefit those who can claim a good employment history, lack of prior offending and stable family background, while disadvantaged members of society will be less favoured.[184] Ashworth goes so far as to say that since a good employment record and stable family may be associated with lower reconviction rates,

> [T]here may be a stark choice between insisting on equality before the law (and thus leaving such factors out of account) and allowing such factors to lead to a reduction in sentence-length because the longer sentence is not necessary for preventative reasons (and thereby, in effect, introducing social inequality into sentencing).[185]

In spite of potentially contributing to social inequality in sentencing, factors such as employment prospects and the support an offender may receive from his or her family remain relevant considerations in the sentencing process. Conversely, an offender's difficult personal circumstances may also be regarded as a factor justifying the imposition of a suspended sentence, so suspended sentences are not exclusively the domain of the white-collar offender.

It has been suggested that suspended sentences are mainly used for offenders who are already privileged within the criminal justice system, namely, middle-class offenders. This issue was explored by analysing the use of suspended sentences in the Supreme Court for

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183 David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study 103 (1988) 35.

184 Ashworth, above n 24, 281-3; Warner, above n 105, 363. Bottoms also points out that suspended sentences may result in excessively lenient sentences for those considered unlikely to re-offend, and excessively punitive sentences for those more likely to offend: Bottoms, above n 3, 17.

185 Ashworth, above n 184, 281. This quote does not appear in subsequent editions of the text.

fraud offences.[186] The relevance of good character and the consequential loss of the offence in the process of imposing a suspended sentence were also examined in the context of judicial comments when imposing a suspended sentence.[187] In addition, the judicial interviews provided examples of the circumstances in which judicial officers regard a suspended sentence as particularly appropriate or inappropriate.[188]

The findings do not provide any clear evidence of a bias towards middle-class offenders in the use of suspended sentences. The fact that an offender's adverse personal circumstances were also regarded as a relevant factor in imposing a suspended sentence in a number of cases[189] would also seem to suggest that suspended sentences are certainly not the exclusive province of the well-off.

F *Suspended Sentences Violate the Proportionality Principle*

The principle of proportionality requires courts to impose sentences which are proportionate to the criminal conduct, ensuring that sentences imposed are of a severity that reflects the gravity of the crime in light of its objective circumstances.[190] The principle has been accepted by the High Court as being 'firmly established in this

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[186] Bartels, Sword or Feather, above n 12, [4.3.6.1].
[187] Ibid [5.3.1.2], [5.3.4.1].
[188] Ibid [3.4.3], (Q4), (Q5).
[189] Ibid [5.3.1.8].
[190] ALRC, above n 49, [5.3]. For discussion, see especially the work of von Hirsch on 'just deserts', including Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976); Andrew von Hirsch, *Past or Future Crimes* (1986); Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"' (1990) 1 *Criminal Law Forum* 259; Andrew von Hirsch, *Censure and Sanctions* (1993). See also Richard Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489; Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12 *Current Issues in Criminal Justice* 142; Bagaric, above n 57, 163-4; Edney and Bagaric, above n 93, Ch 5.
For criticism of desert theory, see Ted Honderich, *Punishment: The Supposed Justifications* (1984) 35; 37; Victorian Sentencing Committee, above n 14, [3.6]; Michael Tonry, 'Proportionality, Parsimony, and Interchangeability of Punishment' in Anthony Duff et al (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (1994) 59; Tonry, above n 106.

country'[191] and is recognised in the relevant legislation of several Australian jurisdictions.[192]

There are three aspects to the argument that suspended sentences infringe the proportionality principle. A key aspect of proportionality is its ability to provide an overall limit on the severity of sentences[193] and it operates to define both the lower and upper limits of punishment, thereby preventing the imposition of sentences which are either unduly lenient or unduly harsh.[194] Bagaric argues that disproportionate sentences:

> [R]isk bringing the entire criminal justice system into disrepute because such sentences offend the apparently pervasive intuitive belief, at the root of which is the broad concept of justice, that privileges and obligations ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual.[195]

Accordingly, although it 'is rare for the principle of proportionality to be invoked as a basis for increasing a sanction, if the principle is to be treated seriously there is no basis for selective application'.[196] In *Dodd*,[197] for example, it was recognised that a sentence which does not give sufficient weight to the seriousness of the offence – that is, an excessively lenient sentence – violates the principle. On this basis, if an offence is so serious as to merit nothing less than a sentence of imprisonment, surely the sentence imposed cannot still be proportionate to the offence once it is suspended in its

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[191] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Hoare v The Queen* (1989) 167 CLR 348, 354.

[192] Eg *Criminal Law (Sentencing) Act 1988* (SA), s 10(k); *Sentencing Act 1991* (Vic), ss5(1)(a), (2)(c), (d) and *Sentencing Act 1995* (WA), s6(1). Section 16A(1) of the *Crimes Act 1914* (Cth) has been interpreted as a reference to the principle of proportionality: see *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370; Fox and Freiberg, above n 165, [3.503]; ALRC, above n 49, [5.3]-[5.8].

[193] Warner, above n 14, [3.205].

[194] von Hirsch (1976), above n 190, 73.

[195] Bagaric, above n 57, 560.

[196] Ibid 561.

[197] *R v Dodd* (1991) 57 A Crim R 349 (NSW CCA).

operation.[198] The effect of this argument is minimised, however, by increasing the penal bite of a suspended sentence through the imposition of conditions or combining the sentence with other orders.[199]

The second issue goes to the lack of certainty about suspended sentences. As Wasik suggests, there are 'serious problems in incorporating conditional sentences within a desert-based scheme'.[200] In Wasik's view, such a sentence is tantamount to a box labelled 'Box 13', with no immediate sanction on the outside, but a wide range of 'penal consequences which might or might not flow in the event of the commission of the next offense'. The sanction the suspended sentence represents is entirely unknown at the time of sentencing, and this is 'unacceptable, within a desert sentencing framework',[201] as proportionality requires sanctions to be clearly ranked in order of severity. One response to this issue is to recognise that in some Australian jurisdictions, for example, in the Tasmanian context, the legislation does not establish a strictly desert-based scheme; the principle of proportionality is therefore only a limiting principle. In addition, attaching one or more conditions or orders to the sentence increases the certainty of what is likely to be contained in 'Box 13', as does a clear legal principle as to the likely consequences for the offender in the event of breach.

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198 See *R v Groom* [1999] 2 VR 159, where the Victorian Court of Appeal held by majority that the principle of proportionality is normally applied to restrain excessive severity in sentencing, and not to *refuse* leniency, and that under s 27(1), the sole criterion for deciding whether to suspend a sentence in whole or part is satisfaction as to its desirability in the circumstances. It was also said however that it would have been unexceptional to rely on the principle of proportionality in *granting* an order of suspension: [37]-[38] (Batt JA, Buchanan JA agreeing, Tadgell JA dissenting).

199 The force of this argument would also be minimised if one severed the nexus between an unsuspended and a suspended sentence, as has previously been proposed: see VSAC Interim Report, above n 18, [1.5], [2.47].

200 Martin Wasik, 'The Problem of Conditional Sentences' (1994) 13(1) *Criminal Justice Ethics* 50, 55. See also Andrew von Hirsch, 'The Ethics of Community Based Sanctions' (1990) 36 *Crime and Delinquency* 162, 169.

201 Wasik, above n 200, 55. It has also been said that this indeterminacy of the sentence to be imposed undermines its efficacy as a sanction as the offender has 'little or no idea what to expect': Roberts, above n 34, 5, 59.

Finally, because of the suspended sentence's current positioning as an alternative to immediate imprisonment and its nominal status as the penultimate penalty on the sentencing ladder, the main sentencing option generally available to the court in the event of breach is immediate imprisonment. On the other hand, if the breaching offence is a minor one, imposing a sentence of imprisonment may be a disproportionately harsh response to the breach.[202] Furthermore, where an additional penalty, such as a fine, has been imposed at the time of original sentence, it may, in the event of a breach be 'difficult to avoid the conclusion that this amounts to double punishment for the original offence'.[203] A possible response is that a court acting on a breach of a suspended sentence should have sufficient discretion to ensure that disproportionate responses can be avoided, while ensuring that the sanctions for breach are subject to clear principles,[204] in order to maintain the integrity of the system.

The three arguments above are particularly forceful if one adheres to a desert-based scheme of sentencing,[205] however even within such a context, proportionality does not necessarily require the abolition of suspended sentences. Wasik suggests that 'if one were to sit down to design a desert-based sentencing scheme from first principles, it is unlikely that one would retain conditional sentences', but concedes that '[i]t may not always be the best course to seek abolition of conditional sentences.'[206]

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[202] See *R v MacGregor* (2003) 138 A Crim R 361, where the South Australian Court of Criminal Appeal rejected the argument that there was a marked disproportion between the seriousness of the breaching offence and the length of the sentence activated on revocation of the suspended sentence.

[203] Bottoms, above n 61, 442. Bottoms suggests that the 'only simple way to avoid this result would be to pay back the fine to the offender on reimprisoning him' but this may be difficult to administer.

[204] Wasik, above n 3, 56-7.

[205] See Warner, above n 14, [3.303], where the suggestion is that 'Just deserts as a limiting principle defines the outward boundaries of punishment and assumes some other justification for its imposition'.

[206] Wasik, above n 3, 56.

G *There are Difficulties in Dealing with Breaches*

There are conflicting views on the most appropriate means of responding to a breach of suspended sentence. 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. After all, if the court 'clearly indicates that a further offence will lead to activation, it must fulfil that indication in the event of a further offence, otherwise it will lose credibility and authority'.[207] Roberts and Gabor note that lax enforcement or repeated warnings will undermine deterrent effect, and lead to a perception among offenders that such sentences are far from being equivalent to a true custodial sentence, which could in turn undermine public and professional confidence.[208] Brignell and Poletti similarly argue that the 'forcefulness and reputation' of suspended sentences depends…on the extent to which the courts ensure a tough approach to any breaches that may occur'.[209] Ashworth argues that 'offenders' perceptions of the seriousness of a suspended sentence would be significantly impaired if they knew that courts had a complete discretion whether or not to activate the suspended sentence on the occasion of a subsequent conviction'.[210] On this view, there is also little scope for indulgence for offenders in breach, who may be regarded 'as especially heinous cases: the offender has not merely re-offended, he has done so in clear defiance of a court order and has, in a sense, betrayed the trust placed in him by the court or at least squandered an opportunity offered to him'.[211]

[207] Samuels, above n 30, 401. See also Daniel Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-first Century' (1998) 23 *Crime and Justice* 1, 18; Julian Roberts and Thomas Gabor, 'Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration' (2004) 44 *British Journal of Criminology* 92, 103, 106.

[208] Roberts and Gabor, above n 207, 103.

[209] Brignell and Poletti, above n 62, 8.

[210] Ashworth, above n 24, 75. This quote does not appear in subsequent editions of the text. The VSAC similarly contends that 'the less certain are the consequences of breach, the less its potential capacity for special deterrence': VSAC Final Report 1, above n 4, [4.187].

[211] Ashworth, above n 210, 242. See also Wasik, above n 3, 52.

On the other hand, there are also powerful arguments for discretion and flexibility on breach. Excessively strict enforcement of the breach process may trigger high numbers of breach hearings, which may in turn undermine sentencers' confidence in the sanction and wipe out any supposed reductions in prison admissions.[212] Judicial discretion enables the courts to take into account any changed circumstances between the time of the sentence and the time when the breach is brought before the court,[213] as well as past compliance with the suspended sentence. It also acknowledges that 'the reality of many criminal offenders is that they do not work within essentially middle-class cognitive and lifestyle frameworks where actions and consequences are carefully premeditated and calculated'.[214] In addition, such an approach accommodates trivial breaches[215] and recognises that in some cases, breach may be a result of a failure to provide support and services to an offender, rather than fault on the part of the offender.[216] Finally, this approach also means that there is an opportunity for the court to correct any net-widening or sentence inflation which may have occurred at sentencing, while avoiding the 'back-door' route to imprisonment.

The thorny issue of dealing with breaches was explored by conducting a breach analysis of suspended sentences imposed in the Tasmanian Supreme Court.[217] The principal finding of this analysis is that there is an overwhelming lack of breach action taken by prosecuting authorities, with such action taken against only seven out of 126 offenders apparently in breach of their suspended sentences. The TLRI described this situation as quite clearly unacceptable, adding that this 'makes a farce of the suspended

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212 Roberts and Gabor, above n 207, 106.

213 Freiberg, above n 49, 8 and Mary Daunton-Fear, *Sentencing in South Australia* (1980) 165.

214 Freiberg, above n 213, 112.

215 In Canada, for example, action was taken against an offender who arrived home 15 minutes after his curfew, and another who sat on the front step of his home while subject to home detention. Both matters were dismissed by the court: see Roberts, above n 34, Ch 4, 3.

216 VSAC Interim Report, above n 18, [4.43].

217 See Bartels, *CICJ* and Bartels, *T&I,* above n 12, 5-6.

sentence – the sword of Damocles is barely a butter knife'.[218] In addition, although the comments in the judicial interviews indicated that the majority of judges would generally activate a breached sentence, this was not confirmed by my analysis of actioned cases, which revealed that just over half of the sentences were activated in whole or part. These findings contributed to the TLRI calling for procedures in relation to breaches of sentencing orders to be radically overhauled and recommending a statutory presumption of activation on breach,[219] which would bring Tasmania into line with the majority of Australian jurisdictions.

IV CONCLUSION

The VSAC observed in its Final Report that '[f]ew issues have divided the community as strongly as suspended sentences…This sentence polarises opinion and provokes high emotions',[220] acknowledging that:

> [t]he philosophical differences between those who accept that a suspended sentence is more severe than other non-custodial orders and who believe it to be an appropriate substitute for immediate prison time, and those who question the internal logic, position and continued need for such an order are fundamental and unlikely ever to be satisfactorily resolved.[221]

In recognition of this dichotomy, this article does not endeavour to ultimately resolve these differences. Instead, it presents a comprehensive discussion of suspended sentences by reviewing the arguments for and against such sentences, against the background of recent research on their use in Tasmania. In particular, the article draws on research findings from quantitative and qualitative analyses of sentencing decisions, judicial interviews and reconviction and breach analyses.

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[218] TLRI, above n 8, [3.3.40].
[219] TLRI, above n 8, Recommendation 18.
[220] VSAC Final Report 1, above n 4, vii.
[221] Ibid [3.74].

When examining the sentencing options available to the courts, it is important to consider whether these options advance or retard our fight against crime and recidivism; whether they serve the interests of the community, whether they are a valid mechanism for securing the purposes of the criminal law. I argue that there is an important place for suspended sentences in the suite of sentencing options. Kirby J noted in *Dinsdale*, 'Whatever the theoretical and practical objections, suspended imprisonment is both a popular and much used sentencing option in Australia. Courts may not ignore the provision of this option because of defects occasionally involved in its use'.[222] Freiberg has suggested that '[t]he objective is to sentence smarter rather than longer, to ensure that offenders are properly targeted, and that sentences are effective, credible and properly enforced'.[223] The discussion in this article makes a substantial contribution towards this objective and the pursuit of law reform by adding to the evidence base for the key arguments for and against a controversial sentencing disposition.

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222 *Dinsdale v The Queen* (2000) 202 CLR 321, [76] (Kirby J).

223 Freiberg, above n 59, 2.