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Suspended sentences, as a condition of a Good Behaviour Order, are considered to be a valuable sentencing option that, if administered correctly, can have important deterrent and rehabilitative benefits. Conversely, the inappropriate use of suspended sentences can put the community at risk of reoffending, be seen as ‘letting off’ serious offenders and reduce community confidence in the justice system. Several Australian jurisdictions have reviewed and reformed their suspended sentences regimes in response to perceptions that suspended sentences are overused and do not reflect the gravity of offences. Some jurisdictions have elected to abolish them altogether.

This paper examines the use of suspended sentences in the ACT, noting:

1. the availability of suspended sentences as a sentencing option for all offences;
2. the lack of a statutory presumption that the suspended sentence of imprisonment be imposed when an offender has breached their Good Behaviour Order; and
3. whether Intensive Correction Orders have supplanted the need for suspended sentences as a sentencing option.

This paper calls for reform of the ACT’s suspended sentences regime.

BACKGROUND

A suspended sentence is a sentence of imprisonment that has been imposed but not executed. The term of imprisonment is ‘suspended’ with conditions that a person be of good behaviour for a certain period of time. The conditions by which someone is released from custody under a suspended sentence are contained in Good Behaviour Orders. These orders set out the conditions of what that behaviour might consist of, always to be good behaviour in the legal sense but also to do or not do certain things. A suspended sentence is a sanction that ‘warns’ a person that the custodial term that has been suspended may be activated if the person does not comply with the terms of the GBO.1

There are a number of arguments in support of the usefulness of suspended sentences. They have an important place in the sentencing hierarchy for first time offenders;2 they can be effective as a specific deterrent against reoffending; and they can allow the offender to avoid the “notoriously corrupting influences of prison” during a short prison sentence.4 A study conducted in NSW determined that suspended sentences are as effective a sentence as full-time imprisonment in reducing the risk of further offending.5 A further study conducted in Tasmania found that offenders who received a wholly suspended sentence had a lower reconviction rate of 42%, compared with those who received a period of full-time imprisonment (62%).6

While Victoria and Tasmania have taken steps to abolish suspended sentences, the ACT Government reaffirmed its commitment to suspended sentences as a sentencing option in 2011, noting “it is a valuable sentencing option to be ordered in appropriate circumstances that not only denounces the conduct of the offender, but promotes rehabilitation and the protection of the community by reducing recidivism”.7 These are laudable and worthy objectives. However, recent cases and reports raise issues with the use of suspended sentences in the ACT and query whether the deterrent and rehabilitative outcomes are being realised.

In particular, the use of suspended sentences in relation to serious offences is arguably inappropriate given that suspended sentences are often regarded by the media, members of the public, and victims as a ‘let-off’ with the

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2 ACT Law Reform Advisory Council (LRAC), A Report on Suspended Sentences in the ACT, Report 1, 31 October 2010, p. 18.
4 Ibid.
6 Bartels, above n 3, p. 131.
7 LRAC, above n 2, p. 7.
offender ‘walking free’ or getting a ‘slap on the wrist’.\(^8\) This is especially the case where serious offenders show a danger of re-offending, as is often the case in domestic violence or child sex abuse cases.

Moreover, the original sentence of imprisonment is often not imposed upon breach of the GBO conditions. The significance and effect of a suspended sentence relies heavily on the consequence of imposition of a term of full-time custody in the event of a breach. However, the deterrent effects of suspended sentences are diminished if this consequence is not consistently applied.

**THE ACT’S SUSPENDED SENTENCES REGIME**

The ACT’s approach to suspended sentences is consistent with most Australian jurisdictions in reflecting the common law principle that imprisonment is a sentence of last resort.\(^9\) However, the regime for suspended sentences in the ACT is different in a number of ways from those of other Australian jurisdictions.

The ACT does not set out any test for the imposition of a suspended sentence or impose any restrictions on their availability. Suspended sentences are available for all offences in the ACT.

Additionally, the ACT is the only Australian jurisdiction that does not have a statutory presumption of activation of the original sentence of imprisonment after a breach is proved.\(^10\) In the ACT, if the offender breaches a condition of the GBO, the court has the power to impose the original sentence or re-sentence the offender,\(^11\) which includes the option for the Court to impose another suspended sentence, something that is not uncommon in the ACT.

**APPLICATION OF SUSPENDED SENTENCES IN ACT**

The Australian Bureau of Statistics (ABS) data on the use of fully suspended sentences over the past five years highlights that they are used in the ACT Magistrates Court and ACT Supreme Court at a significantly higher rate than magistrate courts and supreme courts nationally. Figure 1 shows the percentage of suspended sentences as a proportion of all penalties in the ACT Magistrates Court compared to magistrates courts nationally.\(^12\) Figure 2 compares the percentage as a proportion of all penalties in the ACT Supreme Court and higher courts nationally.\(^13\)

In 2015-2016 in the ACT the two offence categories which made up the biggest proportion of fully suspended sentences in the were traffic, vehicle and regulatory offences (28%) and acts intended to cause injury (20%) (Magistrates and Supreme Courts combined).\(^14\)

There is limited data available in the ACT on the nature and number of breaches of suspended sentences, as well as the outcomes of breaches. An analysis undertaken by the ACT Office of the Director of Public Prosecutions found that of 23 breaches of fully suspended sentences that came before the ACT Supreme Court in 2009, the original suspended sentence was activated (in whole or part) for only 26% of cases.\(^15\)

\(^8\) Lulham, Weatherburn & Bartels, above n 5, p. 1.
\(^9\) LRAC, above n 2, p. 19.
\(^10\) LRAC, above n 2, pp. 6-7.
\(^11\) Crimes (Sentence Administration) Act 2005 s 110.
\(^13\) Ibid.
\(^14\) Ibid.
\(^15\) LRAC, above n 2, p. 39.
natural to be attracted to young males (children). A 2017 corrective services report had said the defendant minimised his actions by claiming he harmed no one, and that child exploitation material will always exist and should not be a focus for law enforcement. The report concluded he was at high risk of reoffending. The judge acknowledged his poor prospects for rehabilitation in his sentencing remarks.

His honour applied a sentence of imprisonment for three years for the new offences; with 12 months served by full-time imprisonment and the remainder suspended with a GBO. He also applied a sentence of imprisonment for 5 months for the breach of the 2011 GBO, to be served concurrently with the existing sentences. In effect, the breach of the suspended sentences did not result in any additional prison time for the defendant.

The appropriateness of suspended sentences for very serious offences is also questionable. Victims, their family and their friends often express high levels of dissatisfaction with suspended sentences. This is particularly so for sex offences. The community’s acceptance of sentences for sex offences is at all time low and many are of the view that penalties imposed are too light and do not appropriately reflect the severity of the crimes committed. In a South Australian study which examined victims’ views on suspended sentences, victims ranked suspended sentences “as the least severe community-based sentencing option.”

In the Northern Territory, wholly suspended sentences are not available for offenders convicted of sexual offences and violent offences, such as common assault, and where an offender is convicted of an aggravated property offence, the court may only impose a wholly suspended sentence if the offender enters into a home detention order. In the ACT suspended sentences can be imposed for all violent offences – and they in fact make up one fifth of all suspended sentences, as shown in the above statistics.

In South Australia, suspended sentences are not able to be imposed for certain offences including manslaughter, causing serious harm, organised crime offences, and trafficking in controlled drugs. In New South Wales only terms of imprisonment of up to two years may be suspended, and terms of up to five years in

Figure 2: Percentage of suspended sentences as a proportion of all penalties – higher courts

SUSPENDED SENTENCES AND SERIOUS OFFENCES
The use of suspended sentences in the ACT can be controversial. In the Supreme Court in 2011, a man convicted for a series of aggravated burglaries was sentenced to 25 months imprisonment, 4½ months of which he had already served in full-time custody awaiting trial. The remainder of his sentence was fully suspended and he was released from custody at the Court.

In late 2014, two offenders in separate matters were convicted of committing acts of indecency in the presence of a child and given suspended sentences. Both were ordered to undertake community service and be assessed for adult sex offender programs. One offender was a 54-year-old man, who received an 18 month suspended sentence after exposing his genitals to a nine-year old girl, buying her a vibrator, and showing her pornographic material on his laptop.

A man who pleaded guilty in 2016 to several child sex offences was given a three-year partially suspended sentence. The offences were committed while the offender was serving suspended sentences and GBOs imposed in 2011 and 2015 for similar offences. During a police interview in 2016, the defendant claimed it was

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16 Ibid.
17 H Belot, Man who bought vibrator for 10-year-old girl gets suspended prison sentence, Canberra Times, 10 December 2014; C Knasus, Man masturbated in Reject Shop, interrupted by grandmother, Canberra Times, 16 December 2014.
18 Ibid.
21 Bartels, above n 3, p. 151.
22 Sentencing Act 1995 (NT) s 78F.
23 Sentencing Act 1995 (NT) Division 6A, ss 78D, 78DG.
24 Sentencing Act 1995 (NT) s 78B.
26 Crimes (Sentencing Procedure) Act 1999 (NSW), s 12.
Queensland and Western Australia.  Victoria has abolished suspended sentences altogether, and Tasmania is phasing them out.  The ACT is the only Australian jurisdiction with no limits on the offences or terms of imprisonment to which a suspended sentence may apply.

**SUSPENDED SENTENCES AND BREACHES OF FAMILY VIOLENCE ORDERS**

Also controversial is the frequency of using fully suspended sentences as a sanction for breaching family violence orders (formerly called domestic violence protection orders). A study conducted by Dr Lorana Bartels of the University of Canberra revealed that between 1 July 2012 and 31 March 2014, fully suspended sentences were the most commonly imposed penalty in the ACT Supreme Court for the offence of contravening a protection order, amounting to 75% of sentences.

The high percentage of suspended sentences imposed for breaches of protection orders sends a mixed message to the community about the resolve of the courts to respond strongly to the prevalence of family violence. Compared to full-time imprisonment, suspended sentences do not adequately protect victims or the community, and do not reflect the community’s intolerance of family violence.

In June 2015 the ACT Magistrates Court issued a two year DVO for an applicant whose ex-partner had previously served time in prison for domestic violence offences against her. In March 2016 he was arrested for breaching the DVO and sentenced to a term of four months imprisonment; to serve two months in custody and the remaining two months suspended upon entering an 18 month GBO with supervision from ACT Corrective Services for a period of 12 months. One month after his release from prison he was arrested for again breaching the DVO. The Court cancelled his GBO and he was given another two month suspended sentence and another GBO for a shorter period of 12 months, without any supervision from ACT Corrective Services. He was fortunate to find himself in a better position for having breached his Court orders. His ex-partner was dismayed.

The concerns regarding the leniency of suspended sentences can be mitigated by including extensive GBO conditions. Additional conditions may include: giving a surety, undertaking community service, participating in a rehabilitation program, a supervision condition, undertaking medical treatment and supervision, attending education programs or counselling, not driving or consuming alcohol, and regularly attending alcohol or drug management programs. The conditions that may be attached to a GBO are said to give some ‘bite’ to a suspended sentence, and are designed to positively affect the offender’s future behaviour. Evidence shows that where these conditions are communicated to victims, their dissatisfaction with suspended sentences may be minimised.

**INTENSIVE CORRECTION ORDERS**

However, a suspended sentence with robust conditions mirrors an Intensive Corrections Order (ICO). ICOs were introduced in March 2016 to replace periodic detention.

ICOs are designed to provide the Court with a stronger community based sentencing option than a standard GBO. The introduction of ICOs prompts consideration of whether suspended sentences continue to serve a useful purpose in the ACT.

An ICO is a term of imprisonment being served in the community with core conditions, as well as any additional conditions set by the court such as community service work, rehabilitation programs or a curfew. The Sentence Administration Board is responsible for hearing breaches of ICOs and may:

- Issue a warning with a maximum of 3 warnings per year;
- Suspend the ICO for 3 days if a breach is admitted or 7 days if the breach is denied but found; or
- Cancel the ICO and require the remainder of the sentence of imprisonment to be served by way of full-time custody, with opportunities to apply for the reinstatement of the ICO in the future.

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27 Penalties and Sentences Act 1992 (QLD), s 144; Sentencing Act 1995 (WA), s 76.
28 Sentencing Advisory Council, Phasing out of suspended sentences complete from today, Media Release, 1 September 2014.
29 Venessa Goodwin, Attorney-General, Major sentencing reforms to phase out the use of suspended sentences and introduce new sentencing options, Media Release, 30 March 2016.
30 Crimes (Sentencing) Act 2005 (ACT), s 12.
33 Crimes (Sentencing) Act 2005 (ACT), s 13.
34 LRAC, above n 2, p. 44.
In mandating certain requirements and setting out clear processes and penalties for breaches, ICOs arguably have more ‘bite’ than suspended sentences. However, ICOs are only available where the sentence of imprisonment is 2 years (in general) or in certain circumstances up to 4 years.\textsuperscript{37} Suspended sentences are applicable to all terms of imprisonment. This creates an anomalous situation where a more lenient sentence is available for more serious offences, while a more robust sentence is only available to less serious offences.

In Victoria, suspended sentences were phased out following the introduction of Community Correction Orders which mirror the ACT’s ICOs.\textsuperscript{38} Tasmania, which also has a similar sentencing option, is currently phasing out suspended sentences.\textsuperscript{39} In NSW where ICOs have been in place since 2010, the NSW Law Reform Commission has recommended the abolition of suspended sentences.\textsuperscript{40} The introduction of ICOs in the ACT raises questions as to whether suspended sentences should continue to operate, particularly if they do not offer benefits that cannot be met by ICOs.

**ACTIVATION OF A SUSPENDED SENTENCE OF IMPRISONMENT**

In 2010 the Attorney-General referred the use of suspended sentences to the ACT Law Reform Advisory Council (LRAC) for consideration. The report found that activation of the original term of imprisonment occurred in as few as 26% of cases where a suspended sentence was breached. The LRAC highlighted that the ACT does not have a statutory presumption that the suspended sentence of imprisonment be imposed when an offender has breached their GBO, and queried whether this should continue to be the case. In response, the government said it would consult with stakeholders on the issue. That consultation has not occurred. LRAC’s report, and the government’s response may be found at these links:


The provisions governing the treatment of breaches of GBOs associated with suspended sentences in the ACT lag significantly behind other jurisdictions. In NSW, the court must revoke the GBO unless satisfied the breach was trivial or there was good reason for the breach.\textsuperscript{41} Provisions in relation to breaches in Western Australia and the Northern Territory require the court to activate the suspended sentence unless it would be unjust to do so, taking into account all the circumstances that have arisen, or become known, since the suspended sentence was imposed.\textsuperscript{42}

A suspended sentence is often referred to as the “Sword of Damocles” – with the threat of a prison sentence being activated should an offender fail to meet his or her obligations under a suspended sentence.\textsuperscript{43} However, if suspended sentences are rarely activated upon breach, this makes a farce of the suspended sentence option, and the ‘Sword of Damocles’ becomes barely a butter knife.\textsuperscript{44} If the court gives repeated warnings for breaches and does not strictly enforce them, this undermines the deterrent effect of suspended sentences and “both offenders and the public in general will treat them as nothing more than a legal fiction designed to allow the offender to escape the punishment that he or she rightly deserved.”\textsuperscript{45}

**CONCLUSION**

Suspended sentences offer a number of benefits, although their broad application in the ACT is concerning to victims of crime and the community. There is merit in limiting the availability of wholly suspended sentences for serious offences, attaching a range of appropriate conditions to the good behaviour order to increase the punitive and rehabilitative elements of suspended sentences, and tightening the consequences of breach by enacting a presumption in favour of activation. However, these characteristics are arguably now embodied within the new ICO regime, raising questions as to whether suspended sentences are necessary at all.

\textsuperscript{37} Crimes (Sentencing) Act 2005, s 11.

\textsuperscript{38} Sentencing Advisory Council, above n 29.

\textsuperscript{39} Goodwin, above n 30.

\textsuperscript{40} NSW Law Reform Commission, Sentencing, Report 139, July 2013, p. 230.

\textsuperscript{41} Crimes (Sentencing Procedure) Act 1999 (NSW) s 98(3).

\textsuperscript{42} Sentencing Act 1995 (WA) s 80; Sentencing Act 1995 (NT) s 43(7).

\textsuperscript{43} Bartels, above n 3, p. 298.

\textsuperscript{44} Tasmania Law Reform Institute, Sentencing, Final Report No 11, June 2008, 118, citing R v Brady [1988] ABCA 7, [46].

\textsuperscript{45} Robert Jildo Saga v Jarrod Reid and Tristan Allan Collect (2010) ACTSC 59 (1 July 2010) at [99] (Refshauge J), citing King CK and Perry J in R v Marston (1993) 60 SASR 320 (at 322, 323).