

REVIEWING REFORMS TO THE LAW OF SUSPENDED SENTENCES IN THE AUSTRALIAN CAPITAL TERRITORY

LORANA BARTELS AND SIMON RICE[†]

Suspended sentences have been the subject of recent or current review in several Australian jurisdictions. This article presents findings from a recent review of suspended sentences in the Australian Capital Territory (ACT) conducted on behalf of the ACT Law Reform Advisory Council, and the ACT Government's response to that review. The article reports on recent trends in the use of suspended sentences in the ACT, and observes on the quality of publicly available sentencing data. Supreme Court data are presented on the age, gender, plea and prior record of offenders receiving wholly suspended sentences in the ACT, as well as data on the length of sentences and operational periods imposed, the conditions of sentence and the mitigating factors cited by the court. The policy implications for further inquiry and human rights implications are also considered.

I INTRODUCTION

A suspended sentence is a sentence of imprisonment, the execution of which is wholly or partly suspended by the court at the time it is

[†] Lorana Bartels, BA, LLB, LLM, GDLP, PhD, Senior Lecturer, School of Law, University of Canberra. Simon Rice, BA, LLB, Med, OAM, Associate Professor, ANU College of Law, Australian National University and Chair, ACT Law Reform Advisory Council. This article is based on research done for a 2010 report written by the Law Reform Advisory Council of the Australian Capital Territory, responding to a request by the Hon Simon Corbell, MLA to inquire into the rate of suspended sentences in the ACT. The authors acknowledge the support and advice of the Council and the ACT, as well as research assistance from Mr Arjuna Dibley, and advice from Ms Wendy Kukulies-Smith (ANU), Professor Kate Warner (UTas) and Honorary Professor George Zdenkowski (UTas). Invaluable assistance and access to information was also received from the ACT Supreme Court Registrar, Ms Annie Glover, the ACT Supreme Court List Clerk, Ms Gaeleen Curley, and the ACT DPP Librarian, Mr Rick Clarke.

imposed. Suspended sentences are currently available in all Australian jurisdictions,¹ although Victoria has announced its intention to abolish such sentences,² following several years of review³ and legislative amendments which have restricted their availability.⁴ New South Wales recently reviewed the use of suspended sentences, although the report finalised by the NSW Sentencing Council in December 2011 did not make any recommendations and instead ‘function[ed] primarily as a background paper to assist’ the broader review of sentencing laws currently being undertaken by the NSW Law Reform Commission.⁵ In 2008, the Tasmania Law Reform Institute completed a review of sentencing, including several recommendations for legislative amendment in relation to suspended sentences, some of which have since been adopted by the Tasmanian Government.⁶ In 2009, the ACT Law Reform Advisory Council (‘LRAC’ or ‘the Council’) was asked by the ACT Attorney-General, the Hon Simon Corbell MLA, to inquire into:⁷

- (a) recent trends in the imposition of suspended sentences in the ACT;
- (b) any relevant factors behind the rates of imposition of suspended

¹ For discussion, see Lorana Bartels, ‘The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles’ (2007) 31 *Criminal Law Journal* 113.

² Attorney-General (Vic), ‘Suspended Sentence Abolition to Start From 1 May’ (Media Release, 19 April 2011).

³ See, eg, Victorian Sentencing Advisory Council (VSAC), *Suspended Sentences Discussion Paper* (2005) (‘VSAC DP’); VSAC, *Suspended Sentences Interim Report* (2005); VSAC, *Suspended Sentences Final Report Part 1* (2006); VSAC, *Suspended Sentences Final Report Part 2* (2008); VSAC, *Suspended Sentences in Victoria: Monitoring Report* (2010).

⁴ See *Sentencing (Suspended Sentences) Act 2006* (Vic); *Sentencing Amendment Act 2010* (Vic); *Sentencing Further Amendment ACT 2011* (Vic).

⁵ NSW Sentencing Council, *Suspended Sentences* (2011) 3. The first named author of this article provided research advice to the NSW Sentencing Council on the review.

⁶ See Tasmania Law Reform Institute, *Sentencing*, Report 11 (2008) and the amendments to the *Sentencing Act 1997* (Tas) contained in the *Justice and Related Legislation (Further Miscellaneous Amendments) Act 2009* (Tas) and *Justice and Related Legislation (Further Miscellaneous Amendments) Act 2010* (Tas).

⁷ See <www.justice.act.gov.au/page/view/564/title/previous-inquiries>.

- sentences in the ACT;
- (c) recent legislative reforms in other Australian jurisdictions in relation to suspended sentences;
 - (d) the policy changes, if any, needed to modify the way in which suspended sentences operate in the ACT; and
 - (e) any other relevant matter.

The Attorney-General later extended the terms of reference to include a review of reforms to the suspended sentence regime in the ACT as a result of the *Crimes (Sentencing) Act 2005* (ACT) and the *Crimes (Sentence Administration) Act 2005* (ACT). In responding to these issues, the Council confined itself to consideration of the issues relating to wholly suspended sentences rather than issues relating as well to partly suspended sentences. The authors prepared a report on the foregoing issues on behalf of the Council, and the Council reported to the Attorney-General in October 2010;⁸ the Government tabled its response to the report in the ACT Legislative Assembly on 22 September 2011.⁹ In this article we set out and analyse the key issues and findings identified in the report, and the Government's response to the report.

II ARGUMENTS FOR AND AGAINST SUSPENDED SENTENCES

As discussed in the recent Australian research,¹⁰ suspended sentences are a controversial sentencing option. A principal justification cited in support of suspended sentences is that they have a symbolic effect, as they recognise the seriousness of the offence

⁸ ACT Law Reform Advisory Council, *A Report on Suspended Sentences in the ACT*, Report 1 31 October 2010
<www.justice.act.gov.au/resources/attachments/LRAC_1_Suspended_Sentences_31_Oct_final1.pdf>.

⁹ Legislative Assembly for the Australian Capital Territory, *ACT Law Reform Advisory Council 'A report on suspended sentences in the ACT': Government Response* (2011) ('ACT Government Response').

¹⁰ See Lorana Bartels, 'An Examination of the Arguments For and Against the Use of Suspended Sentences' (2010) 12 *Flinders Law Journal* 119; VSAC, *Suspended Sentences in Victoria – A Preliminary Information Paper* (2005).

through the formal imposition of a prison sentence, while allowing the court to deal with the offender in a manner that is appropriate given all the circumstances. Suspended sentences have an important place in the sentencing hierarchy, especially for first time offenders. Suspended sentences are expected to have a protective effect against reoffending, and recent recidivism analyses¹¹ suggest that suspended sentences are indeed an effective specific deterrent against the further commission of crime. Finally, the availability of suspended sentences may reduce the size of the prison population and associated expenditure on corrections, and may provide an incentive for offenders to plead guilty.

Critics of such sentences argue that suspended sentences are seen as not being ‘real’ punishment, and are regarded by the public and offenders as a ‘let-off’. There are said to be difficulties with the process for imposing the sentence and dealing with breaches, and it is claimed that suspended sentences cause net-widening, violate the proportionality principle,¹² and favour middle-class offenders.¹³ It is beyond the scope of the present article to review the competing merits of these arguments, save to note that the LRAC did not in its report discuss or make recommendations regarding the future use of suspended sentences as a sentencing option in the ACT.¹⁴ This position reflects current ACT policy: the Government response to the report states that ‘[o]verall, the Government considers that suspended sentences should be maintained as a sentencing option in the ACT’.¹⁵

¹¹ See 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; Rohan Lulham, Don Weatherburn and Lorana Bartels, ‘The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-time Imprisonment’ (Crime and Justice Bulletin no 136, NSW Bureau of Crime Statistics and Research, 2009).

¹² See Bartels, above n 10 for discussion.

¹³ *Ibid.*

¹⁴ ACT Law Reform Advisory Council, above n 8, [170].

¹⁵ ACT Government Response, above n 9, 4. See further discussion on this point below.

III AUSTRALIAN LEGISLATION GOVERNING SUSPENDED SENTENCES

Recent research has detailed the different legislative regimes governing the use of suspended sentences in Australia.¹⁶ For the purposes of this article, the following similarities and differences between the ACT model and other jurisdictions should be noted. The ACT is similar to NSW, Tasmania and Western Australia in that it does not set out any legislative test for imposing a suspended sentence; it is also like these jurisdictions, and Queensland, in that it does not impose any legislative restrictions on the availability of a suspended sentence, for example, in relation to the type of offences for which such a sentencing option may be available. In Victoria, on the other hand, there have been significant amendments in recent years restricting the availability of suspended sentences in relation to serious offences.

The only restriction in the ACT is on the type and combination of conditions of the good behaviour order (GBO) which must be imposed when ordering a suspended sentence: the conditions of the GBO are limited only in that they must not be inconsistent with the *Crimes (Sentence Administration) Act 2005* (ACT).¹⁷ This leaves the courts a very wide discretion as to the conditions to be imposed and, in this respect, the ACT is similar to South Australia and the Northern Territory. Amendments to the Tasmanian regime which came into effect on 1 January 2011 narrowed the scope of the court's power,¹⁸ so that a suspended sentence *may* be subject to certain prescribed conditions, and *must* be subject to the condition that the offender not commit an imprisonable offence. In Queensland, Victoria and Western Australia, by contrast, the only condition which can be ordered is that the offender not commit a further imprisonable offence. In addition, NSW and Victoria limit the combination of orders which may be imposed.¹⁹

¹⁶ See Bartels, above n 1.

¹⁷ *Crimes (Sentencing) Act 2005* (ACT) s 13(3)(g).

¹⁸ *Sentencing Act 1997* (Tas) s 24.

¹⁹ For discussion, see Bartels, above n 1.

The ACT and Tasmania are the only two jurisdictions which set no restrictions on either the length of the suspended sentence or the operational period of the suspension that can be imposed; South Australia and the Commonwealth do not set any limits on the length of the suspended sentence. Following recent amendments to the Tasmanian legislation,²⁰ the ACT is now the only state or territory which does not have a statutory presumption of activation of the original sentence of imprisonment on occurrence of a breach. Although the Commonwealth similarly does not have a presumption of activation on a breach, the court, if it does impose a sentence of imprisonment on a breach, is not able to substitute a shorter sentence than was originally imposed, or order only part of the original term to be served.²¹ As we note below, a presumption that a breach will result in a custodial sentence is contrary to United Nations standards.

IV AUSTRALIAN COMMON LAW PRINCIPLES GOVERNING SUSPENDED SENTENCES

The leading common law Australian authority in relation to suspended sentences is the High Court case of *Dinsdale v The Queen*,²² where Kirby J, with whom Gaudron and Gummow JJ agreed, emphasised the need to:

recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise.²³

²⁰ See *Sentencing Act 1997* (Tas) s 27(4B), adopting the recommendations of the Tasmania Law Reform Institute, above n 6.

²¹ See *Crimes Act 1914* (Cth) s 20A(5)(c).

²² *Dinsdale v The Queen* (2000) 202 CLR 321 (*Dinsdale*).

²³ *Ibid* [79]. For discussion, see Bartels, above n 1.

This test has generally been followed by the ACT courts.²⁴ In *Dinsdale*, Kirby J also considered what factors will determine whether a suspended sentence will be imposed, noting that ‘the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term’. This makes it ‘necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender’, notwithstanding the fact that this necessitates the attribution of ‘double weight’ to all of the factors relevant to the offence and offender which may influence the decision to suspend the sentence.²⁵ We discuss below the factors that judges in the ACT appear to take into account most commonly when deciding whether to impose a suspended sentence.

V HUMAN RIGHTS CONSIDERATIONS

In the absence of national human rights legislation in Australia, it is up to each state and territory to acknowledge formally the human rights dimensions of public conduct (such as sentencing by courts). Only the ACT and Victoria have legislated to guarantee human rights: the *Human Rights Act 2004* (ACT) (‘HRA’) and the *Charter of Rights and Responsibilities 2006* (Vic) (‘Charter’). Although there are extensive international rules and commentary on the human rights aspects of sentencing, there is no direct requirement in either the *HRA* or the *Charter* that human rights considerations be brought to bear on the sentencing process.

Both the *HRA* and the *Charter* require laws to be interpreted in a way that is compatible with human rights, so far as it is possible to

²⁴ See *Kennewell v Rand* [2006] ACTCA 10 (5 June 2006) [39]; *Znotins v Heazlewood* [2008] ACTSC 35 (8 May 2008) [12]-[13]; *R v Taylor (No 2)* [2008] ACTSC 97 (12 September 2008) [22]; *Lukatela v Birch (No 2)* [2008] ACTSC 142 (11 November 2008) [43]; *Saga v Reid* [2010] ACTSC 59 (1 July 2010) [107]-[108]; *Bowman v Campbell* [2011] ACTSC 104 (24 June 2011) [27]; *Haddon v Sarhan and Uren* [2012] ACTSC 73 (1 May 2012) [13].

²⁵ *Dinsdale*, above n 22, [84].

do so consistently with the law's purpose.²⁶ But the reference to 'human rights' is a limited one – it refers to the rights set out in the respective statutes, and in both statutes those rights are derived from the *International Covenant on Civil and Political Rights* ('ICCPR'). Except for the guarantee of protection from torture and cruel, inhuman or degrading treatment, none of the rights guaranteed in the *HRA* or the *Charter*, or the ICCPR, bears on the judicial process of sentencing generally, or on the particular sentencing option of suspending a sentence of imprisonment. In Victoria, for example, the Bill to limit the availability of suspended sentences²⁷ was accompanied by a Statement of Compatibility under section 28 of the *Charter*. The Statement reported the opinion of the Attorney-General that the Bill 'is compatible with human rights under the Charter because it does not limit any human rights as defined by the [Charter]'.²⁸ It was compatible only because there is nothing in the Charter that relates to sentencing, apart from a right to not be subjected to torture, ill-treatment, or medical procedures without consent.²⁹

There is limited scope in Australia for a court, when giving effect to a statute, to refer to international law. While statutory interpretation cannot curtail human rights in the absence of clear legislative intent,³⁰ courts in Australia have not yet taken to relying on international human rights law to promote a human rights dimension to Australian law. To the extent that courts are willing to have human rights considerations in mind when giving effect to legislation, they could, in considering suspended sentences, refer to the 1986 *United Nations Standard Minimum Rules for Non-*

²⁶ *Human Rights Act 2004* (ACT) s 30; *Charter of Rights and Responsibilities 2006* (Vic) s 32(1).

²⁷ *Sentencing Further Amendment Bill 2010* (Vic). See also *Sentencing Further Amendment Act 2011* (Vic).

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, *Sentencing Further Amendment Bill – Statement of Compatibility*, 21 December 2010 (Robert Clark, Attorney-General) 16.

²⁹ *Charter of Rights and Responsibilities 2006* (Vic) s 10.

³⁰ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

Custodial Measures ('the Tokyo Rules').³¹ The Tokyo Rules at 2.3 advocate sentencing options which demonstrate

flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment.

To this end, the Rules require that 'the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions'. Reducing the availability of the option of suspended sentences in Victoria is in breach of the Tokyo Rules, even if not of the *Charter*.

The Tokyo Rules make specific reference at 8.2(g) to 'suspended or deferred sentence' as a non-custodial sentencing option which can be used alone or in combination with other measures. The Rules at 12.1 anticipate that conditions will be imposed on the sentenced person, and require that they take account of the needs of society and the needs and rights of the offender and the victim. On the breach of conditions, the Rules at 14 acknowledge that a non-custodial sentence may be reviewed, but state that a custodial sentence should not be automatic, and should be imposed 'only in the absence of other suitable alternatives'. This contrasts with the position in most of Australia where, as we note above, all states and the Northern Territory have a statutory presumption of activation of the original sentence of imprisonment on occurrence of a breach.

We recognise that the Tokyo Rules are not enforceable, the *HRA* and *Charter* are silent on sentencing principles, and Australian courts are reluctant to refer to international human rights norms in statutory interpretation.³² Nevertheless, the Rules are available as

³¹ United Nations Doc. A/RES/45/110, 14 December 1990 ('*Tokyo Rules*'); see also *Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)* UN doc. ST/CSDHA/22.

³² See Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 376-7 and the references cited there.

criteria for evaluating the law and practice of suspended sentences in Australia and, ideally, to inform the development of policy.

VI LEGISLATION AND POLICY ON SUSPENDED SENTENCES IN THE ACT

The ACT significantly altered its sentencing regime with the passage of the *Crimes (Sentencing) Act 2005* (ACT) and the *Crimes (Sentence Administration) Act 2005* (ACT) ('the 2005 reforms'), which came into effect on 2 June 2006. Prior to this time, sentencing was governed by the *Crimes Act 1900* (ACT) ('the old regime'). This section sets out some of the principal aspects of the ACT suspended sentencing regime in relation to sentences, noting departures from the previous regime.

A *Imposing the Sentence*

In the ACT, if the court sentences a convicted offender to imprisonment, it may make an order suspending all or part of the sentence of imprisonment (known as a 'suspended sentence order'),³³ previously, the court could suspend the sentence only if it 'thinks fit'. There is no limit on the term of the sentence which may be suspended, or on the period for which it may be suspended. Although a good behaviour order ('GBO') – previously a 'recognisance' – must be made when a court orders a suspended sentence, deciding the terms and conditions of a GBO is a separate exercise from deciding to suspend a sentence: first, the court decides to suspend a sentence of imprisonment and then, having done so, the court is required to impose a GBO and to decide what conditions, if any, will be included in that GBO.

³³ *Crimes (Sentencing) Act 2005* (ACT) ss 12(1)-(2).

B *Conditions of the Sentence*

Following the 2005 reforms, courts in the ACT now have much broader powers than they did previously to impose extensive conditions on suspended sentences, and to tailor the conditions to meet the perceived needs of the individual offender. This is consistent with the requirements of the Tokyo Rules.³⁴ We discuss below how this power is exercised in practice.

If an ACT court makes a suspended sentence order, it must also ‘make a good behaviour order for the period during which the sentence is suspended or for any longer period that the court considers appropriate’.³⁵ Previously, the court had the discretion to make the release conditional on the offender’s being of good behaviour, and complying with specified conditions,³⁶ but the court has lost that discretion. The obligation on a court to impose a GBO was a significant policy shift, addressing the perception that offenders who receive a suspended sentence are getting off ‘scot-free’.³⁷ The requirement that the GBO be for at least the period for which the sentence is suspended again represented a policy shift from the old regime. Imposition of a GBO is subject to provisions relating to GBOs³⁸ and imprisonment,³⁹ and to Chapter 6 of the *Crimes (Sentence Administration) Act 2005* (ACT) which sets out ‘core conditions’ for a GBO, such as reporting changes of home or work address and complying with the lawful direction of a corrections officer.⁴⁰ A GBO may include any or all of prescribed conditions,⁴¹ including that the offender give security, engage in a community service condition, undertake a rehabilitation program condition (in which case the order must also include a probation or

³⁴ Tokyo Rules, above n 31, rr 12.1, 12.2.

³⁵ *Crimes (Sentencing) Act 2005* (ACT) s 12(3).

³⁶ *Crimes Act 1900* (ACT) s 403(1)(a)(ii).

³⁷ See, eg, ‘He Got Off Scot-Free: Mum’, *Border Mail*, 9 February 2007 <<http://www.bordermail.com.au/story/31572/he-got-off-scot-free-mum/>>.

³⁸ *Crimes (Sentencing) Act 2005* (ACT) s 13, ch 6.

³⁹ *Crimes (Sentencing) Act 2005* (ACT) ch 5.

⁴⁰ *Crimes (Sentence Administration) Act 2005* (ACT) s 85.

⁴¹ *Crimes (Sentencing) Act 2005* (ACT) s 13(3).

supervision condition⁴²), be on probation, and comply with a reparation order.

The *Crimes (Sentencing) Act 2005* (ACT) includes a list of examples of conditions which the court might consider appropriate, such as requiring the offender to undertake medical treatment and supervision, to supply samples of blood, breath, hair, saliva or urine for alcohol or drug testing, to attend educational, vocational, psychological, psychiatric or other programs or counselling, to not drive a motor vehicle or consume alcohol or non-prescription drugs or medications, and to regularly attend alcohol or drug management programs.⁴³ A prescribed rehabilitation program is one that treats adults and children for sexual behaviour that is unlawful or inappropriate, imparts self-management and social skills to enable offenders to deal with difficult situations in ways that do not involve the criminal behaviour, assists people who have committed a domestic violence offence, or provides alcohol or drug rehabilitation.⁴⁴ The availability of such treatment programs is consistent with the requirements of the Tokyo Rules.⁴⁵ The court may also make a number of other orders in combination with the suspended sentence, including an order of imprisonment to be served by full-time or periodic detention in a correctional centre, a fine, disqualification of a driver's licence, and a non-association or place-restriction order.⁴⁶

C Breaches of the GBO

If a court is satisfied that the offender has breached a condition of a GBO imposed with a suspended sentence, it must cancel the GBO and either impose the sentence had been originally imposed and

⁴² *Crimes (Sentencing) Act 2005* (ACT) ss 95, 133V.

⁴³ *Crimes (Sentencing) Act 2005* (ACT) s 13(3)(g).

⁴⁴ *Crimes (Sentencing) Regulation 2006* (ACT) reg 2.

⁴⁵ Tokyo Rules, above n 31, r 13.1.

⁴⁶ *Crimes (Sentencing) Act 2005* (ACT) s 29.

suspended, or re-sentence the offender for the original offence.⁴⁷ Because there is no presumption that the originally imposed suspended sentence will be activated on a breach of the GBO,⁴⁸ and the Act applies to re-sentencing in the same way that it applies to sentencing at first instance,⁴⁹ the full range of sentencing options is available to the court when sentencing on a breach of the GBO. The previous regime envisaged the offender serving a term not exceeding the balance of the sentence;⁵⁰ for example, if the offender had completed five months of a six month suspended sentence before breaching, the most the court could have ordered was that the person serve the remaining month in prison. This is now only one of the options available to the court when it resentsences the offender.

The *Crimes (Sentence Administration) Act 2005* (ACT) gives the following example of the operation of s 110:

The Magistrates Court convicted Desmond of an offence. The court sentenced Desmond to imprisonment for 6 months for the offence and made a suspended sentence order for the entire sentence of imprisonment. The court also made a good behaviour order for the 6-month period. Desmond breaches the order. In re-sentencing Desmond, the court may impose a sentence of imprisonment to be served by periodic detention.

This is not a helpful example. It should be made clear that the order which Desmond breaches is the GBO. In re-sentencing Desmond, the court may *either* impose the original sentence of six months imprisonment which had been suspended, *or* impose any other sentence, of which a sentence of imprisonment to be served by periodic detention is but one; a fine or further suspended sentence are equally available options.

⁴⁷ *Crimes (Sentence Administration) Act 2005* (ACT) s 110(2).

⁴⁸ This is consistent with the Tokyo Rules, above n 31, r 14.3,

⁴⁹ *Crimes (Sentence Administration) Act 2005* (ACT) s 110(4).

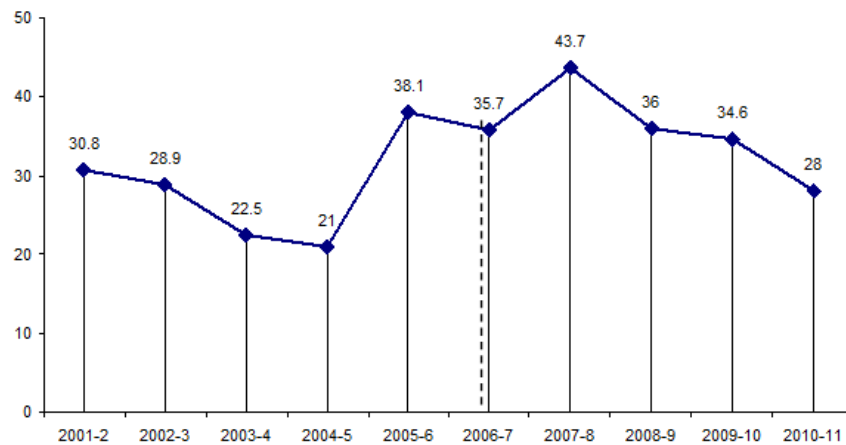
⁵⁰ *Crimes Act 1900* (ACT) s 404(4)(e).

VII RECENT TRENDS IN THE IMPOSITION OF SUSPENDED SENTENCES IN THE ACT

A ACT Supreme Court

Figure 1 is based on data from the Australian Bureau of Statistics (ABS) on the proportion of sentences imposed in the ACT Supreme Court between July 2001 and June 2011 which were fully suspended.⁵¹ We comment below on reservations that attach to the accuracy of these data.

Figure 1: Proportion of 2001-2010 ACT Supreme Court sentences which were fully suspended



* Dotted line shows 2 June 2006, the point at which the *Crimes (Sentencing) Act 2005* (ACT) came into effect.

⁵¹ Australian Bureau of Statistics, *Criminal Courts 2001-2*, Cat no 4513.0 (2003) Table 4; Australian Bureau of Statistics, *Criminal Courts 2002-3*, Cat no 4513.0 (2004) Table 3; Australian Bureau of Statistics, *Criminal Courts 2003-4*, Cat no 4513.0 (2005) Table 5; Australian Bureau of Statistics, *Criminal Courts 2004-5*, Cat no 4513.0 (2006) Table 11; Australian Bureau of Statistics, *Criminal Courts, Australia 2009-10*, Cat no 4513.0 (2011) ('ABS 2011'); Australian Bureau of Statistics, *Criminal Courts, Australia 2010-11*, Cat no 4513.0 (2012) ('ABS 2012').

Figure 1 shows that the rate of imposition of fully suspended sentences in the ACT Supreme Court declined from 31% in 2001-2 to 21% in 2004-5; this period was under the previous regime. Still under the previous regime, the rate increased significantly in 2005-6, *before* the 2005 reforms came into effect on 2 June 2006. Because the previous sentencing law applied to an offender who was charged before the commencement of the 2005 reforms,⁵² the full effect of the new legislation would not have become apparent until well into 2006-7. It is unlikely, therefore, that the increase in the rate of fully suspended sentences in 2005-6 was due to the legislative reforms, although it may have been to some degree a response by the courts to the prospect of the pending reforms.

The data described in Figure 1 also show that after a spike in the use of suspended sentences in 2007-8, there was a return in 2008-9 to the rate for 2005-6 and 2006-7. This suggests that the 2007-8 figure – which was the impetus for the Attorney-General’s reference to the LRAC on this issue – may have been anomalous. For four of the six years since the legislative changes, fully suspended sentences accounted for 35-38% of matters finalised in the Supreme Court. It is too early to tell whether the latest data, which indicated that only 28% of sentences were suspended sentences, are evidence of an ongoing downward trend since the 2007-8 spike or also represent an anomalous figure.

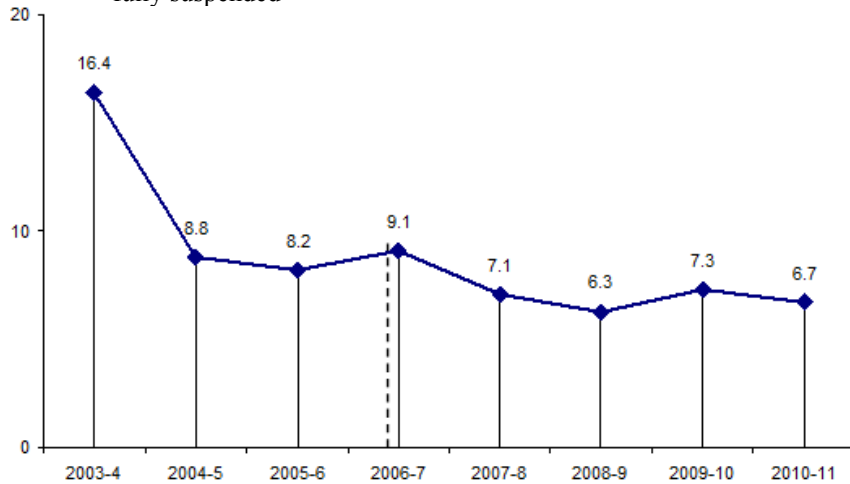
B *ACT Magistrates Court*

Figure 2 is based on data from the Australian Bureau of Statistics (ABS) on the proportion of sentences imposed in the ACT Magistrates Court between July 2003 and June 2011 which were fully suspended.⁵³ We comment below on reservations that attach to the accuracy of these data.

⁵² *Crimes (Sentencing) Act 2005* (ACT) s 140(2).

⁵³ *Criminal Courts, Australia 2008-9*, Cat no 4513.0 (2010) Table 14; ABS (2011), above n 51, Magistrates Court Supplementary Datacube, Table 6; ABS (2012), above n 51.

Figure 2: Proportion of 2003-2010 ACT Magistrates Court sentences which were fully suspended



* Dotted line shows 2 June 2006, the point at which the *Crimes (Sentencing) Act 2005* (ACT) came into effect.

Figure 2 shows that the rate of imposition of fully suspended sentences in the ACT Magistrates Court almost halved between 2003-4 and 2004-5, which was a period where their use was stable in the Supreme Court. Since 2004-5, the rate has been relatively constant, ranging 6.3% to 9.1%, and the 2005 reforms made no apparent difference to the rate. It should be remembered, however, that the ACT Magistrates Court deals with a large number of minor offences, and a custodial order (whether suspended or not) would be appropriate in very few such matters; between 2004-5 and 2009-11, non-custodial orders accounted for 84-87% of sentences imposed in the Magistrates Court.⁵⁴

C Observations on the Accuracy of the ABS Data

The ABS publishes data provided by the courts in each jurisdiction, and the data are therefore only as accurate as the source data. Our independent analysis of the court files (see ‘Methodology’ below) raised concerns about the accuracy of the ABS data.

⁵⁴ ABS 2011, above n 51; ABS 2012, above n 51.

Our research included an examination of the judicial sentencing remarks and/or court orders in 125 of the 126 cases for 2007-8⁵⁵ to check for accuracy of coding according to the ABS categories. This indicated the consistent occurrence of inaccuracies in the way data are recorded. Specifically, the cases coded as ‘fully suspended sentence orders’ were almost entirely comprised of what should properly have been coded as ‘intensive corrections orders’. An examination of the physical files provided by the Supreme Court Registry showed that instead of there being 54 fully suspended sentences, as was recorded, there were in fact only six such orders made, and instead of there being ‘nil or rounded to zero’ intensive corrections orders made, there were in fact 50 such orders. The most recent ABS data recognise some previous coding errors in the ACT, with the Explanatory Notes stating:

In 2007–08, defendants sentenced to a good behaviour bond/recognisance order were incorrectly coded to a fully suspended sentence. This has since been rectified in the 2008–09 extract. Caution should be exercised when making comparisons between 2007–08 and 2008–09 ...

From 2007–08, community service orders imposed with a fully suspended sentence are now coded correctly to 'intensive corrections orders'; in previous years this sentence type was coded to 'fully suspended sentence'. This sentence type relates to defendants charged with federal offences.⁵⁶

In addition to this miscoding, the authors’ own analysis of the ACT sentencing remarks indicated some inconsistency in how sentences are understood and, therefore, recorded and reported to the ABS. When offenders receive a custodial sentence which is backdated to take into account time spent on remand, and the offender is released immediately on being sentenced, this appears usually to have been coded as a fully suspended sentence, but was at times coded as a partly suspended sentence. Further, in relation to the recording of the imposition of GBOs, it appears that, through oversight, essential aspects of the court’s decision were not being recorded at all. In

⁵⁵ In one matter, neither the remarks on sentence nor the court order could be located.

⁵⁶ ABS 2011, above n 51, 137-8.

making these observations, the authors are not critical of the ACT Supreme Court; indeed, we remain indebted to the Court Registry for its assistance in this research, even when it became clear that the research would reveal errors in the Court's data. The errors in coding are not surprising, in light of the following factors we identified in the recording of the data. The Court has limited resources for managing the data, and little time in which to ensure that an offender's order has been accurately recorded. To determine the actual order made, Court staff are dependent on the record made on the file by a judge's associate, but it was at times difficult even for the experienced research team to determine what the actual order was. Referring to judicial remarks on sentence can help clarify the orders made. At the time of the research, the Supreme Court did not have an electronic database of all sentencing remarks, and in several cases, the judicial remarks on sentence were not contained on the court file.⁵⁷

Different forms of judicial expression may have unintended consequences in the collection and reporting of data, because, for example, only the principal sentence is reported to the ABS. Where Judge A might order a suspended sentence and then say 'in addition, I order that you get treatment for your drinking problem', this would correctly be coded as a fully suspended sentence. The alcohol treatment order would be coded as a treatment order, which falls under fully suspended sentences in the ABS coding hierarchy and therefore would not be included. If Judge B, by contrast, imposed a fully suspended sentence and then said 'and as a condition of that sentence, I order that you get treatment for your drinking problem', this should be coded as an intensive corrections order which is higher than a suspended sentence in the ABS hierarchy.

It is known that similar inconsistencies apply in other jurisdictions. For example, the most recent ABS data included in its

⁵⁷ In such cases, the judicial remarks on sentence were kindly provided to us by the library of the Director of Public Prosecutions.

Explanatory Notes the following for South Australia: ‘Intensive corrections orders were all incorrectly coded to fully suspended sentences prior to 2006–07, resulting in an overcount of this offence type and no data for custody in the community’.⁵⁸ Likewise, in Queensland, between July 2004 and February 2005, suspended sentences in the higher courts in certain locations were ‘incorrectly categorised as imprisonment orders leading to imprisonment with a determined term being overstated and fully suspended sentences being understated’, while

some suspended sentences were incorrectly categorised as imprisonment orders leading to imprisonment with a determined term being overstated and fully suspended sentences being understated in the Magistrates Courts.

It is therefore impossible to rely on the ABS data to conduct any reliable comparison of the rates of use of fully suspended sentences across Australian jurisdictions.

D *Recommendations*

The LRAC report made a number of recommendations directed to ensuring the creation and reporting of reliable sentencing data, which were responded to in some detail by the Government. The report recommended, for example, that the Supreme Court Registry be resourced to establish sound administrative systems which ensure that sentencing data are recorded adequately and comprehensively, and in a manner that is consistent with ABS reporting requirements. The report proposed the use of a template to record sentences, and standardised forms of expression in sentencing, in response to which the Government advised that a template for recording sentences is being developed within the Court.

The Government’s response reported that the Attorney-General had instructed the Justice and Community Safety Directorate:

⁵⁸ ABS 2011, above n 51, 135.

to investigate the best options to establish a means of collecting, analysing and publishing statistical data on sentencing. This is to ensure that the ACT has the most efficient and cost-effective method for ensuring that sentencing data is accurate, reliable and accessible.⁵⁹

In June 2012, the ACT Government announced its 2012-13 budget, which included an allocation of \$2.2 million over four years for partnership with the Judicial Commission of NSW to create a new sentencing database, which will ‘provide clear data on sentencing laws and offence penalties’.⁶⁰

The Government agreed ‘in principle’ with recommendations that Supreme Court staff be trained on the accurate collection and reporting of sentencing data, including ABS coding, and be resourced to maintain data collection and recording software that is compatible with ABS requirements. In doing so, the Government reported that in the 2011-12 budget it had provided \$560,000 to conduct a study into a contemporary case management system for the ACT Law Courts. The Government also noted that since 4 July 2011 the ACT courts have had a combined registry, which collocates the functions of the ACT Magistrates Court and Supreme Court and ‘offers the advantages of operational efficiencies, enables better management of administrative workloads, improves business continuity and succession planning and provides for improved communication’.⁶¹ The Government noted a recommendation that the Court be resourced to establish a publicly accessible online database of remarks on sentencing, and responded by saying that the full text of all Supreme Court sentencing decisions are available on the Supreme Court website. The authors found this database difficult to use and incomplete in its data holdings, which is what led to the recommendation. The possible collaboration with the Judicial Commission of NSW to establish an ACT sentencing database may address this issue.

⁵⁹ ACT Government Response, above n 9, 5.

⁶⁰ Simon Corbell, ‘Continued Investment in Community Safety’ (Media Release, 5 June 2012).

⁶¹ ACT Government Response, above n 9, 4-5.

VIII ANALYSIS OF SUPREME COURT SENTENCING DATA

In this section, we present key findings from an analysis of selected sentencing remarks for suspended sentence cases in the ACT Supreme Court.

A *Methodology*

With the support and cooperation of the ACT Supreme Court Registry, we obtained sentencing remarks for fully suspended sentences imposed for two sample periods before the 2005 Act came into effect: January-June 2004 ('2004a'; n=5) and July-December 2004 ('2004b'; n=14), and for two sample periods following the commencement of the 2005 reforms: January-June 2007 (n=19) and January-June 2010 (n=15).⁶² The following data were extracted from those sentencing remarks:

1. date of sentence;
2. name of offender;
3. offences committed (by name and Australian Standard of Classification code as set out by the ABS),⁶³
4. judicial officer;
5. age at date of sentence;
6. gender;
7. plea;
8. prior criminal record;
9. conditions of suspended sentence imposed;
10. whether any sentence other than the fully suspended sentence was imposed;
11. sentence length (months);
12. operational period (months);
13. whether the sentence was the original sentence or imposed on appeal;

⁶² We are grateful for the assistance of the ACT Supreme Court and Office of the Director of Public Prosecutions in providing access to this information.

⁶³ See Australian Bureau of Statistics, *Australian Standard Offence Classification (ASOC)*, Cat no. 1234.0 (2nd ed, 2008). See also Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)*, Cat no. 124.0 (2011).

14. whether the matter was a resentence for a breach of a previous suspended sentence;
15. mitigating factors cited;
16. any comments on suspended sentence policy, law or practice; and
17. any other relevant factor.

The data under discussion are drawn from sample periods, in which the numbers of cases is small (this is especially true for 2004a, where there were only five cases). The sample periods are snapshots of activity and we do not suggest that they are a quantitative representation of any larger period, although we are not aware of any factors which distinguish the sample periods from other comparable periods. Notwithstanding the limitations of the data, they present the most comprehensive available picture of sentencing patterns in the ACT and therefore make an important contribution to the discussion on this issue.

B *Discussion of Findings*

1 *Offence Type*

The most common offences for which a suspended sentence was imposed in the sample periods were:

- in 2004a, assault and theft equally (two offenders each);
- in 2004b, burglary (five out of 14 offenders) and assault (four offenders);
- in 2007, assault (seven out of 19 offenders) and robbery (four offenders); and
- in 2010, burglary (four offenders out of 15 offenders) and assault (three offenders).

It is not possible on the basis of these small numbers to determine whether the kinds of cases for which suspended sentences are being imposed are more or less serious since the reforms, but it is clear that assault dominates as the offence type for which such sentences are imposed.

2 *Age*

The age ranges of offenders in the four sample periods ranged were: 24-51 (2004a), 20-63 (2004b), 19-50 (2007) and 18-71 (2010). The mean age of offenders was 36 in 2004a, 30 in 2004b, and 31 in both 2007 and 2010. The incidence of one offender aged 71 in 2010 slightly inflated the mean age for that period. It is not possible on the basis of these small numbers to determine the extent to which an offender's age was a factor in imposing a suspended sentence, but the data do not suggest any clear pattern in relation to an offender's age in imposing a suspended sentence.

3 *Gender*

Women accounted for one out of five offenders (20%) who received a fully suspended sentence in 2004a, none of the 14 offenders in 2004b, and one out of 19 (5%) in 2007. In 2010, there were 14 men and one offender whose sex was not recorded, suggesting that women comprised either 0% or 7% of offenders who received a fully suspended sentence in 2010. In the absence of data on the proportion of women who were sentenced for comparable offences in the relevant periods, it is not possible to state the extent to which an offender's sex was a factor in imposing a suspended sentence. Future research should consider the number of women who were sentenced for comparable offences in order to determine the comparative rates at which men and women receive suspended sentences in the ACT.

4 *Plea*

In 2004a, 2004b and 2007, all of the suspended sentences followed guilty pleas. In 2010, 13 out of 15 sentences followed a guilty plea. As we discuss below, an early plea of guilty is often cited as a mitigating factor in support of the imposition of a suspended sentence, but the data from 2010 demonstrate that a suspended sentence is still regarded by the Supreme Court as an available sentencing option for an offender who is convicted at trial after a not guilty plea.

5 *Prior Criminal Record*⁶⁴

In 2004a and 2004b, none of the offenders who received suspended sentences was a first offender. In 2007, by contrast, four offenders who received suspended sentences (24%) had no known prior record, and in 2010 two offenders who received suspended sentences (15%) had no known prior record. It is unsurprising that first offenders receive a suspended sentence, although it can at times be controversial, given that this appears to significantly increase the likelihood of subsequently receiving an actual sentence of imprisonment.⁶⁵ In the absence of data on the number of offenders with no prior record who were sentenced, it is not possible to say what proportion of offenders with no prior record received a suspended sentence. Future research should therefore examine how first offenders are sentenced in the ACT and the appropriateness of imposing suspended sentences in such cases.

In 2004a, four offenders who received suspended sentences (80%) had significant prior records, while nine offenders (64%) did so in 2004b. In 2007, there were 11 offenders (66%) known to have had moderate or significant prior records, and in 2010, four offenders (30%) are known to have had a significant prior record. On the basis of these data, it would appear that having a significant prior record does not preclude the imposition of a suspended sentence, but that the 2005 reforms may have led to it being a greater obstacle to receiving a suspended sentence than was the case previously.

⁶⁴ In determining the seriousness of an offender's prior criminal record, we made an assessment on the basis of the number of prior offences, the seriousness of those offences and any relevant comments by the sentencing judge. We acknowledge that this is something of a subjective assessment, and that what one judicial officer regards as significant might be regarded by another as minor. For discussion, see Lorana Bartels, *Sword or Feather: The Use and Utility of Suspended Sentences in Tasmania*, Unpublished PhD thesis, University of Tasmania (2008) 187.

⁶⁵ See Lorana Bartels, 'Suspended Sentences in Tasmania: Key Research Findings' (Trends and Issues in Crime and Criminal Justice No 377, Australian Institute of Criminology, 2009).

6 *Length of Sentence*

In 2004a, four out of five sentences were for 12 months and one was for 36 months, with a mean of 17 months. In 2004b, sentences ranged from nine to 48 months, with a mean of 18 months. In 2007, sentences ranged from six to 36 months, with a mean of 19 months, and in 2010, the range was from six to 24 months, with a mean of 14 months. It appears that, since the 2005 reforms, some shorter suspended sentences (from six months) are being imposed, although there is no clear pattern in terms of the mean length of sentences.

In this sample, there was only one instance (out of 53 sentences) where a sentence exceeding three years was imposed. This is of interest, as the ACT does not set any legislative limit on the length of a sentence which can be suspended. In Tasmania, which similarly does not set a maximum limit, suspended sentences very rarely exceed two years.⁶⁶ In NSW, where suspended sentences are not permitted to exceed two years,⁶⁷ a very high proportion of suspended sentences are for exactly two years,⁶⁸ which suggests that judicial officers in NSW are – consciously or subconsciously – fettered by the ‘two year’ restriction, and tend to impose the longest possible period of imprisonment when suspending the sentence. By way of comparison, in Victoria, where the maximum length of a suspended sentence is two years in the Magistrates Court, only 5% of wholly suspended sentences exceeded six months, while the figures for the higher courts, where sentences of up to three years can be suspended, indicated a concentration among sentences of up to 12 months (53%), followed by sentences of 13-24 months (33%).⁶⁹

Inferentially, the NSW position suggests that a legislative limit on the maximum term of a sentence which can be suspended may affect

⁶⁶ Tasmania Law Reform Institute, above n 6.

⁶⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1).

⁶⁸ Patrizia Poletti and Sumitra Vignaendra, ‘Trends in the Use of Section 12 Suspended Sentences’ (Sentencing Trends and Issues No 34, Judicial Commission of New South Wales, 2005).

⁶⁹ Nick Turner, *Suspended Sentences in Victoria - A Statistical Profile* (Victorian Sentencing Advisory Council, 2007).

judicial behaviour (although this does not appear to be the case in Victoria).⁷⁰ The data from the sample periods suggest that, in the absence of such a limit in the ACT, the courts assess the appropriate period of imprisonment in the particular circumstances of the offender. Consequently, it seems appropriate not to prescribe a maximum limit on the length of a sentence which can be suspended.

7 Length of Operational Period

In 2004a, the period for which the sentence was suspended ('the operational period') ranged from 18 to 48 months, with a mean of 35 months. In 2004b, operational periods ranged from six to 48 months, with a mean of 25 months. In 2007, the range was 12 to 60 months, with a mean of 25 months, while in 2010 the range was 18-36 months, again with a mean of 25 months. These data suggest that operational periods in the ACT are generally just over two years; it would be rare for a sentence to be suspended for less than one year or more than five years, with such an instance occurring only once in the 53 cases studied.

8 Conditions of Sentence

(a) Recognisance

A recognisance attempts to reduce re-offending by threatening a sanction; the imposition of conditions, by contrast, attempts to reduce re-offending by dealing with possible causative factors (eg drug use). In the 2004a period, each offender who received a suspended sentence was placed on a recognisance, as were 11 out of 14 offenders in 2004b. In the 2007 sample, a recognisance was ordered for only four of 19 offenders (21%), and for only two of 15 offenders (13%) in the 2010 sample. Clearly the rate of imposition of recognisances has decreased since the reforms, probably attributable to the mandatory imposition of a GBO and the greater range of options available to the court.

⁷⁰ See Poletti and Vignaendra, above n 68.

(b) Reparations order

A reparations order was made against two of the five offenders in the 2004a sample period, but not at all in the 2004b, 2007 and 2010 samples. This is surprising, as there is no necessary connection between the legislative amendments to the suspended sentencing regime and consideration of a victim's need for reparation. The data may be explained by the random nature of the sampling and/or the futility of a making a reparations order in most circumstances.

(c) Good behaviour order

Even though the 2005 reforms require the imposition of a GBO when a sentence is suspended, GBOs were recorded as having been made only in three cases in the 2007 sample period and not at all in relation to the 15 offenders in the 2010 period. It is unlikely, but possible, that a sentence was suspended but no GBO was imposed. More likely is that the fact of the imposition of the GBO was not recorded, which reinforces our concerns, discussed above, about data recording, collection and management.

(d) Supervision order

In the 2004a period, all five offenders were subject to the supervision of Corrective Services, as were 11 out of 14 offenders (79%) in 2004b. In the 2007 sample, 12 of the 17 offenders known to have been subject to conditions other than or in addition to a GBO (71%) were subject to the supervision of Corrective Services, as were 14 out of 15 offenders (93%) in the 2010 sample.

(e) Other conditions

Table 1: Other conditions imposed with suspended sentences in 2007 and 2010 sample periods*

	2007	2010
Abstain from drug use	1	4
Anger management	1	0
Cognitive skills program	1	1
Community service order	0	3
Counselling	1	1
Drug treatment	1	4
Men's program	1	0
Mental health treatment	2	0
Register as a sex offender	1	1
Take medication	1	0
Urinalysis	4	4

*NB: multiple conditions were imposed in the majority of cases

A rationale for the 2005 reforms was a desire to make it clear to judicial officers that they have the power to craft a sentence which is tailored to the circumstances of the individual offender (see discussion in Part VI above). This is consistent with the Tokyo Rules, which require, among other considerations, that conditions be 'aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender's chances of social integration'.⁷¹

The information in Table 1 suggests that the legislation has met its objectives in this regard, in that an increasing number of orders are being made to meet the individual circumstances. There had, however, been a trend in this direction shortly before the reforms: in 2004b, which was the period during which the reforms were introduced as a Bill to parliament, the Court imposed a number of conditions particular to the offender's circumstances, such as obtaining counselling/treatment (n=7), urinalysis (n=3), abstaining from drugs (n=1), undertaking education (n=1) and receiving residential treatment (n=1).

⁷¹ Tokyo Rules, above n 31, r 12.2.

The data make clear that the imposition of a fully suspended sentence in the ACT is rarely an instance where the offender simply ‘gets off’ without some ‘bite’ to the sentence.⁷² In only two of the 51 sentences for which the conditions of sentence could be determined was the offender required to submit only to a GBO and to no other conditions. Under the 2005 reforms, a fully suspended sentence is almost invariably accompanied by a range of conditions on the behaviour of the offender, in addition to the ‘core’ condition of accepting the supervision of Corrective Services. Although the intention in imposing conditions such as these is to assist the offender in dealing with the criminogenic factors in their lives, it has been suggested that imposing too many conditions on offenders can set them up for failure.⁷³ Further research is required to report on the rate of compliance with the conditions and the recidivism rate among offenders who are subject to specific conditions.

9 *Mitigating Factors Cited*

Sentencing judges usually explicitly refer to some of the factors that have informed their decision to impose a suspended sentence (or any other sentence). Although assessing an appropriate sentence is not a mechanical calculation,⁷⁴ a sentencing judge should explicitly state the factors taken into account in sentencing, with the majority in *Markarian* stating that the law ‘strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public’.⁷⁵ A lack of transparency also makes it impossible to report with certainty on the rate at which different factors arise in decisions to impose a suspended sentence, rather than on the rate at which sentencing judges volunteer such

⁷² For discussion about the ‘bite’ of a suspended sentence generally, see Bartels, above n 1.

⁷³ See George Mair, Noel Cross and Stuart Taylor, *The Use and Impact of the Community Order and Suspended Sentence Order* (Centre for Crime and Justice Studies, 2007) 31.

⁷⁴ See *Markarian v The Queen* (2005) 215 ALR 213, [52] (McHugh J); *Ryan v The Queen* (2001) 206 CLR 267, 294 (Kirby J).

⁷⁵ *Markarian v The Queen*, above n 74, [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ). See also Michael Kirby, ‘Reasons for Judgment: “Always Permissible, Usually Desirable and Often Obligatory”’ (1994) 12 *Australian Bar Review* 121.

information. We consider here the mitigating factors referred to by judges in cases in the four sample periods.⁷⁶

(a) Guilty plea

The fact of an ‘early’ guilty plea was cited as a factor for imposing a suspended sentence for four of the five offenders in 2004a, for three of the 11 offenders for whom mitigating factors were cited in 2004b and for three of 15 offenders in 2010. The fact of a guilty plea, without describing it as ‘early’, was cited as a factor for one of 19 offenders in the 2007 sample period. As we note above, among all 53 suspended sentences in the sample periods only two (in 2010) followed guilty verdicts after trial; it therefore seems likely that a guilty plea was a relevant factor in imposing a suspended sentence in the other cases, but was simply not remarked upon.

(b) Other factors

An intended effect of the 2005 reforms was to enable courts to better tailor a sentence to the circumstances of the offender. The 2007 and 2010 sample periods showed an increase over the 2004a rate at which factors were referred to by the sentencing judges, although, by 2004b – when the proposed reforms had been introduced into parliament – the Supreme Court was already citing a greater number of subjective factors when imposing a suspended sentence. Table 2 sets out the most commonly cited factors in each of the four sample periods; multiple factors were commonly cited.

⁷⁶ For discussion of mitigating factors in suspended sentence cases, see 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.

Table 2: Most commonly cited in mitigation factors when suspending a sentence in sample periods

	2004a	2004b	2007	2010	Total
Offence not serious/offender's minor role	2	4	3	4	13
Evidence of rehabilitation	1	0	6	4	11
Remorse	1	0	4	6	11
Drug/alcohol treatment	0	0	5	3	8
Prior good record	0	5	2	1	8
Mental health problems	2	3	2	0	7
Good character	0	0	5	1	6
Impact on family/family responsibilities	1	0	4	0	5
Employment/employment prospects	0	1	2	2	5
Youth	0	3	1	1	5
Difficult childhood	0	0	4	0	4
Delay in sentencing	0	0	0	2	2
Family support	0	0	0	2	2
Old age	0	1	0	1	2
Restitution	0	1	1	0	2
Consequential punishment	0	0	1	0	1
Cooperation with authorities	0	1	0	2	1
Physical health problems	0	0	0	1	1
Low risk of reoffending	0	0	1	0	1

In light of the observations we make above concerning the differing extent to which sentencing judges cite reasons for their decision, it is difficult to extrapolate from Table 2 any clear pattern in the factors for the imposition of suspended sentences. However, it is possible to say that judicial officers now usually cite a broad collection of factors in each case, which reflects the policy of the 2005 reforms to tailor sentences more readily to the individual offender.

10 *Judicial Statements Relating to Legislative Policy*

The LRAC report examined the sentencing remarks on court files for comments by sentencing judges on the legislation or policy underpinning the power to suspend a sentence. In 2004a and 2010, there were no such statements. In 2004b, in one unreported case, a judge observed that:

It is clearly the law, as understood by the Court of Appeal of New

South Wales, that fully suspending a sentence of imprisonment for supply of a drug of dependence should only occur in what that court has described as exceptional circumstances. Now, our Court of Appeal has taken something of a different view in relation to exceptional circumstances and has reminded sentencing judges in this court that we must look at the full circumstances of every offender and go through the process that is set out in the Crimes Act, and that it would be wrong to limit circumstances warranting mercy to some sort of mathematical formula to say we can only apply them in exceptional circumstances, meaning a minority of cases. We need to look in every case at every circumstance.

In 2007, fairly soon after the reforms came into effect, remarks of this nature were made in three cases. In one case, the sentencing judge commented on how the reforms required the imposition of a GBO, but noted that conditions would have imposed in any event. In the other two cases, there was a reference merely to ‘the law’ and to common sentencing practice.

As is the case with sentencing factors noted above, a sentencing judge is not obliged to comment on the legislative or policy context in which a sentence is imposed, or on the jurisprudence of sentencing practices. From our examination of sentencing decisions more generally, however, it appears that ACT judges rarely refer to other similar cases or engage in analysis of the sentencing legislation. Compared with the practice in some other jurisdictions (for example, NSW and Victoria⁷⁷), ACT judges seem more likely in their sentencing remarks to confine themselves to the facts of the case before them. A consequence of this is that only a limited body of jurisprudence on the imposition of suspended sentences under the 2005 reforms has developed,⁷⁸ which has the potential to reduce sentencing consistency over time.

⁷⁷ See, eg, Georgia Brignell and Patrizia Poletti, ‘Suspended Sentences in New South Wales’ (Sentencing Trends and Issues No 29, Judicial Commission of New South Wales, 2003); VSAC DP, above n 3; Bartels, above n 1.

⁷⁸ This is not to suggest that there have been no cases to consider these issues, especially in the context of breaches: see above n 24 and below, n 89.

IX POLICY IMPLICATIONS FOR FURTHER INQUIRY

In its report, the Council noted a number of policy issues that were raised by the research as possible matters for future inquiry.

A *Should Suspended Sentences be a Sentencing Option in the ACT?*

The report noted that the combined effect of two features of the regime for suspended sentences in the ACT raises the question of whether suspended sentences should be retained as a sentencing option. Because imposing a conditional GBO with a suspended sentence is mandatory, and because there is no presumption of activation of the suspended sentence on a breach of the GBO, it may be that ‘that the actual or effective sentence is the conditional GBO, not the suspended term of imprisonment’.⁷⁹ In its response, the Government considered the objectives of suspended sentences under the Act and the process for imposing them, as well as the research and recent experience in NSW, Tasmania and Victoria, and concluded that ‘suspended sentences should continue to be a sentencing option in the ACT’.⁸⁰ We endorse the Government’s view. Although there are some difficulties with the theoretical and practical use of suspended sentences,⁸¹ we regard it as unwise to abolish this sentencing option, especially in the absence of carefully crafted intermediate alternatives. As we noted above, the Tokyo Rules advocate a flexible range of non-custodial sentencing options, and specify suspended sentences as one such option.

1 *Breaches of Suspended Sentences*

Unlike recent discussion in some other jurisdictions,⁸² the 2005 reforms in the ACT were not underpinned by concern about the

⁷⁹ ACT Law Reform Advisory Council, above n 8, 44.

⁸⁰ ACT Government Response, above n 9, 8.

⁸¹ See, eg, *Dinsdale*, above n 22, [76] per Kirby J.

⁸² See, eg, the reviews in Tasmania and Victoria discussed above.

effectiveness of suspended sentences as a sentencing option. As we noted above, current ACT Government policy is that suspended sentences should be maintained as a sentencing option in the ACT.⁸³ Nevertheless, the effectiveness of suspended sentencing can be monitored, having regard to the rate and nature of breaches of the associated GBOs and other conditions ('a breach analysis').⁸⁴ The data for the present report were not, however, collected for that purpose, and do not support a breach analysis.

A limited breach analysis was undertaken within the office of the ACT Director of Public Prosecutions ('DPP'), and the DPP generously agreed to share that analysis with the authors. The analysis was conducted by searching the Supreme Court sentencing database for sentencing remarks when suspended sentences came before the court for 'breach' in 2009, although, as the DPP acknowledges, there were errors and omissions in the database (discussed above). These remarks were then cross-checked with files held by the DPP. The DPP's limited exercise indicated that in 2009, the Supreme Court dealt with 23 breaches of fully suspended sentences. In 26% of those cases, the original suspended sentence was activated in whole or part, in 56% of cases, a further suspended sentence was imposed, and in 13% of cases, the Court took no action on the breach.⁸⁵ The DPP's analysis was limited to cases where the offender was prosecuted for breaching the conditions associated with the suspended sentence. It does not report on cases where the offender was *not* prosecuted for breach, either because of an exercise of discretion by the police or prosecutors, or because of a failure in

⁸³ ACT Government Response, above n 9, 4. See further discussion on this point below.

⁸⁴ See Lorana Bartels, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21 *Current Issues in Criminal Justice* 219; David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143; Turner, above n 69; VSAC DP, above n 3.

⁸⁵ The Tokyo Rules, above n 31, state that, on a breach, a custodial sentence should not be automatic, and should be imposed 'only in the absence of other suitable alternatives': at rr 14.3, 14.4.

administrative processes for identifying breaches. In a recent breach analysis in Tasmania, these factors were found to account for a significant failure to bring breached sentences back to court.⁸⁶

It is not possible to say what proportion of suspended sentences imposed in the Supreme Court over a specific period of time, or what proportion of all apparently breached sentences, is represented by the 23 cases reported on. Accordingly, although this analysis sheds some light on the prosecution of breaches of fully suspended sentences in the ACT, it provides only a partial picture of what actually happens with suspended sentences. Further research is required to investigate this issue more comprehensively. Any such research should consider the nature of the breaching conduct (for example, whether the offence was breached by further offending or by a failure to comply with conditions of supervision), the number of breaches (for example, whether the action was taken following a single instance of reoffending or after numerous such instances), and the timeframes for reoffending or action (for example, whether the offender breached early or late in the operational period, and how long it took for prosecution action to be taken). The Government's response to the LRAC report indicated that if a breach analysis were to be undertaken, and were to provide evidence 'to question the effectiveness of the suspended sentence option, then further consideration [would] be given to this issue by the ACT Government'.⁸⁷

B *What Should be the Consequences of the Breach of a Condition of the GBO Associated with a Suspended Sentence?*

Related to the previous issue is the question of whether there should in fact be a presumption of activation of the suspended sentence on breach of a condition of the GBO in the ACT, as is the case elsewhere in Australia. In its response, the Government considered the position in other jurisdictions and referred to the decision of

⁸⁶ Bartels, above n 84.

⁸⁷ ACT Government Response, above n 9, 7.

Saga v Reid, where Refshauge J observed that ‘although there is no “default” requirement to activate the sentence of imprisonment that has been suspended, there are important policy reasons for doing so’.⁸⁸ It is apparent from other cases that judges in the ACT do not see activating the original sentence of imprisonment as a default response to a breach,⁸⁹ a position consistent with the Tokyo Rules.

The Government indicated its intention to consult with stakeholders to determine if the ACT should enact a statutory presumption of imprisonment on breach of a GBO,⁹⁰ noting the ACT’s obligations under the *Human Rights Act 2004* (ACT) would

⁸⁸ *Saga v Reid* [2010] ACTSC 59 (1 July 2010) [101] (Refshauge J).

⁸⁹ *Saga v Reid* [2010] ACTSC 59 (1 July 2010) [101] (Refshauge J). See also *Tieu v McEwan* [2007] ACTSC 49 (20 June 2007) (sentence reduced, notwithstanding ‘superficial’ compliance; no error in magistrate stating that an offender who breaches ‘should ordinarily’ expect the sentence to become operative); *Moutrage v Haines* [2008] ACTSC 36 (8 May 2008) (partial activation on breach; relevance of time served considered); *Thompson v Young* [2008] ACTSC 11 (20 January 2008) (requirement for proper evaluation of all sentencing options when re-sentencing); *Glover v Saunders* [2008] ACTSC 130 (18 November 2008) (resentencing offender inadequate in the circumstances); *Taylor v Bowden* [2009] ACTSC 13 (2 March 2009) (consideration of whether preferable to reimpose the sentence or resentence the offender; application of s 65 of the Act; sentence to be imposed for the offence giving rise to the breach irrelevant in determining whether to revoke the GBO); *Tran v Tran* [2009] ACTSC 66 (12 June 2009) (discussion of whether suspended sentence reimposed or offender resented); *Hawkins v Hawkins* [2009] ACTSC 148 (6 November 2009) (correct application of s 63 of the Act and s 110 of the *Crimes (Sentence Administration) Act 2005* (ACT)); *Ledson v Taylor* [2010] ACTSC 42 (17 May 2010) (offender not in breach of good behaviour order imposed on the suspended sentence until convicted of new offence); *Pearce v Tanner* [2010] ACTSC 122 (15 September 2010) (undesirable to pronounce the conviction for the sentence which constituted the breach of suspended sentence *after* activating the suspended sentence); *Wilkins v Hague* [2011] ACTSC 189 (22 November 2011) (if a judicial officer considers that he or she has power on re-sentencing to impose a period of imprisonment more severe than that which was suspended, he or she must indicate that clearly to the parties to give them a fair opportunity to address the issue).

⁹⁰ ACT Government Response, above n 9.

have to be taken into account in considering such a proposal, especially in relation to the rights of young people. In fact, as we note above, there is little in the ACT *Human Rights Act* that bears on sentencing; the relevant international human rights considerations are set out in the Tokyo Rules and, for young people in particular, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('the Beijing Rules').⁹¹

The desirability of national consistency and predictability in sentencing, and of 'sentences meaning what they say they mean',⁹² must be balanced against the need for judicial discretion and flexibility when dealing with a breach. Any proposal to introduce a statutory presumption of activation on breach should be informed by a thorough analysis of the number of suspended sentences imposed in both the Supreme Court and Magistrates Court each year, the number and nature of the breaches, and the action taken in relation to breaches.

C What can be done to Enhance Consistency and Predictability in the Imposition of Suspended Sentences?

The Tokyo Rules at 2.3 acknowledge that having a range of non-custodial sentencing measures must not be at the expense of consistency in sentencing. It was suggested in the LRAC report that consistency and predictability in sentencing would be enhanced through improved reporting of judicial reasons for, and increased judicial observations on, the imposition of suspended sentences. A related policy question is whether the ACT legislature should provide legislative guidance as to the factors for a sentencing court to take into account when determining whether to suspend a sentence, as Victoria does.

The Government indicated in its response that it does not see the

⁹¹ UN Doc. A/40/53, 1985.

⁹² Bartels, above n 84, 220.

need for the legislature to provide additional guidance on the factors to be taken into account by a court when determining whether to suspend a sentence,

mindful that the imposition of legislation to specify the factors that are to be taken into account may unintentionally exclude factors which may be considered in the sentencing of an offender.⁹³

In the Government's view, '[b]y not providing strict legislative guidance, the factors are to be determined by the precedent developed by the courts and on the individual facts and circumstances of each case'.⁹⁴ Read with the proposal, noted above, to work with the Judicial Commission of NSW on an ACT sentencing database,⁹⁵ this approach should enable judges in the ACT to improve consistency in sentencing, while tailoring sentences to the individual circumstances of the case, unfettered by legislative prescriptions.

D *Does the Terminology that is Used Adequately Convey the Nature of a Suspended Sentence?*

The LRAC report noted that the term 'suspended sentence' may not sufficiently convey the gravity of the imposition of a sentence of imprisonment, and the conditional nature of the decision to suspend such a sentence. The Government's response noted that the term is broadly consistent with most jurisdictions in Australia, which variously use the terms 'suspended sentence', 'suspended sentence of imprisonment' and 'suspended imprisonment'. The Australian Law Reform Commission has recommended that 'the term "recognizance release order" [used for federal offences] should be replaced with terminology that reflects its nature as a conditional suspended sentence.'⁹⁶

⁹³ ACT Government Response, above n 9, 13.

⁹⁴ Ibid.

⁹⁵ Ibid 8.

⁹⁶ Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, Report 103 (2006) Rec 2-3.

The ACT Government said that stakeholder consultation would be undertaken to determine whether changes to the terminology were necessary. There is, however, likely to be little enthusiasm among practitioners, the judiciary or the public for a change in terminology. The ACT Law Society, for example, has indicated that it is ‘of the view that the name Suspended Sentence is relatively clear and is consistent with language used in other jurisdictions’, although it would support ‘a change that saw them referred to as “suspended sentences of imprisonment”’.⁹⁷ An alternative may be to consider what more could be done to communicate effectively to the public and the news media what a suspended sentence is, and is not.

X CONCLUSION

In providing an overview of the recently completed review of suspended sentences in the ACT, and the ACT Government’s response to that review, we present data on recent trends on the use of suspended sentences in the ACT Supreme Court and Magistrates Court. We examine issues relating to analysis of breaches of suspended sentences, and consider the limited extent to which the jurisprudence in relation to statements on legislation or policy is developing in the ACT. Finally, we consider some policy implications for further inquiry and comment on the Government’s response on these issues. Throughout, we note the consistency, or not, with the *United Nations Standard Minimum Rules for Non-Custodial Measures* (‘the Tokyo Rules’).

Across Australia, the approach to suspended sentences varies considerably. In the national context, ACT takes a distinctive approach and is generally more compliant with the Tokyo Rules. In giving courts a wide discretion as to the conditions that can be imposed on a GBO accompanying the suspension of a sentence, the ACT is similar to South Australia, the Northern Territory and

⁹⁷ ACT Law Society, *Suspended Sentences – Submission*, Letter to ACT Justice and Community Safety Directorate, 5 December 2011.

Tasmania. The ACT is also like NSW, Tasmania and Western Australia in not setting out a legislative test for imposing a suspended sentence. Like those jurisdictions and Queensland, the ACT does not impose any legislative restrictions on the type of offences for which such a sentence may be suspended. The ACT and Tasmania are the only jurisdictions which do not restrict either the length of the suspended sentence or the operational period of the suspension that can be imposed. Unlike NSW and Victoria, the ACT does not limit the combination of other orders which may be imposed when a sentence is suspended.

Like most jurisdictions (except Victoria), the ACT does not provide guidance on the factors for a sentencing court when determining whether to suspend a sentence. The ACT Government is wary of providing that guidance because of the risk that doing so may unintentionally exclude other factors, and is content to rely on precedent, and individual facts and circumstances. Alone among the states and territories, and consistently with the Tokyo Rules, the ACT does not have a statutory presumption of activation of the original sentence of imprisonment on occurrence of a breach.

Although suspended sentences have been the subject of recent review in Tasmania and New South Wales and are to be abolished in Victoria, the ACT Government in 2011 reaffirmed its commitment to suspended sentences as a sentencing option. This is appropriate because of the need for courts to have available to them a wide range of sentencing options in order to promote the interests of individualised justice. This is particularly apt in a jurisdiction such as the ACT, where the *Human Rights Act 2004* (ACT) creates some justified expectation of compliance with international human rights standards such as the Tokyo Rules.