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International Evidence Review of Conditional (Suspended) Sentences FINAL REPORT

**Sarah Armstrong, Gill McIvor, Fergus
McNeill and Paul McGuinness**

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Executive Summary

Introduction, Background and Methodology

- i. This review presents international evidence on the effect of conditional sentences on: sentencing practices (including possible net widening effects), reoffending rates and public and other stakeholder perceptions.
- ii. A trend of rising imprisonment rates in many parts of Europe, North America and Australia and New Zealand has led to renewed policy interest in suspended sentences. Research shows use of suspended sentences has been accompanied both by rising and falling prison admissions, and the review of the evidence aims to improve the ability to understand how these different results are possible.
- iii. We focused our review of conditional sentences to specific sentences of imprisonment which are suspended for a period of time and never served so long as the person sentenced has displayed good behaviour and in some cases complied with additional conditions. The review further focused on jurisdictions where suspended sentences had a distinct origin in enabling legislation as well as their own penal aims.
- iv. There was insufficient research on deferred sentences to include them in this review. In parts of Scotland schemes of 'structured deferred sentences' are available to provide interventions mainly to low tariff offenders who have underlying needs, in order to avoid 'uptariffing' them to probation or community service. They may offer a useful tool in a wider strategy of reducing unnecessary use of prison.
- v. Evidence was identified through existing knowledge and research of the team involved and traditional searches of relevant publications and databases. This review is not a meta-analysis and does not evaluate the methodologies of the literature cited.

Use, Impact and Enforcement

England and Wales

- vi. Suspended Sentence Orders (SSOs) have been in use since 2004. Suspended sentence orders are a custodial order to be used only where a court is minded to pass a custodial sentence of less than 12 months. Conditions may be added to suspended sentence orders such as a requirement of unpaid work, mental health treatment or drug rehabilitation.
- vii. There were concerns that suspended sentences would be loaded with conditions, setting offenders up for failure, but this has not appeared to have happened (most SSOs have only one or two conditions). However, higher than expected use of SSOs has not been accompanied by declines in imprisonment

rates. And with breach levels running at around 40% in 2008, SSOs may be adding pressure on the prison system.

- viii. Despite the absence of condition loading, the numbers of SSOs being issued, the fact these appear to be being used in place of other community sentences and the kinds of conditions included as requirements of suspended sentences in England and Wales have led some researchers to conclude they are being used punitively.
- ix. In matched sample comparisons of different sentencing options, the Ministry of Justice found that custodial sentences of less than twelve months had higher rates of reconvictions than both community orders and suspended sentence orders.

Australia

- x. Suspended sentences are available in all Australian states, though research has focused on New South Wales, Victoria and Tasmania. Use of suspended sentences in lower courts ranged from around 5% of all disposals in New South Wales to 7% in Victoria, while they represented 42% of disposals made by the Supreme Court in Tasmania.
- xi. In Victoria, sentences up of to two years (in lower courts) or three years (in high courts) may be suspended. In New South Wales, suspended sentences are used most commonly for sentences of six to 12 months in lower courts and 24 months in higher courts. There is variance from state to state in the degree to which suspended sentences are used and combined with other sentences.
- xii. There is confusion over what a suspended sentence is and what it is intended to achieve, further affecting public and judicial confidence. Concerns about the suspended sentence reached such a level that the Sentencing Advisory Council of Victoria at one point recommended their abolition. In New South Wales, the justification for suspended sentences was that they would reduce the use of imprisonment without sacrificing the deterrent effects of imprisonment.
- xiii. In Australia suspended sentences can be imposed with or without supervision and various degrees of conditionality. In Victoria and Queensland, the only requirement is that the offender does not commit any offence punishable by imprisonment; in Tasmania, one study found 23% of suspended sentence orders included a community supervision order.
- xiv. *Net widening*. It appears suspended sentences are often used instead of other non-custodial options. In the Tasmanian research, the likelihood of receiving an unsuspended sentence was four times higher for someone who previously had received a suspended sentence. There is little evidence that suspended sentences had contributed to reduction in the NSW prison population, and it was found that courts sometimes imposed suspended sentences as an alternative to non-custodial penalties.

- xv. *Activation rates.* The majority of Australian jurisdictions have a presumption that the suspended sentence will be activated upon breach by new offending or not complying with conditions. Activation rates ranged in the Australian states reviewed from 9% to 27%.
- xvi. Overall, the evidence is mixed and inconclusive on whether suspended sentences are more effective than other disposals with regards to recidivism. Research on New South Wales showed there is no clear indication that suspended sentences were any less effective than prison sentences but were more cost effective. In the Tasmanian research, offenders who were unsupervised performed better (had lower levels of reconvictions) than those who were supervised calling into question the effectiveness of 'increasing the bite' of suspended sentences.

Canada

- xvii. Conditional sentences were introduced in 1996 and can be used for sentences of less than two years where the offender is deemed not to present a risk to the public. Conditional sentences in Canada have a set of standard conditions that apply to all orders, while additional conditions are available.
- xviii. Victims may prepare victim impact statements to inform the sentence imposed and the nature of any conditions.
- xix. Conditional sentences are intended to be both rehabilitative and punitive. Canadian judges saw the main advantage of such sentences as reducing the prison population.
- xx. The use of conditional sentences grew steadily following their introduction until 2002/2003 since when their use has tended to fluctuate. There is evidence that conditional sentences became progressively longer following their introduction.
- xxi. Conditional sentences comprise approximately 20% of community supervision cases. The proportion of conditional sentences that were combined with other sentences was found to vary across jurisdictions from 47% to 82% of orders.
- xxii. *Net widening.* Decreasing rates in the use of immediate prison sentences corresponded to increasing rates of conditional sentences studied in Canadian research. This might be a result of the clear understanding of such sentences as a tool in managing prison populations and a consequent level of careful thought by judges before adding conditions to orders.
- xxiii. In the first four years of their availability, four-fifths of Canadian conditional sentences were terminated without violation of the conditions, but breach rates vary across jurisdictions. Activation rates were also found to vary: among those breached, 53% in Manitoba compared to 23% in Ontario resulted in a custodial sentence.

Perceptions of Conditional Sentences

Generally

- xxiv. The public does not know much about crime rates or criminal justice processes. Therefore, it is not surprising that research has established there is even less awareness about the existence and understanding of the aims of non-custodial punishments.
- xxv. Research has concluded that it is particularly in the area of community penalties that judges are most likely to be apprehensive of public hostility. In other words, if the public is (perceived to be) strongly opposed to suspended sentences, then over the course of time, they may fall into disfavour with the judiciary as well.
- xxvi. Most of the evidence suggests that the more, and more specific, information a person has (about a case, a convicted person's circumstances, and the operation and aims of a given sanction) the more likely they are to support community penalties and to come up with similar sentences as judges.

Scotland

- xxvii. Public attitudes research on Scottish subjects shows the same lack of awareness of and generally sceptical view of community-based punishments that is found in other countries. Focus group participants in Scotland had almost no awareness of common community penalties.

Netherlands

- xxviii. Dutch research found that providing more information about suspended sentences does not change people's general level of punitiveness, which is a dominant influence in forming opinions about different penal sanctions. However, more information did change people's views about how effective suspended sentences were felt to be, and improved the positive disposition towards them.

England and Wales

- xxix. There appears to be no published research yet on the public's knowledge or attitudes about the current use of suspended sentences in England and Wales.
- xxx. In research into the perceptions of sentencers, by far the most commonly voiced advantage of the suspended sentence order was being able to avoid a sentence of imprisonment.
- xxxi. About half those surveyed thought suspended sentence orders were being used well, while the other half felt they were used too often, '[a] bit like confetti'.
- xxxii. The sentencer perception research suggested there is conceptual confusion among sentencers about the purpose of suspended sentence orders. This was attributed to a lack of clarity or differences of opinion about the purpose of the

suspended sentence order (and whether its aims are rehabilitative, punitive or both), and thus of when best to use it.

Australia

xxxiii. Suspended sentences appear to be viewed generally by the media, public and victims in Australia as the offender evading punishment and it has been suggested that a full-time prison sentence would have a greater deterrent effect.

xxxiv. Between 2004 and 2008 an inquiry was carried out in Victoria into the use of suspended sentences. The inquiry revealed relatively widespread support for the retention of suspended sentences in that state, though respondents indicated dissatisfaction with certain elements of their operation.

Canada

xxxv. In Canada there appears to be limited public understanding of the conditional sentence and a lack of support for its use with more serious violent offences. Public support is stronger when the rationale for imposition of a conditional sentence is clear and where a number of optional conditions are imposed.

xxxvi. A survey of Canadian judges found that reducing the prison population was perceived to be the most important objective of the conditional sentence. Conditional sentences were regarded as being as effective as custodial sentences in achieving rehabilitative goals but less effective in terms of deterrence or denunciation.

xxxvii. Public support for conditional sentences was found to increase when people were provided with the judge's reasons for imposing such a sentence in a case example.

xxxviii. Offenders believed that conditional sentences demanded more active engagement by the offender than did imprisonment.

Conclusion

xxxix. The desire to minimise unnecessary use of prison and exert control over rising imprisonment and reoffending rates is a common motivation among jurisdictions making use of suspended sentences. But aside from this, there appears to be much ambivalence and confusion among the judiciary and lack of awareness among the public about the penal purposes of this sanction.

xl. The net widening effect of conditional sentences is a real concern, and there is evidence of net widening in England and Wales and parts of Australia. The early research showing declines in prison population following the introduction of conditional sentences in that jurisdiction may be a result of how clearly sentencers see conditional sentences as one tool of managing prison populations, tailoring their sentence orders accordingly.

- xli. Conditional sentences appear to have lower reconviction rates than a short custodial sentence. However, the evidence on recidivism is particularly inconclusive due to methodological limitations of much of the research.
- xlii. Public opinion surveys consistently show little awareness, understanding or support for community-based punishments. These findings may apply especially in the case of suspended sentences. However, other research has shown that public attitudes are flexible and people are more likely to support actual sentencing decisions when given more information. Research has suggested that more methods of public attitudes data collection are needed, such as deliberative panels, which are better able to capture nuances, contradictions and changes in perceptions and beliefs.

1. Introduction

1.1 In this report we summarise the international research on conditional sentences. According to our terms of reference, we sought evidence on such sentences and the effect they have been shown to have on:

- **sentencing:** have judges made use of such sentences in cases which otherwise would have resulted in immediate custodial sentences, and is there any evidence of net widening?
- **reoffending:** what impact have conditional sentences had on the consequent involvement of people in the criminal justice system?
- **perceptions:** what do the public, sentencers, offenders and others think about conditional sentences?

1.2 The report is organised as follows: first we present some definitional and background discussion on conditional sentences, and then describe the methodology of this review. The bulk of the report is organised by several major jurisdictions where such sentences are used – Australia, Canada and England and Wales. A subsequent section presents additional research on public and other attitudes mainly about suspended sentences, but also community sentences more generally where this is apposite. The final section of the report provides a concluding comment summarising key issues raised by the evidence reviewed.

2. Defining Terms: Conditional Sentences

2.1 A Focus on Suspended Sentences

2.1.1 The term ‘conditional sentence’ has been used to refer to a number of sentence types. Sometimes it is used as an umbrella concept that encompasses all instances of delaying a sentence. Sometimes it is used interchangeably with a particular kind of sentence deferment. *In this review, we use the term ‘conditional sentence’ to refer to a sentence of imprisonment that has been suspended for a period of time and which will never be served so long as the person complies with a designated set of conditions.* In this review therefore, ‘suspended sentence’ is used interchangeably with ‘conditional sentence’. The exception to this, discussed below, are the distinctive uses of the term ‘suspended sentence’ in the US (to refer to a prison sentence that is not served so long as the person displays good behaviour) and many parts of continental Europe (where most offences entail a mandatory prison sentence, so that a suspended sentence becomes the mechanism for enabling the use of probation). These are more general uses of the term ‘suspended sentence’ and the phrase ‘conditional sentence’ makes clear that the suspension of a

sentence requires something more active than simply refraining from offending, but may include also compliance with additional requirements set by the court (such as unpaid work or supervision). In this sense, the reference to suspended sentence in this review refers to a specific sentence that has a distinct origin in enabling legislation as well as its own penal aims. This focused our review on more recent developments (since the late 1990s) and on jurisdictions which employ a similar definition. The differing definitions and practices in Europe and the United States limited their comparability.

2.2 Deferred Sentences

2.2.1 Sometimes, a conditional sentence has been described as a 'deferred sentence'. A deferred sentence, can refer to the situation where the issuing of a sentence is put on hold, for example where the court has ordered reports to inform sentencing decisions. Sentence might also be deferred for a period allowing the convicted person a period to display good behaviour (as has been possible in Scotland since 1995) after which a sentence is chosen. We are aware of this latter use of deferred sentences in Australia and America (where they might also be called suspended sentences), but there is little evidence on their use and impact, and it is not clear they are used in a systematic way.

2.2.2 In Scotland a sentencing scheme called Structured Deferred Sentencing (SDS) has been available since around 2005 (when it began as a pilot in three areas), which provides to offenders post-conviction but pre-sentence various interventions to address underlying problems (e.g., drug and alcohol dependence, mental health issues, unemployment). The development of the scheme arose in light of the perception among practitioners that 'low-tariff offenders with high levels of need were being up-tariffed to probation in order to provide social work support, which would not be available through lower tariff sentence options' (Macdivitt, 2008: 2). An evaluation of the first years of the scheme found strong support for this kind of deferred sentence among sentencers in areas using them, and also provided evidence that compliance was higher for SDS than for probation or community service (Macdivitt, 2008). Interestingly, the SDS pilot areas made use of a progress review at the end and sometimes also middle of the three and six month periods of deferment, during which courts had the opportunity to consider positive and negative behaviour and make adjustments to orders. These were a well-received aspect of the pilots (Macdivitt, 2008), and may provide an exemplar of the 'progress reviews' now available as part of the Community Payback Order.

2.2.3 A common aim among the areas using the SDS scheme was to provide an effective alternative to higher tariff *non*-custodial sentences, and so does not fit with the focus of this review on conditional sentences as an alternative to direct custodial sentences. However, SDS, which remains in operation in some parts of Scotland,

might be providing an early opportunity in dealing with people who eventually develop a high risk of custody through low level, but high frequency offending (e.g. breaches of the peace and shoplifting). To the extent evidence supports their ability to achieve this result, it might be one part of a wider strategy for a more efficient and effective approach to sentencing and management of prison populations and/or as part of a strategy specifically targeted at reducing reoffending in low tariff repeat offenders.

3. Background

3.1 A trend of rising imprisonment rates in many parts of Europe, North America and Australia and New Zealand has led to renewed policy interest in suspended sentences, among other things, as one means of controlling growth in prison populations. Between the 1970s and 1990s both Finland and (Federal Republic and then unified) Germany embarked on penal reforms which sought to reduce rising prison rates. Finland focused on reducing sentence lengths so that prison sentences overall would become shorter, while Germany took the opposite tack of discouraging use of short prison sentences in favour of expanded use of suspended sentences (Tonry, 1996). Both countries realised reductions in imprisonment rates in the aftermath of reforms. The Finnish 'success' story in controlling imprisonment rates, relative to other countries in Europe, has been attributed not only to measures to manage use of prison but to the strong consensus among policy elites that continues to the present time (Tonry, 1996; Lappi-Seppälä, 2007). The Netherlands has had suspended sentences available for at least a century but this option recently has been placed at the centre of criminal justice policy as part of an effort to reduce the prison population (Van Gelder et al., 2011). The advantageousness of the suspended sentence is explained as follows:

'The underlying rationale is that, due to the variety and combinations of special conditions that can be imposed [as part of a suspended sentence], sanctions are 'tailored' to suit the needs of the offender, which, coupled with the threat of revocation in case of noncompliance, is believed to be more effective in reducing recidivism than a prison sentence' (p. 3).

3.2 Although the Netherlands like many other parts of Europe uses the term 'suspended sentence' in a generic way to cover all non-prison sentences (except for fines), as explained in section 5.4, this is the rationale which has guided comparable policy reforms elsewhere. Given the relative newness of the conditional sentence as part of a wider strategy to manage prison population size, evidence is only beginning to emerge which can test this theory. Some of this evidence suggests suspended sentences may have the effect opposite of that desired, contributing to prison growth. Hence given that research shows use of suspended sentences has been accompanied both by rising and falling prison admissions, it would be useful to know under what conditions these different results are possible.

4. Methodology

4.1 Evidence was identified through existing knowledge and research of the team involved (e.g. of major evaluation work done, as on the Community Orders and Suspended Sentencing Orders in England and Wales, evaluations of community sentences in Scotland, research on conditional sentences in Australia), and traditional searches of relevant publications and databases. English language searches (using the terms: conditional, deferred, suspended, sentences, public perceptions, public confidence, public attitudes) were made of Cambridge Scientific Abstracts, Google Scholar, Campbell Collaboration, NCJRS and the National Institute of Corrections Library.

4.2 Research has tended to consider the effect of conditional sentences for offender populations generally. There is very little work that considers the effectiveness of such sentences by types of offences, background of the offender (e.g. those with extensive criminal histories or drug and alcohol issues, or across different jurisdictions). Some research has taken on this focus, and this may be an emergent area of future work (Patel and Stanley, 2008, for example, studied the use of community and conditional sentences for women in England and Wales).

4.3 This is not a meta-analysis and the methodologies of the research cited were not under review. Where possible and helpful we identify any methodological issues of the research to inform the reader's consideration of the evidence base.

5. Use, Impact and Enforcement of Conditional Sentences

5.1 England and Wales

5.1.1 The Criminal Justice Act (2003) created both a single 'generic' Community Order (CO) and the Suspended Sentence Order (SSO). Both measures allow the courts to impose one or more of the following conditions: unpaid work requirement; activity requirement; programme requirement; prohibited activity requirement; curfew requirement; exclusion requirement; residence requirement; mental health treatment requirement; drug rehabilitation requirement; alcohol treatment requirement; supervision requirement; attendance centre requirement (available only for those under 25).

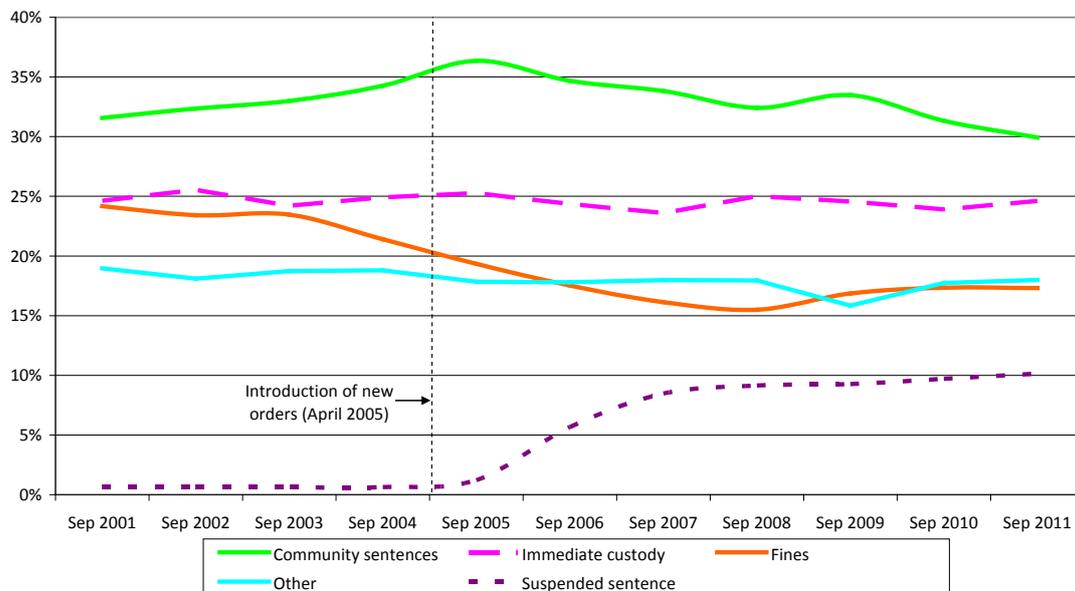
5.1.2 The major difference between the two orders is that the SSO is a custodial sentence, as it should only be used where the court is minded to pass a custodial sentence of less than 12 months. In the absence of breach the SSO is served wholly in the community. It consists of an 'operational period' (the time for which the custodial sentence is suspended) and a 'supervision period' (the time during which any requirements take effect). Both may be between six months and two years and the 'supervision period' cannot be longer than the 'operational period', although it may be shorter.

5.1.3 Prior to their implementation, commentators were concerned that courts might be tempted to engage in 'condition loading' (i.e. making such sentences unduly or excessively demanding and thereby more likely to be breached) and that the SSO (because it seemed to offer both stronger deterrence and rehabilitative opportunities) might come to displace the CO, rather than displacing short custodial sentences.

5.1.4 However, studies of the implementation of the orders (Mair, Cross and Taylor, 2007; Mair, Cross and Taylor, 2008; Mair and Mills, 2009) revealed a more complex picture. Firstly, there is no clear evidence of condition loading; the majority of COs and SSOs have only one or two conditions. COs in particular seem to resemble the separate community sanctions that preceded them. Secondly, breach rates ran collectively for COs and SSOs at about 40% in 2008, which was a decline on earlier years but is still troubling given the risk that breaches can be enforced by imposing a custodial sentence. Thirdly, there is little evidence that either COs or SSOs are being used instead of short custodial sentences.

5.1.5 The use of SSOs has increased alongside increasing admissions to prison, leading to concerns of net-widening and drawing more people who might previously have received a probation or community service orders into a higher tariff sanction. Mair, Cross and Taylor (2008: 23) note that at the time of their research the level of use of the SSO was running at about double original Home Office estimates, with around 40% of SSOs being made for summary offences – ‘a surprisingly high figure for what is meant to be a high tariff sentence’. Net widening persists as a concern when, as Mills (2011: 35) notes: ‘Courts’ proportional use of custody for indictable offences is precisely unchanged in 2009 from that which it was before the community sentence reforms were introduced in 2004’ (and see chart below).

Sentencing outcomes for indictable offences in England and Wales



Source: Chart produced by Scottish Government Justice Analytical Services, April 2012

5.1.6 Mair, Cross and Taylor (2007, 2008), in analysing the number and type of conditions attached to the two orders, argue that the SSO is being used punitively, despite proposals from the Sentencing Guidelines Council (and a Home Office Circular 25/2005) which suggest that the use of more onerous and intensive conditions is more appropriate within a CO than a SSO. Though this is a significant concern, not least because breach of conditions ought to imply custodial sentencing, Mair and Mills (2009) found that probation officers complained that magistrates often failed to impose custody on breach (though sentencers expressed different views – see Mair, Cross and Taylor, 2008, and following section on perceptions of sentences). Some probation staff argued that this undermined their credibility and that of the SSO itself.

5.1.7 The Ministry of Justice now prepares reports on the relative effectiveness of different sentencing options. In its comparisons of re-offending among those receiving custodial sentences of less than twelve months and those serving a community sentence it uses matched samples (by offence, offending history, age, gender and ethnicity) of known criminogenic factors providing a robust basis for comparison, meaning even small differences are important. Its most recent analysis (Ministry of Justice, 2011) suggests:

- ‘Custodial sentences of less than twelve months were less effective at reducing re-offending than both community orders and suspended sentence orders – between five and nine percentage points in 2008. This reinforces the finding in the 2010 Compendium which was only based on 2007 data. The findings were similar for both community orders and suspended sentence orders’ (p. 4);
- ‘Offenders sentenced to community orders had slightly higher re-offending rates than those sentenced to suspended sentence orders – the difference being 2.7 percentage points. However, this difference is reduced to 1.4 percentage points when sensitivity testing was carried out’ (p. 4).

5.2 Australia

5.2.1 Suspended sentences are available to the courts in each of the Australian states, though the conditions attached to them vary and the extent to which they may be combined with other sentencing disposals differs from state to state. While suspended sentences are available in all Australian jurisdictions, the majority of available data (and associated academic debate and analysis) relates to the use of suspended sentences in the states of Victoria, Tasmania and New South Wales (NSW).

5.2.2 *The advantages and disadvantages of suspended sentences*

Bartels (2009a) suggests that support for the use of suspended sentences in Australia can be attributed to their assumed ability to provide effective denunciation and deterrence; their value to sentencers in providing an additional weapon in the sentencing armoury; the fact that they enable some offenders to avoid prison sentences; and their corresponding ability to effect reductions in the size of the prison population. The deterrent effects of suspended sentences are assumed to be more effective than those of other community based orders such as probation because with suspended sentences the consequences of re-offending during the operational period are both ‘known and certain’ (Weatherburn and Bartels, 2008). Furthermore, as Freiberg and Moore (2009) observe, ‘for sentencers, a suspended sentence has the dual advantage of allowing the court to mark the seriousness of the offence, while permitting a more merciful outcome than a term of imprisonment’ (p.108) and sentencers appear to regard it as ‘an important arrow from the quiver of

sentencing dispositions available to the court' (Sentencing Advisory Council, 2005a, para 2.4).

5.2.3 Equally, however, critics of suspended sentences would argue that they do not represent 'real' punishment and are regarded by offenders, sentencers and the public as a 'let off' or 'slap on the wrist'; that the processes of imposing the sentence and dealing with breaches are inherently problematic (particularly as a consequence of the 'conceptual incongruity' surrounding their imposition (Bagaric, 1999)); that they violate principles of proportionality and contribute to net-widening; and that they tend to favour middle class offenders (Bartels, 2009a; Bartels, 2010a). For example, Bagaric (1999: 536) has suggested that suspended sentences 'do not constitute a recognisable form of punishment at all' and that surveys of community attitudes indicate that 'few are deceived by the superficial punitive veneer of the suspended sentence' (p. 548). In a similar vein, the Sentencing Advisory Council in Victoria observed that 'confusion over what a suspended sentence is and what it is intended to achieve has not only affected levels of community confidence in sentencing but is also evidence of the order's failure to satisfy its symbolic and communicative purpose' (2006: xvii). Sentencers in Tasmania – especially those sitting in the higher courts – tended to regard the significance of the suspended sentence as something that was self apparent and that therefore did not need to be communicated at length in court (Bartels, 2009b).

5.2.4 Freiberg and Moore (2009) have identified a number of perceptual issues that they argue render the suspended sentence problematic, including its perception as misleading or untruthful (it is not really a sentence of imprisonment if not activated with the result that the offender is regarded as having evaded punishment). The absence of conditions that could be attached to a suspended sentence in Victoria meant that 'provided the person does not commit an offence during the operational period, there are no restrictions placed on his or her time or resources' (p.111). Although there was acknowledged to be support among those who favoured the use of suspended sentence for the availability of conditions to give suspended sentences additional punitive 'bite', such a development was resisted by the Sentencing Advisory Council on the grounds that it would increase the numbers of offenders imprisoned as a consequence of breach.

5.2.5 The Sentencing Advisory Council of Victoria concluded in the first part of its review of the suspended sentence (2006: xvii) that that it was 'an inherently flawed order' and recommended that courts' power to impose such orders should be removed through a phased abolition over a three year period during which a new range of community-based orders would be introduced. In a later report the Council revised its view on the three year time frame for abolition on the grounds that until other reforms had been fully implemented and evaluated, there could be a significant expansionary impact on rates of imprisonment (Sentencing Advisory

Council, 2008). In May 2011 the Sentencing Further Amendment Act 2011 abolished suspended sentences for the 'significant offences' of recklessly causing serious injury; commercial drug trafficking; aggravated burglary; and arson.

5.2.6 Following a more recent review of suspended sentences in the Australian Capital Territory (ACT, located within NSW), by the ACT Law Reform Advisory Council (2010), the Attorney General announced in September 2011 that '[t]he Government has decided that suspended sentences of imprisonment should be retained as they serve a valuable function in the sentencing process in the ACT. They promote a reduction in recidivism whilst leaving in place a mechanism to re-sentence offenders who breach conditions of their order' (ACT Chief Minister, 2011; Legislative Assembly for the Australian Capital Territory (2011). A review of sentencing by the Tasmanian Law Reform Institute (2008) concluded that 'notwithstanding criticisms of the suspended sentence, the Institute is of the view that the suspended sentence is a useful sentencing option that should be retained' (para. 3.3.36) but recommended a number of changes to their use – to make them more onerous and to tighten responses to breach – which were accepted by the state government. The New South Wales Sentencing Council has recently consulted on the use of suspended sentences in that State (NSW Sentencing Council, 2011) but has yet to report the conclusions of its review.

5.2.7 *The relative use of suspended sentences*

In Victoria, sentences of up to three years in the higher courts (two years in the Magistrates Court) can be suspended for periods of up to three years (two years in the Magistrates Court). Analysis by the Sentencing Advisory Council (2006) indicated that Victoria ranked third among Australian states in terms of its usage of suspended sentence in the higher courts, while these sentences comprised 7% of disposals in magistrates courts (compared to 5% in New South Wales (Poletti and Vignaendra, 2005; Weatherburn and Bartels, 2008)).

5.2.8 Suspended sentences were introduced in New South Wales on 3 April 2000 following a recommendation of the New South Wales Law Reform Commission. The justification for their introduction was that they would reduce the use of imprisonment and associated costs and overcrowding without sacrificing the deterrent effects of imprisonment (Weatherburn and Bartels, 2008). Between 3 April 2000 and 31 December 2002, 9,278 suspended sentences were imposed representing 4.2% of sentences imposed in the local (lower) courts (where the most common offence was driving whilst disqualified) and 11.7% in the higher courts (most commonly for possession of non-commercial quantities of drugs). In the lower courts terms of 6-12 months were most often suspended while in the higher courts judges were most likely to impose suspended terms of 24 months (Brignell and Poletti, 2003). Subsequently, suspended sentences have been found to account for approximately 5% of all sentences imposed (Weatherburn and Bartels, 2008).

5.2.9 An analysis of factors related to the use of the suspended sentence in New South Wales found that there were some variations between the local and higher courts. In both types of court, however, offences against the person and drug offences were most common while women, non-indigenous offenders, first offenders, and offenders who had been given bail were more likely to receive a suspended sentence (Poletti and Vignaendra, 2005).

5.2.10 Bartels' (2009a) study of the use of suspended sentences in Tasmania indicated that they represented 42% of disposals (29% wholly and 13% partly suspended) in the Supreme Court between July 2002 and June 2004. During the same period, 44% of cases resulted in an unsuspended prison sentence and 14% in a non-custodial order. She found that, despite there being no legislated limit on the length of custodial sentence that could be suspended, fewer than 7% of wholly suspended sentences were longer than 12 months and none exceeded two years.

5.2.11 *Conditions attached to suspended sentences*

In Australia suspended sentences can be imposed with or without supervision and various degrees of conditionality (Freiberg and Moore, 2009). In New South Wales, South Australia and Australian Capitol Territory the court may require the offender to enter into a good behaviour bond while in Victoria and Queensland the only requirement is that the offender does not commit any offence punishable by imprisonment. In Tasmania, by contrast, the court may, when suspending sentence, attach any conditions that are considered to be 'necessary or expedient' (Bartels, 2010b). Bartels found that in a two year period between 2002 and 2004, 23% of suspended sentence orders in Tasmania were subject to community corrections supervision (compared with 68% of cases dealt with in the higher courts in New South Wales).

5.2.12 *Net-widening, tariff escalation and impact on the prison population*

A key argument for the use of suspended sentences is their purported ability to enable offenders to avoid short prison sentences and the negative impact that such sentences have on offenders and their family members. Short prison sentences are recognised as contributing to rising prison populations and overcrowding, as being associated with relatively high levels of recidivism and as being associated with relatively high economic costs (Bartels, 2010a). Whether suspended sentences actually lower the prison population is a more complex question: as Bartels (2010a), notes, this is likely to be influenced by a number of factors rather than by a single factor – such as the introduction of suspended sentences – alone. She observes that 'the ability of suspended sentences to reduce the prison population cannot be easily disentangled from policies affecting its use and other sentencing policies' (p. 141).

5.2.13 Bagaric (1999) argues that international evidence indicates that only around one half represent a diversion from an immediate sentence of imprisonment while the remainder represent net-widening with suspended sentences used in place of other less severe penalties. He also suggests that suspended sentences result in sentence inflation whereby offenders are given longer sentences when the term of imprisonment is suspended.

5.2.14 Evidence from various Australian jurisdictions suggests that suspended sentences generally have little impact on the rate of imprisonment and may actually increase it. A notable exception has been Victoria, where the imprisonment rate decreased following the introduction of suspended sentences (Tait, 1995). The positive impact of suspended sentences on the level of imprisonment in Victoria has been attributed to the low breach rate arising from the imposition of relatively short periods of supervision (operational periods) and the flexibility afforded to sentencers when responding to breach (Bagaric, 1999; Weatherburn and Bartels, 2008). The subsequent legislative amendment of these factors appears to have resulted in higher rates of breach and higher rates of activation of the custodial penalty on breach (Turner, 2007; Weatherburn and Bartels, 2008).

5.2.15 Tait (1995) found an inflation rate of around 50% in Victoria such that suspended sentences of six months would equate to an unsuspended sentence of around four months. Although Bartels found no direct evidence of sentence inflation in her study of suspended sentences in Tasmania, and while most sentencers who were interviewed considered it inappropriate to extend the length of a suspended sentence, some indicated that they had been tempted to increase the sentence or had done so, if only by a small amount (Bartels, 2009b).

5.2.16 The Sentencing Advisory Council in Victoria (2006) concluded that not only were suspended sentences in that state being over-used but that in some cases they were being misused by 'diverting offenders not only from prison, but also from non-custodial orders' (p. xix). The Council made the observation that the use of suspended sentences increased following their introduction, despite a growing range of intermediate sentencing options being made available to the courts (Sentencing Advisory Council, 2008), arguing that 'sentencing orders that are contingent upon a prison sentence being imposed but do not involve an offender serving prison time should be recast as orders in their own right' (p. 2).

5.2.17 In her study of suspended sentences in Tasmania, Bartels (2009c) found evidence, from comments passed by judges in court, that suspended sentences were sometimes made as an alternative to a community based order such as community service or a fine. Interviews with sentencers in Tasmania indicated that some were unclear regarding the 'two-step' process that is supposed to underpin the imposition

of a suspended sentence i.e. that the court has to first decide that a custodial sentence is warranted then decide to suspend it.

5.2.18 Bartels (2009a) found that suspended sentences were only rarely imposed in Tasmania for very serious offences and that there was evidence that judges were treating wholly suspended sentences as a low level form of non-custodial order. For example, first offenders were more likely to receive a wholly suspended sentence (39%) than a non-custodial order (24%) or unsuspended sentence (23%): this compares with rates of 29%, 14% and 44% overall. Quantitative analysis of Tasmanian data did not provide evidence of significant sentence inflation but there was extensive use of suspended sentences for young and first offenders at the expense of non-custodial penalties (Bartels, 2010a).

5.2.19 By examining sentencing outcomes by previous sentencing history, Bartels (2009a) found that a previous suspended sentence was a strong predictor of a subsequent unsuspended sentence, suggesting that first offenders might receive a custodial sentence for even a minor offence on a second conviction. The likelihood of receiving an unsuspended sentence was four times higher for someone who previously had received a suspended sentence (55%) than for someone who had previously been sentenced to a non-custodial order (13%) while the chance of receiving a non-custodial order was the same (3% for those who had previously served a custodial sentence and those previously given a suspended sentence). Bartels argues that offenders who have previously had a suspended sentence may be treated as more serious offenders than those given a non-custodial order even if the suspended sentence was made in respect of a first offence.

5.2.20 Brignell and Poletti's (2003) statistical analysis of use of suspended sentences in New South Wales suggested that courts sometimes imposed suspended sentences instead of less severe penalties such as community service orders and good behaviour bonds. They found little evidence that suspended sentences had contributed to any meaningful reduction in the NSW prison population. Following the re-introduction of the suspended sentence in 2000, there was a 0.5% decrease in more severe penalties and a 3.6% decrease in less severe penalties in the local courts, suggesting that 88% of suspended sentences may have represented net-widening. A more recent analysis by McInnis and Jones (2010) – which prompted a review of suspended sentences by the New South Wales Sentencing Council – concluded that, although suspended sentences had replaced imprisonment to some extent, they had also been used instead of other non-custodial options such as community service orders and good behaviour bonds. The analysis concluded that the use of suspended sentences was increasing at the expense of other non-custodial sanctions with the risk that greater numbers of offenders were being drawn into the prison population as a consequence of orders being breached.

5.2.21 *Responding to breaches of conditions*

Bartels (2010b) notes that there are opposing views on the most appropriate way of responding to breaches of suspended sentences. It is argued on the one hand that the credibility of the suspended sentence is dependent upon predictability of enforcement on the grounds that 'lax enforcement will undermine the deterrent effect, undermining offenders' perceptions of the severity of the offence' (p. 220). On the other hand, it is argued that there is some need for flexibility and discretion because sentencers' confidence in the penalty may be eroded by high levels of breach proceedings which may also serve to counteract reductions in prison admissions that the suspended sentence is intended to achieve.

5.2.22 The majority of Australian jurisdictions have a presumption that the suspended sentence will be activated upon breach, which can be triggered by the commission of an imprisonable offence or, where applicable, breach of a condition of the sentence. The exceptions to this presumption are the Australian Capitol Territory and Tasmania. In Tasmania, courts may activate the sentence, order a substitute sentence (no greater than the term of imprisonment of the suspended sentence) or vary the conditions of the suspended sentence. Sentencers interviewed by Bartels (2009b) indicated that they adopted varying approaches to the matter of breach and had very limited knowledge about the processes for monitoring and dealing with breached suspended sentences.

5.2.23 Bartels (2010b) makes the observation that breach studies generally focus on the activation rate (proportion of breached orders activated) or the imprisonment rate (proportion of suspended sentences that ultimately result in the offender serving time in custody). The most comprehensive data on breach of suspended sentences is available for Victoria and Tasmania. Less detailed information on the use of suspended sentences in New South Wales suggested that 84% had been completed successfully in 2003 and 2004 (Potas et al., 2005). The difficulty in obtaining an accurate picture of the breach and enforcement of suspended sentences is highlighted by Bartels (2010b: 223) who indicates that 'attempts to obtain information on the incidence and activation of breaches in other jurisdictions around Australia indicates that this information is not generally kept by relevant government departments'. More recent data obtained by the New South Wales Sentencing Council for its consultation on suspended sentences suggests that between 2000 and 2010 the rate of imprisonment on breach varied between 70 and 75% (New South Wales Sentencing Council, 2011).

5.2.24 Tait's (1995) study in Victoria was based on 2,804 offenders who received a suspended sentence in 1990. He found that 18% breached their orders by committing an imprisonable offence, 54% of whom had their suspended sentences activated, resulting in an overall imprisonment rate of less than 10%. Subsequent data provided by the Sentencing Advisory Council (2005b) suggested that between

1998 and 1999 36% of suspended sentences imposed in Higher Courts were breached, 76% of which were activated, resulting in an overall imprisonment rate of 27%.

5.2.25 The Victorian Sentencing Advisory Council (2006) did not recommend an increase in flexibility regarding the enforcement of breaches in its review of suspended sentences because removal of the certainty that the original sentences would be activated would undermine the specific deterrent impact of the disposal. It did, however, recommend that breach of a suspended sentence order should not in itself constitute a separate offence. A subsequent analysis of breaches indicated that breach rates were higher in the lower courts, among those under 25 years of age and among those convicted of a property or 'other' principal offence. Nearly 63% of breached suspended sentences resulted in the prison sentenced being restored, giving an overall imprisonment rate of 17% of those given a suspended sentence, with a higher proportion of men than women having their sentences restored (Turner, 2007).

5.2.26 Bartels' (2010b) study of breaches of suspended sentences in Tasmania focused on the commission of an offence punishable by imprisonment during the operational period of the sentence (that is, the period of time during which the suspended sentence could be activated). She found that 41% of those whose sentence was fully suspended had breached their sentence but that breach action was only taken in five of 94 cases (that is, 5% of offenders who were technically in breach), resulting in two cases being activated. Overall, the activation rate was 3% and the imprisonment rate was 1%. When offence seriousness was taken into account, 31% of breaches were deemed to have involved the commission of a serious offence, but breach action was taken in only 7% of cases in which the offender had committed a moderately serious offence and in 12% of cases where the offence was classed as serious. Indeed, no breach action was taken against the most prolific offenders (who had committed between 44 and 83 offences during the operational period of their suspended sentence).

5.2.27 A number of factors other than the offence were found to be related to whether or not offenders in Tasmania breached their suspended sentences. These included age (older offenders were less likely to breach); gender (men were slightly more likely to breach); prior criminal record; length of suspended sentence (those between 6-12 months were most likely to be breached); and length of the operational period (those under two years were most likely to be breached).

5.2.28 As Bartels (2009a: 6) concludes, 'breach action is taken in only a very small proportion of cases, with numerous examples of repeated and serious offending going unprosecuted' leading her to argue elsewhere (Bartels, 2010b: 228) that there should be 'greater concordance between the stated operation of the law in respect

of the prosecution of breaches and actual practices'. Failure to bring offenders back to court, she suggests, 'may encourage offenders to perceive a suspended sentence as a slap on the wrist. This may in turn promote further offending, in the belief that breach action will not be pursued' (p. 231). Freiberg and Moore (2009) have likewise commented that the public perception of the suspended sentence may be further undermined by breaches not always resulting in the activation of the sentence of imprisonment, even where the law stipulates that this should always occur.

5.2.29 *Recidivism*

There are methodological problems with studies that have attempted to compare reconviction rates following suspended and other sentences, arising from the failure to ensure that like are compared with like (Weatherburn and Bartels, 2008). The method of propensity matching, however, provides a mechanism for ensuring that those given different sentences are, as far as possible, similar in relevant respects. A comparison of time to first reconviction among those given suspended sentences and supervised bonds in New South Wales which used propensity matching found no significant differences in survival time between the two groups. It has been assumed that the threat of imprisonment associated with suspended sentences would have been a more effective deterrent to further offending and would therefore result in longer time to reconviction (Weatherburn and Bartels, 2008).

5.2.30 A further New South Wales study compared offenders given suspended sentences or custodial sentences in a Local or District Court in 2002-4, using propensity score matching to identify samples that were compared with respect to free time to first offence. Overall, the study found no evidence that offenders who were imprisoned were less likely to re-offend than those given a suspended sentence: there was no difference in time to reconviction among those with no prior experience of imprisonment but among those with prior prison experience, those given a prison sentence offended more quickly. Lulham et al. (2009) conclude that there is no clear indication that suspended sentences were any less effective than prison sentences with regard to specific deterrence but that the former were evidently more cost effective.

5.2.31 Bartels' (2009a) study found that offenders given wholly suspended sentences by the Supreme Court in Tasmania were less likely to be reconvicted within two years (42%) compared with those given partly suspended sentences (44%), non-custodial orders (52%) and unsuspended prison sentences (62%) and were most likely to be reconvicted of a minor offence. Wholly suspended sentences appeared to be more effective in comparison with other disposals for those with more extensive criminal histories while sentences involving an element of imprisonment were more effective with first offenders than wholly suspended or non-custodial sentences, suggesting that imprisonment may have been a more effective deterrent for first offenders. With regards to recidivism, Bartels found that

young offenders performed relatively well on a suspended sentence in comparison to older offenders. Bartels (2009d) also concluded from the study that offenders who were unsupervised performed better than those who were supervised (either as a condition of or in combination with the suspended sentence) 'thereby calling into question the effectiveness of routinely increasing the bite of suspended sentences' (p. 92).

5.2.32 The Victorian Sentencing Advisory Council (2006) concluded that the suspended sentence was less effective than other orders in Victoria in preventing re-offending, citing higher breach rates (as a result of further offending) among those given suspended sentences (36% in the higher Courts and 31% in the Magistrates Courts) compared with those on community based orders (19%) or parole orders (15%). It also highlighted, however, the relative paucity of information about the effectiveness of suspended sentences: in particular, with what types of offenders the orders are most effective.

5.2.33 *Conclusion*

There has been considerable debate in Australia regarding the value and impact of the suspended sentence. While the recent reviews of suspended sentences in Tasmania and Australian Capitol Territory recommended their continuation, albeit with modifications to increase their punitive impact, the Sentencing Advisory Council in Victoria, following a more detailed analysis and extensive consultation, recommended the phased abolition of suspended sentences in that state and the introduction instead of a range of intermediate sanctions that would function as sentences in their own right. Bartels (2010a) argues that evidence of net-widening does not mean that suspended sentences should not be used at all but, rather, that their use needs to be more carefully considered and refined. However, given evidence of net-widening and their flawed conceptual underpinning, the reluctance of the Victorian Sentencing Council to recommend immediate abolition of suspended sentences stemmed solely from the likely impact on levels of imprisonment that would ensue. There is certainly little evidence that suspended sentences are more effective than other disposals with regards to recidivism, with mixed and inconclusive findings in the respect.

5.2.34 There is limited evidence – other than in Victoria – that the introduction of suspended sentences in Australia had a significant impact on levels of imprisonment as a result of net-widening, sentence inflation and tariff escalation. Suspended sentences, it appears, are often used instead of other non-custodial options and breaches of orders and activation of the custodial sentence results in imprisonment 'by the back door'. Toughening up suspended sentences through the use of multiple conditions and through more stringent enforcement to maintain public confidence in the disposal may result in high breach rates, a lack of judicial confidence and, according to Bartels' (2009d) research, higher rates of recidivism.

5.2.35 The use of the suspended sentence in Australia presents a dilemma that cannot easily be resolved and that has been neatly summarised as follows by Freiberg and Moore (2009, p. 111):

‘...courts that have the option of making a conditional suspended sentence order will attach conditions to reinforce the severity of the disposition, thereby increasing the risk of breach. When the risks of net-widening are taken into account, this may result in a number of offenders, who might otherwise have been sentenced to some form of community order, serving prison time. Measures designed to guard against this outcome – such as relaxing the breach provisions – risk rendering the Damoclean threat all but meaningless and carry the potential to further erode public confidence in the order.’

5.3 Canada

5.3.1 Conditional sentences were introduced by Section 742 of the Criminal Code of Canada in 1996 and can be used where no minimum prison term for the offence was specified in the criminal code, the sentence is less than two years and the offender is deemed not to present a risk to the public. Conditional sentences, which are, in effect, suspended sentences (prison terms that are served in the community), have a set of standard conditions that apply to all orders, while additional conditions (including restitution, participation in a treatment programme community service and curfews) can be tailored to the needs and circumstance of the offender, victim and community: in practice it was found that treatment orders and community service orders were the most frequently imposed optional conditions (Roberts and LaPrairie, 2000). Victims may prepare victim impact statements to inform the sentence imposed and the nature of any conditions and offenders who fail to comply with conditional sentence orders may be required to serve the remainder of the sentence in prison.

5.3.2 Although conditional sentences and probation tended at first to have very similar conditions, they subsequently became quite different because conditional sentences are intended to be both rehabilitative and punitive while probation is meant only to be rehabilitative. A Supreme Court judgment indicated that imposition of a curfew should be the norm when a conditional sentence was made and that non-compliance should result in the offender being recalled to custody to serve the remainder of the sentence.

5.3.3 The Supreme Court of Canada has defined the conditional sentence as ‘a punishment which also promotes a sense of responsibility in the offender and has the objectives of rehabilitation and reparation to the victim and the community’.

The purported benefits include reductions in the prison population and associated cost savings (Roberts, 2007).

5.3.4 *Level of Use*

The use of conditional sentences grew steadily following their introduction (Correctional Services Program, 2002) until 2002/2003 since when their use has tended to fluctuate (Calverly, 2010). The proportion of conditional sentences that were combined with other sentences – usually a period of probation or, less often, restitution – was found to vary across jurisdictions from 47% to 82% of orders (Correctional Services Program, 2002). Conditional sentences comprise approximately 20% of community supervision cases (with probation comprising approximately 80%) (Johnson, 2006).

5.3.5 Regional variations in the types of offences that attract a conditional sentence have been identified, with violent offences predominating in some areas and property offences in others and there is evidence that conditional sentences became progressively longer following their introduction (Zubrycki, 2003). In 2009/10 conditional sentences were most commonly imposed for property crimes, crimes of violence, drug trafficking and crimes against the administration of justice (Statistics Canada, 2011). Conditional sentences for drug offences tend to be longer than those imposed for other types of offences (Calverly, 2010).

5.3.6 Although relatively few conditional sentences are made in respect of serious violent offences (Roberts and LaPrairie, 2000), those that do tend to attract media attention and ensuing public and political criticism. In 2007 legislation was introduced in Canada to make it impossible for a conditional sentence to be imposed for a 'serious personal injury offence', terrorist offence or organised crime offence carrying a maximum term of imprisonment of 10 years or more.

5.3.7 *Impact on prison rates*

Zubrycki (2003) concluded that decreasing rates in the use of immediate prison sentences had corresponded to increasing rates of conditional sentences, evidenced by an increase in the use of conditional sentences since 1997/8 being matched by a decrease in the use of immediate custody and a relatively stable use of probation over the same period. Roberts and Gabor (2004) found that within three years of the introduction of the conditional sentence there had been a 13% reduction in prison admissions that could be directly attributable to the new sanction along with a minor degree of net-widening (around 1% overall).

5.3.8 *Breach and recidivism*

Roberts (2005) reports that in the first four years on their availability, four-fifths of conditional sentences were terminated without violation of the conditions. Breach rates appear to vary across jurisdictions, however. For example, Roberts and Gabor

(2004) reported breach rates of 37% in Manitoba but only 11% in Ontario. Although a previous survey of sentencers found that most considered custody to be the most appropriate response to breach of a conditional sentence (Roberts and LaPrairie, 2000), activation rates were also found to vary: among those breached, 53% in Manitoba compared to 23% in Ontario received a custodial sentence (Roberts and Gabor, 2004).

5.3.9 A subsequent analysis of outcomes for conditional sentences by Johnson (2006) indicated that the highest breach rates were for robbery and burglary offences and the lowest for sexual assault, drug and traffic offences. Aboriginal people tend to be over-represented on conditional sentences (compared with probation), with slightly higher breach rates among aboriginal offenders. In the state of Alberta, breach rates were lower among offenders given conditional sentences than among those given probation (25% compared with 34%) but there was also evidence that rates of re-involvement in correctional supervision were slightly higher among those given conditional sentences as opposed to probation (Johnson, 2006).

5.3.10 *Conclusion*

The use of conditional sentences increased steadily following their introduction with commensurate decreases in the use of immediate imprisonment and evidence of only limited net-widening. The absence of clear evidence of net-widening in Canada (compared with other jurisdictions where suspended sentences have been introduced) may be a result of sentencers thinking more carefully before imposing a sentence that has onerous conditions attached (Bartels, 2010a).

5.4 Europe and the United States

5.4.1 European practice and definitions of conditional sentences make for a difficult comparison with the UK. In continental Europe this is because suspended sentences are the mechanism for issuing community-based sentences generally. In Spain, to take a representative example, offences are divided into those punishable by a fine (minor offences), and those mandating a prison sentence (major offences) (Cid, 2009). Cid (2005: 172) notes that a suspended sentence is granted nearly 'automatically' to first time offenders, and moreover, suspended sentences are the most common sentence handed down in Spain. There are two kinds of suspended sentence, the first involves no supervision of any kind, while the second form is a 'suspended sentence with probation' which can involve similar sorts of conditions as are available under probation or community orders throughout the UK. In practice, judges rarely issue a suspended sentence with probation, probation itself being a fairly new development (created through legislation in 1995) (Cid, 2005). Nevertheless, the creation of the expanded suspended sentence appears to have had some impact on reducing prison receptions: while the number of criminal convictions has been relatively stable since the introduction of probation between

1996 and 2002, prison admissions have fallen during this same period from around 51,000 to 41,000 per year (Cid, 2005).

5.4.2 In Germany, a concerted effort to reduce the use of prison in the 1970s led to several policy and legislative changes including discouraging use of short prison sentences, and expanding the use of suspended sentences:

‘At the same time as use of short sentences [of six months or less] was discouraged in Germany, authority for suspension of prison sentences was broadened. Under Penal Code Section 56, the court should suspend sentences of up to one year whenever the offender can be expected to refrain from new crimes without being sent to prison. Longer sentences, up to two years, can also be suspended. Here too, the effects were prompt and dramatic. Thirty-six per cent of sentences were suspended in 1968, before the statutory changes; by 1979, 65 per cent of sentences were suspended, with the rate remaining stable through the early 1990s’ (Tonry, 1996: 36, citing Weigend, 1992; and Albrecht, 1995; see also Teske and Albrecht, 1992: 95).

5.4.3 Since the time of this article, the German prison population has been on the rise, and a more recent study of two regions in the country found increasing use of prison sentences, both immediate and suspended, are more likely causes than changes in the crime rate (Suhling, 2003). The potential that this is due to revocation of probation (i.e. breaches of suspended sentences) is raised as an important issue for further research (Suhling, 2003).

5.4.4 Suspended sentences traditionally have been available in American states and the historical link to their use in Europe has been described as the ‘germ of probation’ (Sieh, 2006: 32). Today, state trial judges generally have the power to suspend sentences but there is little research in this area.¹ The cause of this is likely due to the fact that the suspended sentence is not a distinct sentence with its own penal aims, but is generally an act of leniency on the part of the court and quite specific to the circumstances of the offence and convicted person though in some places it may be considered equivalent to a sentence of probation (Gale Encyclopaedia of American Law, 2011). We were unable to locate any published statistics that track current patterns of use of suspended sentences anywhere in the US. In any case, it does not appear that any criminal justice system in the US uses the suspended sentence as part of a strategy to manage prison populations.

5.4.5 The comparability of suspended sentences in most parts of Europe and the US to the UK is questionable given the very different organisation and operation in these regions.

¹ Federal courts lost the power to suspend sentences through the Sentencing Reform Act (1984).

6. Perceptions of Conditional Sentences

6.1 Generally

6.1.1 There is a large and well-rehearsed body of research that has shown the public does not know much about crime rates or criminal justice processes. Therefore, it is not surprising that research has established there is even less awareness about the existence and understanding of the aims of non-custodial punishments (van Gelder et al., 2011, citing Hough & Roberts, 1998). The public tends to have punitive views on the absolute severity of punishment, but may be more open to rehabilitative sanctions when given more information about these and/or more information about specific features of a case. Van Gelder et al. (2011) reviewed attitudes to community penalties research, focusing on that most relevant to suspended sentences, noting points of connection between public and judicial attitudes in summarising the existing research:

‘[R]esearch evidence from England and Canada [shows] that, when sentencing offenders, professional judges are not entirely impervious to the force of public opinion (Roberts & Hough, 2005)...According to Roberts (2002), it is particularly in the area of community penalties that judges are most likely to be apprehensive of public hostility. In other words, if the public is (perceived to be) strongly opposed to suspended sentences, then over the course of time, they may fall into disfavour with the judiciary as well. Flanagan (1996) even suggested that perceived public opinion is the greatest obstacle to the success of community-based penalties such as the suspended sentence. Indeed, according to Roberts (2004: 134), public opinion played a critical role in the demise of the suspended sentence in England and Wales: “The disposition came to be regarded as a ‘let off’: all the offender had to do was stay out of trouble and punishment was waived, or so it appeared to the public eye” (p.4).

6.1.2 Most of the evidence suggests that the more, and more specific, information a person has (about a case, a convicted person’s circumstances, the operation and aims of a given sanction) the more likely they are to support community penalties and to come up with similar sentences as judges (Roberts and Hough, 2005; Hough and Roberts, 1999). However, there are exceptions and important nuances to this general rule, and so it would be premature to draw any policy conclusions from it without a deeper perusal of the evidence. The method chosen for probing public attitudes may also be crucial in whether research identifies more or less positive attitudes; Kury et al. (2009) found that opinions solicited through surveys were significantly more punitive than those emerging out of interviews. Increasingly, the concept of ‘public opinion’ about justice has come under attack as hopelessly crude

with suggestions that the method of deliberative panels are better able to capture the subtleties and complexities of views about crime issues (Green, 2006). It is important to note that 'punitiveness is not a consistent construct, that there is no punitiveness as such, but only varying aspects thereof that may take on a different significance in different areas of crime. Attitudes to punishment depend not only on the survey method used, but also on demographic factors, character traits, personal attitudes, and on the knowledge and the degree of information of the respondents about the type of offences concerned' (Kury et al., 2009: 67). Finally, the effect of providing information to people in a research setting is very different from trying to change general public attitudes about punishment (Allen, 2008).

6.2 Scotland

6.2.1 There is no specific research on the Scottish public's attitude to conditional sentences (though see Section 2.2 for research on Scottish sentencers' views of deferred sentences). Generally, research on Scottish subjects has found the same lack of awareness of and sceptical view of community-based punishments that is found in other countries where research has been conducted on this issue. Recent work commissioned by the Scottish Government (TNS System Three, 2007) used focus groups to assess Scottish public attitudes to crime, the criminal justice system generally and community sanctions specifically (as part of the Reforming and Revitalising review of community penalties, Scottish Government, 2007). At that time, the research found (despite reported crime statistics showing the contrary) a sense among respondents that crime was increasing, and this was attributed partly to a breakdown of traditional values and the social order. Focus group participants held the government responsible for 'failing to deal with crime or engender a culture of respect for the law and society as a whole' (TNS System Three, 2007: 17). More specifically, focus group participants had almost no awareness of some common community penalties such as community service (confusing it with a general concept of community punishment) and supervised attendance orders. Probation was the only community-based sanction for which there was broad awareness, though even here there was little understanding of how it actually works.

6.2.2 Those with the highest levels of fear about crime or concern that crime is a major problem in society also tend to have the most punitive attitudes (Pfeiffer et al., 2007). This general finding is relevant for assessing the implications of the 2007 Scottish focus groups. Much has changed since this research was conducted, including a global economic downturn which has been felt in Scotland and wider UK.

6.3 Netherlands

6.3.1 Though in the Netherlands suspended sentences are, in common with most of Europe, the catchall phrase for any prison sentence that has not been enforced, recent research provides useful detail as to particular attitudes about non-prison

punishment and so are reported in this review. Van Gelder et al. (2011) surveyed a representative sample of 409 Dutch-speaking people to analyse the relationship between knowledge about suspended sentences and attitudes towards them. They found that knowledge about suspended sentences did not correlate with support for or opposition to their use. However, a person's general disposition towards punishment, whether they were more or less punitive, did correlate with attitudes about suspended sentences. That is, '[p]eople with a more restorative and rehabilitative orientation believe more strongly in the effectiveness of suspended sentences' (p. 10).

6.3.2 In the same article, Van Gelder and colleagues (2011) present findings from a consequent experiment to test how changes in knowledge about suspended sentences affected attitudes about their effectiveness and support for them. Here they found that 'providing information about suspended sentences, either stressing the punitive elements or their goal, does not alter peoples' perceptions' of how punitive suspended sentences are (p. 14). However, giving this information did affect positively people's general attitude about suspended sentences and the belief that they are effective compared with people who did not receive any information about them (Van Gelder et al., 2011).

6.4 England and Wales

6.4.1 As part of the evaluation of Community Orders and Suspended Sentencing Orders, Professor George Mair and his team also researched sentencer attitudes towards these new sanctions. Sentencers in eight probation regions were surveyed which involved interviews with six Crown Court judges and seven district judges, and ten focus groups (averaging five participants each) carried out with magistrates (a total of 65 sentencers). Sentencers reported minor teething problems with COs and SSOs, but most negative comments were reserved for SSOs 'where preparation was seen as lacking, leading to inappropriate use' (Mair, Cross and Taylor, 2008: 13). About half those surveyed thought SSOs were being used well, while the other half felt they was used too often, '[a] bit like confetti' according to one respondent (Mair, Cross and Taylor, 2008: 13). There was some sentiment that flawed use of SSOs was most likely to take place at the magistrate level. By far the most commonly voiced advantage of the SSO was being able to avoid a sentence of imprisonment.

6.4.2 Comments by sentencers reflected that across the group, there may be a lack of clarity or differences of opinion about the purpose of the SSO, and thus of when best to use it. One Crown Court Judge said: 'I'm not clear in my mind whether the SSO is a Community Order in which the defendant is already told what he is going to serve if he fails, or whether it is an old-fashioned sentence of imprisonment suspended, provided he does certain things' (Mair, Cross and Taylor, 2008: 24). Mair and colleagues give other examples of 'conceptual confusion'. This may explain

further divergence in the numbers and kinds of conditions ordered as part of the SSO, with some sentencers preferring punitive conditions, seeing the SSO as in effect having punitive aims, while others viewed it as a kind of probation, while still others saw it as a hybrid between probation and imprisonment – ‘a community sentence...plus bite’ (Mair, Cross and Taylor, 2008: 28).

6.4.3 Interestingly, despite the SSOs high breach rate, higher even than for COs, Mair and colleagues (2008) reported that the sentencers they spoke with generally were untroubled by enforcement of the SSO. The authors note at the outset, however, that their research was conducted in the early days of COs and SSOs, and a more definitive account would cover a longer period (Mair, Cross and Taylor, 2008: 13).

6.4.4 The research team evaluating COs and SSOs also gathered perceptions of these orders among probation officers and offenders through face to face interviews. In the case of probation officers, 25 were interviewed (from four probation areas) (Mair and Mills, 2009). As above in the section on use and impact of conditional sentences in England and Wales, the research found some dissatisfaction among probation officers that breaches of these orders were not enforced with adequate consistency. In addition, probation officers felt suspended sentences were being used too frequently (Mair and Mills, 2009). Probation officers also reported problems with ability to comply with some requirements given the lack of availability of, particularly, alcohol and mental health treatment services.

6.4.5 The research on offender perceptions of COs and SSOs included 16 offenders (recruited through probation officers) serving one of the orders at the time of research, with six of these on SSOs (Mair and Mills, 2009). Mair and Mills (2009) reported that relief was a dominant feeling among those receiving either of the two orders, for having avoided a term of imprisonment. Most were also positive about their overall experience of the order, and it should be noted that because identical conditions are allowed and seemed to be used on the COs and SSOs of the interviewed group, there didn’t seem to be much distinction in the experience of an SSO compared with a CO. Offenders were clear that there would be consequences for breach, though some were gently surprised to learn that this did not always mean automatic imposition of the prison sentence:

‘The word breach to me means your order’s over and the police are likely to come and pick you up to take you to prison. That’s what I thought a breach was, do you know what I mean? But I didn’t realise that you do get a warning breach sort of thing [a formal warning letter if you miss an appointment] ... you know, even though you call it a breach, it’s basically a letter, a formal warning. So obviously that made me feel a bit better [when received a warning letter]. I did panic at first.’ (Mair and Mills, 2009: 39)

6.5 Australia

6.5.1 Suspended sentences appear to be viewed by the media, public and victims in Australia as the offender evading punishment and it has been suggested that a full-time prison sentence would have a greater deterrent effect (Lulham et al., 2009). Sentencers in Tasmania mostly were of the view that suspended sentences were very poorly regarded by the public but were divided with respect to whether public opinion had an impact on their decision to impose a suspended sentence. Possibly because they were dealing with more serious – and, hence, potentially more ‘headline worthy’ – cases, judges tended to pay more regard to public opinion than magistrates who tended not to consider it relevant to their sentencing decisions (Bartels, 2009b).

6.5.2 Between 2004 and 2008 an inquiry was carried out by the Sentencing Advisory Council in Victoria into the use of suspended sentences. The inquiry was initiated as a response to public concerns over the imposition of a suspended sentence for rape in 2004 and involved an extensive public and professional consultation on the suspended sentence (Freiberg and Moore, 2009). The resulting amended legislation – in the form of the Sentencing (Suspended Sentences) Act 2006 (Vic) – requires that courts take into account a range of factors when deciding whether or not to suspend a sentence of imprisonment: the capacity of the sentence to deter, denounce and reflect the gravity of the offence; the offender’s response to any previous suspended sentences; and the risk that the offender will re-offend during the operational period of the sentence (Sentencing Advisory Council, 2006; Freiberg and Moore, 2009).

6.5.3 The consultation undertaken by the Sentencing Advisory Council in Victoria revealed relatively widespread support for the retention of suspended sentences in that state, though respondents indicated dissatisfaction with certain elements of their operation. For example, consistent with Bartels’ (2010a: 150) conclusion about Tasmanian practice that ‘adding some form of immediate punishment to a suspended sentence may make it more palatable in the eyes of the public’, there was support for the attachment of specific conditions to suspended sentence orders, and a belief that suspended sentences were not appropriate for serious crimes involving personal violence on the grounds of proportionality and denunciatory impact. In the absence of conditions there is a risk that suspended sentences will be perceived as less punitive than non-custodial sentences (Freiberg and Moore, 2009). In addition to recommending the introduction of guidelines indicating which factors would make suspension of a sentence inappropriate, the Sentencing Advisory Council recommended that suspended sentences should be used only in exceptional circumstances involving serious violent or sexual offences (Sentencing Advisory Council, 2006). In advocating that less use be made overall of suspended sentences (because of their net-widening potential and lack of public support) the Sentencing

Advisory Council also recommended the re-casting of community sanctions as orders in their own right to which requirements could be attached to make them sufficiently punitive and denunciatory (Sentencing Advisory Council, 2006).

6.6 Canada

6.6.1 In Canada there appears to be limited public understanding of the conditional sentence and a lack of support for its use with more serious violent offences. Public support is stronger when the rationale for imposition of a conditional sentence is clear and where a number of optional conditions are imposed but there is evidence that curfews, which are a core condition of conditional sentences, are difficult to monitor and enforce. This may explain why completion rates are relatively high while recidivism rates appear also to be higher than probation.

6.6.2 A survey of 461 Canadian judges found that reducing the prison population was perceived to be the most important objective of the conditional sentence. Conditional sentences were regarded as being as effective as custodial sentences in achieving rehabilitative goals but less effective in terms of deterrence or denunciation. Sentencers believed that the public had limited understanding of conditional sentences and most admitted that they considered the potential effect upon public opinion before imposing such a sentence (Roberts and LaPrairie, 2000).

6.6.3 A multi-site survey of crime victims and professionals found broad agreement that conditional sentences were appropriate for non-violent offences. Defence solicitors believed that conditional sentences were suitable where there was no risk of recidivism and where the offender appeared motivated towards rehabilitation. In most cases, conditions would be imposed to ensure victims' safety (Prairie Research Associates, 2005). Interviews conducted with victims found support in principle for conditional sentences but not for the most serious crimes of violence, which is consistent with an earlier finding that broader public support was higher for the use of conditional sentences for assaults than for sexual assaults (Roberts and LaPrairie, 2000). Some concern was expressed by victims about the laxity of the curfew restrictions imposed and the extent of non-compliance with conditions attached to orders (Roberts and Roach, 2004). There has been evidence of inadequate supervision, more specifically in relation to the ability of probation orders to ensure compliance with curfew requirements (Roberts, 2007).

6.6.4 A survey of 100 people undertaken in February 2002 found that only 48% of respondents correctly identified the definition of a conditional sentence, echoing the finding from previous surveys of the public that there tended to be confusion about the definition of this disposal (Roberts and LaPrairie, 2000). Overall, conditional sentences and prison sentences were each regarded as moderately effective in meeting sentencing goals, though conditional sentences were regarded as more

effective than custody in meeting rehabilitative goals. Public support for conditional sentences was found to increase when people were provided with the judge's reasons for imposing such a sentence in a case example (Sanders, 2002) and has been found to be higher when the sentence includes a number of optional conditions (Roberts and LaPrairie, 2000).

6.6.5 Internationally there is a dearth of information about offenders' experiences and perceptions of conditional or suspended sentences (Bartels, 2010a). Research conducted in Canada, however, found that offenders believed that conditional sentences demanded more active engagement by the offender than did imprisonment. While most considered conditional sentences to be a better alternative than prison around one half found the conditional sentence to be more severe, with some offenders making reference to the impact of conditions such as curfews on other people, particularly those living with the offender (Roberts, 2004).

7. Conclusion

7.1 The desire to minimise unnecessary use of prison and exert control over rising imprisonment and reoffending rates is the common motivation among jurisdictions that recently have encouraged or introduced use of conditional sentences. Conditional sentencing practices and rules varied across jurisdictions according to: the maximum sentences to which they can be and typically are applied; whether additional conditions to the basic rule of not offending while under sentence are allowable or required; whether they are used in combination with other sentences; and how breaches are handled. And aside from the consensus about the potential of suspended sentences to address imprisonment rates, there appears to be ambivalence and confusion about the penal purposes of such sanctions.

7.2 In Canada, although researchers identified a small net widening effect, conditional sentences appear in the first several years of operation to have accompanied a decline in prison admissions. However, the evidence from Australia and England and Wales suggests net widening is a valid concern. Suspended sentences in these jurisdictions have not been accompanied by reduced prison admissions, and these sentences sometimes are being used as alternatives to non-custodial sentences. The particularly high breach rate observed in England and Wales creates a risk of exacerbating pressure on the prison population. The Australian research also found that, in one state, having had a prior suspended sentence made it four times more likely that a person would receive an unsuspended sentence upon future convictions. This shows an uptariffing effect may be playing out over longer periods than most research is designed to capture. The clarity with which Canadian sentencers understood conditional sentences as aimed at reducing use of prison compared to the conceptual confusion that appeared to be more common in England and Wales may explain some of the difference in net widening effects, but this speculation would need to be validated in further research.

7.3 The evidence on conditional sentences and recidivism is mixed. Much of it is also inconclusive partly due to methodological problems given the difficulty of matching like with like in comparing outcomes for those receiving a conditional sentence or another sentence. Keeping these qualifications in mind, suspended sentences appeared to have lower reconviction rates compared to a short prison sentence. Their performance against non-custodial sentences is mixed, with some studies showing lower reconviction rates for suspended sentences and others showing higher rates. The most rigorous comparison was conducted by the Ministry of Justice and provided closely matched samples of offenders in England and Wales. This analysis showed lower reconviction rates following completion of a suspended

sentence compared to completion of a prison sentence of twelve months or less or another type of community sentence (though the difference was slight in this latter case).

7.4 Public awareness of non-custodial sentences, let alone conditional sentences, is weak. Lack of awareness and understanding of community sentences may underlie the finding in studies of general public opinion that there is widespread scepticism about community-based punishments. The public, according to this work, feel that community punishment, and perhaps especially a suspended sentence, is a 'let off'. Research on public attitudes to punishment commonly finds that the more information people are given, the more likely they are to support the use of community penalties. This has led to research into ways of improving public understanding about how community penalties work and what their purpose is. Public attitudes research also has evolved in making use of methods such as deliberative panels which have provided evidence that people's perceptions of the justice system are more sophisticated and flexible than is visible through the survey methods of much opinion research.

7.5 The experience of Victoria in Australia may be instructive for jurisdictions considering introducing conditional sentences. The Sentencing Advisory Council there concluded suspended sentences were 'an inherently flawed order' (2006: xvii) and recommended their abolition. This is because such sentences are at risk either of being viewed as lacking any meaningful quality of punishment, or if conditions are added to give them bite, exacerbating the problems they were introduced to minimise. Ultimately, the Sentencing Advisory Council moved away from its recommended abolition, not because of evidence that the order securing public confidence and reduced recidivism, but because of a vacuum of alternatives that would exist were they to be abolished. This suggests that once introduced, whether or not they are achieving anything in terms of reducing imprisonment rates or recidivism, conditional sentences may be difficult to remove without negative consequences for the prison population. The different experiences of the jurisdictions reviewed here also underline the importance of the context in understanding the effects of penal change.

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