Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System

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This article examines the ambivalent nature of suspended sentences of imprisonment and public reactions to them. In Australia, and elsewhere, they have created confusion, have been in and out of political and judicial favour and have been repeatedly modified. The article discusses the Victorian Sentencing Advisory Council’s review of suspended sentences, with particular reference to public perceptions of the sentence and the council’s various proposals for reform. It examines, in particular, four issues relating to this sanction: (1) the meaning of punishment, (2) the severity of punishment, (3) truth in sentencing and the nature of substitutional sanctions and (4) the appropriateness of the sanction for specific offences. The article concludes with a discussion as to whether public perceptions matter in the broad sentencing context and notes that public perceptions are only one of a number of factors driving sentencing reform.

Keywords: suspended sentences, public confidence, sentencing

There are a number of sanctions that strongly divide communities. Capital punishment, corporal punishment and mandatory sentencing are amongst the most controversial. Suspended sentences appear to especially polarise opinion and provoke high emotion. Views are widely divergent and strongly held. Unlike sanctions such as imprisonment, fines, probation and community service, suspended sentences have been in and out of favour in many jurisdictions over time, partly for criminological reasons (such as their impact upon prison populations), but often because of public perceptions about their role in the sentencing hierarchy.

This article reports on an inquiry conducted by the Victorian Sentencing Advisory Council between 2004 and 2008 into suspended sentences that arose from public concerns over a suspended sentence of imprisonment imposed for the offence of rape in 2004 (R v Sims [Unreported, County Court of Victoria, April 1, 2004]). It examines the role of the Sentencing Advisory Council in the political/criminological discourse in Victoria and the relationship between suspended sentences and public opinion.

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The Background: A Public Outcry
In Melbourne in April 2004, a young man was convicted of one count of aggravated burglary, two counts of lingual and digital rape and one count of indecent assault and was given a sentence of 2 years and 9 months imprisonment suspended for 3 years. On appeal against the leniency of the sentence (Director of Public Prosecutions v Sims [2004] VSCA 129), judgment in which was delivered in July 2004, the Victorian Court of Appeal upheld the sentence by a 2:1 majority. The sentence was condemned in the popular press. A public protest by nearly 10,000 people on the steps of the Victorian Parliament House called for mandatory minimum sentences and the restriction or abolition of suspended sentences.1

The Response
The political response was a reference by the Attorney-General to the Victorian Sentencing Advisory Council (SAC) under section 108C(1)(f) of the Sentencing Act 1991 (Vic) requesting advice on the current use of suspended sentences and whether ‘reported community concerns about their operation’ indicated a need for reform, and if so, what those reforms might be. The Attorney expressed particular interest in the views of the community, including victims of crime, on this issue. This was significant not only because of the overt reference to the community’s angst over what was perceived by some to be an inadequate sentence, but the reference to the council was consistent with its role as a mechanism for incorporating community views into the development of sentencing policy both through its membership, which is diverse,2 and its consultative processes.

The Victorian Sentencing Advisory Council (SAC) was established in July 2004 to ‘bridge the gap between the community, the courts and government by informing, educating and advising on sentencing issues’ and was a product of a reformist government that was keen to project itself as responsive to community concerns (Freiberg, 2008). The Council has a legislative mandate to ‘gauge public opinion’ and involving the community in the development of sentencing policy was one of the reasons the council was established.

The remainder of this article examines the problematic nature of suspended sentence, the role of the Council in the Victorian political landscape and questions whether suspended sentences undermine public confidence in the justice system. This latter question concerns not only the relationship between the courts and the public, but also the relationships between different forms of punishment, between punishment and offenders and between the various purposes of punishment.

A Volatile and Paradoxical Sanction
The suspended sentence of imprisonment forms part of a constellation of sanctions or processes that include conditional and deferred sentences.

A suspended sentence of imprisonment3 is a sentence of imprisonment that is imposed but not executed, with or without supervision and with various degrees and levels of conditionality. It can vary in length, in its operational period,4 the options available to a court on breach and as to whether it can be wholly or partly suspended, that is, whether it follows a period of actual imprisonment.
A suspended sentence can be distinguished from a deferred sentence in that in the latter case, the court does not impose sentence, but can do so at a later date. It can also be conditional and the process of sentencing can be deferred for various periods of time.

In some jurisdictions, a conditional sentence can be imposed by a court that may attach a set of conditions to be observed, such as performance of community service, or adherence to probation or other supervisory conditions, which, if successfully completed will not result in a sentence of imprisonment being imposed. A variation of this is the conditional sentence where the sentence of imprisonment is actually imposed, but is served in the community under various conditions.

A Chequered History
Dating back to late 19th century Europe (Ancel, 1971, pp. 2–4) the suspended sentence was adopted in various parts of the common law world in different guises, primarily aimed at keeping first, or minor offenders, out of prison. Its purpose was rehabilitative rather than punitive. Suspended and conditional sentences of imprisonment are available in most European jurisdictions, for example Holland\(^5\) (Tak, 2001, p. 162), Germany\(^6\) (Meier, 2003–4; Weigend, 2001), Finland (Lappi-Seppala, 2001), in the United Kingdom (Bottoms, 1981; Thomas, 1974), the United States, Australia and, until recently, in New Zealand\(^7\) (Brown & Young, 2000), as well as Israel\(^8\) (Sebba, 1970; Shoham & Sandberg, 1964) and many other countries.

In the United Kingdom, suspended sentences of imprisonment were introduced in 1967, after being rejected by two reviews in 1952 and 1958.\(^9\) They were modified in 1982 by the introduction of partially suspended sentences,\(^10\) severely restricted in 1992\(^11\) and expanded again in 2003 (though not coming into operation until 2005)\(^12\) and, in the light of serious concerns about their use, the government considered removing the power to make a suspended sentence order altogether from magistrates.\(^13\)

Canada introduced conditional sentences of imprisonment in 1996\(^14\) and then passed legislation in December 2007 designed to limit their use in relation to serious offences.\(^15\) It has been a highly controversial sentence in that jurisdiction (Manson 2001, 2004; Roberts, 1997, 1999; Roberts & Healy, 2001). New Zealand abolished suspended sentences in 2002\(^16\) and considered, and rejected, their reintroduction in 2006–2007.\(^17\)

In Australia, suspended sentences are available in all jurisdictions in a variety of forms.\(^18\) In Victoria, they were introduced in 1915, disappeared in 1958, reintroduced in 1986, modified in 1991 and again in 1997, ordered to be reviewed in 2005, recommended for abolition and modified in 2007 and given an extension of life in 2008 (Bagaric, 1999; Sentencing Advisory Council, 2008). Tasmania has recently reaffirmed their role and usefulness, but recommended a number of changes to their operation (Tasmania, Law Reform Institute, 2008).

The suspended sentence is clearly an unusual and unstable element in the periodic table of sentences. It has been described as paradoxical (Sanders & Roberts, 2000) and confusing (Thomas, 1974). O'Malley's description of contemporary penal policy as 'volatile and contradictory' is particularly apt in this context.
(O’Malley, 1999). There are a number of conceptual, legal, criminological and perceptual reasons for this. English sentencing expert, David Thomas observed:

The suspended sentence has clearly caused great confusion to all concerned with it — to the sentencer contemplating its use, the offender often — despite the statutory incantation — unable to grasp its implications, and the population at large puzzled by its intended message. (Thomas, 1974, p. 688)

It is to this public dimension of sentencing that we now turn.

**Public Perceptions, Public Confidence and Sentencing**

Public attitudes to sentencing in general, and to specific forms of sentences in particular, are crucial for a number of reasons: first, because one of the purposes of sentencing is to contribute to respect for the law;19 second, because judges are sensitive to public perceptions;20 and third, because adverse public opinion can force changes to the law (Roberts, 2002; Sanders & Roberts, 2000).

Public opinion defines the boundaries of what is possible in public life and a loss of confidence can result in very poor decision-making by legislators. The impact on sentencing law on public opinion, mediated or unmediated, is clearly evident across many jurisdictions where laws such as sex offender registration and community notification schemes, ‘three strikes and you’re out’ provisions and increased mandatory minimum and maximum sentences have been introduced as legislative responses to a perceived punitive public.

Sentencing is a process of communication, both to offender, victims and the public (Duff, 2000; Rex, 2002). Among the various aims of sentencing — retribution, deterrence, rehabilitation and incapacitation, sits that of ‘denunciation’, either explicitly as in section 5(1)(d) of the Sentencing Act 1991 (Vic) or implicitly. It has been described in the following terms:

The purpose of denunciation is a symbolic one, often linked with retributivism, by which the court conveys a message from the community to the offender that the conduct is unacceptable. Denunciation, as an expression of public condemnation, has an important role in public confidence in the criminal justice system: justice being seen to be done. (Mackenzie, 2005, p. 113)

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

Perceptions of sentencing are important not only from a public confidence perspective, but also because of the nature of sentencing. Sentencing is not just about punishment, rehabilitation and community protection, but also performs important symbolic and communicative functions. In sentencing an offender, courts censure the offender’s conduct, signifying the wrongfulness of his or her actions, and through the sentence passed, endeavour to deter the offender and others from committing similar offences in the future. The effectiveness of this symbolic and communicative endeavour depends on offenders and the broader community understanding what the court, in sentencing, is setting out to convey. It could be argued that confusion over what a suspended sentence is, and where it should sit in the sentencing hierarchy, is evidence of the order’s failure to satisfy this central purpose. (Sentencing Advisory Council, 2006, p. 29)
Engaging the Public
The Sentencing Advisory Council's response to the Attorney's reference involved extensive community and professional consultation, including meetings with victims' groups. It is always dangerous and frequently misleading to talk about 'public attitudes' or perceptions. Who is the public? How are they represented? How informed are their views? Should anyone care? In this case, it was clear the Attorney-General cared, at least enough to refer the matter to the newly established council.

The council was acutely aware of the difficulties in gauging 'public opinion' (Gelb, 2008) and of generalising too much from limited sources and information. In relation to this controversial reference, its strategy was to provide those members of the community consulted with as much information as was possible about the nature of suspended sentences and their use, in Victoria and elsewhere in the world. It was based on the premise that if decisions were to be made, they should be made on an informed basis, and this applied as much to council members as to the broader and professional publics.

The public consultation process involved community forums in urban and regional areas, a series of specialist round tables focusing on legal issues, issues for offenders with a mental illness and/or intellectual disability, offenders with drug and alcohol problems, young offenders and offenders convicted of a sexual offence, focus groups and workshops with victims of crime and individual meetings. Submissions were also invited from the public. In all, it received 25 submissions on its interim report, 54 submissions on its discussion paper, 12 submissions on its draft recommendations, and held 14 meetings or round tables on its draft recommendations (Sentencing Advisory Council, 2008, pp. 3–5 and Appendix 1).

The council's extensive consultations provided it with a reasonable, though clearly not perfect, insight into some of the views of the public and the legal profession in relation to suspended sentence.

The process of inquiry produced an information paper in February 2005 (Sentencing Advisory Council, 2005a), a discussion paper in April 2005 (Sentencing Advisory Council, 2005b) and an interim report in October 2005 (Sentencing Advisory Council, 2005c). After extensive community debate on this report, the council released part 1 of its final report in May 2006 (Sentencing Advisory Council, 2006) that dealt with restrictions on the use of suspended sentences but left open the question of wider reforms to the sentencing options currently available to the courts. It also recommended the possible phasing out of such sentences in the long term.

The part 1 recommendations were, to a large extent, enacted in the Sentencing (Suspended Sentences) Act 2006 (Vic) that made a number of amendments to the Sentencing Act 1991 (Vic). The Act requires courts to take into account a range of factors in deciding whether or not to suspend a sentence of imprisonment including: (1) the need to ensure that the sentence adequately deters, denounces and reflects the gravity of the offence; (2) any previous suspended sentences imposed and whether the offender breached the order; (3) whether the offence was committed during the operational period of the sentence; (4) the degree of risk of the offender committing a further offence during the operational period. It also provided that a court can only suspend a sentence of imprisonment in exceptional circumstances...
and where it is in the interests of justice to do so, for a range of serious offences and allowed a court to order a young offender, on breach, to serve all or part of the sentence in a youth justice or youth residential centre instead of in prison.

Part 2 of the final report was released in April 2008 and is still awaiting a government response.

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

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

Punishment Paradoxes and Contradictions
Punishment is a complex concept and process. As Marinos argues, it is multidimensional and contextual (Marinos, 2005). The idea that a sentence that does not result in immediate custody can be readily substituted for one that does is simplistic and lacks credibility. The idea that a legislative statement of equivalence invests the sanction with the authority it lacks is fatuous. Freiberg has argued that punishment must be understood beyond its legal/rationalist frame and must take into account the affective or emotional dimensions of crime and punishment (Freiberg, 2001). Thousands of citizens do not march in the streets because they wish to have a calm, cerebral, public debate about the distinctions between different forms of custody, but because they feel strongly some injustice has occurred:

[S]uccessful penal reform must take account of the emotions people feel in the face of wrongdoing. Further, successful reform must take into account changes in the public ‘mood’ or emotions over time and be sensitive to different political and social cultures. (Freiberg, 2001, p. 275)
In the authors’ view, there are four main perceptual issues that render the suspended sentence problematic. First, the sentence is seen as misleading or untruthful; second, the gap between legislative/judicial and community perceptions of the nature of the sanction is too large; third, the punitive content of the sentence is regarded by the public as inadequate; and fourth, it is regarded as inappropriate for some forms of criminal behaviour.

**Truth in Sentencing: Substitutional Sanctions**

The term ‘truth in sentencing’ has acquired various meanings over its relatively short life. Originally referring to the difference between the sentence imposed by a court and the time actually served by the offender, and resulting in many jurisdictions in the abolition of either or both remissions and parole (Freiberg, 1992), it can also refer to the gap between statutory maximum penalties and the sentences imposed by the courts and to ‘life’ sentences that allow offenders to be released before their death (Roberts 1997, p. 196; Roberts, 2002, p. 33). However, truth in sentencing can also mean that the nature and form of the sentence should be honest and transparent. The suspended sentence of imprisonment is vulnerable on this ground because, while purporting to be a sentence of imprisonment, the public may regard the offender as having evaded the ‘real’ sanction by ‘walking free’.

In Australia, suspended sentences, like a number of similar orders, are ‘substitutional’ sanctions in that they allow courts to replace different forms of sanction for an imposed sentence of imprisonment. A ‘substitute’ sentence is one where the court that imposes a sentence of imprisonment is empowered to alter the form of imprisonment. The Canadian conditional sentence of imprisonment is a substitutional sentence because it requires the court first to impose a sentence of imprisonment (of up to 2 years) and then allows the court to order that the offender serve the sentence in the community, subject to the offender’s compliance with certain conditions (section 742.1 *Canadian Criminal Code*). A substitutional sanction can be distinguished from an ‘alternative’ to imprisonment in that the latter does not require a sentence of imprisonment to be imposed first. Rather, the sentencer is given a choice between a custodial and noncustodial sentence. The difference is subtle but crucial.

The notion of ‘custody’ is itself complex. It may be notional or actual and allows for the possibility of different degrees of physical restraint and control over a person (Fox & Freiberg, 1999, para. 9.101; Sentencing Advisory Council, 2008, p. 67). In Victoria there are eight different forms of ‘custodial’ sentences’ available to courts under Part 3, Division 2 of the *Sentencing Act 1991* (Vic) when sentencing adult offenders: (1) imprisonment (which may be followed by parole); (2) indefinite sentences of imprisonment (which may involve periods of time in the community but an indefinite liability to be recalled); (3) combined custody and treatment orders (some period of time in prison, some in the community); (4) drug treatment orders (a specialised form of suspended sentence, subject to conditions and a liability to spend short periods in custody); (5) home detention orders (a sentence of imprisonment to be served by an offender at his or her place of residence); (6) intensive correction orders (imprisonment served in the community by way of community service and treatment or education); (7) partially suspended sentences of...
imprisonment (some period in prison, the rest held in suspense); and (8) wholly suspended sentences of imprisonment (a prison sentence imposed but not executed).

Substitutional sentences are problematic for two reasons. First, they require a nexus between the sanction and imprisonment, and, although some legislation effectively treats the two forms of sanction as equal, in both the judicial (see Bice [2000] VSCA 226) and the public mind, they are not equivalent. Second, because they are not regarded as equal, when they imposed in place of an executed sentence of imprisonment, the offender is regarded as having 'escaped' or 'avoided' imprisonment (Sentencing Advisory Council, 2005c, p. 23). More tellingly, the law is seen to be mendacious, hypocritical or untruthful.

The SAC took the view that the use of orders substituted for immediate imprisonment should be kept to a minimum. In its view, these sentences result in net-widening from other lower-level orders, and, due to their legal status as 'sentences of imprisonment' and stringent breach provisions, place offenders who might otherwise have received a less severe sentence at real risk of serving time in prison. In the council's view, the best response was to break the nexus between imprisonment and the substituted sanction so that the latter becomes a sanction in its own right. Home detention, for example, should be just that, a sentence of home detention, and should not purport to be a form of imprisonment. Though susceptible to the criticism that it might be an inadequate penalty for a particular crime, it is not open to the criticism that it purports to be what it is not — a sentence of imprisonment (Sentencing Advisory Council, 2008).

Ostensible vs. Actual Punishment

In Victoria, the Sentencing Act 1991 (Vic), sections 27 (3) and (5) make clear that suspended sentences at law are intended to be equivalent to executed sentences of imprisonment. Judicial perceptions and pronouncements reinforce the view that suspended sentences are intended to constitute a significant punishment. Chief Justice Bray, in taking this view, stated in Elliott v Harris (No 2 (1976) 13 SASR 516, p. 527):

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

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. Manson, for example, has argued in respect of the Canadian conditional sentence, that it allows trial judges to have their cake and eat it too (Manson, 1997). For this reason, Bottoms (1981, p. 20) has suggested:

[The suspended sentence] has acquired … a special psychological attraction to sentencers in that they can feel they are being punitive and passing a severe sentence, while at the same time allowing themselves the warmth of recognising the humanity of their leniency.
A suspended sentence of imprisonment is often described as hanging like the Sword of Damocles over the head of the offender: it will fall if he or she commits another offence during the operational period. But while judicial officers may regard suspended sentences as a significant penalty, in the public mind the offender awarded such a sentence is regarded as ‘getting off’, ‘walking free’, or as having received a ‘slap on the wrist’. Justice Kirby of the Australian High Court has encapsulated the dilemma thus in *Dinsdale v R* (2000) 202 CLR 321, pp. 346–347 (Kirby J):

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

An analysis by the council of headlines of articles published in the two major Victorian dailies, *Herald Sun* and *The Age* for the period December 7, 2002 to December 6, 2004 found that the representation of offenders as ‘walking free’ when a suspended sentence was imposed was a common one (Sentencing Advisory Council, 2006, p. 27).

A number of articles also described offenders receiving suspended terms of imprisonment as having been ‘spared jail’ and as ‘avoiding jail’ or ‘dodging jail’. As Julian Roberts, an acknowledged expert on sentencing and public opinion, has observed:

Most members of the public (and many criminal justice professionals) regard a suspended sentence as a warning, rather than a sentence per se: desist from criminal behaviour, and no sanction will ensue; violate the conditions of the probationary period, and the sentence of imprisonment will be executed. A person on whom a suspended fine was imposed would not be perceived by the public to have been punished, if, after six months the threat of the fine was lifted, leaving the individual with nothing to pay. (Roberts, 2004, p. 6)

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

Suspended sentences are not seen by the public as the next best thing to a gaol sentence, they are not seen as a penalty, nor as a deterrent. Particularly by victims of crimes-against-the-person, they are seen to be a ‘slap on the wrist with a wet tissue paper’. [emphasis in original] (Sentencing Advisory Council, 2006, p. 5)

Another submission stated:

As an ordinary citizen observing the operation of the system I find the use of suspended sentences as the single most abhorrent factor in the administration of justice in Victoria … The community expends time, money and effort in the provision of a police service and justice system. That system investigates crime, presents evidence to the court and the court then finds that an offence punishable by imprisonment has been committed
by the defendant. It then lets him or her go free. The community does not consider that to be justice. I do not consider that to be justice … A suspended sentence is not a penalty. (Sentencing Advisory Council, 2006, p. 27)

Consultations with victims of crime and various submissions confirmed the offender’s receipt of a suspended sentence, in some cases, can make victims feel as if the offender has ‘gotten off’, while the victim and his or her family are left to deal with the consequences of this offending. One submission reported that a suspended sentence could result in ‘considerable distress’ for a victim of sexual assault and lead victims to regard the legal system as ‘unsupportive and a waste of time’ (Sentencing Advisory Council, 2006, p. 5). A strong theme that emerged from all consultations held with victims of crime was the need for the impact of the offence on the victim to be properly understood and taken into account at sentencing.

Studies that have invited respondents to rank sanctions in terms of their perceived severity have confirmed a high level of disagreement concerning the punitive weight of a suspended sentence. For example, a South Australian study found victims of crime ranked suspended sentences as the least severe community-based sanction, in contrast to judicial officers, who ranked them as the next most severe after home detention (Pearson, 1999, p. 40). Other research suggests offenders also view a suspended sentence as less punitive than probation or some form of financial penalty (Sebba & Nathan, 1984, p. 231).

A New Zealand Ministry of Justice survey of 387 people sentenced to periodic detention found of all the types of sentences respondents were asked to rank, there was the greatest variation among respondents in the ranking of suspended sentences. Overall, the 9-month suspended sentence with an operational period of 18 months was given a mean ranking of 6, suggesting that most offenders considered it more severe than a fine of $200, a fine of $500, 12 months supervision, 100 hours community service, or 4 months periodic detention, but less severe than a 6-month residential community program, a fine of $1,000, 12 months periodic detention, or terms of imprisonment between 3 months and 3 years. However, close to one in three (30%) ranked it in the four ‘least tough’ positions and 16% ranked it more severe than 3 months in prison (Searle, Knaggs, & Simonsen, 2003, pp. 24 [Table 4.1] and 29).

Another problematic element of suspended sentences is the credibility of the Damoclean threat. While in many jurisdictions, breach of the order suspending or converting the sentence leaves the courts with some discretion as to whether to order the execution of the sentence of imprisonment, in Victoria the court must do so unless there are exceptional circumstances. However, an analysis of the outcomes of breaches in the Victorian Magistrates’ Court and higher courts reveals that around 37% of all cases did not result in a term of imprisonment following breach (Turner, 2007), rendering the threat real, but not overwhelming. Again, the public perception that those who have been ‘let off’, have once more escaped justice could be reinforced.

 Degrees of Punishment

In Victoria, in contrast to orders such as community-based orders (CBOs), no conditions apply to a person under a suspended sentence. Provided the offender
does not commit an offence during the operational period, there are no restrictions placed on his or her time or resources. While a suspended sentence is intended to be a harsher punishment than noncustodial orders, such as CBOs and fines, suspended sentences in some respects may be regarded as being less punitive.

A possible response to this might be to argue that the punitive weight of the suspended sentence is only of secondary importance. The real purpose of a suspended sentence, it might be suggested, is not punitive, but to provide for an offender’s rehabilitation in the community while symbolically marking the seriousness of the offence. This problem remains, however, of why a suspended sentence, which places offenders under no greater obligation than other community members not to break the law, should be treated at law as a more severe form of sanction than community sentences that generally place a number of positive obligations on offenders, such as reporting and supervision requirements. The imposition of a nominal prison sentence on the offender’s criminal record, combined with the threat of imprisonment on breach, may be regarded by many as insufficient alone to justify its positioning.

Another answer to this might be to add some punitive and rehabilitative content to the sanction (as there is in most jurisdictions other than Victoria) and indeed, those who defended suspended sentences endorsed their rationale and current positioning in the hierarchy of sentencing orders on this basis. It was argued the order could be improved by allowing courts to attach conditions and providing them with more flexibility in handling breaches of suspended sentences. Sanders and Roberts’ (2000) research into public attitudes to conditional sentencing in Canada found that public support for conditional sentences of imprisonment increased dramatically when optional conditions were added to the sentence. In other words, ensuring there was a sufficiently punitive element to the sentence was crucial to public confidence in the sanction.

The difficulty is that 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 a relaxing of the breach provisions — risk rendering the Damoclean threat all but meaningless and carry the potential to further erode public confidence in the order.

The dangers of introducing a conditional form of order have been manifested in England and Wales. Preliminary research has found courts are much more likely to attach two or more conditions to a suspended sentence than to a community order, contrary to Sentencing Guidelines Council advice that the requirements on a suspended sentence should be ‘less onerous than those imposed as part of a community sentence’ (2004, p. 25). Between April 2005 and July 2006, only 36% of suspended sentence orders had a single requirement, compared to 49% of community orders (Solomon & Rutherford, 2007, p. 37). There are also said to be ‘growing concerns about the numbers of people on Suspended Sentence Orders who are going to prison as a result of small technical breaches’ (Solomon & Rutherford, 2007, p. 19). According to the Home Office, 800 people were imprisoned for breach between January and August 2006, compared to only 132 in the whole of 2005.
Three-quarters of orders breached were issued in the Magistrates’ Court, and nearly half were imposed for summary offences (Doward, 2007).

**Appropriateness and Proportionality**

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

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

To some extent, the issue is one of proportionality: a suspended sentence of a certain length, even if it considered equivalent to imprisonment, might be regarded as insufficiently commensurate with the harm caused. This is a straight desert argument. However, the issue is also one sentence type: a sentence served in the community is regarded as being qualitatively different to one served in a prison, as being insufficiently denunciatory (Roberts, 1997, p. 191).

Some studies of public attitudes indicate that independent of questions concerning severity, different forms of sanctions are viewed as having different functions depending on the nature of the offence. For example, a Canadian study found the level of support for the use of conditional sentences varied significantly depending on the specific circumstances and nature of the offence. While 77% of respondents supported the use of a conditional sentence of imprisonment for a scenario involving an assault causing bodily harm, only 25% supported its use over imprisonment for a case of impaired driving causing bodily harm, while just 3% supported its use in the case of an offender convicted of sexual assaults perpetrated on his 5-year-old stepdaughter (Sanders & Roberts, 2000).

Responding to these concerns, the Council, in part 1 of its final report (2006), recommended the introduction of guidelines in the legislation as to the factors that might make the suspension of a prison sentence inappropriate (such as the gravity of the offence and its impact on the victim, the risk of the offender reoffending while on a suspended sentence and whether the offender committed the offence while on a suspended sentence). It also recommended that the suspended sentence only be allowed to be used in exceptional circumstances of serious violent and sexual offences such as murder, manslaughter and rape.

The Council was conscious that much of the apparent community concern about the use of suspended sentences had resulted from their use in particular types of cases. Such cases had often, though not exclusively, concerned sexual offences and other violent offences, where the level of harm caused to a victim has been
high. Although these offences account for only a tiny proportion of the total number of suspended sentences handed down annually, the Council was of the view that once a court has determined no other sentence but imprisonment is appropriate for such offences, there should be a presumption the sentence will be served.

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

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

In deciding whether to suspend a sentence, the court must consider:

- the nature of the offence, its impact on any victim of the offence and any injury, loss or damage resulting directly from the offence, to ensure that the sentence adequately manifests the denunciation by the court of the type of conduct in which the offender engaged, adequately deters the offender or other persons from committing offences of the same or a similar character, and reflects the gravity of the offence. (Sentencing Act 1991 (Vic), s 27(1A)(a)).

In late 2007, the Canadian government passed legislation that removed the possibility of a conditional sentence being imposed for a ‘serious personal injury offence’ (including sexual offence), a terrorism offence or a criminal organisation offence that carries a maximum term of imprisonment of 10 years or more.26

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

- While allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed serious or violent crime, to serve their sentence in the community is widely believed to be beneficial, it has also been argued that sometimes the very nature of the offence and the offender require incarceration. The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that appear to justify incarceration. (MacKay, 2006)

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

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

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

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

The approach advocated by the Council, however, is of a distinctly different character
to that promoted by the Canadian government. First, even in the case of serious
offences, the Council believed that it was important Victorian courts retain the power
to make a noncustodial form of order where it is appropriate to do so. Under the
Council’s Part 2 proposals, the range of noncustodial options in Victoria would be
broadened to include two new forms of intensive correction orders, a new form of
community-based order targeted at young adult offenders, and home detention as a
sentence in its own right. Second, rather than removing the power to suspend a term
of imprisonment altogether in the case of serious offences, the Council supported
courts retaining the power to suspend that sentence in exceptional circumstances.
The Council believed this approach will ensure imprisonment remains an option of
last resort, reserved for higher-risk offenders convicted of more serious offences, but
will also protect against the potential for injustice in individual cases.

Is More Education the Answer?

One of the consistent themes that emerged from those submissions supporting the
retention of suspended sentences was that the problem with suspended sentences
was not with the order itself, but rather public perceptions of what the order was
and what it was intended to achieve. It was argued by some in the legal profession
that the education of the community, rather than the removal of suspended
sentences as a sentencing option, would alleviate many of the community concerns,
particularly if a power to attach conditions to suspended sentences was also intro-
duced. Public education is important and there is evidence the more information
the public has about the details and complexities of sentencing, the more nuanced
are its views (Doob & Roberts, 1983).

However, the Council did not believe the problems with suspended sentences
lay only with the public and, through its recommended reforms, it sought to
achieve not only a better sentencing system but one that was more easily under-
standable to the broader community. The Council specifically rejected the view
that community concerns about suspended sentences are solely a product of a lack
of understanding about the nature and purpose of these orders and suggested that
it is important to improve the language and structure of sentencing to make it
more logical, transparent and coherent (Roberts, 2002, p. 33). As Julian Roberts,
in suggesting how to explain the concept of prison alternatives, such as commu-
nity custody, has proposed: ‘First, the concept needs to make sense; the criminal
justice system needs to have a good ‘product’ to sell to the community in the place of prison’ (Roberts, 2004, p. 181).

Enhancing Community Sentences

If suspended sentences fail to meet the denunciatory and punitive expectations of the public because of their ambiguous or ambivalent status, another response is to create a set of nonimprisonment options that can be regarded as both severe enough and appropriate for the types of offences now receiving suspended sentences and which will fill the sentencing space vacated by the suspended sentence.

Critical to the greater acceptance of intermediate sanctions as substitutes for imprisonment is a ‘de-coupling’ of denunciation from sentences of imprisonment and its ‘re-coupling’ to community sentences (Marinos, 2005, p. 450). The search for ways to invest community sanctions with the same kind of denunciatory power as imprisonment recognises that, in order to gain support for community alternatives, the ‘emotional’ or ‘affective dimension’ of punishment cannot be ignored (Freiberg, 2001; Garland, 1990, 2001).

One means suggested to engender greater confidence in these alternatives is through the use of conditions that are intrusive or restrict an offender’s liberty (in a similar way to imprisonment), or which involve some other condemnatory component (such as requiring offender convicted of offences to speak about the consequences of this behaviour) (Marinos, 2005, p. 450). For example, some forms of intensive supervision and parole involve high levels of face-to-face contacts, drug testing, curfew and electronic monitoring conditions. These characteristics, together with the more severe response to breach of these orders, have been pointed to as evidence of their intrinsically punitive value (Fulton, 1997).

Research on other conditional intermediate orders suggests that these orders are experienced by offenders as punitive. A study of 100 offenders in Victoria on intensive corrections orders found while 58% of offenders agreed that intensive correction orders (ICOs) were better than going to prison, 60% disliked ICOs on the basis they were too demanding and time consuming. Most (88%) did not view ICOs as a soft option (Tomaino & Kapardis, 1996).

The Council’s part 2 proposals aim to remedy the substitutional nature of many of Victoria’s existing intermediate sanctions by recasting them as orders in their own right, and to invest the new forms of orders with sufficient punitive and denunciatory weight to encourage their acceptance by the broader community.

Conclusion

Public confidence in the judicial system is vital. As Roberts has observed, referring to the provisions of section 718 of the Canadian Criminal Code, one of the fundamental purposes of sentencing is to contribute to respect for law. We concur with Roberts in his view that conditional or suspended sentences ‘have the power to undermine public respect for the law in general and in particular, the institution of the judiciary’ (Roberts, 1997, p. 196).

The problem of lack of confidence in the courts is probably chronic rather than acute, but the problem of suspended sentences of imprisonment tends to make the
chronic problem worse. It appears that public confidence in the courts has been consistently lower than levels of confidence in the police, prisons or the criminal justice system as a whole for many decades. The status of judges and the courts have gradually been eroded by constant media polls and reports that the courts are ‘soft on crime’ and therefore failing to protect the community (Freiberg & Gelb, 2008; Indemaur, 2008; Pratt, 2008).

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

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

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

Although the Sentencing Advisory Council had originally indicated its desire to see suspended sentences abolished by the end of 2009 (Sentencing Advisory Council, 2006), in its final report (2008) it acknowledged that change needed to be gradual, and while continuing to be concerned about the inherent flaws in the sentence, it recommended changes in the intermediate orders should be fully tested before any further changes were made to restricting the use of suspended sentences or abolishing them altogether. It also recognised that an immediate abolition of suspended sentences could have catastrophic effects upon the prison population, which could be ‘unmanageable, unwise and very expensive’ (Sentencing Advisory Council, 2008, p. xix).

The changes to the range of intermediate sanctions outlined above were recommended by the Council in the belief they offered better, and more honest and transparent, options to the courts and to the public. The Council remained concerned about the effect that suspended sentences had on public confidence in the criminal justice system. The recognition that public confidence in the system is an important element in the design of any sentencing system, and the establishment of forums such as the Council to incorporate, and be sensitive to, community views are important steps in ensuring that public confidence is maintained and that, in the long run, the forces of unbridled penal populism are kept at bay.
Author Note

Acknowledgments
Our thanks are due to Professor Julian Roberts for his comments on an earlier draft of this article.

Endnotes
1 The political potency of sentencing decisions was also evident in Australia in late 2007 in relation to 6-month suspended jail sentences imposed by the Queensland District Court in the Cape York area on three Aboriginal men aged 17, 18 and 25, convicted of rape of a 10-year-old girl. Six other offenders were juveniles. A national outcry resulted, which received international coverage (See for example, ‘Rape Case Ruling Shock Australia’, BBC News, December 10, 2007. Retrieved January 21, 2008, from http://news.bbc.co.uk/2/hi/asia-pacific/7136269.stm. Public and political concern resulted in an application for an extension of time to appeal against the leniency of the sentences imposed. In June 2008, the Queensland Court of Appeal upheld the DPP’s appeals and resentedence three of the adult offenders to a maximum of 6 years’ imprisonment. In contrast to Victoria, these sentences did not precipitate any reviews of suspended sentences themselves but produced a review carried out by the Office of the Director of Public Prosecutions of the adequacy of sentences imposed in Cape York communities over the previous 2 years (‘Cape York Sentences to be Reviewed After Rape Judgement’, ABC News, 12 December 2007. Retrieved January 21, 2008, from http://www.abc.net.au/news/stories/2007/12/10/2114704.htm. The review, released in June 2008, found no evidence of a general pattern of inadequate sentences in Cape York, but recommended that a new system be put in place to advise the Attorney-General when marginal or inadequate sentences are handed down (see Davis, 2008).
2 The Council has statutory categories of membership drawing from different groups in the community: prosecution, defence, victims, academia and those with experience in the criminal justice system: Sentencing Act 1991 (Vic), s 108F.
3 The execution of a fine or other financial penalty may also be suspended in some jurisdictions.
4 The period over which the sentence is suspended, which may be different from the period actually suspended: for example, a 6-month sentence may be suspended for a 2-year period, during which the offender is at risk of the sentence being executed.
5 Introduced in 1915.
6 In Germany, suspended sentences were introduced in 1953 and currently around two-thirds of all prison sentences are suspended (Meier, 2003–4, p. 227).
7 Introduced in 1993.
8 Introduced in 1954.
9 The 1957 report concluded: ‘The suspended sentence is wrong in principle and to a large extent impracticable. It should not be adopted, either in conjunction with probation or otherwise’ (Home Office, 1957, Appendix D, para. 23(b)).
10 This new power was introduced by the Criminal Law Act 1978 (UK), but did not come into force until 1982. This was possibly due to concerns by the Home Office that ‘there can be no...

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


13 Clause 10 of the Criminal Justice and Immigration Bill 2006–07 to 2007–08 (UK), proposing this amendment to s 189 of the Criminal Justice Act (2003), was removed prior to the Bill’s enactment following opposition by the House of Lords to its inclusion.

14 Conditional sentences of imprisonment were introduced by Bill C-41, now SC 1995, c 22, proclaimed in force on September 3, 1996, amending the Criminal Code, RSC 1985, c C-46. Amendments to the conditional sentencing regime were made by Bill C-51, An Act to amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act, SC 1999, c 5. The relevant sections came into force on July 1, 1999.

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


18 See generally Crimes (Sentencing Procedure) Act 1999 (NSW), s 12; Penalties and Sentences Act 1992 (Qld), Part 8; Crimes (Sentencing) Act 1988 (SA), s 38; Sentencing Act 1995 (NT), s 40; Sentencing Act 1997 (Tas), s 24; Sentencing Act 1991 (Vic), s 27; Sentencing Act 1995 (WA), Part 11; Crimes (Sentencing) Act 2005 (ACT), s 12.

19 See for example, Sentencing Act 1991 (Vic), s 1(d) (the purposes of this Act are … ‘to prevent crime and promote respect for the law by’ providing for sentences that are intended to deter, rehabilitate, denounce and punish justly); Criminal Code (Canada), s 718 (“The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives …’).

20 A Canadian survey of judges found that 80% of the judges stated that they considered the views of the public before imposing a conditional sentence of imprisonment (Roberts 2002, p. 23; Roberts, Doob, & Marinos, 2000).

21 The exact nature of those submissions and their source are documented in detail in each of the council’s reports.

22 There are other issues in the literature and the news in relation to the operation of suspended sentences that can erode public confidence; for example, their use in relieving pressures on overcrowded prison systems when otherwise an executed sentence might have been warranted; their differential use in relation to white- and blue-collar offenders and others (see Albonetti, 1999). These were not the issues detected in Victoria.

23 They reported the findings of a study which found that offenders ranked suspended sentences of 6 months, 12 months and 3 years below a fine of $500 and below 3 years probation. These results need to be interpreted with caution due to the small number of respondents (15 prisoners).

24 This was the purpose behind the introduction of the new form of suspended sentence order, referred to as ‘custody minus’, in the UK that aimed to make the suspended sentence more
onerous: ‘A new suspended sentence that will be much more demanding than the existing suspended sentences and more widely available. An offender will have requirements to fulfil in the community, just like in a community sentence. If an offender breaches the requirements the presumption will be that the suspended prison sentence is activated’; see Home Office Press Office (November 21, 2003). ‘Delivering Justice For All—Criminal Justice Bill Receives Royal Assent’. Retrieved August, 14, 2008, from http://press.homeoffice.gov.uk/press-releases/Delivering_Justice_For_All_-Crim/version=1

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


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

References


