

SUSPENDED SENTENCES IN AUSTRALIA: UNCERTAIN, UNSTABLE, UNPOPULAR, AND UNNECESSARY?

ARIE FREIBERG*

I INTRODUCTION

In the international catalogue of sanctions, most forms of disposition are relatively well understood. Imprisonment is understood as a custodial sanction, albeit one that may be served in maximum, medium, or low security facilities, or partly in a prison and partly on parole, or periodically, for example, on weekends. The fine is generally recognized as a financial sanction, which may be paid immediately or by installments or may be adjusted for the means of the offender. Community, or noncustodial, sanctions such as community work, probation, or supervision are generally identifiable, though the type of work performed, the intensity of supervision, or the content of therapeutic programs may vary widely.¹

In contrast, the suspended sentence of imprisonment is widely divergent in its form, content, and, most importantly, in its place in a sentencing hierarchy. It has been described as a “chameleon” sanction,² a “paradox,”³ confusing,⁴ and “volatile and contradictory.”⁵

The history and practice of suspended sentences in a number of jurisdictions are discussed elsewhere in this issue.⁶ It is a sanction that has been the subject of

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* Emeritus Professor, Monash University, Melbourne Australia; Chair, Victorian and Tasmanian Sentencing Advisory Councils. My thanks to Sophie Norman for her assistance in preparing this article for publication and to Geoff Fisher for his statistical assistance.

1. See SARAH ARMSTRONG ET AL., INTERNATIONAL EVIDENCE REVIEW OF CONDITIONAL (SUSPENDED) SENTENCES: FINAL REPORT (2013).

2. LAW REFORM COMM’N (IR.), ISSUES PAPER: SUSPENDED SENTENCES 71 (2017) (citing David Riordan, The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective (2009) (unpublished Ph.D Thesis, University College Cork)).

3. Trevor Sanders & Julian V. Roberts, *Public Attitudes Toward Conditional Sentencing: Results of a National Survey*, 32 CANADIAN J. BEHAV. SCI. 199, 199 (2000).

4. David Thomas, *Developments in Sentencing 1964-1973*, CRIM. L. REV. 685, 688 (1974).

5. Arie Freiberg & Victoria Moore, *Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 101, 103 (2009) (citing Pat O’Malley, *Volatile and Contradictory Punishment*, 3 THEORETICAL CRIMINOLOGY 175 (1999)).

6. See Cheryl Webster & Anthony N. Doob, *Canada’s Conditional Sentence of Imprisonment: The Unfortunate Failure of a Bad Idea*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 163; Keir Irwin-

recent attention in Scotland⁷ and Ireland,⁸ among others, and has been of an extraordinary amount of interest in Australia, where it has been frequently and closely reviewed in the states of Victoria,⁹ New South Wales,¹⁰ the Australian Capital Territory,¹¹ and Tasmania.¹² Some of these states have limited its availability whereas others have abolished it completely.

No other sanction in Australia has led such a precarious life. Suspended sentences were introduced in South Australia in 1886 and survive to the present day.¹³ In New South Wales, the sentence was introduced in 1900 and survived until 1974, only to be reintroduced in 2000¹⁴ and again abolished in 2017.¹⁵ In Victoria, it was introduced in 1915, disappeared in 1958, was reintroduced in 1986, was modified in 1991, 1997, 2006, 2010, 2011,¹⁶ and was abolished in different levels of court in 2013 and 2014¹⁷ following a series of reports by the Victorian Sentencing Advisory Council.¹⁸ Despite recommendations to the

Rogers & Julian V. Roberts, *Swimming Against the Tide: The Suspended Sentence Order in England and Wales*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 137.

7. ARMSTRONG ET AL., *supra* note 1, at 31.

8. LAW REFORM COMM'N (IR.), *supra* note 2.

9. ARIE FREIBERG, PATHWAYS TO JUSTICE: SENTENCING REVIEW 2002 (2002); SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES: FINAL REPORT PART 1 (2006) [hereinafter SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES: FINAL REPORT PART 1]; SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES AND INTERMEDIATE SENTENCING ORDERS: SUSPENDED SENTENCES: FINAL REPORT PART 2 (2008) [hereinafter SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES: FINAL REPORT PART 2].

10. NEW SOUTH WALES LAW REFORM COMM'N, SENTENCING, DISCUSSION PAPER NO. 33 (1996); NEW SOUTH WALES SENTENCING COUNCIL, SUSPENDED SENTENCES (2011).

11. ACT LAW REFORM ADVISORY COUNCIL, A REPORT ON SUSPENDED SENTENCES IN THE ACT: REPORT 1 (2010); VICTIMS OF CRIME COMM'R, ACT HUMAN RIGHTS COMM'N, ISSUES PAPER: SUSPENDED SENTENCES (2017).

12. SENTENCING ADVISORY COUNCIL (TAS.), PHASING OUT OF SUSPENDED SENTENCES: FINAL REPORT NO. 6 (2016); TASMANIAN LAW REFORM INST., SENTENCING, FINAL REPORT NO. 11 (2008).

13. See Evan Smith, *Modern Diversion or Colonial Hangover? The History and Development of Suspended Sentences in South Australia*, 49 AUSTL. & N.Z. J. CRIMINOLOGY 240 (2016).

14. *Crimes (Sentencing Procedure) Act 1999* (N.S.W.) (Austl.) reintroduced this penalty in the belief that there was a gap in the range of options available to the court; see NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 10, at ¶ 9.62; see *Parente v R* [2017] NSWCCA 284 ¶ 88 for an explanation of this new Act.

15. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (N.S.W.) (Austl.) (effective September 2018).

16. In 1991, the maximum sentence was increased from one year to two years. *Sentencing Act 1991* (Vict.) s 27 (Austl.). The maximum sentence in the higher courts was later increased to three years. In relation to serious offenses, the penalty was first limited for use only in "exceptional circumstances." It was later wholly abolished for serious offenses, and then abolished for serious and significant offenses. See *Sentencing Amendment Act 2010* (Vict.) (Austl.); *Sentencing Further Amendment Act 2011* (Vict.) (Austl.).

17. It was first abolished completely in the higher courts, and then abolished in the Magistrates' Court.

18. SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES: INTERIM REPORT (2005); SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES: FINAL REPORT PART 1, *supra* note 9; SENTENCING ADVISORY COUNCIL (VICT.), SUSPENDED SENTENCES: FINAL REPORT PART 2, *supra* note 9.

contrary by the Tasmanian Law Reform Institute,¹⁹ and after a later report by the Tasmanian Sentencing Advisory Council,²⁰ Tasmania has recently moved to phase suspended sentences out over time.²¹

What is it about this sanction that makes it so contentious and fragile and the subject of so much academic and legislative attention? Why have so many jurisdictions either limited its use or removed it altogether from the sanction armamentarium? This article examines the ambiguous nature of the sanction itself, the extensive critiques made of its status and use, and the consequences of its abolition where that has occurred. It argues that, although there is persuasive evidence that the suspended sentence had positive effects on recidivism and that its abolition may have contributed to a rise in prison populations where it was abolished, criminological evidence only partly influenced sentencing reform. Public emotions stirred by egregious and controversial cases can more powerfully influence sentencing reform. This article suggests that the sanction's ambiguous and paradoxical nature, which made it so appealing to lawyers and offenders, was also its fatal weakness.

A. The Sentence

The suspended sentence of imprisonment goes by various names. In Australian federal legislation, it is called a recognizance release order²² and in relation to drug treatment orders, an unactivated term of imprisonment.²³ In Australia, it has a statutory foundation. It is generally regarded as a sentence of imprisonment that is imposed but not immediately executed. It may be partly suspended—that is, one part of the sentence may be served in custody with the remainder served in the community, thereby blurring the lines of what has been termed the “custody threshold.”²⁴ It may or may not have conditions attached and can vary in length from maximum periods of two years to indefinitely.²⁵ Its

19. TASMANIAN L. REFORM INST., *supra* note 12, at 120.

20. SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12.

21. *Sentencing Amendment (Phasing out of Suspended Sentences) Act 2017* (Tas.) (Austl.). It remains available in the Northern Territory, *Sentencing Act* (N. Terr.) ss 40–43 (Austl.) (allowing that sentences of no more than five years can be suspended); Queensland, *Penalties and Sentences Act 1992* (Queensl.) ss 143–151A (Austl.) (allowing suspension of sentences no longer than five-years); South Australia, *Criminal Law (Sentencing) Act 1988* (S. Austl.) s 38 (Austl.) (providing the court the option to suspend a sentence subject to the defendant entering into a bond); and Western Australia, *Sentencing Act 1995* (W. Austl.) ss 76–80 (Austl.) (allowing that sentences five years and under may be suspended but the period of suspension is limited to 24 months).

22. *Crimes Act 1914* (Cth) s 20(1)(b) (Austl.).

23. *Sentencing Act 1991* (Vict.) s 18Z (Austl.).

24. In Victoria, this option has proven to be particularly useful where an offender has served a period of time in custody, thus allowing the sentencer to recognize this period as part of the sentence without requiring any further period of time to be served.

25. For example, in New South Wales, the maximum period may be two years, whereas in the Australian Capital Territory, Tasmania, and South Australia, there are no restrictions on duration. *Crimes (Sentencing) Act 2005* (Austl. Cap. Terr.) s 12 (Austl.); *Crimes (Sentencing Procedure) Act 1999* (N.S.W.) s 12 (Austl.); *Criminal Law (Sentencing) Act 1988* (S. Austl.) s 38 (Austl.); *Sentencing Act 1997* (Tas.) s 24 (Austl.); see generally SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 22.

duration should not be longer than the sentence that would have been imposed had the sentence not been suspended.²⁶ It may have an operational period—namely the period over which the sentence is suspended—that may be different from the period actually suspended.²⁷ Noncompliance with conditions or breach by further offending may result in the suspended sentence being executed, though the degree of discretion left to the sentencer will vary widely between jurisdictions. The suspended sentence can, in some jurisdictions, be combined with other sentencing orders such as community service, probation, fines, rehabilitation programs, or forms of disqualification.²⁸

In Australia, the suspended sentence must be distinguished from a deferred sentence. The former sanction requires the imposition of a term of imprisonment, whereas a deferred sentence does not require the sentencer to impose any sentence at the time of the finding of guilt. Rather, once a court finds a person guilty, a court may impose a deferred sentence if it determines that such a period of deferral is in the offender's interests. At the end of the period of deferral, the offender must return to court for sentencing.²⁹

The suspended sentence must also be distinguished from conditional, intermediate, or noncustodial sanctions such as community-based orders (“CBOs”), or probation, where those sanctions are not imposed as substitutes for imprisonment. A distinction must be drawn between an *alternative* to imprisonment and a *substitute* for imprisonment. An alternative sentence is one that may be imposed by a court when a sentence of imprisonment is an option but may be considered too severe or inappropriate under the circumstances. A *substitute* for imprisonment occurs where a court has determined that a sentence of imprisonment is appropriate and imposes that sentence but substitutes another form of punishment, as seen in the use of suspended sentences of imprisonment. The difference is subtle but crucial.³⁰

Judging by its widespread use, the suspended sentence presented—and still presents—an important, beneficial, and attractive sentencing option to sentencers, defense counsel, offenders, and some community members.³¹ The

In practice, in Tasmania, suspended sentences are of relatively short duration and used in relation to relatively less serious offenses. See TASMANIAN LAW REFORM INST., *supra* note 12, at para 3.3.27, recommendation 10.

26. Compare proposals put forward by Irwin-Rogers & Roberts, *supra* note 6, to increase the length of the sentence or the period of suspension.

27. For example, a six-month sentence may be suspended for a two-year period, during which the offender is at risk of the sentence being executed. The operational period can, and often does, exceed the period of the sentence which is suspended.

28. See SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 23.

29. See ARIE FREIBERG, FOX AND FREIBERG'S SENTENCING: STATE AND FEDERAL LAW IN VICTORIA, 196–99 (3d ed. 2014); see also ARMSTRONG ET AL., *supra* note 1, at 11.

30. See Freiberg & Moore, *supra* note 5, at 107. In New South Wales, the current suspended sentence provisions are placed under the noncustodial alternatives heading, even though it is a sentence of imprisonment. See also ARIE FREIBERG & STUART ROSS, SENTENCING REFORM AND PENAL CHANGE: THE VICTORIAN EXPERIENCE chs. 6–7 (1999).

31. See LAW REFORM COMM'N (IR.), *supra* note 2, at 8; Kate Warner & Caroline Spiranic, *Jurors' Views of Suspended Sentences*, AUSTL. & N.Z. J. CRIMINOLOGY 47, 141 (2014).

sanction may have many positive attributes:³² it can avoid the harmful effects of full-time imprisonment and keep imprisonment numbers (and costs) down;³³ it can serve as a specific deterrent;³⁴ it can have a symbolic effect by allowing “for the seriousness of the offence and/or the offender’s conduct to be appropriately acknowledged by imposing a sentence of imprisonment, while at the same time allowing for mercy;”³⁵ it can provide an incentive for offenders to plead guilty; and it can be especially suitable for those offenders who have committed a serious offense but who may be first-time offenders, have mental health problems, have family responsibilities, are employed, or have stable accommodation, as well as for those who are young, remorseful, and have good prospects of rehabilitation and a low risk of reoffending.³⁶ Usually, a combination of factors will ultimately determine the decision to suspend a sentence.

Suspended sentences may also serve the multiple purposes of sentencing: retribution,³⁷ specific deterrence, denunciation, rehabilitation,³⁸ community protection, and incapacitation.³⁹ Its particular attraction appears to be that it can simultaneously—if not uniquely—combine the denunciatory and the mitigating elements of sentencing, “marking the gravity of the offence while simultaneously acknowledging some extenuating circumstances.”⁴⁰

32. Lorana Bartels, *An Examination of the Arguments For and Against the Use of Suspended Sentences*, 12 FLINDERS L.J. 119 (2010) (setting out these arguments in detail); see also SENTENCING ADVISORY COUNCIL (Tas.), *supra* note 12; VICTIMS OF CRIME COMM’R, ACT HUMAN RIGHTS COMM’N, *supra* note 11.

33. This impact is particularly notable in relation to short prison sentences. These were the manifest aims of the sanction in England, Wales, and Germany. See LAW REFORM COMM’N (IR.), *supra* note 2, at 27; Bartels, *supra* note 32, at 131.

34. Suspended sentences can serve as a specific deterrent through the threat of punishment—the Sword of Damocles theory. See David Tait, *The Invisible Sanction: Suspended Sentences in Victoria 1985-1991*, 28 AUSTL. & N.Z. J. CRIMINOLOGY 143 (1995); Bartels, *supra* note 32, at 128.

35. SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: DISCUSSION PAPER* para. 8.20 (2005).

36. See Lorana Bartels, *To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania*, 28 U. TAS. L. REV. 23 (2009).

37. The suspended sentence can be viewed as retributive through its stigmatic qualities and the possibility of a period in custody, particularly where it is a partly suspended sentence.

38. The suspended sentence may be rehabilitative where conditions are attached to the order. It may be considered to be rehabilitative in that by not sending offenders, particularly young offenders, to prison, their chances of being adversely influenced are reduced. See LAW REFORM COMM’N (IR.), *supra* note 2, at 27.

39. Although not in the same sense as an executed sentence of imprisonment, a suspended sentence has the potential to be considered incapacitating. Unlike the executed sentence of imprisonment, an offender given a suspended sentence is not held in custody and is free to commit further crimes in the community. However, such an offender remains theoretically incapacitated by the conditions of their suspended sentence. Cf. LAW REFORM COMM’N (IR.), *supra* note 2, at 26.

40. *Id.*

B. A Case Study: Abolition in Victoria and Subsequent Developments

The checkered history of the suspended sentence in the state of Victoria provides an excellent illustration of the vicissitudes of this sanction.

A form of suspended sentence was introduced in 1915 and remained relatively-seldom used until the late 1950s, when it quietly disappeared.⁴¹ It was reintroduced in the mid-1980s as a sanction that would support the principle that imprisonment would remain a sanction of last resort.⁴² In 2002, I published a review of sentencing that criticized the suspended sentence on many of the same grounds outlined in Part II of this article.⁴³

As often occurs, sentencing reform was precipitated by an egregious case that attracts intense media coverage and captures the public attention. In this instance, it was a case of a young man, Sims, who illegally entered a woman's apartment in the early morning of a summer's night and committed lingual and digital rape as well as indecent assault. Sims was sentenced to two years and nine months' imprisonment, suspended for three years. The sentence was upheld on appeal by a two-to-one majority in the Supreme Court of Victoria.⁴⁴ This sentence was condemned in the media and sparked public protests in front of Victoria's Parliament House.⁴⁵ Responding to the intense public pressure, the then-Attorney General requested advice from the newly established Sentencing Advisory Council on the use of suspended sentences, noting in particular the community's concern.⁴⁶

Over the next four years the Council conducted extensive consultations and produced a number of papers and two final reports⁴⁷ which led first to limitations in the use of suspended sentences and ultimately to their complete abolition in 2014. The first tranche of reforms—which reflected community concern about the seriousness of the Sims case—restricted the use of suspended sentences by requiring courts to take into account, when deciding whether or not to suspend the sentence, such factors as the capacity of the sentence to deter, denounce, and reflect the gravity of the offense, the offender's response to any previous suspended sentences, and the risk that the offender would

41. This took the form of allowing the Governor to extend mercy to an offender under the age of twenty-five who was under a sentence of imprisonment by releasing the offender on a recognizance to be of good behavior. *Crimes Act 1915* (Vict.) s 533 (Austl.).

42. *Penalties and Sentences Act 1985* (Vict.) (Austl.); see FREIBERG, *supra* note 9.

43. FREIBERG, *supra* note 9, at ch. 4.

44. *Director of Public Prosecutions v Sims* [2004] VSCA 129 (Austl.).

45. Some 10,000 people attended a rally on the steps of parliament.

46. See Freiberg & Moore, *supra* note 5, at 102. Interestingly, the Attorney-General did not request a review of sentencing for sexual offenses.

47. SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES IN VICTORIA: A PRELIMINARY INFORMATION PAPER* (2005); SENTENCING ADVISORY COUNCIL (VICT.), *supra* note 35; SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: INTERIM REPORT*, *supra* note 18; SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: FINAL REPORT PART 1*, *supra* note 9; SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: FINAL REPORT PART 2*, *supra* note 9.

reoffend during the operational period of the sentence.⁴⁸ A 2010 monitoring report by the Sentencing Advisory Council showed that under three offenses for which there were sufficient data, there had been no significant changes in the use of the sentence.⁴⁹ The report resulted in further restrictions on the use of the sanction in 2010 that prevented courts from imposing it for “serious” offenses,⁵⁰ and again in 2011 for “significant” offenses.⁵¹ Further criticisms of the suspended sentence by both major political parties ultimately resulted in the abolition of the suspended sentence in the higher courts in 2013 and in the Magistrates’ Court in 2014.⁵²

The history of its replacement is equally illuminating with respect to the volatility of sentencing and the effect of media coverage and political sensitivities. Prior to the abolition of suspended sentences, Victoria’s sentencing hierarchy, ranked in order from most serious to least serious, included: imprisonment, a combined custody and treatment order,⁵³ an intensive correction order,⁵⁴ the suspended sentence,⁵⁵ a CBO,⁵⁶ a fine, and at the bottom of the hierarchy, conditional or unconditional discharges, dismissals, and adjournments.

In 2012, the community-correction order (“CCO”) was introduced to abolish the CBO, the intensive correction order, and the combined custody and treatment order. It was intended to occupy a central place in the sentencing hierarchy between custodial and financial sanctions and to be a flexible option serving punitive, rehabilitative, deterrent, and protective purposes. Originally, it could be imposed for a maximum of two years for a single offense or five years for multiple offenses and could be combined with 3 months’ imprisonment in the Magistrates’ Court. In the higher courts, the maximum length was equal to the maximum penalty of imprisonment plus 3 months’ imprisonment. The order

48. See *Sentencing (Suspended Sentences) Act 2006* (Vict.) (Austl.); SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: FINAL REPORT PART 1*, *supra* note 9; Freiberg & Moore, *supra* note 5.

49. SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES IN VICTORIA: MONITORING REPORT* (2010).

50. *Sentencing Amendment Act 2010* (Vict.) (Austl.). “Serious offences” included offenses such as murder, manslaughter, serious personal injury, serious sex offenses, sex offenses against children, and others. See *Sentencing Act 1991* (Vict.) s 3 (Austl.).

51. *Sentencing Further Amendment Act 2011* (Vict.) (Austl.). A “significant offence” included serious injury offenses, aggravated burglary, arson, and certain serious drug offenses.

52. *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vict.) (Austl.).

53. Such an order was available for all imprisonable offenses where drunkenness or drug addiction has contributed, with a maximum term of one year. It was a form of partly suspended sentence.

54. Such an order was available for all imprisonable offenses for a maximum of one year, requiring intensive supervision. It was a substitute sentence.

55. The suspended sentence was limited in length to a maximum of three years in the higher courts and two years in the lower court.

56. The CBO was an intermediate, noncustodial order that could be combined with a term of imprisonment of three months for a maximum of two years with conditions of community service, supervision, education, or other conditions as deemed necessary.

contained a number of core and optional conditions.⁵⁷ Breach of a CCO is an offense. On breach, a court may cancel the order and resentence the offender for the original offense, or the court may vary the order, confirm it, or make no further order. Unlike the suspended sentence, there is no presumption or requirement that the offender be sentenced to imprisonment.

In 2014, partly in response to rapidly rising prison populations, legislation was introduced to encourage greater use of CCOs, in particular as an alternative to suspended sentences.⁵⁸ The maximum term of imprisonment that could be combined with a CCO was increased to two years.⁵⁹ In December 2014, the first guideline judgment handed down in Victoria advised sentencers as to the appropriate use of the CCO. It stated, among other matters, that a CCO could be used in relation to offenses that had previously received a sentence of imprisonment.⁶⁰ This produced intense media criticism fueled by the opposition conservative parties alleging that the CCO and the courts were soft on crime. In response, the maximum period of imprisonment that could be combined with a CCO was reduced to one year, the use of CCOs in relation to some serious offenses was abolished or restricted, and the maximum length of the CCO in the higher courts was reduced to five years.⁶¹

As this catalogue of change indicates, the CCO itself has proved to be a volatile sanction, subject to as much criticism and political pressure as the suspended sentence. The consequences of these changes are discussed in Part II below.

II CRITIQUE

It is not my intention to balance the advantages and disadvantages of suspended sentences. A brief summary of the former is provided above.⁶² Further analysis can be seen from Bartels who has comprehensively catalogued

57. Examples of the former include conditions to not commit an imprisonable offense during the currency of the order, to report to and receive visits from a community corrections officer during the period of the order, report to a community corrections centre within 21 days of the order, report any change of address or employment, not leave the state without permission, and comply with any direction necessary to ensure compliance with the order. Examples of the latter include unpaid community work up to 600 hours, treatment and rehabilitation, supervision, non-association, residence restriction or exclusion, place or area restriction, curfew, alcohol exclusion, judicial monitoring, residential conditions, a forfeitable bond, and electronic monitoring.

58. *Sentencing Act 1991* (Vict.) s 36(2) (Austl.) (“[W]ithout limiting when a community correction order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment.”).

59. *Sentencing Amendment (Emergency Workers) Act 2014* (Vict.) s 18(1) (Austl.).

60. *See Boulton v The Queen* [2014] VSCA 342 (Austl.).

61. *Sentencing (Community Correction Order) And Other Act Amendment Act 2016* (Vict.) (Austl.).

62. *See supra* Part I A.

their pro and cons, concluding in favor of their retention.⁶³ My own views—reflected in my 2002 review of sentencing⁶⁴ and as chair of both the Victorian and Tasmanian Sentencing Advisory Councils, whose reviews resulted in the abolition, or pending abolition, of suspended sentences in those jurisdictions—are less favorable. The following critique provides a personal and Australian perspective on this sanction.

A. Ambiguous Place in Sentencing Hierarchy

In some jurisdictions the sanctions available to the courts are set out in a hierarchy of seriousness, with imprisonment being the most serious, and unconditional or conditional dismissals, adjournments, or good behavior bonds as the least intrusive.⁶⁵ Sentencers are directed by statute not to impose a sentence that is more severe than necessary to achieve the purpose or purposes for which the sentence is imposed.⁶⁶ Imprisonment is generally regarded as a sanction of last resort. This is based on both the principles of proportionality and parsimony.

However, the suspended sentence occupies an ambiguous position in the hierarchy. Imprisonment is generally understood as a custodial sanction requiring an offender to spend at least some time in confinement, but the fact that those receiving a suspended sentence of imprisonment need not spend any time in custody can mean that the sanction is regarded as equivalent to a good behavior bond or similar low-level conditional order. This impression can persist despite the fundamental and substantial differences between the two sanctions with regard to the consequences of violating its conditions. Despite judicial pronouncements to the contrary, the threat of punishment is not considered to be the equivalent of actual imprisonment.⁶⁷

63. See Bartels, *supra* note 32; see also LAW REFORM COMMISSION (IR.), *supra* note 2; ARMSTRONG ET AL., *supra* note 1 (comprehensive reviews).

64. FREIBERG, *supra* note 9.

65. See, e.g., *supra* Part I B.

66. See, e.g., *Sentencing Act 1991* (Vict.) s 5(3) (Austl.).

67. See SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: INTERIM REPORT*, *supra* note 18, at 19; SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 11; LAW REFORM COMM'N (IR.), *supra* note 3, at 71; Bartels, *supra* note 32, at 142; Warner & Spiranovic, *supra* note 31, at 142. Determining equivalence is highly problematic and may require gauging judicial, victims', and offenders' views or those of the public. See Chloe Leclerc & Pierre Tremblay, *Looking at Penalty Scales: How Judicial Actors and the General Public Judge Penal Severity*, 58 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 354 (2016); Leslie Sebba & Gad Nathan, *Further Exploration in the Scaling of Penalties*, 23 BRITISH J. CRIMINOLOGY 221 (1984). In this context, much depends upon the amount of weight given to the threat of punishment.

B. Disproportionate and Incommensurate

In Australia, the suspended sentence is ranked as being equivalent in severity to a sentence of imprisonment.⁶⁸ It should, in theory, then be an appropriate sanction for any offense that warrants a sentence of imprisonment. In practice, this proposition has not been found to hold.

First, the community and victims do not consider the sentence to be commensurate with the seriousness of offenses such as sexual assault and other offenses of personal violence.⁶⁹ Independent of the pure concept of desert, the suspended sentence appears to serve a different function than an executed sentence of imprisonment. Sentences of imprisonment are not fungible or directly interchangeable. For some types or classes of offense, the suspended sentence does not satisfy all of the emotional requirements of punishment, such as denunciation.⁷⁰ These particular objections to suspended sentences resulted in a number of restrictions in the use of the sanction,⁷¹ sometimes as ends in themselves and sometimes as steps on the path towards complete abolition. In Victoria, the *Sentencing (Suspended Sentence) Act 2006* required a court to consider, among other factors, the effect of the crime on the victim, deterrence, and the need to “ensure that the sentence adequately manifests the denunciation by the court of the type of conduct in which the offender engaged.”⁷²

Second, the sentence may turn out to be disproportionately severe in cases where it was inappropriate to impose the sentence in the first instance, but strict

68. A suspended sentence should only be imposed if an executed sentence of imprisonment of equivalent length is warranted, even though a sentencer may be aware that immediate imprisonment is, in reality, more severe.

69. See Freiberg & Moore, *supra* note 5, at 112.

70. See Julian V. Roberts, *Conditional Sentencing: Sword of Damocles or Pandora's Box?*, 2 CANADIAN CRIM. L. REV. 183, 191 (1997). Punishment must be understood as more than a legal/rational response to crime but must also take into account its affective or emotional dimensions. Arie Freiberg, *Affective versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice*, 3 PUNISHMENT & SOC'Y 265 (2001). In Victoria, the *Sentencing Act 1991* (Vict.) s 5(1)(d) (Austl.) states that one of the aims of sentencing is “to manifest the denunciation by the court of the type of conduct in which the offender engaged.” See also *Sentencing Act* (N. Terr.) s 5(1)(d) (Austl.); *Penalties and Sentences Act 1992* (Queensl.) s 9(1)(d) (Austl.).

71. For example, in the Northern Territory, it is not available for sexual offenses, violent offenses, or aggravated property offenses (with home detention only). *Sentencing Act 1995* (N. Terr.) ss 78F (wholly suspended sentences prohibited), Division 6A, 78D, 78DG (wholly suspended sentences prohibited), 78B (Austl.). In South Australia, it is not available for manslaughter, causing serious harm, organized crime, or trafficking in controlled drugs. *Criminal Law (Sentencing) Act 1988* (S. Austl.) s 38 (Austl.). In Victoria, before the suspended sentence was abolished, it was not available for offenses involving “carrying a firearm when committing an indictable offence” or “carrying an offensive weapon when committing a sexual offence.” *Crimes Act 1958* (Vict.) ss 31A, 60A (Austl.). In Tasmania, the Sentencing Advisory Council did not consider it to be used inappropriately and recommended against offense-based restrictions. SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 15–16; see also TASMANIAN LAW REFORM INST., *supra* note 12, at recommendation 10.

72. *Sentencing (Suspended Sentences) Act 2006* (Vict.) (Austl.) (emphasis added).

requirements on breach, where required, may result in an offender being subsequently sentenced to imprisonment.⁷³

C. Illogical or Conceptually Incongruous

The process of imposing a suspended sentence in Australia is said to be illogical, conceptually incongruous, or paradoxical. First, it requires a sentencer to decide that a sentence of imprisonment is warranted. Then, by reconsidering all the circumstances of the case and attributing double weight to all the factors relevant to both the offense and the offender, the sentencer must decide that actual service of the sentence is not required.⁷⁴ A more logical approach might suggest that if all the circumstances of the case were included in the initial consideration of the appropriate sentence—in particular, mitigating factors—a noncustodial sanction would more likely be imposed in the first place. Having to decide that no sentence other than imprisonment is appropriate and then to decide again, on the same facts, that executing that sentence is inappropriate confuses the concepts of relevance and weight. Both should be considered only once.

D. Perceived as Untruthful

The suspended sentence has been criticized on the grounds that it is a misleading sanction in that it purports to be a sentence of imprisonment, while in reality it is anything but. The phrase “walks free” is immensely popular in public discourse and the media. The disparity between the judicial perception of the suspended sentence as a real or significant punishment,⁷⁵ appropriate for the most serious offenses, and the public’s view that an offender has, by these means, escaped their due punishment, creates the perception that the courts are somehow being disingenuous or fraudulent, saying one thing and doing another.⁷⁶ This has on more than one occasion, and in a variety of contexts, produced calls for more “truth in sentencing.”⁷⁷

The disparity between what the courts may be required to do on breach and what they actually do reinforces this perception. It might be expected that, following a breach of an order suspending the execution of a term of imprisonment, the offender would be imprisoned. In some jurisdictions, there is

73. See Bartels, *supra* note 32, at 168; see *infra* Part II F (inflationary).

74. See *Dinsdale v The Queen* [2000] HCA 54 at 74, 86 per Kirby J (Austl.); see also Mirko Bagarić, *Suspended Sentences and Preventative Sentence: Illusory Evils and Disproportionate Punishments*, 22 U.N.S.W. L.J. 535 (1999). A similar argument has been made in respect of comparable Canadian provisions. See Webster & Doob, *supra* note 6.

75. *Elliott v Harris [No 2]* (1976) 13 SASR 516, 527 (Austl.).

76. See JENNY PEARSON & ASSOCS. PTY LTD, JUSTICE STRATEGY UNIT: ATTORNEY-GENERAL’S DEP’T (S. AUSTL.), REVIEW OF COMMUNITY BASED OFFENDER PROGRAMS: FINAL REPORT 40 (1999); SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 13; SENTENCING ADVISORY COUNCIL (VICT.), *supra* note 18, at paras. 2.3, 2.7; Freiberg & Moore, *supra* note 5, at 108.

77. See Arie Freiberg, *Truth in Sentencing?: The Abolition of Remissions in Victoria*, 16 CRIM. L.J. 165 (1992).

a presumption that the sentence of imprisonment must be reinstated, but there are often exceptions to that rule that result in the non-execution of the sentence.⁷⁸ As well, courts may have a number of options other than imprisonment on breach, such as ordering home detention or intensive correction, imposing a fine, substituting a new suspension period, extending the operational period, or even resentencing the offender, further eroding its credibility in the eyes of the community.⁷⁹

E. Discriminatory

Many of the factors that warrant the imposition of a suspended sentence, such as good employment history, lack of prior convictions, and a stable family background, are those that are more likely to be found in middle-class offenders than other demographic groups. It has been argued that the sentencing of white collar crimes sometimes requires resolving the paradox of so-called bad crimes committed by so-called good people. The former refers to major frauds, offenses involving the abuse of trust, environmental crimes, corporate crime, consumer frauds, and the like, whereas the latter refers to offenders who have no prior convictions but whose criminal activity spanned long periods of time. Such offenders may be considered to be people of good character who will suffer a number of other collateral consequences of conviction such as loss of employment, disqualification from office or from a profession, loss of pension rights, or public humiliation and shame. For them, the process is the punishment. In such cases the sentencing dilemma may be resolved by the imposition of a suspended sentence: a symbolically severe sanction with no real penal substance.⁸⁰

Paradoxically, the suspended sentence has been found to discriminate against Indigenous offenders in Australia.⁸¹ Indigenous offenders are grossly overrepresented in the criminal justice system: in 2016 they were 12.5 times more likely to receive a prison sentence than non-Indigenous people and 11 times more likely to be held in prison on remand awaiting trial and sentencing. Although they make up around 2% of the population, they constitute around

78. For example, some jurisdictions will not reinstate the sentence of imprisonment where the failure to comply was trivial in nature, or there were “good reasons” for the failure to comply, or it would be unjust to do so. *See, e.g., Crimes (Sentencing Procedure) Act 1999* (N.S.W.) s 98(3)(a) and (b) (Austl.).

79. In New South Wales, only 59% of those who breached their order in 2012 were required to serve the sentence of imprisonment; 21% received an intensive correction order or home detention while 16% remained subject to a suspended sentence. NEW SOUTH WALES LAW REFORM COMM’N, REPORT 139: SENTENCING para. 10.18 (2013).

80. *See* Arie Freiberg, *Sentencing White-Collar Criminals* (2000) (unpublished paper); *see also* ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* (2d ed. 1995); Celesta A. Albonetti, *The Avoidance of Punishment: A Legal-Bureaucratic Model of Suspended Sentences in Federal White-Collar Cases Prior to the Federal Sentencing Guidelines*, 78 SOC. FORCES 303 (1999); *compare* Bartels, *supra* note 32, at 164–65 (finding no evidence of such bias in Tasmania).

81. *See* AUSTRALIAN LAW REFORM COMM’N, REPORT 133: PATHWAYS TO JUSTICE—AN INQUIRY INTO THE INCARCERATION RATE OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (2018).

27% of the Australian prison population.⁸² In 2015–2016, in New South Wales, 8.5% of Indigenous defendants received a suspended sentence compared to 6.3% of non-Indigenous offenders; in Queensland, 5.5% received such a sentence compared with 4.5% of non-Indigenous offenders.⁸³ Following the logic of the previous paragraph, this may appear, on its face, to be favorable to Indigenous offenders. However, the Australian Law Reform Commission found that, in many cases, the suspended sentence was imposed in regional and remote areas because of a lack in the availability of lower-order community-based sanctions, resulting in an escalation of the sentence. Coupled with the consequences of the breach, this escalation could result in more offenders going to prison. Nonetheless, the Commission recommended that, in the absence of better access to community-based sentences, suspended sentences should not be abolished, despite their numerous shortcomings.⁸⁴

F. Inflationary

In theory, the suspended sentence should divert offenders from imprisonment. In a properly functioning sentencing system, each suspended sentence should result in one fewer person taken into custody. However, the evidence is to the contrary due to the net-widening and sentence-escalation effects of the suspended sentence. This can occur for three reasons. First, suspended sentences replace lower order sanctions such as CBOs, fines, or even conditional adjournments, rather than imprisonment.⁸⁵ Second, when an

82. *Id.* at 21, 26.

83. *Id.* at 264 n.198.

84. AUSTRALIAN LAW REFORM COMM'N, *supra* note 81, at 267–68. The Commission observed that, for some offenders, the suspended sentence provided a useful option as a “last chance” to avoid full-time custody. The Commission also found the suspended sentence to be appropriate for some female offenders for whom the few reporting obligations or onerous conditions of the suspended sentence made it suitable for those who have kinship and cultural obligations, more so than other types of community-based orders. *Id.* at 266.

85. From its re-introduction in 1985 in Victoria, the suspended sentence produced major changes in sentencing practices, particularly in the higher courts where they amounted to about 33% of all sentences. While the use of imprisonment did decrease, there was a greater decline in the use of low-end orders such as bonds, though this varied widely between offenses. *See* FREIBERG & ROSS, *supra* note 30, at 89, ch. 5; *see also* GEORGIA BRIGNELL & PATRIZIA POLETTI, NEW SOUTH WALES JUDICIAL COMM'N, SUSPENDED SENTENCES IN NEW SOUTH WALES: SENTENCING TRENDS AND ISSUES NO. 29 (2003) (finding that when introduced in New South Wales, suspended sentences displaced sentences such as community service orders); LIA MCINNIS & CRAIG JONES, NEW SOUTH WALES BUREAU OF CRIME STATISTICS & RESEARCH, TRENDS IN THE USE OF SUSPENDED SENTENCES IN NSW, ISSUE PAPER NO. 47 (2010) (finding that suspended sentences were being used instead of community service and good behavior bonds). A subsequent study in New South Wales confirmed McInnis and Jones' findings. The study found that a rise in the use of suspended sentences produced a rise in the number of offenders entering prison: for every 10 additional persons given a suspended sentence, 3.6 receive a full-time sentence of imprisonment partly due to the consequences of breaching the order. PATRICIA MENENDEZ & DON WEATHERBURN, NEW SOUTH WALES BUREAU OF CRIME STATISTICS & RESEARCH, THE EFFECT OF SUSPENDED SENTENCES ON IMPRISONMENT, ISSUE PAPER NO. 97 (2014); *see also* LAW REFORM COMM'N (IR.), *supra* note 2, at 55; Bartels, *supra* note 36; Bartels, *supra* note 32 (finding that first offenders are more likely to receive a wholly suspended sentence than a noncustodial order).

offender has breached a suspended sentence that was initially inappropriately imposed, the chances of that offender being sentenced to prison for that breach are increased, particularly in those jurisdictions where the execution of the sentence is mandatory, or nearly so.⁸⁶ Finally, there is the danger that, on account of the initial suspension, the ultimate sentence of imprisonment imposed is longer than it would have been had the sentence been immediately executed. This may occur despite the fact that, under Australian law, sentencers are specifically directed not to impose a sentence of imprisonment longer than is otherwise warranted due to its suspension.⁸⁷

G. Questionable Effectiveness

There are a number of ways in which the effectiveness of suspended sentences may be evaluated. First, do they decrease prisons populations? That is, do they in fact replace the sentence of imprisonment? Second, are they complied with? Third, are they a credible threat? Do they in fact act as a Sword of Damocles rather than a butter knife? Finally, are they effective in reducing crime through reducing recidivism?

1. Effect on Prison Populations

It is difficult to accurately measure whether suspended sentences affect imprisonment populations, as these are influenced by many factors such as crime rates, reporting, prosecution and conviction rates, sentencing policies such as mandatory and presumptive sentencing, remand in custody rates, and the availability of other sanctions.⁸⁸ This issue is discussed in more detail below.⁸⁹

2. Breach Rates

Breach rates for suspended sentences are difficult to determine accurately, particularly where the sentence was substantially unconditional. In this case, the only form of breach is through the commission of a further offense, which must

86. In the early days of the suspended sentence in Victoria, Tait found that the imprisonment rate decreased following its introduction, partly due to low breach rates and the fact that sentencers did not execute the sentence of imprisonment on breach. Tait, *supra* note 34; Bagaric, *supra* note 74; Don Weatherburn & Lorana Bartels, *The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia*, 48 BRIT. J. CRIMINOLOGY 667 (2008). Later changes that restricted sentencers' discretion on breach resulted in a higher activation rate on breach. NICK TURNER, SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES IN VICTORIA: A STATISTICAL PROFILE* (2007); Weatherburn & Bartels, *supra* note 86. Weatherburn has noted that, if an offender is caught breaching a bond, there is a 20% chance that he will go to prison, whereas if the offender is caught breaching a suspended sentence, there is a 70% chance that he will go to prison. Don Weatherburn, "Rack 'em, Pack 'em and Stack 'em": *Decarceration in an Age of Zero Tolerance*, 28 CURRENT ISSUES CRIM. JUST. 137, 147 (2016).

87. See, e.g., *Sentencing Act 1991* (Vict.) s 27(3) (now repealed) (Austl.). Tait found an inflation rate of 50% in Victoria, Tait, *supra* note 34, although Bartels did not find any evidence of sentence inflation in Tasmania, Bartels, *supra* note 36. See also LAW REFORM COMM'N (IR.), *supra* note 2, at 55.

88. See Bartels, *supra* note 32, at 141.

89. See *infra* Part II I.

be detected and prosecuted. Where the suspended sentence is conditional, breaches are likely to be more common and more likely to be detected due to the closer supervision of the offender by correctional authorities.

The Australian evidence on breaches is equivocal. In Victoria, of those who received a suspended sentence between 2000 and 2002, 27.5% breached their orders in the following five years. Of those who breached, around 62.8% had their original sentence restored, which amounted to some 17.2% of all persons who had received a suspended sentence having their sentence wholly or partly restored.⁹⁰ A New South Wales study found that around 27% of offenders given a suspended sentence with supervision breached their order, and around 22% who were given an unsupervised suspended sentence breached their order.⁹¹ A Tasmanian study of breach rates for fully suspended sentences imposed by the Supreme Court found that 34% had breached their order by committing an imprisonable offense.⁹²

3. Activation Rates

Not only is the evidence of breach rates problematic, but there have been concerns about the actions taken on breach. Bartels, for example, found in an early study that in Tasmania, breach action was taken in only 5% of cases.⁹³ A later study found that only 55% of offenders who had breached their sentence were subject to breach action. Of those actioned cases, over half were required to serve a period of imprisonment: 42% were activated in full and 13% were partially activated or a lesser sentence of imprisonment was imposed.⁹⁴ In the Supreme Court in the Australian Capital Territory, only 26% of the 23 breaches in 2009 were activated in whole or in part.⁹⁵ In New South Wales, the activation rate between 2000 and 2010 appeared to be around 70–75%.⁹⁶

The relatively low activation rates on breach, often due to the fact that a suspended sentence was not warranted in the first place, adds to the cynicism of the public, which regards the offender as having been leniently dealt with a second time and further escaping their due punishment. Failure to act on breaches may also undermine the purported deterrent effects of suspended sentences if both offenders and the public come to believe that imprisonment is not the inevitable, or even the probable, consequence of a breach.⁹⁷

90. TURNER, *supra* note 86, at 13.

91. NEW SOUTH WALES SENTENCING COUNCIL, *supra* note 10, at para. 3.15.

92. SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at ix.

93. Bartels, *supra* note 32, 134.

94. SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 24.

95. VICTIMS OF CRIME COMM'R, ACT HUMAN RIGHTS COMM'N, *supra* note 11, at 2.

96. NEW SOUTH WALES SENTENCING COUNCIL, *supra* note 10.

97. See Lorana Bartels, *Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania*, 21 CURRENT ISSUES CRIM. JUST. 219 (2010); Freiberg & Moore, *supra* note 5.

4. Recidivism Rates

There are considerable difficulties in measuring reoffending rates generally and in determining the effect of sanction type in particular. The evidence supports that factors such as an offender's prior criminal history, rather than the type of sentence imposed, are better predictors of subsequent offending.⁹⁸ Recidivism, or reoffending, is a complex concept. It may be measured and evaluated by the number of offenses committed, the seriousness of the offenses committed, or the time taken following the initial sanction to commit the subsequent offense. Reoffending rates will be influenced by the nature of the offense⁹⁹ and it will often be difficult to determine the actual number of offenses committed. A less accurate, but more reliable, measure is the reconviction rate, which at least has the virtue of being observable and quantifiable.

The Victorian Sentencing Advisory Council conducted a study of reoffending following sentences imposed on adult offenders by the Magistrates' Court of Victoria, in which over 95% of all criminal cases are heard. This study followed offenders sentenced between July 2004 and June 2011 to determine whether they had been subsequently sentenced in any Victorian Court.¹⁰⁰ The study attempted to determine the effect of factors such as age, gender, offense, and sentence type on reoffending. Of the total number of sentences imposed, 7.8% were suspended sentences.¹⁰¹ Taking into account the effect of offender, offense, and prior offending characteristics, the study found that the likelihood of reoffending following imprisonment was 24.6% higher compared to wholly suspended sentences.¹⁰² The criminogenic effects of imprisonment or unmeasured characteristics used by sentencers in determining the sentence may explain these results.¹⁰³ The study also found that, after four years, the predicted reoffending rate for the "average" offender on a suspended sentence was around 32% compared with 37% for offenders who had been imprisoned.¹⁰⁴

A New South Wales study of time to first reconviction by those given suspended sentences and supervised bonds found no significant differences between the groups.¹⁰⁵ Another New South Wales study, which compared

98. See SENTENCING ADVISORY COUNCIL (VICT.), REOFFENDING FOLLOWING SENTENCING IN THE MAGISTRATES' COURT OF VICTORIA ix (2013). Research has found that while sentence type does have an effect on reoffending, that effect is relatively small compared with other factors. *Id.* at 9; DAVID TAIT, THE EFFECTIVENESS OF CRIMINAL SANCTIONS: A NATURAL EXPERIMENT. REPORT 33/96-7 TO THE CRIMINOLOGY RESEARCH COUNCIL (2001).

99. Some offenses, such as sexual offenses, may be less likely to be reported to the police.

100. Victorian Courts include the Supreme and County Courts, which hear indictable offenses; the Magistrates' Court, which hears summary offenses as well as indictable offenses triable summarily; and the Children's Court.

101. 4.8% were immediate custodial sentences, 6.3% were community-based orders, 54.7% were fines, and 15% were low-end orders. SENTENCING ADVISORY COUNCIL (VICT.), *supra* note 98, at 19.

102. *Id.* at 25.

103. *Id.* at 26.

104. *Id.* at 29.

105. Bartels, *supra* note 32, at 129; Weatherburn & Bartels, *supra* note 86; ARMSTRONG ET AL., *supra* note 1, at 24. Judy Trevena & Don Weatherburn, *Does the First Prison Sentence Reduce the Risk*

suspended sentences with custodial sentences imposed in the Local (summary offenses) or District (indictable offenses) Court in 2002–2004, found similar reoffending rates and faster reoffending times for those with prior prison experience.¹⁰⁶

A Tasmanian study of offenders who had received a wholly suspended sentence found that after two years, 42% had reoffended compared with 44% for partly suspended sentences and 62% for offenders who had received an executed sentence of imprisonment.¹⁰⁷ In these terms, at least, the suspended sentence should be preferred to imprisonment.

H. Unpopular?

The suspended sentence speaks to diverse audiences which have reacted to them differently. To legal professionals, the sentence is attractive, comprehensible, flexible, and jurisprudentially defensible, once its complexities and nuances are understood. Its popularity is evidenced by its generally extensive application. However, to the lay public often influenced by media depictions of it as a sanction that lacks significant penal substance, it is perceived as a flawed disposition that fails to reflect their desire for meaningful and adequate punishment for serious crimes.

1. Judiciary And Counsel

The suspended sentence has been popular with the courts and counsel, providing them with another rung in the sanction hierarchy that sits between imprisonment and CBOs. Although Australian law requires the sentence to constitute a significant punishment, it has had a particular attraction to sentencers in that it allowed them to mark the seriousness of the offense while permitting a more merciful outcome—to have their cake and eat it too.¹⁰⁸ Perceptively, Bottoms observed,¹⁰⁹

[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.

of Further Offending?, 187 CONTEMP. ISSUES CRIME & JUST. BULL. 1 (2015), found no significant differences between the matched and suspended sentence group in the time to first new offense. The authors conclude that these results suggest that short custodial sentences exert no more deterrent effect than comparable community orders.

106. Rohan Lulham, Don Weatherburn & Lorana Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment*, 136 CONTEMP. ISSUES CRIME & JUST. BULL. 1 (2009); see also ARMSTRONG ET AL., *supra* note 1, at 24 (discussing Lulham, Weatherburn, and Bartels' New South Wales study and similar studies).

107. Lorana Bartels, *The Weight of the Sword of Damocles: A Reconviction Analysis of Suspended Sentences in Tasmania*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 72 (2009).

108. See Allan Manson, *Finding a Place for Conditional Sentences*, 3 CRIM. REP. 283 (1997).

109. A.E. Bottoms, *The Suspended Sentence in England 1967-1978*, 21 BRIT. J. CRIMINOLOGY 1, 20 (1981); see also Freiberg & Moore, *supra* note 5, at 108.

Surveys of judicial officers in Tasmania and New South Wales have found that they are generally supportive of suspended sentences because they were regarded as “filling a vital role in the sentencing hierarchy” and having “strong support in both courts for their retention,”¹¹⁰ although some judges have recognized that members of the public may not share their view about the severity of the sentence.¹¹¹

For defense counsel, the sentence provides an excellent compromise. They can concede the seriousness of the offense to the court while at the same time obtaining a disposition that spares their client the pains of imprisonment with its attendant disadvantages such as loss of liberty as well as possible loss of employment, accommodation, or family ties.

2. Use

The popularity of suspended sentences, as measured by their usage, has varied widely between jurisdictions depending upon matters such as the prerequisites for their imposition, the restrictions on their use, the level of court that imposes them, the degree of familiarity that the courts have with them, the courts trust in correctional authorities, and the other sentencing options available to them.

Tasmania has had the highest use of suspended sentences. The Tasmanian Sentencing Advisory Council found that over 35% of prison sentences imposed in the higher courts were fully suspended compared to the national average of around 17%.¹¹² In Victoria, prior to their abolition, around 30% of all sentences in the higher courts were suspended sentences of imprisonment.¹¹³ Similarly, Tasmania has the highest use of fully suspended sentences at the Magistrates Court-level in Australia (10.3%). Comparable rates in other Australian courts of summary jurisdiction were Northern Territory (5.7%), South Australia (5.6%), the Australian Capital Territory (5.6%), Victoria (4.9%), New South Wales (4%), Queensland (2.8%), and Western Australia (2.7%).¹¹⁴ In New South Wales, in 2016, 14.38% of sentences imposed in the District Court were

110. Lorana Bartels, *Sword or Feather: The Use and Utility of Suspended Sentences in Tasmania*, 109 (2008) (unpublished PhD Thesis, Univ. of Tasmania); see also KAREN GELB, CATHOLIC SOCIAL SERVICES VICTORIA, *THE PERFECT STORM? THE IMPACTS OF ABOLISHING SUSPENDED SENTENCES IN VICTORIA* 44 (2013) (finding, after consultations with a wide range of people, strong support for maintaining a full range of sentencing options); LAW REFORM COMM’N (IR.), *supra* note 2, at 28 (finding that the suspended sentence is considered a useful sanction for the purposes of specific deterrence, rehabilitation, denunciation, and avoiding prison); NEW SOUTH WALES LAW REFORM COMM’N, *supra* note 79, at 227; SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 3.

111. See *Latham v The Queen* (2000) 117 A Crim R 74 ¶ 32 (Austl.); *Nicholls v Police* [2003] SASC 303 ¶ 32 (Austl.); *R v Weaver* (1973) 6 SASR 265, 267 (Austl.); Bartels, *supra* note 32, at 146.

112. SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at viii.

113. *Sentencing Outcomes in the Higher Courts*, SENTENCING ADVISORY COUNCIL (VICT.), (Feb. 1, 2018), <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/sentencing-outcomes-higher-courts> [<https://perma.cc/V34C-GEQN>].

114. SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 16.

suspended sentences and of those, 4.52% were without supervision.¹¹⁵ In the Local Court, 2.72% of all sentences imposed were suspended sentences with supervision and 2.27% were without supervision, while full-time imprisonment amounted to 8.77% of all sentences imposed.¹¹⁶

3. Community and Victims' Attitudes

Public attitudes to criminal justice are important because public confidence in the law underpins the operation of the system as a whole. Public attitudes and community expectations influence government policies. A general perception that an offender convicted of a serious offense has walked free can place great pressure on legislatures to restrict or abolish the sentence if the case is egregious enough, at least as portrayed by unsympathetic or uninformed media. Loss of confidence can change governments themselves.¹¹⁷ Van Gelder et al. have argued that the greater the consistency between public values and opinions and the law, the greater the perceptions of legitimacy and ultimately compliance with the law.¹¹⁸ Judges in Australia are sensitive to public opinion, even though they may not consciously be aware of this or concede the influence of community pressure on their day-to-day decision-making.

Public views of the suspended sentence are mixed.¹¹⁹ Studies of Australian views of sentencing have found that victims of crime have ranked suspended sentences as the least severe community-based sentence, in comparison with judicial officers who ranked them more severely, sitting below home detention.¹²⁰

In its extensive review of suspended sentences in Victoria commencing in 2004, the Victorian Sentencing Advisory Council conducted consultations with

115. See *Court Criminal Statistics*, BUREAU OF CRIME STATISTICS & RESEARCH (N.S.W.), (May 2017), http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx [https://perma.cc/596E-BUAT].

116. *Id.*

117. See Freiberg & Moore, *supra* note 5, at 104 (discussing the impact that public perception can have on legislative decision-making).

118. See Jean-Louis van Gelder, Pauline Aarten, Willemijn Lamet & Peter van der Laan, *Unknown, Unloved? Public Opinion on and Knowledge of Suspended Sentences in the Netherlands*, 61 *CRIME & DELINQ.* 669, 673 (2015).

119. There are problems in accurately gauging “public opinion” or public attitudes about crime and sentencing. Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing*, in *PENAL POPULISM: SENTENCING COUNCILS AND SENTENCING POLICY* (Arie Freiberg & Karen Gelb eds., 2008).

120. See PEARSON, *supra* note 76. Recent studies in the Netherlands found that suspended sentences were regarded as typical of too-lenient sentencing, were detrimental to public confidence in the judiciary, did not amount to serious punishment, and were not severe enough to be effective. However, they also found that people with more knowledge of the sanction were more supportive of it. van Gelder et al., *supra* note 118; see also Pauline G.M. Aarten, Jean-Louis van Gelder, Willemijn Lamet, Matthias J. Borgers & Peter H. van der Laan, *Exploring Public Support for Suspended Sentences in the Netherlands*, 12 *EUR. J. CRIMINOLOGY* 188 (2014) (finding that people were more likely to support suspended sentences when they were perceived as having a punitive element).

members of the public.¹²¹ Some submissions viewed the sentence as a “slap on the wrist with a wet tissue paper,”¹²² not as a penalty or a deterrent. However, when given detailed information about the nature of the sentence together with vignettes, there was support for the suspended sentence, although many respondents were supportive of attaching conditions to the order to increase its punitive content. Some respondents viewed wholly suspended sentences as inappropriate for serious crimes of personal violence.

In Tasmania, a study of jurors’ views of suspended sentences found that they were generally supportive of the sanction, even in relation to some serious offenses. The study found that jurors’ aversion to sentences of imprisonment and a preference for noncustodial sanctions informed their views rather than support for the suspended sentence. Jurors were supportive of a transparent sanction that did not allow the offender a “let off,” or in other words, one that constituted a meaningful punishment.¹²³

For victims, the sanction was an inadequate response to the offense. The Sentencing Advisory Council review in Victoria found that some victims believed that the offender had escaped punishment while the victim and their family were left to suffer the consequences of the crime.¹²⁴ They did not believe that the courts had sufficiently taken the effect of the crime on the victim into account.¹²⁵

I. Unnecessary in Sentencing Scheme?

The suspended sentence provided another sentencing option for the courts—another rung in the sentencing hierarchy that served the purpose of possibly delaying some offenders’ inevitable journey to prison. Courts are usually in favor of more, rather than fewer, sentencing options, which give them more scope to exercise their discretion and tailor their sentencing to the myriad of individual circumstances of each case.¹²⁶

The abolition of suspended sentences raises the question of what sanction should replace them and what the consequences have been following their abolition. If the sentence has functioned as a true alternative to imprisonment, then one would expect that, following its abolition, the prison population would rise accordingly: every sentence previously suspended would become a sentence of imprisonment.

121. In this context it is important to note that the suspended sentence in Victoria did not allow for any conditions to be attached. See Freiberg & Moore, *supra* note 5, at 105–06.

122. SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: INTERIM REPORT*, *supra* note 18, at para. 2.9.

123. Warner & Spiranovic, *supra* note 31, at 157; see also SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 10.

124. See SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: FINAL REPORT PART 1*, *supra* note 9, at 5.

125. See Warner & Spiranovic, *supra* note 31, at 142.

126. See Bartels, *supra* note 32, at 126.

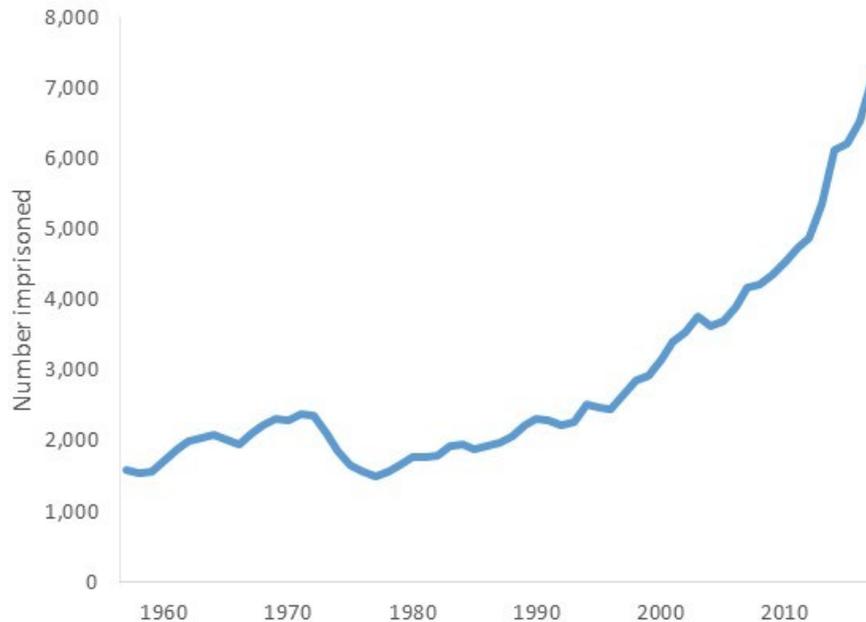
As noted above,¹²⁷ in Victoria, the CCO was intended to replace a significant proportion of suspended sentences. Victoria does not have a system of sentencing guidelines like that of the United Kingdom, but the legislature made it clear that CCOs were intended primarily to replace suspended sentences.¹²⁸

Understanding the changes in sentencing practices following the restriction and eventual abolition of suspended sentences in Victoria requires an understanding of changes in the overall prison population, which has increased dramatically since the early 1980s to the present day.¹²⁹

127. *See supra* Part I B.

128. *Sentencing Act 1991* (Vict.) s 36(2) (Austl.) (“[W]ithout limiting when a community correction order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment.”). This provision was introduced in 2014.

129. *See Victoria’s Prison Population*, SENTENCING ADVISORY COUNCIL (VICT.), (Feb. 1, 2018), <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/victoria-prison-population/> [<https://perma.cc/A3VF-FN4J>]. The imprisonment rate stood at 113 per 100,000 of the total population as of 2017, which is among the lowest in Australia. *See generally* Weatherburn, *supra* note 86 (regarding the rise of prison populations in Australia).

Figure 1: Victoria's prison population 1960–2017¹³⁰

In the late 1970s, Victoria's imprisonment numbers fell considerably. Before the introduction of suspended sentences in 1985, 53% of defendants sentenced in the higher courts received a sentence of imprisonment, which fell to 43% in 1997 and then returned to 53% in 2004.¹³¹ Thus, the ameliorative effect of the suspended sentence may have been short-lived.¹³²

The recent spectacular increase in prison population is due to a number of factors, of which rising crime rates only partly contributed.¹³³ The increase, particularly over the past four years, was also partly due to a significant increase in prisoners held on remand—that is, denied bail—which now amounts to around 35% of the prison population. Between June 2013 and June 2017, the remand population nearly doubled, from 1,139 to 2,224 people.¹³⁴ Most of the increase can be attributed to an increase in the number of people entering the

130. See *Victoria's Prison Population*, *supra* note 129, from which these numbers have been extracted.

131. SENTENCING ADVISORY COUNCIL (VICT.), *supra* note 35, at para. 5.6; SENTENCING ADVISORY COUNCIL (VICT.), *SUSPENDED SENTENCES: FINAL REPORT PART 2*, *supra* note 9, at para. 2.50.

132. See Bartels, *supra* note 32, at 137.

133. See SENTENCING ADVISORY COUNCIL (VICT.), *VICTORIA'S PRISON POPULATION 2005 TO 2016* (2016). Some of the increase can be attributed to an increase in offenses against the person, which tend to attract sentences of imprisonment.

134. CORRECTIONS, PRISON & PAROLE, VICTORIA STATE GOV'T, *MONTHLY TIME SERIES PRISONER AND OFFENDER DATA* (2018).

criminal justice system and the number of custodial sentences imposed since 2010–11, rather than increased sentence lengths.¹³⁵

To what extent did the abolition of suspended sentences contribute to this increase?¹³⁶ Victoria gradually abolished suspended sentences completely from September 1, 2013 in the higher courts and from September 1, 2014 in the Magistrates' Court.¹³⁷ As can be seen from Figure 2, wholly and partly suspended sentences decreased from 31.6% in 2008–09 to 2.1% in 2015–16 (619 to 38), a decline of 29.5 percentage points.¹³⁸ Over this time, the percentage of cases sentenced to imprisonment in the higher courts of Victoria had been steadily increasing from 48.2% to 65.1% (16.9 percentage points). Likewise, CBOs and CCOs increased from 6.3% to 20.9% (14.6 percentage points).¹³⁹ Based on these figures, imprisonment was slightly favored over the CCO as a replacement for suspended sentences.

The abolition of suspended sentences in the higher courts is likely to have resulted in more people going to prison, but given the relatively small annual number of suspended sentences imposed prior to their phase-out—approximately 600—the overall effect on the prison population would have been small and spread over a long period of time.

Focusing on the sharp decline in suspended sentences between 2011–12 and 2012–13 (9.6 percentage points), approximately two-thirds of these suspended sentences were replaced by imprisonment sentences, which rose by 6.8 percentage points, while the remaining one-third were replaced by the CBO and the CCO, which rose by 3.2 percentage points. The favoring of imprisonment over the CCO as a replacement for suspended sentences likely occurred because the suspended sentence became unavailable for “serious” and “significant” offenses after May 2011.¹⁴⁰

There was also a steep decline in suspended sentences in 2014–15 (6.2 percentage points) as a result of their full abolition from September 1, 2013.

135. See SENTENCING ADVISORY COUNCIL (VICT.), *supra* note 133, at x.

136. One analysis of the abolition of suspended sentences estimated that it could add approximately 5500 people to the corrections population. GELB, *supra* note 110. Gelb argued that the abolition of suspended sentences coupled with an overstretched correctional system had the potential to create a “perfect storm” in terms of the functioning of the state’s criminal justice system. GELB, *supra* note 110, at 1.

137. From November 1, 2006, wholly suspended sentences were only available in exceptional circumstances in relation to a number of statutorily defined “serious offences.” After May 1, 2011, they were abolished for “serious” and “significant” offenses.

138. This and the following figures do not show changes in other sentencing orders, which I believe did not have a significant effect on the interaction between the orders depicted here. The full range of options can be examined at *Sentencing Outcomes in the Higher Courts*, *supra* note 113, from which these figures have been extracted.

139. The number of orders in the higher courts is relatively low: there were 1008 sentences of imprisonment in 2007–08 and 1265 in 2016–17. CBOs and CCOs increased from 212 to 241 in that period, with a peak of 372 in 2014–15 and wholly or partly suspended sentences decreased from 644 to 39. SENTENCING ADVISORY COUNCIL (VICT.), *supra* note 113.

140. See *Sentencing Amendment Act 2010* (Vict.) (Austl.); *Sentencing Further Amendment Act 2011* (Vict.) (Austl.).

Unlike in 2012–13, the primary replacement for suspended sentences this time was the CCO, which increased by 5.2 percentage points while imprisonment remained steady. The final major decline in suspended sentences was 4.6 percentage points in 2015–16. This time, the suspended sentences were mainly replaced by imprisonment, which rose by 4 percentage points while CCOs remained steady.

Figure 2: Imprisonment sentences imposed in the Higher Courts post-abolition of suspended sentence¹⁴¹

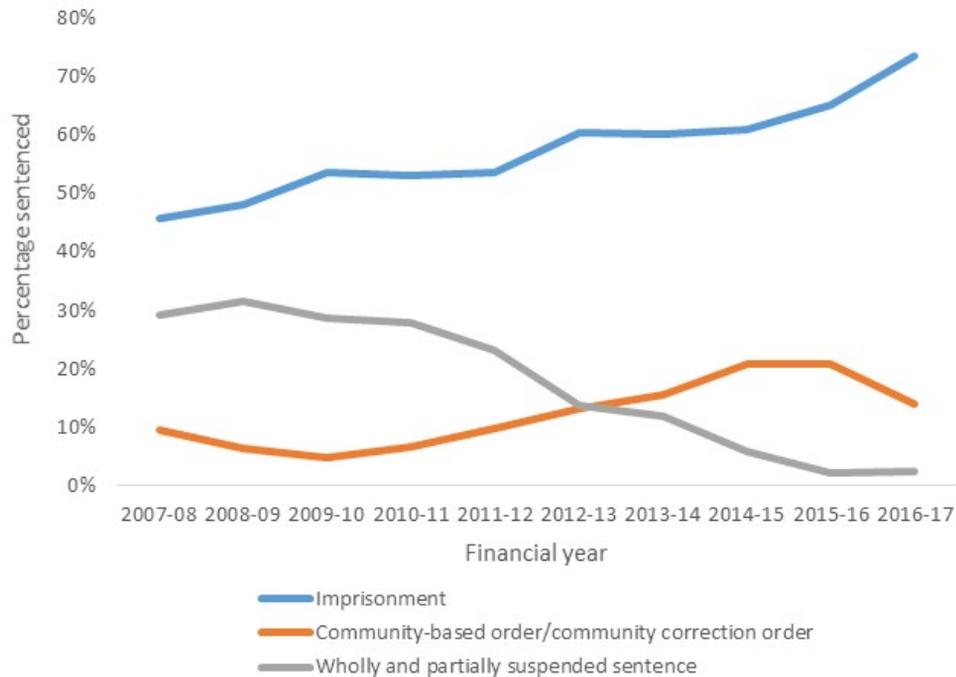


Figure 3 shows that in the Magistrates' Court there was also a fairly even division of sentences following the abolition of suspended sentences, which declined from 6.0% of all sentences in 2013–14 (prior to their abolition) to 0.5% in 2015–16 (following their abolition).¹⁴² In that period, imprisonment increased from 5.1% to 6.9% of all sentences (4670 to 6882 sentences), and CBOs and CCOs increased from 8.0% to 10.5% (7284 to 10,512). As with suspended sentences in the higher courts, a little over half of suspended sentences were replaced by imprisonment and half by CCOs.¹⁴³

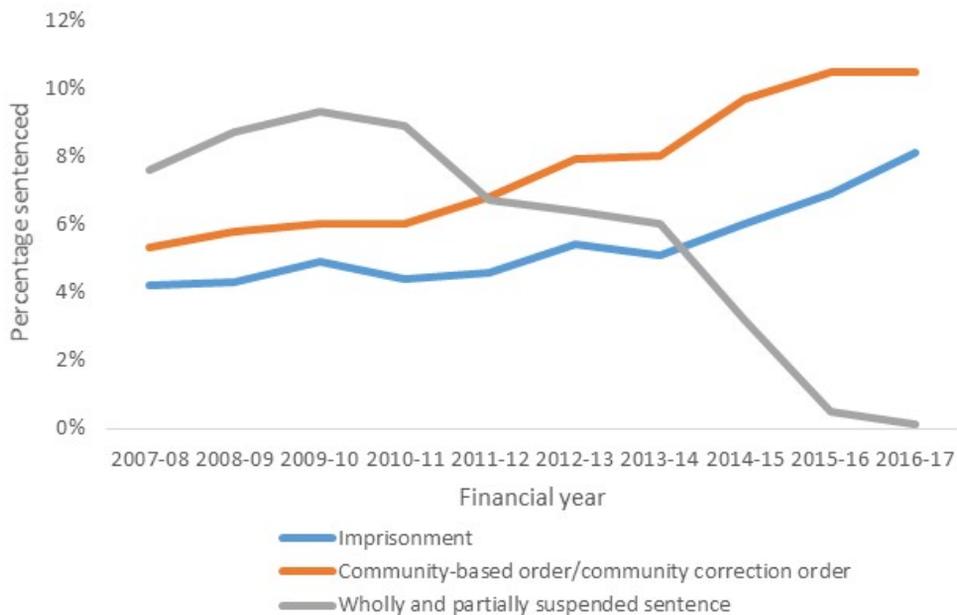
141. See *Sentencing Outcomes in the Higher Courts*, *supra* note 113, from which these figures have been extracted.

142. Declining from 5431 to 488 sentences. *Sentencing Outcomes in the Higher Courts*, *supra* note 113.

143. See *Sentencing Outcomes in the Higher Courts*, *supra* note 113. There is another factor that can explain the rapid decrease in the use of suspended sentences around 2010–11. Until that time, an

In relation to the prison population, with at least 5000 suspended sentences imposed annually in the Magistrates' Court prior to their abolition, the abolition of suspended sentences is likely to have resulted in substantially more people entering prison over a two-year period from September 2014. However, it is likely that the imprisonment sentences used to replace suspended sentences would have been relatively short, and as a result, the time spent in prison by these additional prisoners would be relatively short, perhaps served entirely on remand.

Figure 3: Community Based Orders and Community Correctional Orders imposed in the Magistrates' Court compared to wholly and partially suspended sentences¹⁴⁴



One of the most significant changes in sentencing practices was the use of the combination order. Whereas previously a CBO/CCO could only be combined with a prison term of three months, the increase to two years saw a

offender who was found guilty of a second or subsequent offense of driving while disqualified or suspended faced a mandatory minimum term of one month's imprisonment. Although the court had no discretion to impose any sentence other than imprisonment, it retained the power to suspend the sentence, which they did in over 54% of cases. SENTENCING ADVISORY COUNCIL (VICT.), *DRIVING WHILE DISQUALIFIED OR SUSPENDED: REPORT 13* (2009). As a result of recommendations made by the Sentencing Advisory Council, the mandatory sentence provision was repealed, which then provided the sentence with the full range of sentencing options. Many of the offenders who had previously received a suspended sentence received a fine instead. *See also* GELB, *supra* note 110, at 28.

144. *See Sentencing Outcomes in the Higher Courts*, *supra* note 113, from which these figures have been extracted.

dramatic increase in the use of such a measure,¹⁴⁵ which could be attributed to a number of factors. First, to some extent, it replaced the partly suspended sentence.¹⁴⁶ Second, it provided the courts with an opportunity to increase the punitive component of the mix to reflect the more serious nature of the offenses that came before the courts. Third, it allowed the courts to take into account lengthy periods of custody served on remand, which meant that no further period of imprisonment was required, while showing on the record that the offender had been sentenced to imprisonment. Fourth, it allowed the courts, rather than the parole board, to retain control of contraventions of the CCO. Finally, owing to the complex nature of the parole system in Victoria¹⁴⁷ and the tightening up of parole practices following a number of inquiries into parole,¹⁴⁸ sentencers preferred to use the combination sentence for sentences between 12 and 24 months, which allowed them, not the parole board, to determine the date of release. The combined CCO became, in effect, a form of court-ordered parole.¹⁴⁹ However, on March 20, 2017, the imprisonment component of the combination sentence was reduced from 24 months to 12 months, which will further affect sentencing practices following the abolition of the suspended sentence.

It would appear therefore that the abolition of suspended sentences resulted in more sentences of imprisonment being imposed, contributing in part to the massive increase in the Victorian prison population over recent years.

145. See Figure 4.

146. The Victorian Sentencing Advisory Council had found that short combination sentences had replaced some wholly and partly suspended sentences at both levels of court, but in the higher courts, combination sentences replaced sentences of imprisonment without a CCO. SENTENCING ADVISORY COUNCIL (VICT.), COMMUNITY CORRECTION ORDERS: THIRD MONITORING REPORT (POST-GUIDELINE JUDGMENT) (2016). The Council closely monitored the effect of the phasing out of suspended sentences and the introduction of the CCO. See SENTENCING ADVISORY COUNCIL (VICT.), COMMUNITY CORRECTION ORDERS IN THE HIGHER COURTS: IMPOSITION, DURATION AND CONDITIONS (2014); SENTENCING ADVISORY COUNCIL (VICT.), COMMUNITY CORRECTION ORDERS: SECOND MONITORING REPORT (PRE-GUIDELINE JUDGMENT) (2015); SENTENCING ADVISORY COUNCIL (VICT.), PAROLE AND SENTENCING: RESEARCH REPORT (2016) [hereinafter SENTENCING ADVISORY COUNCIL (VICT.), PAROLE AND SENTENCING: RESEARCH REPORT].

147. Under Victorian law, the court cannot impose a non-parole period for sentences of imprisonment under 12 months, has an option to do so for sentences between 12 and 24 months, and must do so for sentences over 24 months unless certain conditions apply. *Sentencing Act 1991* (Vict.) s 11 (Austl.).

148. See SENTENCING ADVISORY COUNCIL (VICT.), PAROLE AND SENTENCING: RESEARCH REPORT, *supra* note 146.

149. See SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at 116.

Figure 4: Comparing percentages of imprisonment combined with Community Correctional Order in the Magistrates' Court to the Higher Courts¹⁵⁰



In jurisdictions other than Victoria that have abolished or contemplated the abolition of suspended sentences, the alternatives have taken the form of various community orders, while accepting that an executed sentence of imprisonment would be the appropriate sanction for an offense that is so serious that neither a fine nor a community sentence can be justified.¹⁵¹ Tasmania has introduced legislation that would remove suspended sentences as a penalty and allow courts to impose CCOs and home detention in the alternative. However, unlike Victoria, Tasmania has decided to phase out suspended sentences over coming years rather than repealing them immediately.¹⁵² The CCO can be made for not more than two years and will replace community work and probation orders.¹⁵³ The legislation specifically provides that it will be appropriate to impose a CCO where a court “would otherwise have sentenced the offender to a wholly or partly suspended sentence of imprisonment.”¹⁵⁴

150. See *Sentencing Outcomes in the Higher Courts*, *supra* note 113, from which these figures have been extracted.

151. See, e.g., SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12, at xv.

152. *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas.) (Austl.).

153. The “special conditions” of the CCO include community work, attending educational and other programs, supervision by a probation officer, drug testing, assessment and treatment for drug and alcohol use, abstention from alcohol use, place restrictions, and others. See *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas.) s 42AP (Austl.).

154. *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas.) s 42AN (Austl.) (not yet in effect); see also *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas.) s 42AC(1) (Austl.) (establishing that a home detention order may be imposed if the court would

New South Wales has abolished suspended sentences, though the law has yet to come into effect. A new substitute sentence,¹⁵⁵ the intensive correction order, has been introduced. It provides that, where a court has sentenced an offender to imprisonment, it may order that the sentence be served by way of intensive correction in the community.¹⁵⁶ The maximum term will be two years for a single offense and three years for multiple offenses. The order will contain several standard conditions relating to further offending and supervision by a community corrections officer and additional conditions including home detention, electronic monitoring, curfew, community service not exceeding 750 hours, rehabilitation or treatment, abstention from alcohol or drugs or both, non-association, and place restrictions.¹⁵⁷

III

CONCLUSION

The sentencing of offenders takes place in each jurisdiction's unique social-political environment. The range of sentencing options available to the courts will vary widely. Their place in the penal hierarchy, if one exists, will vary, as will their precise content, their nomenclature, and their symbolic representation. For these reasons, interjurisdictional comparisons, as the contributions to this volume illustrate, will always be difficult.

On its face, a case can be made for retaining the suspended sentence. Judicial support is strong, it can limit or reduce the prison population, recidivism rates are slightly better than those for offenders serving executed terms of imprisonment, and informed public opinion regarding the sanction is equivocal or, at best, contextually supportive. Partly suspended and suspended sentences with both rehabilitative and punitive conditions can provide valuable hybrid forms of sentencing and give the sanction the "penal validity" that some have argued give it increased legitimacy.¹⁵⁸

have sentenced the offender to a term of imprisonment whether or not it would have, or could have, suspended all or part of the sentence). For background to these amendments, see SENTENCING ADVISORY COUNCIL (TAS.), *supra* note 12. The Council recommended that imprisonment combined with a CCO could replace partly suspended sentences and that home detention should not be a substitutional sanction but a sanction in its own right, as would the CCO.

155. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (N.S.W.) (Austl.).

156. *See id.* (Schedule 1 inserting a new section 7 into the *Crimes (Sentencing Procedure) Act 1999* (N.S.W.) (Austl.)); *see also* NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 79. This order will not be available in respect of a number of serious offenses. *See Crimes (Sentencing Procedure) Act 1999* (N.S.W.) s 67 (Austl.); *Parente v R* [2017] NSWCCA 284 at ¶ 88. The Act received assent in October 2017 but is not in effect until proclamation. The date of proclamation at the time of writing was unannounced. It is ironic that the Victorian legislature abolished intensive correction orders ("ICOs") when it introduced the CCOs because they were little used and had high breach rates. The Australian Capital Territory retains the ICO alongside suspended sentences as a substitutional sanction for two years' imprisonment (or four years in exceptional circumstances). *Crimes (Sentencing) Act 2005* (Austl. Cap. Terr.) s 11 (Austl.).

157. *Crimes (Sentencing Procedure) Act 1999* (N.S.W.) s 73A (Austl.).

158. *See supra* note 26.

However, in some Australian jurisdictions, it was ultimately not the jurisprudential arguments regarding its ambiguous status or the criminological arguments regarding recidivism or prison populations that determined the fate of suspended sentences. It was the powerful forces of penal populism. Abolition of the suspended sentence reflected a significant loss of public confidence in the sanction, often precipitated and amplified by adverse media coverage. Sadly, and possibly inevitably, the measures instituted to replace the suspended sentence have been subjected to the same forces that regard any sentence other than imprisonment as an inadequate response to a wide range of offenses, further driving up imprisonment rates. Until there is a recognition that imprisonment is not the only means of fulfilling the various purposes of punishment—just deserts or retribution, deterrence, denunciation, rehabilitation, and community protection—pressures on legislatures to restrict or eliminate substitute or alternative sanctions will continue to grow.

The suspended sentence was, in my view, a conceptually and practically flawed sanction. It deserved its demise. But as the events subsequent to its repeal in Victoria reveal, where it is to be abolished, it should be phased out slowly, its effects should be monitored, and its alternatives should be given time to gain judicial acceptance and public support. The logical corollary of its abolition is not the increased use of imprisonment but finding alternatives that meet the needs of courts, offenders, victims, and the public at large.