**2011**

**LEGISLATIVE ASSEMBLY FOR THE**

**AUSTRALIAN CAPITAL TERRITORY**

# ACT Law Reform Advisory Council 'A report on suspended sentences in the ACT'.

## GOVERNMENT RESPONSE

**September 2011**

Circulated by authority of the

Attorney General

Simon Corbell MLA

## 1. Overview

This response considers the five recommendations and the four policy questions for Government inquiry arising from the ACT Law Reform Advisory Council's report on suspended sentences of imprisonment in the ACT.

The Government is currently considering mechanisms to improve the sentencing data that is available and anticipates that further work will be undertaken in this area.

The Government has broadly considered the four policy questions raised by the report. Overall, the Government considers that suspended sentences should be maintained as a sentencing option in the ACT.

## 2. Background

In late 2009 the Attorney General, Mr Simon Corbell MLA, established the ACT Law Reform Advisory Council (LRAC). LRAC is a non-statutory advisory body which provides expert advice and recommendations on significant legal policy issues referred to it by the Attorney General.

In 2010, the first issue referred to LRAC for consideration was the use of suspended sentences in the ACT. The terms of reference were:

- the recent trends in the imposition of suspended sentences in the ACT;
- any relevant factors behind the rates of imposition of suspended sentences in the ACT Supreme Court;
- recent legislative reforms in other Australian jurisdictions in relation to suspended sentences;
- the policy changes, if any that are needed to modify the way in which suspended sentences operate in the ACT; and
- a review of the reforms to the suspended sentence regime in the ACT as a result of the *Crimes (Sentencing) Act 2005* and the *Crimes (Sentence Administration) Act 2005*.

The referral was made in response to the release of the Australian Bureau of Statistics 2009 publication *'Criminal Courts 2007-2008'*. These statistics showed that for the period 2007-2008, 43.7% of defendants who were proved guilty in the ACT Supreme Court were given fully suspended custodial sentences. This was compared with 15.8% in NSW; 22.8% in Victoria; 12.8% in Queensland; 13.8% in South Australia; 22.6% in Western Australia; 28.9% in Tasmania and 19.2% in the Northern Territory[1].

On 1 February 2011 the Chair of LRAC, Mr Simon Rice, wrote to the Attorney General (Annexure A) to advise that the rate of 43.7% appeared to be anomalous. This was evidenced by the data for fully suspended sentences for the period 2008-

[1] ABS, *Criminal Courts 2008-09*, Table 2.14, p41-43.

2009, which reports that the rate of fully suspended sentences imposed by the Supreme Court was 34.6%. This finding is supported by the recently released ABS statistics for 2009-10, which indicated that the rate of suspended sentences in the ACT for the period was 34.5%.

## 3. ACT Law Reform Advisory Council 'A report in suspended sentences in the ACT.'

On 1 November 2010, LRAC provided the Attorney General with its report. The report makes five recommendations in relation to sentencing data collection and reporting, and raises four policy issues for further consideration by the Government.

## 4. Recommendations

| | **Data collection and reporting** | **ACT Government response** |
|---|---|---|
| 1 | The Supreme Court Registry be resourced to take urgent steps to establish sound administrative systems which ensure that sentencing data are recorded adequately and comprehensively, and in a manner that is consistent with ABS reporting requirements. In particular we recommend the use of a template to record sentences, and standardised forms of expression in sentencing. | Noted. The Government understands that a template for recording sentences is being developed by a member of the Supreme Court judiciary. |
| 2 | The Supreme Court Registry staff and staff of judicial officers be resourced to undertake regular training on the accurate collection and reporting of sentencing data, including ABS coding. | Agreed in principle. |
| 3 | The Supreme Court Registry be resourced to maintain data collection and recording software that is compatible with ABS requirements. | Agreed in principle. The Government provided $560,000 in the 2011-12 budget to conduct a study into a contemporary case management system for the ACT Law Courts. |
| 4 | The Supreme Court Registry be resourced to establish an electronic database of remarks made on sentencing, to be made publically available on the court website and/ or through the AustLi website www.austlii.edu.au. | Noted. Since 2001, the full text of all Supreme Court sentencing decisions has been made available on the Supreme Court website. Additionally, work is currently underway with the Judicial Commission of NSW to explore the feasibility of establishing a sentencing database for the ACT. |
| 5 | The Attorney General consider taking advantage of the opportunity created by systematic and reliable | Agreed in principle. This will be explored as part of |

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| | collection of sentencing data to make that data public on a regular basis. | the work being undertaken with the Judicial Commission of NSW. |
| | **Policy questions for further inquiry** | |
| 1 | Should suspended sentences be a sentencing option in the ACT? | Yes. The Government considers that suspended sentences are an appropriate sentencing option. |
| 2 | What should be the consequences of the breach of a condition of the good behaviour order associated with a suspended sentence? | The Government will consult with stakeholders to determine if the ACT should enact a statutory presumption requiring that a suspended sentence of imprisonment be imposed where an offender has breached their good behaviour order. |
| 3 | What can be done to enhance the consistency and predictability in the imposition of suspended sentences? | The Government has committed to conducting a feasibility study for a contemporary case management system for the ACT Courts and to investigate the best method to improve sentencing data collection and reporting. Work is also underway with the Judicial Commission of NSW to explore the feasibility of establishing a sentencing database for the ACT. |
| 4 | Does the terminology that is used adequately convey the nature of suspended sentences? | The Government will consult with stakeholders to determine if an amendment to the ACT's terminology is required. |

The following sections of this response address the recommendations arising from the LRAC Report. It should be noted since the completion of the LRAC Report, the ACT no longer has a separate Supreme Court Registry. On 4 July 2011 the ACT Courts Combined Registry commenced. The ACT Courts Combined Registry co-locates the Registry functions of the ACT Magistrates Court and the ACT Supreme Court. The Combined Registry offers the advantages of operational efficiencies,

enables better management of administrative workloads, improves business continuity and succession planning and provides for improved communication.

### 4.1 Data collection and reporting recommendations

The LRAC Report makes five recommendations relating to the collection and reporting of data by the ACT Supreme Court.

In the ACT Supreme Court, sentences are recorded in writing (on bench sheets) by judicial associates and are also recorded by audio in court. Sentence transcripts are produced from the audio recording and are edited and checked for accuracy by the relevant judge's associate before being made available on the Supreme Court website.

The sentence results recorded by judicial associates are then entered in the case management system by registry staff. This data is used to meet the Supreme Court's internal and external reporting commitments.

The ACT Government and the ACT Supreme Court have undertaken steps to address issues with data collection and reporting of sentencing information. With regard to the first recommendation of the LRAC Report, the Government understands that work is already underway by a member of the Supreme Court Judiciary to develop a template to record sentences.

In the 2011-12 budget the Government committed $560,000 to conduct an investigation, analysis and feasibility study to enable the ACT Law Courts and Tribunal to provide options on the best way to modernise processes and systems to be incorporated into a contemporary case management system.

It is anticipated that the feasibility study will contribute to the development of a system that will allow for greater accuracy and reliability with the recording of sentencing data.

The Attorney General has also instructed the Justice and Community Safety Directorate to investigate the best options to establish a means of collecting, analysing and publishing statistical data on sentencing. This is to ensure that the ACT has the most efficient and cost-effective method for ensuring that sentencing data is accurate, reliable and accessible.

One option currently being explored with the Judicial Commission of New South Wales is the possibility of a hosted database, as is the case in Queensland and with the Commonwealth sentencing database. The Judicial Commission of New South Wales had agreed to undertake a feasibility study to assess the ability to implement a fully functioning system for the ACT.

In response to LRAC's fourth recommendation, the Government notes that the Supreme Court Publication Policy, which has been in existence since July 2001,

publishes (on the Supreme Court website) the full text of all sentencing decisions. The text consists of the sentence imposed and the Judge's accompanying reasons.

### 4.2 Policy questions for further inquiry

**Question 1- Should suspended sentences be a sentencing option in the ACT?**

*'Two features of the regime for suspended sentences in the ACT raise the question of whether suspended sentences should be retained as a sentencing option. The two features are that it is mandatory to impose a conditional GBO (good behaviour order) with a suspended sentence, and that there is no presumption that a suspended sentence will be activated on a breach of the GBO. These features combine to suggest that the actual or effective sentence is the conditional GBO, not the suspended term of imprisonment'* (p. 44 LRAC Report).

**The ACT Government considers that suspended sentences should be maintained as a sentencing option in the ACT.**

Section 12 (1) of the *Crimes (Sentencing) Act 2005* requires the court to order a period of imprisonment before consideration can be given to suspending a sentence.

The sentencing reforms enacted by the ACT Government in 2005 included the requirement for a suspended sentence to be accompanied by a good behaviour order (GBO). Section 12 (3) of the Crimes (Sentencing) Act requires a court to make a GBO when ordering a suspended sentence. As noted at page 6 of the LRAC Report, both NSW and SA also require a suspended sentence to be accompanied by a GBO.

The ability of the ACT courts to impose a suspended sentence must be considered with reference to the objects of the Crimes (Sentencing) Act (section 6) and the purposes of sentencing (section 7). As stated by Mr Jon Stanhope (then Attorney General) in the debate on the Crimes (Sentencing) Bill 2005, the Crimes (Sentence Administration) Bill 2005 and the Sentencing and Corrections Reform Amendment Bill 2005 on 15 November 2005, 'sentencing is not a mathematical task, but an act of judicial thinking that applies the law to the facts.' Mr Stanhope further stated 'the government's sentencing bill [Crimes Sentencing Bill 2005] aims to provide meaningful options to the courts to tackle offending behaviour'.

Section 12 of the Crimes (Sentencing) Act states that a suspended sentence can only be ordered where the offender is convicted of an offence, and where the court sentences the offender to imprisonment. The order for imprisonment, and subsequent suspension, is a critical step in the imposition of the suspended sentence as it is an acknowledgement of the severity of the offence. If the court were to only impose a good behaviour order, the offender may not appreciate how close they came to receiving an immediate custodial sentence.

Given the numerous purposes of sentencing as reflected by section 7 of the Crimes (Sentencing) Act, the ACT Government considers that suspended sentences should be maintained as a sentencing option in the ACT. This is because it is a valuable sentencing option to be ordered in appropriate circumstances that not only denounces the conduct of the offender, but promotes rehabilitation and the protection of the community by reducing recidivism.

As is noted in the LRAC Report, the authors of the report were unable to complete an analysis of the 'breach' cases (where an offender breached a condition of a GBO) due to issues with the recording of sentencing data. Should such an analysis provide evidence to question the effectiveness of the suspended sentence option, then further consideration will be given to this issue by the ACT Government.

In 1999 in NSW, the then Attorney General the Hon. RJ Debus gave the second reading speech in the NSW Legislative Council for the Crimes (Sentencing Procedure) Bill 1999. He stated:

> 'the primary purpose of suspended sentences is to denote the seriousness of the offence and the consequences of re-offending whilst at the same time providing (offenders) an opportunity, by good behaviour, to avoid the consequences.[2]'

Section 7 of the ACT's Crimes (Sentencing) Act acknowledges the purposes of sentencing. As the section indicates, there are numerous factors that influence the purpose of sentencing. Section 7 provides:

(1) A court may impose a sentence on an offender for 1 or more of the following purposes:
  (a) to ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
  (b) to prevent crime by deterring the offender and other people from committing the same or similar offences;
  (c) to protect the community from the offender;
  (d) to promote rehabilitation of the offender;
  (e) to make the offender accountable for his or her actions;
  (f) to denounce the conduct of the offender;
  (g) to recognise the harm done to the victim of the crime and the community.

Two of those factors, 'to promote the rehabilitation of the offender' and 'to protect the community from the offender', may not be achieved by imposing a sentence of imprisonment.

[2] Suspended Sentences- Judicial Commission of New South Wales, at 5-700 (www.judcom.nsw.gov.au/publications/benchbks/sentencing/suspended_sentence)

A recent study in NSW has determined that suspended sentences are as effective as a sentence of full-time imprisonment in reducing the risk of further offending[3]. In a 2009 Dr Lorana Bartels study, 588 Tasmanian offenders convicted by the Supreme Court of Tasmania were followed over a period of two years. The study concluded that 'offenders who received a wholly suspended sentence had the lowest reconviction rates (42%) compared with offenders who received full time imprisonment (62%)[4]'.

A contrary approach to sentencing has recently been legislated by the Victorian Government. The Victorian Government has recently passed the *Sentencing Amendment Act 2010* and has tabled the Sentencing Further Amendment Bill 2010. The purpose of the *Sentencing Amendment Act 2010* was to reform the Victorian *Sentencing Act 1991* to ensure that a court must not make an order suspending the whole or a part of a part of a sentence of imprisonment imposed on an offender for a serious offence. The offences include armed robbery, sexual penetration of a child under 16 and intentionally causing serious injury. The Victorian Government has introduced an 'intensive correction management order' as an alternative to a suspended sentence. Additionally, the new Victorian Government has announced plans to abolish the use of suspended sentences altogether.

Community opposition to the reforms of the past and present Victorian governments have noted that in Victoria, suspended sentences are overwhelmingly ordered for non-violent crimes. It has been reported by the Victorian Sentencing Advisory Council that the most frequent recipients of suspended sentences are people who drive while disqualified. A recent analysis of the Victorian moves to abolish the application of suspended sentences states 'abolishing suspended sentences is likely to lead to a drastic, costly and unmanageable increase in the prison population[5]'.

In June 2008, the Tasmanian Law Reform Institute published their final report on sentencing. The report acknowledged the criticisms of suspended sentences, but concluded that they were a valuable tool 'which enables courts to mark the seriousness of the offence by imposing a sentence of imprisonment while showing mercy in the particular case by suspending it[6]'.

The ACT Government considers that suspended sentences should continue to be a sentencing option in the ACT. The question of whether the ACT Government should legislate to include a presumption that the period of the suspended sentence will be activated on a breach of a condition of a good behaviour order is discussed in response to question 2 below.

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[3] Suspended Sentences- Judicial Commission of New South Wales, at 5-825 (www.judcom.nsw.gov.au/publications/benchbks/sentencing/suspended_sentence)

[4] 'The weight of the Sword of Damocles: a reconviction analysis of suspended sentences in Tasmania' Australian and New Zealand Journal of Criminology, vol.42, pp 72-101.

[5] Suspended sentences, Smart Justice Factsheet, p.1 (available www.smartjustice.org.au)

[6] Tasmanian law Reform Institute 'Sentencing- Final Report No.11', June 2008, p.30.

**Question 2- What should be the consequences of the breach of a condition of the GBO associated with a suspended sentence?**

*'Related to the previous issue is the question of whether there should be in the ACT a presumption of activation of the suspended sentence in a breach of a condition of a GBO. This is the case in NSW, South Australia, Victoria, Queensland, WA and NT, although the details of how the presumption operates vary. Tasmania, ACT and the Commonwealth do not have such a presumption. However the Tasmanian Law Reform Institute has recently recommended introducing a statutory presumption in favour of activation on breach'* (p. 44 LRAC Report).

Note- Following the completion of the LRAC report, the Tasmanian Parliament has enacted an amending Act to include a statutory presumption in favour of the activation of the sentence of imprisonment that is held in suspense following a breach.

**The ACT Government will consult with stakeholders to consider whether to include a statutory presumption that the suspended sentence of imprisonment will be imposed where an offender breaches a condition of a good behaviour order.**

Currently, section 110 of the *Crimes (Sentence Administration) Act 2005* provides for the cancellation of a good behaviour order with a suspended sentence order. The cancellation is to take effect where a suspended sentence order has been made under section 12 (3) of the Crimes (Sentencing) Act and the court is satisfied that the offender has breached any of their good behaviour obligations.

Upon cancellation of the order, section 110 (2) of the Crimes (Sentence Administration) Act requires the court to either impose the suspended sentence for the offence (the offender must serve the sentence of imprisonment), or the court may re-sentence the offender. As is noted at paragraph 63 of the LRAC Report, the ACT does not have a presumption that the originally imposed sentence of imprisonment will be activated by a breach of a GBO.

Section 110 (2) currently allows for each breach to be considered on its individual facts and circumstances. This issue was discussed at paragraph 14 of *Dinsdale v The Queen* (2000) HCA 54 by Gleeson CJ and Hayne J who noted:

> 'the related consideration that committing a further offence during the period of suspension should not produce an unintended consequence.'

The ACT Supreme Court has recently considered these issues in *Robert Jildo Saga v Jarrod Reid and Tristan Allan Collett (2010) ACTSC 59* (1 July 2010).

The judgment of Refshauge J, at paragraph 99, adopted what was said by King CJ and Perry J in *R v Marston (1993) 60 SASR 320* (at 322, 323):

> ‘There is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison. Notwithstanding what has been stated about the reality of the punishment involved in a suspended sentence, if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved.’

Justice Refshauge concluded, at 101, ‘thus, although there is no ‘default’ requirement to activate the imprisonment that has been suspended there are important policy reasons for doing so.’

Refshauge J also made important comments on the operation of section 110 of the *Crimes (Sentence Administration) Act 2005*. Refshauge J stated, at paragraph 102, that the option of re-sentencing is also important. The judgement of Refshauge J at paragraph 103 noted the decision of Gray J in *Thompson v Young (2008)* ACTSC 11:

> ‘However, even if imprisonment has been appropriate, there would still need to have been a consideration of aspects of suspension, periodic detention and community service. Those matters are still as appropriate on re-sentencing as on the original sentencing.’

The Tasmanian parliament has recently amended their *Sentencing Act 1997* to include, at section 27 (4B), a new section which prescribes that where the court is satisfied that the offender has been found guilty of a new offence, the court must activate the sentence of imprisonment that is held in suspense and order the offender to serve it, unless the activation would be unjust.

In NSW, section 98 (3) of the *Crimes (Sentencing Procedure) Act 1999* details the proceedings for breach of a good behaviour bond made as a condition of the suspension of a sentence of imprisonment. The court must revoke the bond unless satisfied that the offender’s failure to comply with a condition was trivial or where there are good reasons for excusing the offender’s failure to comply. Where the bond is revoked, section 99 provides that the order suspending the sentence of imprisonment ceases to have effect.

However, section 99 (2) provides that on revoking a good behaviour bond under section 12 (suspended sentences), a NSW Court may make an order directing that the sentence of imprisonment be served by way of an intensive correction order or home detention.

In Victoria, section 31 of the *Sentencing Act 1991* provides for breaches of suspended sentence orders. At (5), the Act states that where the court has imposed a suspended sentence of imprisonment and the court is satisfied that the offender has been found guilty of an offence punishable by imprisonment committed during the operational period of the suspended sentence, the court must order the offender to serve the suspended sentence of imprisonment, or restore part of the sentence and order that the offender serve it, or in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date no longer than 12 months after the day of the order under this subsection, or make no order with respect to the suspended sentence.

Section 5(A) states that despite anything to the contrary in subsection (5), the court must restore the sentence or part of the sentence unless it is of the opinion that it would be unjust to do so in view of an exceptional circumstances which have arisen since the order suspending the sentence was made.

In South Australia, section 58 (1) (d) of the *Criminal Law (Sentencing) Act 1988* provides that where a court is satisfied that there has been a failure to comply with a condition of a bond that is attached to a suspended sentence of imprisonment, the court must revoke the suspension and order that the sentence be carried into effect.

However, section 58 (3) provides that where the failure to comply with the conditions of the bond was trivial or that there are proper grounds upon which the failure should be excused, then the court may refrain from revoking the suspension and may extend the bond, may extend the bond, may extend the period of community service by no more than 6 months, cancel the whole or a number of unperformed hours of community service or revoke or vary any other condition of the bond.

In Western Australia the *Sentencing Act 1995* section 80 (1) provides that where an offender who is sentenced to suspended imprisonment is convicted of another offence, the statutory penalty for which includes imprisonment, the court must either:

(a) order the person to serve the term or terms of imprisonment that were suspended;
(b) order the person to serve part of the term or terms of imprisonment;
(c) substitute another suspension period of not more than 24 months; or
(d) fine the person not more than $6000 and make no order in respect of the suspended imprisonment.

Section 80 (3) provides that a court must make an order under subsection (1) (a) unless it would be unjust to do so in view of all of the circumstances that have arisen, or become known, since the suspended imprisonment was imposed.

Finally, the Northern Territory's *Sentencing Act 1995* provides that where the offender has committed another offence against a law in force in the Territory or

elsewhere punishable by imprisonment or where the offender has breached a condition of their order, section 43 (5) allows the court to:

(a) restore the sentence or part of the sentence held in suspense;
(b) extend the operational period of a wholly suspended sentence to a date after the date of the order suspending the sentence;
(c) in the case of a partially suspended sentence- extend the operational period to a date after the date specified in the order suspending the sentence; or
(d) make no order with respect to the suspended sentence.

Section (7) provides that a court shall make an order under subsection (5) (c) restoring the sentence of imprisonment unless it is of the opinion that it would be unjust to do so in view of all of the circumstances which have arisen since the suspended sentence was imposed including the facts of any subsequent offence.

In order to determine whether the ACT should include a statutory presumption to activate a suspended sentence of imprisonment where an offender has breached a condition of their suspended sentence, the ACT Government will consult with criminal justice stakeholders to consider whether the ACT should include a presumption.

It is noted that the ACT's obligations under the *Human Rights Act 2004* (the HR Act) would be considered with any proposal to introduce a presumption. The ACT Government would be required to ensure that any presumption is not unjust and would allow for the court to consider the particular circumstances of the offender and the circumstances of the breach of the good behaviour order (including whether they are a young offender) prior to the suspended sentence of imprisonment being imposed.

In relation to young people, any amendment would need to be considered with respect to the interaction between section 11 (2) and 20 of the HR Act. Section 11 (2) provides that 'every child has the right to the protection needed by the child because of being a child, without distinction of discrimination of any kind.'

Section 20 of the HR Act provides that 'a convicted child must be treated in a way that is appropriate for a person of the child's age that has been convicted'. These are important principles that will require consideration in any proposed amendment.

**Question 3- What can be done to enhance consistency and predictability in the imposition of suspended sentences?**

*'The research has enabled us to recommend above at Part B1.3, and to comment at C3.12, that consistency and predictability will be enhanced through improved reporting of judicial reasons for and observations on the imposition of suspended sentences. A related policy question is whether the legislature should provide guidance as to the factors a sentencing court should have regard to in determining*

*whether to suspend a sentence, as is currently the case, for example, in Victoria'* (p. 44 LRAC Report).

**While it is important that there is guidance as to the factors that a sentencing court should have regard to in determining whether to suspend a sentence of imprisonment, the ACT Government does not agree that there is a need for the Legislature to provide further guidance. This is because this guidance is provided by:**

- **the broad direction of section 7 (purposes) of the *Crimes (Sentencing) Act 2005*; and**
- **precedent developed by the Judiciary.**

**As was noted in *Lowndes v the Queen (1999) 195 CLR 665* 'the discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.'**

In the ACT, section 12 (1) of the Crimes (Sentencing) Act allows a court to order a suspended sentence where an offender is convicted of an offence and, the court sentences the offender to imprisonment for that offence. In determining whether to sentence an offender to a period of imprisonment, section 10 (2) of the Crimes (Sentencing) Act states that the court may sentence an offender to imprisonment for all or part of the term of imprisonment, if the court is satisfied, having considered possible alternatives, that no other penalty is appropriate.

Section 7 of the *Crimes (Sentencing) Act 2005* is extracted above. This section describes the numerous purposes of sentencing. However, the ACT Government is mindful that the imposition of legislation to specify the factors that are to be taken into account may unintentionally exclude factors which may be considered in the sentencing of an offender. By not providing strict legislative guidance, the factors are to be determined by the precedent developed by the courts and on the individual facts and circumstances of each case.

The factors which a sentencing court considers is a question that has been discussed by the Judiciary across Australian jurisdictions, and by the High Court of Australia. As is quoted at paragraph 44 of the LRAC Report (page 19), Kirby J considered this question in *Dinsdale v The Queen*[7]. It was noted by Kirby J that the 'same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term'.

In the ACT, this question was considered by the Court of Appeal in the matter of *R v SP*[8]. Despite the fact that this case was determined prior to the amendments to sentencing procedure provided by the *Crimes (Sentencing) Act 2005,* it provides guidance as to the factors that are to be taken into account. This is because both the

[7] (2000) 202 CLR 321
[8] (2004) ACTCA 16

*Crimes (Sentencing) Act 2005* and its predecessor, the sentencing provisions located in the ACT's *Crimes Act 1900*, are intentionally silent on the factors that are to be considered when determining whether to suspend a sentence of imprisonment.

In *R v SP*, paragraph 39 quotes Kirby J in *Dinsdale v The Queen*:

> 'A number of attempts have been made to resolve this tension (the decision to imprison and the decision to suspend) and to provide guidance concerning the circumstances in which a sentence of imprisonment should be suspended. There is a line of authority in Australian courts that suggests that the primary consideration will be the effect such an order will have on the rehabilitation of the offender, which will achieve the protection of the community which the sentence of imprisonment itself is designed to attain. But most such statements are qualified by judicial recognition that other factors may be taken into account. The point is therefore largely one of emphasis.'

Further, at paragraph 41, Gray J noted (when discussing Kirby J's reasons in *Dinsdale*) that

> 'Kirby J would not confine the exercise of the discretion to the effect of it by reference to rehabilitation of the offender either wholly, mainly or specially. He considered that the same considerations that are relevant to the imposition of the term of imprisonment must be revisited in determining whether to suspend that term.'

Similarly, the judgement of Gyles J in *R v SP* discusses the factors to be considered when determining if a suspended sentence is appropriate. At paragraph 71, Gyles J quotes Kirby J in *Dinsdale*:

> 'Adopting this approach, then, permits attention to be given not only to the circumstances personal to the offender but also to the objective features of the offence. These may, in a particular case, outweigh the personal considerations of rehabilitation and mercy. They may require that the prison sentence be immediately served, despite mitigating personal considerations.'

Further, Gyles J considered, at paragraph 77, 'because of the width of the discretion given by section 403(1)(b) of the *Crimes Act 1900*, a sentencing judge is entitled to have regard to factors that have been considered in relation to the head sentence when considering whether to suspend the sentence.

Section 403 (1)(b) of the *Crimes Act 1900* (now repealed) provided for the conditional release of offenders. The section allowed the court to sentence a person to a term of imprisonment, but direct that the person be released. The legislation did not specify any factors to be taken into consideration by the sentencing court. In lieu of legislation specifying the factors to be taken into account by the sentencing court, Gyles considered (at paragraph 77):

> ‘the purposes for which a sentence may be imposed by section 341 of the Act remain paramount. In my respectful opinion, the primary judge fell into error by not asking himself whether those purposes were properly served by wholly suspending a sentence which had already taken full account of subjective factors caused by the effect of delay including the interests of the respondent’s family.’

The purposes outlined in the repealed section 341 of the *Crimes Act 1900* now appear, in similar form, at section 7 of the *Crimes (Sentencing) Act 2005*. Section 7 is set out above.

Paragraph 48 of the LRAC Report (page 20) notes that legislators in the ACT, NSW, Tasmania and Western Australia have not imposed factors to be considered when determining whether to impose a suspended sentence. In Queensland and the Northern Territory, the guiding principles are whether it is appropriate or desirable to do so in the circumstances. Only Victoria has enacted legislation to specify the factors to be taken into account when deciding if it is appropriate to impose a suspended sentence.

The ACT Government’s budget commitment to conduct a feasibility study to provide options to modernise processes and systems at the ACT Law Courts and Tribunal into a modern case management system, and the current work of the Justice and Community Safety Directorate to establish a means of collecting, analysing and publishing statistical data on sentencing will enhance the availability of sentencing information.

In addition, in 2010 the ACT Judiciary were provided with access to the NSW Judicial Commissions Judicial Information Research System. This system contains case law, sentencing statistics and principles of sentences in order to encourage consistency in approach to sentencing. Access to this system will assist the ACT Judiciary by providing a useful comparator when determining sentences.

Consequently, the ACT Government does not consider it necessary to provide further guidance on the factors to be taken into account when a court is deciding whether to suspend a period of imprisonment.

**Question 4- Does the terminology that is used adequately convey the nature of a suspended sentence?**

*‘A so-called ‘suspended sentence’ is not the mere suspension of a sentence. It is the suspension of a sentence of imprisonment, and is subject to conditions. It may be that the term ‘suspended sentences’ does not sufficiently convey the gravity and conditional nature of the decision. There has been discussion in Canada and the United Kingdom about other possible descriptions, such as ‘suspended custodial sentence’ or ‘conditional suspension of custody’* (p.45 LRAC Report).

**The Government accepts that the term 'suspended sentence' may not expressly indicate that a 'suspended sentence' is referring to a suspended sentence of imprisonment. The Government will consult with stakeholders in order to determine whether an amendment to the term is necessary.**

One of the intentions of the sentencing reforms enacted in the ACT by the *Crimes (Sentencing) Act 2005* and the *Crimes (Sentence Administration) Act 2005* was the modernisation and simplification of the terminology used in sentencing. An order suspending a sentence of imprisonment under the repealed section 403 (1) (6) of the *Crimes Act 1900* was amended to be called a suspended sentence order.

The terminology used in the ACT is broadly consistent with the terminology in use across Australia. Section 12 (1) (a) of the NSW *Crimes (Sentencing Procedure) Act 1999* provides for an order suspending a sentence of imprisonment; section 27 of the Victorian *Sentencing Act 1991* provides for a 'suspended sentence of imprisonment'; section 24 of the Tasmanian *Sentencing Act 1997* creates 'suspended sentences'; Queensland's *Penalties and Sentences Act 1992* refers to 'suspended sentences'; Section 40 of the Northern Territories *Sentencing Act* creates suspended sentences of imprisonment; Section 38 of South Australia's *Criminal Law (Sentencing) Act 1988* allows the court to suspend a period of imprisonment, which is subsequently referred to as a 'suspended sentence'; and Western Australia's *Sentencing Act 1995,* at section 76 refers to 'suspended imprisonment'.

As is evident with section 12 (b), for consideration to be given to suspending a sentence of imprisonment, a sentence of imprisonment must firstly be imposed. Section 12 (2) of the *Crimes (Sentencing) Act 2005* states that a court may make an order (a suspended sentence order) suspending all or part of the sentence of imprisonment.

While this section explicitly states that a sentence of imprisonment is being suspended, the Government accepts the term 'suspended sentence order' may not adequately describe that it is a period of imprisonment that is being suspended. In order to ascertain if an amendment is required, the Government will consult with stakeholders on the adequacy of the existing terminology.