To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania

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Abstract

Suspended sentences are a controversial sentencing option currently available in all Australian jurisdictions. This article presents a qualitative analysis of all partly and wholly suspended sentences imposed in the Tasmanian Supreme Court over a two-year period. The importance of reasons for sentence is discussed and the relevance of a range of factors to the decision to suspend a sentence is considered. In particular, the discussion considers factors relating to the offender, for example, prior record and youth; factors relating to the offence, especially where offences are committed in company; the response to the charges, such as cooperation with the authorities; and the effect of the offence and sanction, including hardship to the offender and others. In addition, cases which suggest an improper reasoning process was applied in exercising the discretion to suspend are reviewed.

Introduction

Suspended sentences are a controversial sentencing option currently available in all Australian jurisdictions.[1] This article examines the factors cited by judges in imposing a suspended sentence, in order to better understand how such sentences are used and promote consistency in sentencing. The test for imposing a suspended sentence was set out by the High Court in *Dinsdale v The Queen*.[2] Kirby J, with whom Gummow and

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The research reported in this article is based on a chapter of my PhD, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania*. This project was funded by the Australian Research Council (LP0349240) and had ethics approval from the University of Tasmania (H8969).

I am indebted to my supervisors, Professor Kate Warner, Terese Henning and George Zdenkowski and to two anonymous referees for their comments. I am also grateful for the comments of my examiners, Professors Arie Freiberg and Julian Roberts. The views and any errors contained in the article are the author's own.

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

[2] *Dinsdale v The Queen* (2000) 202 CLR 321 (*Dinsdale*), [79] (Kirby J).

Gaudron JJ agreed, stated that the court is first required to determine that a sentence of imprisonment, and not some lesser sentence, is called for. Only then can the court determine whether to suspend the sentence.

Over 220 factors have been identified which appear to influence courts in passing sentence.[3] Some factors may be aggravating or mitigating, depending on the circumstances, and what one sentencer regards as a mitigating factor, might be perceived by another as neutral or even aggravating.[4] Hayne J observed in *Ryan*[5] that sentencing 'requires consideration and balancing of many different and often conflicting matters'. Consideration of these factors will be determinative not only of the quantum of sentence, but also the manner in which the sentence is to be served. As Perry J of the South Australian Supreme Court observed in *Wacyk*,

> It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of the particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender. [6]

A similar approach was endorsed by Kirby J, who stated in *Dinsdale* that 'in determining whether to suspend, one has to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender'.[7] According to a study undertaken by the Judicial Commission of NSW,

> a multitude of factors account for the decision to impose a...suspended sentence, more so than the offence itself. The results seem to point to factors currently not available in numeric form exerting a greater influence on the decision than even the plea, bail status and the offender's prior criminal record. For example, the court might give a large consideration to the

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3 See Joanna Shapland, *Between Conviction and Sentence: the Process of Mitigation* (1981), 55, where 229 factors were identified and La Trobe University Legal Studies Department, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (1980), which identified 292 relevant sentencing factors.

4 Andrew Ashworth, 'Disentangling Disparity' in Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing* (1987) 24, 31; Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (2001), 19; and Australian Law Reform Commission, *Same Crime, Same Time,* Report 103 (2006) (ALRC), [6.157].

5 *Ryan v The Queen* (2001) 206 CLR 267, [133] (Hayne J).

6 *R v Wacyk* (1996) 66 SASR 530, 536.

7 *Dinsdale*, [85] (Kirby J).

> subjective features of the offence, such as the offender's ability and willingness to rehabilitate, and hardship factors.[8]

The following discussion is a qualitative analysis of the 'multitude of factors' which appear to influence when a suspended sentence will be imposed in the Tasmanian Supreme Court. In presenting this qualitative analysis, I do not suggest that the factors considered will always result in a suspended sentence, that these are the only factors which are relevant to the decision to impose such a sentence, or that it is possible to ascertain the relevant weight of each factor in an individual case. As McHugh J noted in *Markarian*,[9]

> A sentence can only be the product of human judgment, based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments. The instinctive synthesiser asserts that sentencing is not an exercise in linear reasoning because the result of each step in the process is not the logical foundation for the next step in the process. Nor in practice can it be an exercise in multiple regression where one starts with particular coefficients and adds to or subtracts from their result by changing the weighting of each variable as new variables are added to the process. The circumstances of criminal cases are so various that they cannot be the subject of mathematical equations. Sociological variables do not easily lend themselves to mathematization.

Accepting that sentencing is not a mathematical exercise, and that it is therefore not possible to determine the worth of each factor in the decision to impose a suspended sentence, my analysis of judges'

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[8] Patrizia Poletti and Sumitra Vignaendra, 'Trends in the Use of Section 12 Suspended Sentences', Sentencing Trends and Issues, No 34 (2005), 21. See also Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison* (2003), 36.

[9] *Markarian v The Queen* (2005) 215 ALR 213, [52] (McHugh J). For comment, see Kate Warner, 'Sentencing Review 2004-2005' (2005) 29 *Criminal Law Journal* 355. See also *Ryan v The Queen* (2001) 206 CLR 267, 294, where Kirby J suggested that 'This court has said many times that sentencing is not a mechanical function but one that involves intuition and judgment'. The principle that sentencing 'is an art, and not a science', as enunciated by Crisp J in *Wise v The Queen* [1965] Tas SR 196, 200, was reaffirmed by the Tasmanian Court of Criminal Appeal in *A-G (Tas) v Blackler* (2001) 121 A Crim R 465, [10]. Cf *Dennison v Tasmania* (2005) 15 Tas R 50, 57. The term 'instinctive synthesis' originates from the Victorian decision of *R v Williscroft* [1975] VR 292, where Adam and Crockett JJ stated that 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process': 300. For discussion, see Sally Traynor and Ivan Potas, 'Sentencing Methodology: Two tiered or Instinctive Synthesis', *Sentencing Trends and Issues,* No 25 (2002) and Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (2007), Ch 2. See also David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15 and Richard Sparks, 'Some Facts of Life' in Paul Halmos (ed), *Sociological Studies in the British Penal Services* (1965) 71, 80.

sentencing comments aims to shed more light on the way judges exercise their sentencing discretion and, in particular, the discretion to dangle the Sword of Damocles over an offender's head.

Methodology

This article presents a qualitative analysis of judicial remarks on sentence. Judicial sentencing comments as reproduced in the court's Comments on Passing Sentence (COPS) are the public 'voice' of sentencing and provide a fertile ground for analysing sentencing practice.[10] This study examines the COPS for all sentences imposed in the Tasmanian Supreme Court between 1 July 2002 and 30 June 2004 (hereafter '2002-2004'), with 246 wholly suspended and 105 partly suspended sentences imposed by the Court in this period. A content analysis[11] was undertaken on the COPS in these 351 cases by recording whether the judge mentioned any of a number of commonly recognised factors in mitigation. The list of factors considered and the structure of the following discussion were informed by relevant sentencing texts.[12]

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[10] For a recent example, see Brigitte Bouhours and Kathleen Daly, 'Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks' (2007) 9 *Punishment and Society* 371.

[11] Maxfield and Babbie explain that content analysis involves 'the systematic study of messages'. It can be applied, *inter alia*, to speeches and laws, as well as any components or collections thereof and is particularly well suited 'to answering the classic question of communications research: Who says what, to whom, why, how and with what effect?': Michael Maxfield and Earl Babbie, *Research Methods for Criminal Justice and Criminology* (3rd ed, 2001), 329.

[12] See Laws of Australia, *Criminal Sentencing*, Volume 12 and Kate Warner, *Sentencing in Tasmania* (2nd ed, 2002).The full list of factors set out by Warner at 78-121 is:

- *Nature of the offence* - Legislative view of gravity; Legislative history; Intention and Consequences (Motive); Method (Premeditation and provocation; Weapons; In company); Degree of participation; Breach of trust; The victim (Sexual offences; Victim's wishes and forgiveness; Victim impact); Prevalence
- *Nature of the offender* – Prior criminality (Statutory provisions; The principle of proportionality; Which priors are relevant?; The gap effect); Young offenders (Offenders under 18; offenders 18 and over); Old age; Gender (Judicial pronouncements and sentencing policy; Should gender be relevant to sentence?); Good character; Mental disorder; Intellectual disability; Substance abuse; Personal crises; Physical illness)
- *Response to the charges* – Remorse; Guilty pleas (Is a plea of guilty *per se* mitigating?; Examples of where a bare plea is not mitigating or of minimal weight; Quantifying the discount); Restitution; Co-operating and informing; Conduct at the trial; Jury's recommendation of mercy; Delay)
- *Effect of offence and sanction* – Hardship to the offender (Loss of employment and social status; Social punishment; Hardship to others)
- *Parity* (The parity principle; Illustration of the principle; Disparity must be unjustified; Disparity must be significant; Inadequate sentences; The duty to consider the co-offender's sentence; Can the Crown rely on disparity? Sentencing disparity in Courts of Petty Sessions).

Table 1: Most Common Reasons for Suspending a Sentence

	Partly suspended (n=105)		Wholly suspended (n=246)		Total (n=351)	
Reason for suspending sentence	**n**	**%**	**n**	**%**	**N**	**%**
First offender	37	35%	110	45%	147	42%
Employment	12	11%	53	22%	65	19%
Drug/alcohol rehabilitation	13	12%	49	20%	62	18%
Youth	15	14%	44	18%	59	17%
Good character	19	18%	35	14%	54	15%
Mental health/intellectual disability	10	10%	34	14%	44	13%
Family responsibility	10	10%	32	13%	42	12%
Guilty plea	10	10%	24	10%	34	10%
Remorse	10	10%	24	10%	34	10%
Adverse personal circumstances	7	7%	25	10%	32	9%
Supportive relationships	5	5%	26	11%	31	9%
Physical health issues	14	13%	16	7%	30	9%
Co-operating/informing	8	8%	16	7%	24	7%
Degree of participation/parity	5	5%	19	8%	24	7%
Risk of re-offending	5	5%	15	6%	20	6%
Gap effect	3	3%	11	4%	14	4%
Motive	0	0%	13	5%	13	4%
Consequential loss	3	3%	10	4%	13	4%
Financial stress	1	1%	8	3%	9	3%
Restitution	3	3%	6	2%	9	3%
Victims' wishes	2	2%	5	2%	7	2%
Old age	1	1%	5	2%	6	2%
Gambling	4	4%	2	1%	6	2%
Delay	4	4%	2	1%	6	2%

Table 1 sets out in descending order of frequency the most common reasons given by the court for imposing a suspended sentence.

Factors in aggravation were not examined in this research, as these would not generally be cited in deciding to impose a suspended, rather than unsuspended, sentence.

The analysis in this article discusses the factors which were cited in at least 20 cases. More than one factor will generally be cited, and it appears to be the interaction of various factors which ultimately determines the decision to suspend a sentence, with judges listing up to eight factors as relevant to their decision to impose a suspended sentence.[13]

It must be acknowledged that in an analysis of this nature there is necessarily a subjective assessment made as to what constitutes a relevant reason. A 'reason for sentence' has been defined as 'a factor which the sentencer clearly stated to be one which was taken into account in deciding sentence'.[14] In some cases, the sentencing judge expressly stated the relevance of a particular factor to the decision to suspend, while in others it was more obliquely referred to. I therefore sought to be as consistent and systematic in my coding as possible.[15]

Discussion of findings

This discussion examines the judicial comments in 351 cases where a suspended sentence was imposed in the context of factors relating to the offender; factors relating to the offence; response to the charges and the effect of the offence and sanction. Improper reasons for imposing a suspended sentence are also discussed.

Factors relating to the offender

In *Lelei*, Badgery-Parker AJ suggested that 'in most cases it is the circumstances individual to the offender which will carry the most weight

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[13] It should also be noted that there were five cases where was no reason given for suspending the sentence. See eg *Dallas Wilkinson-Reed* (COPS, Crawford J, 19 November 2003) and *Bronson Navaro* (COPS, Evans J, 9 December 2003). It is acknowledged that in these cases, the judge may have had regard to certain factors which were not mentioned in their comments, but the lack of explication gives one cause to suspect that in spite of all exhortations to the contrary, judges may impose such a penalty when 'not quite certain what to do': see *R v O'Keefe* [1969] 1 All ER 426, 429, cited with approval by Kirby J in *Dinsdale*, [79].

It is in this context relevant to note the following observation: 'In a story that may be apocryphal, it [was] said that some magistrates courts [had] rubber stamps bearing the legendary "nature and gravity of the offence"...reasons are often expressed as terse formula...rather than as thought out justifications specific to individual cases': Catherine Fitzmaurice and Ken Pease, *The Psychology of Judicial Sentencing* (1986), 36.

[14] Brian Ewart and Donald Pennington, 'An Attributional Approach to Explaining Sentence Disparity' in Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing* (1987) 182, 187.

[15] See Maxfield and Babbie, n 11, 333 for some of the issues which arise in such analyses. For discussion of the interpretive paradigm which underpins such research, see eg Ronet Bachman and Russell Schutt, *The Practice of Research in Criminology and Criminal Justice*, Sage Publications (2003, 3rd ed), 20.

in determining whether a sentence should be suspended',[16] and these factors appeared to be most determinative of the decision to suspend, in terms of both the range of factors and the number of cases in which they were cited.

Prior record

All other things being equal, courts will generally sentence repeat offenders more severely than those with lesser criminal records, although it is clear that an offender's record may not be used as a justification for imposing a sentence which is disproportionate to the gravity of the offence.[17] The appropriate means of taking antecedent offences into account was set out by the High Court in *Veen (No 2)*,[18] where it was deemed to be relevant to determine whether the offence is an uncharacteristic aberration or a continuing attitude of disobedience of the law. If the latter, 'retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted'.

The fact that an offender was a first offender was mentioned as a reason for wholly suspending the sentence in 110 cases,[19] while 128 offenders in

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[16] *R v Lelei* [2001] NSWCCA 229, [30] (Badgery-Parker AJ). Cf research suggesting that in sentencing, the circumstances of the offence are generally given greater weight than those associated with the offender: John Hogarth, *Sentencing as a Human Process* (1971), 282.

[17] There appears to be some uncertainty as to whether prior offending merely inhibits mitigation or amounts to aggravation. See discussion in Andreas Kapardis, *Sentencing by English Magistrates as a Human Process* (1985), 99; Mirko Bagaric, 'Double Punishment and Punishing Character: The Unfairness of Prior Convictions' (2000) 19 *Criminal Justice Ethics* 10; Bagaric, n 4, 230; Warner, n 12, [3.503]; Andrew von Hirsch, 'Record-enhanced Sentencing in England and Wales' (2002) 4 *Punishment and Society* 443; Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed, 2005), [6.2.3]; Julian Roberts, 'Reducing the Use of Incarceration: A Review of Strategies' (2005) 86 *Reform* 15, 18; ALRC, n 4, [6.177]; Rec 6-5(b) and Edney and Bagaric, n 9, Ch 9. Note however that the *Criminal Justice Act 2003* (UK) directs sentencers to treat previous convictions as an aggravating factor: for discussion, see Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (2007), 1 and von Hirsch, Andrew and Roberts, Julian, 'Legislating Sentencing Principles: The Provisions of the *Criminal Justice Act 2003* relating to Sentencing Purposes and the Role of Previous Convictions' [2004] *Criminal Law Review* 639. See also Julian Roberts, 'The Role of Criminal Record in the Sentencing Process' (1997) 22 *Crime and Justice* 303, 322-3.

[18] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Baumer v The Queen* (1988) 166 CLR 51, [14] (The Court).

[19] This includes cases where the judge did not refer specifically to this issue when giving his reasons for deciding to suspend the sentence, but did refer to the offender's lack of prior offending in his comments overall. It is accordingly taken to have been an implicit factor in the decision to suspend the sentence. Note that four offenders had no priors at the time of committing the offence for which they were now being sentenced but had in fact since had a sentence imposed for offences committed subsequent to the present offence.

receipt of a wholly suspended sentence were first offenders.[20] The case of *Campbell and Berry*[21] provides a poignant example of how the use of suspended sentences for such offenders may be an excessively harsh penalty. In that case, two offenders set out to steal an ATM, but were intercepted by police after moving away from it and it was accepted by the court that they had voluntarily decided not to proceed with their plan before being apprehended. Evans J sentenced both offenders to a suspended sentence of six months. On the face of it, however, he appears not to have given adequate weight to the differences between the two offenders. Berry was 40 years old and had served numerous prison terms, as well as having previously had the benefit of a suspended sentence. The main factor in mitigation was that he had recently obtained employment for the first time in many years. His co-offender, by contrast was only 18 years old, had no prior convictions, and the judge formed the impression that he was 'more talk than action'. Notwithstanding the need for parity, I would suggest that it would have been appropriate in the circumstances to impose some lesser sentence on Campbell, in light of his youth and absence of prior convictions. If Campbell were to re-offend, there would be a natural inclination to see him as having already exhausted more lenient options in the sentencing hierarchy, leaving an unsuspended sentence as the next logical step.

Good character or record

There is a so-called 'cardinal rule' at common law in relation to character that while bad character cannot increase a sentence, good character may operate to reduce the sentence.[22] As Slicer J stated in *Bullock*,[23] 'good character, of itself, is not sufficient to warrant exculpation from the need for a substantial penalty for serious crimes.' The ACT Court of Appeal also considered this issue in relation to Social Security fraud in *Brewer*,[24] stating that:

> The otherwise good character of the respondent has no special features that would mark her out for lenient treatment compared with many other persons who, with prior good record, find themselves before the courts in relation to

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20 In fact, 39% of all first offenders received a wholly suspended sentence, with a further 14% receiving partly suspended sentences.

21 *Michael Campbell and Timothy Berry* (COPS, Evans J, 2 October 2003).

22 *R v McInerney* (1986) 42 SASR 111, 113 (King CJ). See also *Giles v Barnes* [1967] SASR 174; *R v Sherlock* (Unreported, Tas CCA, Green CJ, Chambers and Nettlefold JJ, 28 August 1975); *Smith v The Queen* (1982) 7 A Crim R 437 and *R v Gillan* (1991) 100 ALR 66. For discussion, see Kate Warner, 'Sentencing Review 2000-2001' (2001) 25 *Criminal Law Journal* 332.

23 *R v Bullock* [2003] TASSC 37, [4].

24 *R v Brewer* [2004] ACTCA 10, [19] (The Court). Emphasis added. See also *R v Pollard* [2006] NSWCCA 405.

> social security fraud. The authorities to which we have referred point out that many offenders in this field will be first offenders of otherwise good character. Good character was reflected in the effective head sentence of only two years...*To take her good character into account again in determining to wholly suspend an already modest sentence was to fall into error of principle.*

On the other hand, when the High Court reviewed the case of a priest who had sexually abused boys in his church over a lengthy period, McHugh, Kirby and Callinan J found the sentencing judge had been in error in refusing to attach any weight to the offender's otherwise good character.[25] As Callinan J observed, much, but not all 'of the shine' of the offender's good work had been 'taken off by his gross misconduct in abuse of his office', because character is not 'a one-dimensional feature of any person'.

There were 54 offenders who had good character explicitly taken into account when receiving a suspended sentence, of whom 31 had no prior convictions. There is obviously significant overlap between this factor and that of being a first offender, discussed above, but this factor was also applied to offenders whose record indicated only minor previous offending, or that the offence in question was considered to be out of character. Comments about the offender being well thought of in the community or involved in community/volunteer work were also classified here. In *Fletcher-Jones*,[26] for example, Evans J remarked, before partly suspending a two year sentence for aggravated burglary and assault: 'As a volunteer fireman and in other ways you have contributed to your local community. It is a tragedy that by your commission of these crimes you have jeopardised that which you have striven to achieve.'

This is a factor which may particularly benefit white collar offenders, as they are more likely to have strong ties to their community and have their conduct considered an aberration from otherwise law-abiding behaviour. Indeed, Burchett and Higgins JJ of the Federal Court suggested in *McDonald*[27] that 'an equivalent gaol term is plainly a severer punishment for a man like the appellant [an accountant and tax agent] than it would be for many violent criminals, who could take up much the same life upon leaving gaol as they had led before'. This approach to 'respectable

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[25] *Ryan v The Queen* (2001) 206 CLR 267, [178] (Callinan J). References omitted. See also [35] (McHugh J); [112] (Kirby J).

[26] *Nigel Fletcher-Jones* (COPS, Evans J, 7 May 2003).

[27] *McDonald v The Queen* (1994) 48 FCR 555, 380.

offenders' has been criticised on the basis of unfair discrimination in favour of middle class offenders,[28] and it is likely to be one of the factors which gives rise to a perception that suspended sentences are more likely to benefit white collar offenders. Moxon, for example, has suggested that 'suspended sentences are used largely as a means of appearing tough on those who are normally treated leniently anyway: middle class offenders and those with a settled life style'.[29]

Youth

When sentencing young offenders, there is an emphasis on rehabilitation.[30] In Tasmania, offenders under the age of 18 are dealt with by the *Youth Justice Act 1997*, which provides, *inter alia*, that a person who was a child at the time of the offence will be dealt with and sentenced as a child, regardless of his or her age when charged, brought before the court, or sentenced.[31] At common law, the general sentencing principles for young offenders continue to apply until the age of 21 or beyond,[32] with authority to suggest that the mitigating effect gradually diminishes throughout the early twenties.[33] In *Jones v Fleming*,[34] Burbury

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[28] Warner, above n 22, 344.

[29] David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study 103 (1988), 35. Note a recent study of English sentencers' decisions in 'cusp' cases, where the authors concluded that the emphasis on personal mitigation has a 'differential impact' on offenders from different socio-economic groups', arguing that '[s]ince having a job, home and family are frequently cited as factors militating against custody, offenders who are already socially and economically disadvantaged are likely to suffer further disadvantage in the sentencing process: Hough, Jacobson and Millie, above n 8, 42.

[30] See eg ALRC, n 4, Ch 27 and Edney and Bagaric, above n 9, [7.4.1].

[31] *Youth Justice Act 1997* (Tas), s 103. Note however that where the offender is aged 19 years or over at the time of commencement of proceedings, any term of detention imposed by the court is to be served in an adult prison.

[32] See eg *R v Mather and Rogers* [1962] Tas SR 25; *Spaulding v Lowe* (Unreported, Tas SC, Underwood J, 19 February 1985) and *George v The Queen* [1986] Tas R 49.

[33] *Haney v Cochrane* (Unreported, Tas SC, Slicer J, 1 May 1997). See also *McKenna v The Queen* (1992) 7 WAR 455 and discussion in David Thomas, *Principles of Sentencing* (2nd ed, 1979), 195 and Edney and Bagaric, above n 9, [7.4.1].

[34] *Jones v Fleming* [1957] Tas SR 1, 4. See also *Lahey v Sanderson* [1959] Tas SR 17, 21; *Mathers v Rogers* [1962] Tas SR 25*Mathers v Rogers* [1962] Tas SR (NC 25); *Arnold v Samuels* (1972) 3 SASR 585; *R v S (No 2)* (1992) 7 WAR 434; *McKenna v The Queen* (1992) 7 WAR 455; *Benns v Judd* (1992) 58 SASR 295; *R v Everett and Phillips* (1994) 72 A Crim R 422 (Tas CCA) and *Maney v White* [2007] TASSC 7. For further discussion, see Warner, above n 12, [3.507]-[3.509]. Note also that the Tasmanian Government has formally acknowledged that 'it is particularly inappropriate for young people to be detained in prison, unless there are exceptional circumstances. There is substantial evidence that the experience of prison is more likely to confirm young people into a criminal career than to deter or rehabilitate them': Tasmanian Government, *Corrective Services and the Response to Crime in Tasmania*, Policy Paper (1992).

CJ asserted that 'a juvenile offender should be given every reasonable opportunity to reform, rather than that he should be exposed to the possible corrupting influence of other inmates of the gaol and thereby set on a path of crime'.

The Court of Criminal Appeal recently considered the relevance of youth in the case of *Attorney-General (Tas) v Blackler*.[35] The offender, who was 20 years old at the time of sentence, received a 12 month wholly suspended sentence in combination with a probation order for 20 property offences totalling over $40,000. The Crown's appeal was dismissed, with Crawford and Slicer J noting at [15] that:

> Imprisonment is a punishment of last resort, one reserved for the serious cases, and more so for a young offender. Rehabilitation cannot be achieved through imprisonment in many cases and the fear with a young offender is that imprisonment has the potential for further corruption and may ensure that the youth embarks on a path of crime. If leaving out of prison a young person who has not previously appeared in a court for offences results in the offender not reoffending, then the public will have been well served by the sentence which was selected.

A similar approach was taken by Blow J when dealing with three brothers aged 21, 22 and 28 who pleaded guilty to a series of burglaries and thefts totalling some $24,000.[36] One of the brothers had incurred drug debts which he had no means of paying and was scared of his creditors, so he enlisted his brothers' assistance to steal enough to repay the debts. He vowed that he had then intended to stop stealing and he had ceased using drugs. Justice Blow imposed wholly suspended sentences on two of the brothers, including the drug-addicted instigator, while the third received a community service order, stating that:

> I have to balance the need for deterrent penalties against the public interest in reforming these young offenders. Imprisonment would be likely to expose them to corrupting influences, and defeat the very purpose for which punishment is imposed. I think it will be helpful for them to keep their jobs. I have therefore decided to impose a combination of community service orders and suspended sentences.

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[35] *A-G (Tas) v Blackler* (2001) 121 A Crim R 465. See also *MJD v The Queen* [2000] TASSC 175.

[36] *Matthew Bresnehan, Andrew Bresnehan and Robert Mundy* (COPS, Blow J, 15 August 2002). The main offender, Matthew Bresnehan, was subsequently dealt with for a further 66 property offences, for which he received a 20 month unsuspended sentence: *Matthew Bresnehan* (COPS, Slicer J, 28 June 2004).

Youth was cited as a consideration in suspending a sentence in whole or part in 59 cases.[37] Prima facie, suspended sentences may not be an ideal sentencing option for young offenders, where they are offered no support during the sentence; coupled with a lengthy operational period, this may expose them to a high risk of failure. In jurisdictions where there is a presumption of activation on breach, this may mean that they end up prematurely in an adult prison.[38] Even if any subsequent offending takes place after the expiration of the operational period, suspended sentences may pose the same problems for young offenders as for first offenders, namely that they will be regarded as having failed to respond to more lenient dispositions, for whom immediate imprisonment may therefore be the next logical progression.[39]

Drug/alcohol rehabilitation

A new drug treatment order was recently introduced for offenders sentenced in the Magistrates' Court, although such orders are not available where the court would otherwise have suspended the sentence in whole or part. The Court Mandated Diversion for drug offenders pilot introduced in mid-2007 also enables magistrates to make drug treatment a condition of a suspended sentence. If this option proves 'promising', the Tasmania Law Reform Institute has recommended that similar powers be granted to the Supreme Court.[40]

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[37] These data support the view above that there is a progressive loss of leniency for youth, rather than a sharp cut-off at 21: 47 of the 59 offenders were aged 21 or under, seven offenders were aged 22 and four aged 23. There was also one offender whose age was not mentioned but the sentence was suspended 'because firstly you are still comparatively a young man': *Nathan Smith* (COPS, Cox CJ, 22 March 2004).

[38] Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002), 124. Note that the Tasmania Law Reform Institute has recently recommended the introduction of a statutory presumption in favour of activation on breach in Tasmania: see Tasmania Law Reform Institute, *Sentencing* (2008) (TLRI), Recommendation 18.

[39] It has been noted that suspended sentences put young people at risk of entering the *adult* correctional system, as there is a presumption in Victoria that on breach the young person must serve the sentence in an adult gaol: Sentencing Advisory Council, *Suspended Sentences: Interim Report* (2005) (SAC Interim Report), [5.45]-[5.55]. In Part 1 of its Final Report, the Council recommended that where the court is dealing with a young offender for breach, it be permitted to order the offender to serve the sentence in a youth training or residential centre: Sentencing Advisory Council, *Suspended Sentences: Final Report - Part 1* (2006) (SAC Final Report), Rec 11.

[40] TLRI, above n 38, Recommendation 47.

There is considerable case law to suggest that addiction to drugs or alcohol will not generally constitute a factor in mitigation.[41] As King CJ held in *Spiero*,[42]

> One feels sympathy for a person who has become entangled in drug addiction, but the courts cannot treat addiction as an excuse, or even a mitigating factor, in relation to serious crime. Those who are addicted to drugs must understand that if they allow their addiction to lead them into serious crime, they must expect to receive the same severe punishment as would be received by others.

Wright J similarly held in *Harland-White*[43] that the offender's drug dependency went 'some way towards explaining his conduct, but it is by no means an excuse for what he did. Drug dependency is responsible for a vast amount of dishonest crime these days. To seek to excuse criminal conduct because of such a condition is facile nonsense.'

This position is not universally accepted, however. As Simpson J acknowledged in *Henry*, drug addicts 'do not come to their addiction from a social or environmental vacuum. This court should not close its eyes to the multifarious circumstances of disadvantage and deprivation that frequently precede and precipitate a descent into illegal drug use'.[44] Her Honour went on to say that the exercise of the sentencing decision 'may call for an examination of the circumstances that led the offender to drug use, addiction and crime. All the circumstances that precipitate the use of drugs are relevant to the evaluation of moral culpability that is essential to the sentencing process', suggesting that it would therefore be 'too simplistic to lay down a principle that addiction either is, or is not, a mitigating circumstance in the sentencing of offenders convicted of drug related crime'.[45]

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[41] See Greg Taylor, 'Should Addiction to Drugs be a Mitigating Factor in Sentencing?' (2002) 26 *Criminal Law Journal* 324 and Edney and Bagaric, n 9, [7.4.6]. Recent research reported that 39% of all Tasmanian inmates stated that the main reason for committing the most serious offence for which they were currently incarcerated was drug-related: Paul Williams, Leesa Morris and Catherine Rushforth, *Drug Use Careers of Offenders (DUCO): Tasmania Sample (Confidential Report to Corrective Services Tasmania),* Australian Institute of Criminology (2003), 7. See also Raimondo Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS),* Technical Report No 245 (2006).

[42] *R v Spiero* (1979) 22 SASR 543, 549.

[43] *Harland-White v The Queen* (Unreported, Tas CCA, Underwood, Wright and Crawford JJ, 4 February 1998). See also *R v Henry* (1999) 46 NSWLR 346, [206] (Spiegelman CJ); *R v McKee* (2003) 138 A Crim R 88 and *R v Proom* (2003) 85 SASR 120.

[44] *R v Henry* (1999) 46 NSWLR 346, [337] (Simpson J).

[45] Ibid [341]-[342] (Simpson J). See also *R v Fabian* (1992) 64 A Crim R 365 (Vic CCA); *Dunford v The Queen* (Unreported, Tas CCA, Cox, Underwood, Wright JJ, 17 March

The ALRC recently recommended that Federal sentencing legislation be amended to provide that the court take into account that an offender is voluntarily seeking treatment to address any physical or mental condition or illness that may have contributed to the commission of the offence.[46] This could be held to include any attempts to overcome substance abuse issues. In *Thomson*,[47] the Western Australian Court of Criminal Appeal imposed a suspended sentence in order to assist the offender's continued rehabilitation. The Victorian Court of Appeal observed in *Cotry*,[48] however, that a suspended sentence for offenders with substance abuse issues 'is not always the best option...Those who are drug addicted are always at risk of breaching their suspension orders when unsupervised, thus imperilling the purpose for which the order is made'.

There were 52 offenders who received a suspended sentence who had by the time of sentence undergone some form of drug and/or alcohol rehabilitation or were in the process of doing so,[49] although the evidence of rehabilitation was sometimes less than persuasive. *MacDonald*,[50] for example, was dealt with for aggravated burglary and stealing. He had been using drugs for a decade and had been admitted to a detoxification clinic on at least three previous occasions. He had also already received an eight month partly suspended sentence for property offences committed to support his drug habit and committed the subject offence during the operational period of that sentence. Shortly thereafter, he was again admitted to a detoxification clinic, before commencing a methadone program. Evans J may have found the offender's participation in the program compelling, because he suggested that '[w]hilst your progress since that time has been patchy, there is reason to hope that with the support of your parents it will continue.' He referred to the fact that this offence was committed in breach of a suspended sentence and imposed another eight month sentence, four months of which was

1995), [10]; *R v Denman* (1995) 84 A Crim R 365 and *Harland-White v The Queen* (Unreported, Tas CCA, Underwood, Wright and Crawford JJ, 4 February 1998).

46 ALRC, above n 4, Rec 28-5(b). See further discussion below in the context of mental health issues.

47 *Thomson v The Queen* [1998] WASCA 199.

48 *R v Cotry* [2002] VSCA 13, [9] (Winneke P, Charles and Brooking JJA agreeing). See also *Mobilia v The Queen* [2002] WASCA 130, [54] (McKechnie J, in dissent).

49 Not surprisingly, there was some overlap in these categories, as follows: 38 offenders were classified under drug rehabilitation, 6 under alcohol rehabilitation and a further 6 who received both. There were also 15 offenders who had received some other form of treatment, for example, anger management course or counselling, some in conjunction with drug/alcohol rehabilitation.

50 *Cameron MacDonald* (COPS, Evans J, 29 October 2003).

suspended, 'in recognition of the progress you have made towards overcoming your abuse of drugs and with a view to providing impetus for those efforts'.

In some other cases, there was greater evidence in support of the offender's attempts at rehabilitation. In *Damien*,[51] for example, the offender pleaded guilty to arson for setting fire to his mother's house while under the influence of alcohol, cannabis and amphetamines. At the time of the offence, he been addicted to drugs for some 10 years and had been admitted to hospitals and clinics on numerous occasions. Underwood J imposed a wholly suspended sentence of 12 months, and noted:

> During the 18 months that have passed since the commission of the crime you have made tremendous steps towards self-rehabilitation. You successfully undertook a drug rehabilitation course and I am told that you are not now using any drugs at all other than some prescribed medication. You undertook a TAFE social work course and subsequently have organised a men's group to help others who have similar past experiences to yourself.

In such cases, the ability of the court to suspend sentence presents a key incentive to offenders to make genuine efforts to deal with their drug addiction, but it may be desirable to link supervision and/or participation in a drug rehabilitation program more frequently with suspension of the sentence. To this end, the ALRC recently recommended that when a court imposes a suspended sentence, it should have broad discretion to order that offender to undertake a rehabilitation program.[52] It seems somewhat

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[51] *Michael Damien* (COPS, Underwood J, 4 April 2003).

[52] ALRC, above n 4, Rec 7-10(a). Cf *R v Murphy* [2006] NSWCCA 417, where the NSW Court of Criminal Appeal rejected the submission that 'in the light of her background of drug abuse and the fact that she was continuing to use drugs at the time of sentence, her entry into a residential rehabilitation program should have been made a condition of the bond, rather than simply the subject of a recommendation. As he put it, it was unreasonable to put her back into the community and expect her to cope as matters then stood': [25]. Note also the position that requiring an offender subject to a conditional release order to undergo drug treatment may be inconsistent with the offender's release: *R v Jones* [1984] WAR 175, 180. For early discussion on consent issues relating to such treatment, see eg Richard Fox, 'Compulsion of Voluntary Treatment' (1992) 16 *Criminal Law Journal* 37, 44-46. It would seem that such considerations have been effectively subsumed in the Drug Court literature: see Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8; Arie Freiberg, 'Problem-oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196; Maria Borzycki, *Interventions for Prisoners: Returning to the Community* (2005), 31-2 and Arthur Caplan, 'Ethical Issues Surrounding Forced, Mandated, or Coerced Treatment' (2006) 31 *Journal of Substance Abuse Treatment* 117.

naïve to assume that an offender who is trying to overcome many years of dependency on drugs and/or alcohol will readily be able to do so just because they have a suspended sentence hanging over their head. Accordingly, there may be a need to have broader use of treatment, whether as a condition or in combination with the suspended sentence. The need for adequate supervision and treatment is especially acute in the context of offenders with dual diagnosis, who may require a variety of treatment and rehabilitation programs,[53] as was recognised recently in submissions to the Victorian Sentencing Advisory Council (SAC).[54] It is therefore worth bearing in mind the following comments in the Queensland case of *Basawa*:

> A suspended sentence will not provide this applicant with any supervision for his psychiatric illness and his drug abuse when he is released into the community, something which is in both the applicant's and the community's interest. To release the applicant with his myriad of complex problems into the community without supervision is to invite disaster, not just for him but also for the community.[55]

Mental health issues

It is well-accepted that mentally ill and intellectually disabled people are overrepresented within the Australian criminal justice system.[56] Where there is evidence that the offender was mentally disordered at the time of the offence, this is relevant to sentence, so long as there is no inconsistency with an unsuccessful defence of insanity or a guilty plea.[57] In some instances, the offender's mental condition may justify the imposition of a longer sentence in order to satisfy the offender's need for

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[53] ALRC, above n 4, [28.43] and Rec 28-4(c). For discussion of the prevalence of dual diagnosis in the criminal justice system, see Maree Teesson and Lucy Byrnes (eds), *National Drug Strategy and National Mental Health Strategy: National Comorbidity Project* (2001).

[54] SAC Interim Report, above n 39, [2.16].

[55] *R v Basawa* [2001] QCA 222 (McMurdo P, Thomas JA and Atkinson J agreeing).

[56] ALRC, above n 4, [28.1]. See also James Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice*, No 334 (2007). For UK data on the mental health of prisoners compared with the general population, see *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison* (2004), Table 4. Whereas 0% of the general female population suffered from three or more mental disorders, 62% of female prisoners did so.

Note that there is now a specialised mental health list being piloted in the Magistrates' Court, which aims to 'provide an opportunity for eligible individuals to voluntarily address their mental health and/or disability needs associated with offending behaviour': Tasmanian Magistrates' Court, *Mental Health Diversion List - Procedural Manual*, Hobart (April 2007), 3.

[57] Warner, above n 12, [3.515]. See also Edney and Bagaric, above n 9, [7.4.2].

treatment or the protection of society.[58] Generally, however, it will be considered a factor in mitigation, because general deterrence usually plays a lesser role in such circumstances, as the offender may not be considered an appropriate medium for making an example to others.[59]

As discussed above, the ALRC recently recommended that voluntary treatment undertaken by an offender 'to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence' should be regarded as a relevant factor to be considered in sentencing.[60] In particular, it was suggested that if a person 'is receiving and responding to a program or treatment it may be that the period of time required for rehabilitation is lessened, justifying a shorter sentence *or less severe sentencing option.*'[61] Even where there has not been any past rehabilitation, however, Warner observes that '[t]he chance of rehabilitation by psychiatric treatment may provide grounds for wholly or partly suspending the sentence',[62] citing inter alia the case of *Hurd*,[63] where Cox J found that he was 'not persuaded that a total sentence of two years' imprisonment, half of which was suspended, sufficiently recognised the diminished responsibility of the [offender]'.

Mental health problems were mentioned as a relevant factor for 35 offenders who received a suspended sentence in 2002-2004, including where the offender suffered from schizophrenia, depression or suicidal tendencies. There were a further 10 suspended sentences where the offender suffered from intellectual disability, brain damage or low intelligence, the principles for which are similar to those governing

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[58] This will always be subject to the principle of proportionality: see *Channon v The Queen* (1978) 20 ALR 1; *Veen v The Queen* (1979) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465.

[59] See eg *Roadley v The Queen* (1990) 51 A Crim R 336, 343 (Vic CCA) and *Parker v Gleeson* (Unreported, Tas SC, Underwood J, 30 August 1991).

[60] ALRC, above n 4, Rec 28-5(b) and Ch 28. See also Susan Hayes, 'Sentencing of People with Mental Disorders' (2005) 96 *Reform* 24 and Jacobson and Hough, above n 17, 23. For discussion in relation to conditional sentences in Canada, see Julian Roberts and Simon Verdun-Jones, 'Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*' (2002) 39 *Alberta Law Review* 788.

[61] ALRC, above n 4, [28.54]. Emphasis added.

[62] Warner, above n 12, [3.516].

[63] *Hurd v The Queen* [1988] Tas R 126, 129. See also *R v Chandra* [2003] SASC 319, where Debelle J in dissent suggested that an offender's psychological or medical condition which would render imprisonment a greater hardship to him than to another person is a relevant consideration in determining the length of a term of imprisonment *and whether it should be suspended*: [50]. Emphasis added.

mental disorder.[64] Imposition of a suspended sentence in such cases can provide a valuable means of ensuring that a very vulnerable sector of the community are not further disadvantaged and, where additional conditions are imposed, can allow scope for treatment. It is arguable, however, that such treatment could and should be made available in the absence of a suspended sentence.[65] In the case of *Rawlings*,[66] for example, the offender pleaded guilty to demanding property with menaces, injury to property and unlawfully setting fire to property, having previously committed similar offences. She had had a troubled life and appeared to be suffering from depression following the birth of unplanned triplets, who had since been removed from her care. Slicer J stated:

> The criminal law is a cumbersome vehicle for the disposition of a case such as this. The crimes were serious but immediate further imprisonment is not appropriate. Ms Rawlings has served 49 days in custody for these crimes and, as best as I am able, I will meet the competing principles of sentencing by imposing a suspended term of imprisonment of 6 months, but provide conditions which will both afford supervision and permit access to State resources for treatment.

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[64] See *R v Koeppen* (Unreported, Tas CCA, Green CJ, Neasey and Cox JJ, 3 December 1982) and *Devine v The Queen* (1992) 2 Tas R 167. See also *M v Hibble* [2003] TASSC 13, [12]. Ironically, in the case of *Arlo Walsh* (COPS, Underwood J, 12 May 2004), the fact that the offender appeared to be *intelligent* was taken into consideration in deciding to suspend the sentence.

[65] Conversely, it may be argued that it is not the court's role to facilitate the treatment of offenders for social and psychological problems through the imposition of one sentence or another. For discussion of the therapeutic jurisprudence movement and the role of the judicial officer in treating offenders' social and psychological problems, see eg Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems' (2001) 11 *Journal of Judicial Administration* 8; Alfred Allan, 'The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis' (2003) 20(2) *Law in Context* 24; Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20(2) *Law in Context* 121; Michael King and Julie Wager, 'Therapeutic Jurisprudence and Problem-solving Judicial Case Management' (2005) 15 *Journal of Judicial Administration* 28; Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle' in Gregory Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (2007), 129; Annette Hennessy, 'Reconnection to Community as a Sentencing Tool' in Reinhardt G and Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (2007), 35; Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205; Harry Blagg, *Problem-Oriented Courts* (2008); Michael King, 'Problem-solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership' (2008) 17 *Journal of Judicial Administration* 155; Andrew Cannon, 'Smoke and Mirrors or Meaningful Change: The Way Forward for Therapeutic Jurisprudence (2008) 17 *Journal of Judicial Administration* 217.

[66] *Kay Rawlings* (COPS, Slicer J, 4 May 2004).

Justice Slicer imposed a number of conditions on Rawlings, including supervision by a probation officer, attendance at educational programs as directed by the court or probation officer, and drug, alcohol, medical, psychological and/or psychiatric testing and treatment, as directed by a probation officer. These conditions represent a constructive attempt to assist the offender in refraining from re-offending, however it could be argued that it would have been more appropriate to impose them as conditions of a probation order, rather than subjecting the offender to a suspended sentence and thereby exposing her to the risk of imprisonment upon breach, especially given that she had already spent seven weeks in custody.[67]

The sentence imposed in the case of *Baker*[68] was even more far-reaching, comprising a four month sentence, wholly suspended with treatment conditions similar to those imposed on Rawlings, and in addition, an assessment order, a supervision order and a continuing care order.[69] Once again, it is debatable whether her offence, namely one count of making a false threat of danger, merited a sentence of imprisonment in the first place, with 14 of the 16 such cases between 1978 and 2000 resulting in a non-custodial order.[70]

It is far from clear that mentally ill offenders are capable of comprehending such complex orders. At the same time, there are significant practical difficulties in ensuring that sentencers are able to craft meaningful and hopefully effective treatment regimes which don't potentially expose offenders to prison. While there should be scope for individualising treatment, judges should be careful not to overload any offender, particularly a mentally disordered one, with an array of orders which may merely make breach an inevitable consequence. In this context, it is also relevant to note the submission to the SAC by the Victorian Mental Health Legal Centre that for those with a mental illness, 'the prospect of likely imprisonment on breach may be more likely to precipitate breach than deter it'.[71]

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67 Although Slicer J referred to earlier convictions for assault, disorderly conduct, injury to property and stealing, these offences appear to have been dealt with in the Magistrates' Court and it is therefore not possible to ascertain what sentences she received for her previous offending.

68 *Amanda Baker* (COPS, Slicer J, 30 April 2004).

69 See *Sentencing Act 1997* (Tas), ss 72-77A for the power to make such orders.

70 Warner, above n 12, [13.211].

71 SAC Interim Report, above n 39, [2.45]. By way of analogy, a NSW study found that there were almost twice as many prisoners with intellectual disabilities in prison for breach of parole conditions, compared with the general prisoner population: Jim

Physical health issues

Ill health or physical disability is a mitigating factor where the punishment is more burdensome to the offender or where there is a risk that imprisonment will have a grave effect on the offender's health, with King CJ explaining in *Smith*[72] that:

> The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have on the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health.

Chief Justice King expanded on this principle in *De Vroome*, when he stated that an offender's 'psychological or medical condition which would render imprisonment a greater hardship to him than to another person, is a relevant consideration in determining the length of a term of imprisonment *and whether it should be suspended*'.[73]

Health problems were cited as a factor in deciding to suspend the sentence for 30 offenders in 2002-2004, with women overrepresented in this category.[74] In the case of *JPK*,[75] the offender abetted her then partner in committing sexual assaults on her daughter, who was aged 10-12 at the time. The offender's personal circumstances were compelling, including having herself been sexually abused in childhood. At the time of sentence, she had been recently diagnosed with multiple sclerosis, and Blow J noted that '[i]mprisonment, and the resulting stress, is likely either to exacerbate the condition or to interfere with its treatment.' He set a sentence of two years, adding that '[s]he must go to prison but, solely because of her multiple sclerosis, I will suspend part of her

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Simpson and Linda Rogers, 'Intellectual Disability and Criminal Law', *Hot Topics*, Issue 39 (2002). It follows that it is essential that offenders with such disabilities or mental health issues properly understand and are able to meet the conditions imposed upon them, whether as part of parole or a suspended sentence.

72 *R v Smith* (1987) 44 SASR 587, 589, approved by the High Court in *Bailey v DPP (NSW)* (1988) 78 ALR 116.

73 *R v De Vroome* (1989) 38 A Crim R 146, 147 (SA CCA). Emphasis added. In that case, however, the fact that the offender suffered from claustrophobia was deemed an inadequate reason to suspend the sentence. Similarly, in *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, it was held on appeal that the offender's bulimic condition did not preclude a sentence of actual imprisonment. See also *R v Chandra* [2003] SASC 319.

74 There were 11 female offenders in this category (37%), compared with 13% overall.

75 *JPK* (COPS, Blow J, 28 May 2003). The principal offender was sent to prison but no details were provided as to the length of sentence received.

sentence [6 months] and impose the shortest possible non-parole period [9 months]'.

There were also several cases where the offender's 'poor health' was adverted to, without any details of such condition being provided, including where this was the only factor mentioned as a possible reason for suspending the sentence.[76] Given the significant practical difference to an offender between a sentence of imprisonment served in a correctional facility and having merely the spectre of such sentence hanging over one's head, it is in my view desirable that more specific details be provided as to the health problems suffered by the offender and why this makes suspension of the sentence appropriate.

Adverse personal circumstances

Brennan J held in *Neal*[77] that 'emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence, though its mitigating effect can be outweighed by a countervailing factor'. In *S*,[78] Slicer J accepted that 'the emotional state of the offender is a factor to be considered as mitigatory', while in *Brown*,[79] the Court of Criminal Appeal regarded the offender's distress at his parents' recent death as diminishing his culpability such as to justify reducing the sentence for unlawfully setting fire to property from four years to one year, six months of which was to be suspended.

The adverse personal circumstances of 32 offenders were specifically taken into account in deciding to suspend a sentence, for example, where the offender had 'had a terrible life',[80] had been subjected to abuse in childhood,[81] or was in an abusive relationship at the time of the offence,[82] had been orphaned at a young age[83] or had recently experienced the death of a significant family member.[84] Although a life of adversity should not be regarded either by offenders or the community

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76 Eg *Timothy Gay* (COPS, Slicer J, 16 April 2003).

77 *Neal v The Queen* (1982) 149 CLR 305, 324. Reference omitted. See more recently *R v AWF* (2000) 2 VR 1 and *DPP (Vic) v Duong* [2006] VSCA 78.

78 *R v S* (1991) Tas R 192.

79 *R v Brown* (Unreported, Tas CCA, Nettlefold, Brettingham-Moore and Underwood JJ, 12 April 1985).

80 *Suzanne Banks* (COPS, Blow J, 10 November 2003).

81 Eg *JPK* (COPS, Blow J, 28 May 2003).

82 Eg *Tammy Freeman* (COPS, Slicer J, 21 August 2002).

83 *Nathan Smith* (COPS, Cox CJ, 22 March 2004).

84 *Sarah Pearce* (COPS, Crawford J, 25 June 2003).

as a carte blanche for a life of crime,[85] it seems only just that offenders whose lives provide them with little opportunity or incentive for law-abiding conduct receive some recognition of the difficult circumstances which they face.

Supportive relationships

Where an offender has what might be thought of as particularly good personal circumstances, this may also be taken into account in deciding to suspend a sentence. In particular, the Court appears ready to acknowledge the significance of supportive personal relationships, which are likely to help an offender desist from offending behaviour.[86]

There were 31 offenders where some form of significant support in their lives appeared to be a reason for suspension. Although this was generally either a stable intimate relationship (13 cases), or supportive family (18 cases), a stable domestic environment generally may also provide grounds for suspension. In [redacted],[87] one of the factors Slicer J had regard to in imposing a suspended sentence for trafficking in a narcotic substance was the fact that the offender was now living in Melbourne with two lawyers whose son was of the same age as the offender and attended the same university. It was said that the couple were 'well experienced in dealing with young adults and [were] providing appropriate guidance and supervision.'

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[85] For discussion of the so-called 'Rotten Social Background Defense' see William Heffernan and John Kleinig (eds), *From Social Justice to Criminal Justice* (2000), especially William Heffernan, 'Social Justice/Criminal Justice', 47, 63-72; Stephen Morse, 'Deprivation and Desert', 114, 153. See also Barbara Hudson, 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society* (2002) 562; Ashworth, above n 17, [4.5] and Edney and Bagaric, above n 9, [7.4.4].

[86] For a summary of the pro-social effects of marriage, especially for men, see Andrea Leverentz, 'The Love of a Good Man? Romantic Relationships as a Source of Support or Hindrance for Female Ex-Offenders' (2006) 43 *Journal of Research in Crime and Delinquency* 459. See also John Laub, Daniel Nagin and Robert Sampson, 'Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process' (1998) 63 *American Sociological Review* 225; Shadd Maruna, *Making Good: How Ex-convicts Reform and Rebuild Their Lives* (2001); Terry Rawnsley, *Dynamics in Repeat Imprisonment: Utilising Prison Census Data* (2003), 17 and Borzycki, n 53, Appendix A, Table A5. Cf Chris May, *Explaining Reconviction Following a Community Sentence: The Role of Social Factors,* Home Office Research Study 192 (1999), where reconviction rates for single offenders and those with partners were found to be 'virtually identical': ix. For discussion of the benefits of supportive parental relationships, see Shayne Jones, Elizabeth Cauffman and Alex Piquero, 'The Influence of Parental Support Among Incarcerated Adolescent Offenders' (2007) 34 *Criminal Justice and Behavior* 229.

[87] [Redacted] (COPS, Slicer J, 9 July 2002). The Crown appealed unsuccessfully against the sentence: [redacted]

Risk of re-offending

The low likelihood of the offender re-offending was considered by Kirby J in *Dinsdale*[88] to be relevant to the decision whether to suspend. Cox J's position in *Causby* that 'a defendant does not qualify for a suspended sentence merely by persuading the court that the likelihood of repetition is slight or non-existent'[89] should, however, still be borne in mind. There were 20 cases in 2002-2004, 11 of which involved first offenders, in which the sentencing judge made an assessment that the offender was at low risk of re-offending in deciding to suspend. On the other hand, an assessment that there is a high risk of re-offending does not appear to preclude at least partly suspending a sentence, as there were two cases where a partly suspended sentence was imposed following an assessment that the offender was at risk of re-offending. There was also one case where such an offender received a wholly suspended sentence, but this was replaced with an unsuspended sentence following a successful Crown appeal.[90]

Factors relating to the offence

Offences committed in company

It is axiomatic that where there are multiple offenders, the sentence each receives should reflect his or her degree of participation in the offence. As Neasey J observed in *Prestage*,[91] 'where other things are equal persons concerned in the same crime should receive the same punishment, and that where other things are not equal a due discrimination should be made between them'.[92] Furthermore, the High

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[88] *Dinsdale*, n 2, [88] (Kirby J). See also *Fardon v A-G (Qld)* (2004) 223 CLR 575, [124]-[126] (Kirby J). For discussion of the issues surrounding predicting the risk of re-offending, see eg James Wilson, 'Dealing with the High-Rate Offender' (1983) 72 *Public Interest* 52; Michael Tonry, *Sentencing Matters* (1996), 139; Arie Freiberg, *Sentencing Review: Discussion Paper* (2001), 44; Gemma Harper et al, 'Factors Associated with Offending' in Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291 (2004) 17; ALRC, above n 4, [4.16] and Edney and Bagaric, above n 9, [3.2.2.2].

[89] *R v Causby* [1984] Tas R 54, 67. Cf *R v Meers and Moles* (1998) 101 A Crim R 329. See also *M v Hibble* [2003] TASSC 13 where the relevance of the risk of reoffending on the length of operational period was considered.

[90] See *Timothy Knight* (COPS, Slicer J, 13 June 2003) and *A-G (Tas) v Knight* [2003] TASSC 77.

[91] *R v Prestage* [1979] Tas R 270, 272-273. See also *R v Tait* (1979) 24 ALR 473 and *Lowe v The Queen* (1984) 154 CLR 606. For discussion, see Warner, above n 12, [3.801]; ALRC, above n 4, [5.20].

[92] In Hogarth's study of Canadian magistrates, the most important individual determining factor in sentencing was the degree of culpability of the offender: Hogarth, above n 16, 280.

Court held in *Postiglione*[93] that a proper comparison of co-offenders' sentences requires consideration of all components of the sentence.

In *Joneceski*,[94] Wright and Crawford JJ held that the fact of suspension may be a basis for a legitimate sense of grievance, whereas in the South Australian case of *Huggett*, it was held that 'whether there has been unjustified disparity between sentences, the fact that one offender has received a suspended sentence can, in the usual case, have little or no relevance to the issue'.[95] The Tasmanian Court of Criminal Appeal recently considered this issue in *Attorney-General (Tas) v Knight*,[96] where it was submitted that the parity principle required that the offender receive a 'like sentence' to his co-offender's wholly suspended sentence. This proposition was rejected by the Court on the basis of the offender's worse record and greater role in the offence.

There were 14 cases in 2002-2004 where the offender's minor role was stated as a relevant factor in deciding to suspend the sentence; in all such cases, the sentence was wholly suspended. In *Walsh*,[97] for example, the offender received a two month sentence for his part in an attack between two rival gangs, while his co-offenders received unsuspended sentences of up to 20 months. There were a further 10 cases where parity was mentioned as a relevant factor in imposing a suspended sentence. In *Pursell*,[98] an aggravated burglary case, Evans J noted that the co-offender 'did not receive an immediate custodial sentence for his involvement in these offences, notwithstanding that his record of prior convictions is worse than yours'. Although Evans J felt the co-offender had been dealt with leniently, 'the consideration of parity, coupled with the steps you have taken to rehabilitate yourself since your commission of these offences, satisfy me that an immediate custodial sentence is not required'.

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93 *Postiglione v The Queen* (1997) 189 CLR 295.

94 *Jonceski v The Queen* [1991] Tas R (NC) N32 (Tas CCA).

95 *R v Huggett* [2005] SASC 236, [32] (Sulan J, Doyle CJ and Perry J agreeing). See also *R v Canino* [2002] NSWCCA 76 and *El-Kheir v The Queen* [2007] NSWCCA 280.

96 *A-G (Tas) v Knight* [2003] TASSC 77. See also *Brinkman v Dix* (Unreported, Tas CCA, Cox CJ, Wright and Slicer JJ, 2 November 1998) and *Clark v The Queen* [2000] TASSC 161.

97 *George Walsh* (COPS, Cox CJ, 16 October 2002). See also *Claire Blyton and Donna Cullen* (COPS, Evans J, 20 February 2004) and *Rebecca Smith* (COPS, Cox CJ, 25 February 2004).

98 *Paul Pursell* (COPS, Evans J, 9 September 2002).

Response to the charges

Plea of guilty

Although a sentence may not be increased because of a decision to plead not guilty, a guilty plea will generally be considered a mitigatory factor, albeit one of little weight where it results only from a bowing to the inevitable.[99] The High Court considered the issue in *Siganto*, where the majority held that:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.[100]

More recently, a majority of the High Court held in *Cameron*[101] that in order to reconcile the requirement that a person not be penalized for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation, the rationale for any discount must be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a trial. It is not required for the present discussion to resolve the issue of how much weight is to be given to guilty pleas and the appropriate means of acknowledging any such discount, but I accept that a plea is 'without more, a matter going to the mitigation of penalty'.[102]

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99 *Murphy v The Queen* [2000] TASSC 169. See also *R v Shannon* (1979) 21 SASR 442; *R v Lyons* (1993) 69 A Crim R 307 (Tas CCA) and *Inkson v The Queen* (1996) 6 Tas R 1.

100 *Siganto v The Queen* (1998) 194 CLR 656, 663-664 (Gleeson CJ, Gummow, Hayne and Callinan JJ). See also *R v Dowie* [1989] Tas R 167; *Inkson v The Queen* (1996) 6 Tas R 1 and *Harland-White v The Queen* (Unreported, Tas CCA, Underwood, Wright and Crawford JJ, 4 February 1998).

101 *Cameron v The Queen* (2002) 209 CLR 339, [13]-[15] (Gaudron, Gummow and Callinan JJ); cf the approach taken in NSW as discussed in *R v Sharma* (2002) 54 NSWLR 300. Note also the NSW guideline judgment on guilty pleas: *R v Thomson and Houlton* (2000) 49 NSWLR 383. For the view that discounts for guilty pleas put an inappropriate burden on the accused and undermine proper sentencing principles, see Kathy Mack and Sharyn Roach Anleu, 'Sentencing Discount for a Guilty Plea: Time for New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 124 and David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251, 258. See also Edney and Bagaric, above n 9, Ch 8.

102 *Pavlic v The Queen* (1995) 5 Tas R 186, 192-193 (Slicer J). For further discussion, see ALRC, n 4, [6.164]-[6.166]; [11.15]-[11.56]; Recs 11-1 and 11-2.

Kirby J declared in *Dinsdale*[103] that in deciding whether to suspend a sentence, it is necessary to look again at all the relevant matters, while the relevant legislation in Queensland which requires a court to take an offender's guilty plea into account has been interpreted as including partly or wholly suspending the sentence.[104] The prospect that their custodial sentence may be suspended may induce some offenders to plead guilty, with the SAC querying whether the abolition of suspended sentences might cause a reduction in the number of guilty pleas.[105]

It is not surprising to find that offenders who pleaded guilty were dealt with more leniently than those who pleaded not guilty, although there was little difference in the use of non-custodial orders (14% vs 11%). Offenders who pleaded guilty were, however, much more likely to receive a wholly suspended sentence (31% vs 22%). The offender's guilty plea was explicitly referred to as a relevant factor in the imposition of a suspended sentence in 34 cases, although 303 of the 351 suspended sentences handed down in fact followed a guilty plea. It would therefore seem that although a guilty plea is a relevant consideration in the sentencing disposition overall, mentioning it as an express factor relevant to the decision to suspend occurs somewhat arbitrarily. Indeed, it might almost be thought that express reference to this factor, especially when there is no other mitigating factor which would justify the imposition of a suspended sentence,[106] occurs when a judge is searching 'for reason "in mercy"' to suspend a term of imprisonment.

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103 *Dinsdale*, above n 2, [85] (Kirby J).

104 *R v Timoti* [2003] QCA 96, interpreting section 13 of the *Penalties and Sentences Act 1992* (Qld), which requires a court sentencing an offender who has pleaded guilty to take that plea into account and states that the court *may* reduce the sentence that would have been imposed. It has been suggested in the Northern Territory that it may be appropriate to give effect to the value of a guilty plea by *partially* suspending a sentence: *Kelly v The Queen* (2000) 10 NTLR 39 and *Booth v The Queen* [2002] NTCCA 1.

In England, the Sentencing Guidelines Council has suggested that 'application of the reduction principle may properly form the basis for imposing an alternative to an immediate custodial sentence: Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (2004), [2.6].

105 Sentencing Advisory Council, *Suspended Sentences: Discussion Paper* (2005), [8.27] and SAC Final Report, above n 39, [4.49].

106 See for example *Stephen Hall* (COPS, Evans J, 14 October 2003), where the offender's guilty plea appeared to be the only factor in mitigation, as the judge did not accept his stated remorse for his actions.

Remorse[107]

It has been suggested to be 'beyond argument that contrition is a factor properly to be considered in determining what measure of clemency should be extended to an accused person',[108] although more recent discussion, including in *Cameron*,[109] suggests a lesser role for remorse in the sentencing process, with Kirby J describing it as 'icing on the cake'.[110]

Slicer J has suggested that remorse 'is acceptance of and insight into conduct. Genuine remorse permits a form of reconciliation with self, victim, family and the community'.[111] Although a plea of guilty is not essential as a demonstration of contrition or remorse,[112] Wright J observed in *Dowie* that:

> actions speak louder than words. Furthermore, it is not without relevance to consider that an offender's regret is often born from self reproach following apprehension, rather than from genuine contrition for the crime itself. If, however, it is more comforting to justify mitigation on the basis of contrition and remorse I think such subjective attitudes of mind are more readily inferred from a plea of guilty than from protestations from the dock or the bar table.[113]

The Supreme Court has previously considered the relevance of contrition in relation to suspended sentences, with Cox J suggesting in *Causby* that

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107 The terms 'remorse' and 'contrition' appear to be used interchangeably by Tasmanian judges and I accordingly do so too. For discussion of the perceived differences between the terms, consider *R v Pereira* (1991) 57 A Crim R 46 (NSWCCA).

108 *R v Gray* [1977] VR 225, 231 (McInerney and Crockett JJ).

109 See *Cameron v The Queen* (2002) 209 CLR 339, [11], [22] (Gaudron, Gummow and Callinan JJ); [38], [39], [45] (McHugh J); [65], [82] (Kirby J), see For discussion, see Andrew West, 'The Relevance of an Apology in the Sentencing Process' (1997) 18 *Queensland Lawyer* 80; Michael Proeve, David Smith and Diane Niblo, 'Mitigation without Definition: Remorse in the Criminal Justice System' (1999) 32 *Australian and New Zealand Journal of Criminology* 16 and Jacobson and Hough, n 17, 24. Cf Mirko Bagaric and Kumar Amarasekara, 'Feeling Sorry?-Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40 *Howard Journal of Criminal Justice* 364 and Field, n 100, 264-7. See also Edney and Bagaric, n 9, [7.4.5], where it is argued that 'remorse should henceforth be abandoned as a sentencing consideration unless demonstrable empirical data indicates that rehabilitation is an attainable sentencing objective'.

110 *Cameron v The Queen* (2002) 209 CLR 339, [82] (Kirby J).

111 *Murphy v The Queen* [2000] TASSC 169, [18].

112 *R v Gray* [1977] VR 225, 231 (McInerney and Crockett JJ). See also *R v Lane* (1990) 48 A Crim R 161 (SA CCA).

113 *R v Dowie* [1989] Tas R 167, 251. Cf *Paul v The Queen* (Unreported, Tas CCA, Neasey, Nettlefold and Cox JJ, 7 September 1988) and *Hryczszyn v The Queen* [1976] Tas SR 10.

on one view, contrition is a factor which should be taken into account in determining the initial sentence rather than as a factor calling for clemency by way of suspension,[114] although he later clarified this position when he stated in *Meers and Moles*:

> the view that contrition and the prospect of non-repetition are factors to be taken into account in setting the initial sentence is simply one view. In my opinion it is still legitimate for the sentencer to treat these matters as factors relevant to the suspension of a sentence in whole or in part and I dispute the proposition that the sentencer can only give them effect by way of a reduction of the initial sentence.[115]

In a recent English survey of judges it was said to be 'common for sentencers to refer to "remorse" or "contrition" as a factor that could tip them away from a custodial sentence, even if the offence in itself might otherwise merit custody'.[116] The offender's demonstration of remorse or contrition was referred to by the judge in deciding to suspend in 34 cases in 2002-2004. In all but one of these cases, the offender had also pleaded guilty,[117] although the plea was referred to as a factor relevant to the decision to suspend in only six of those cases. In *Smith*,[118] Evans J observed that the offender was '23 years of age and has no prior convictions. This factor, *coupled with the remorse manifested by his plea of guilty*, persuades me that the sentence of imprisonment I am to impose should be wholly suspended.'

There was a somewhat clearer manifestation of contrition in the case of *Rainbird*,[119] who pleaded guilty to causing grievous bodily harm. The victim was his 96-year-old grandmother, with whom he often stayed overnight. On this occasion, he went to see her to say goodbye, as he was planning to move to Western Australia. They started arguing, apparently because she did not agree with his decision to move interstate, and he struck her forcefully several times. In sentencing the offender to a 12 month sentence, six months of which was suspended, Crawford J said that the offender 'demonstrated considerable remorse when being

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114 *R v Causby* [1984] Tas R 54, 57 (Cox J).

115 *R v Meers and Moles* (1998) 101 A Crim R 329, 332. This approach would seem to presage the decision in *Dinsdale*, above n 2, that the discretion to suspend is not to be confined to the offender's prospects of rehabilitation.

116 Hough, Jacobson and Millie, above n 8, 41.

117 See *Grant Brakey* (COPS, Crawford J, 7 May 2003), where the offender pleaded guilty to one count and was found guilty by a jury of a further two counts, all of which related to assaults on the same person over two nights.

118 *Ricky Smith* (COPS, Evans J, 30 October 2002). Emphasis added.

119 *Barry Rainbird* (COPS, Crawford J, 27 April 2004).

interviewed and continues to do so...His violence was not premeditated and he is truly shocked by what he did.' Similarly, in the case of *West*,[120] the offender was woken up in the middle of the night to feed his de facto partner's baby. He reacted to the baby's crying by throwing him across the room, causing him serious head injuries, from which he had fortunately since recovered. Cox CJ took into account a number of factors, including the offender's youth, and in imposing a wholly suspended sentence of six months, noted that the offender was 'immediately appalled by [his] behaviour' and 'when interviewed by police...clearly demonstrated [his] revulsion at what [he] had done and [his] remorse for it.'

In my view, it would be preferable, when the court suspends a sentence of imprisonment on the basis of this factor, for there to be some clear manifestation of true remorse or contrition, separate from a guilty plea. In some cases, a plea of guilty may mean nothing more than a recognition of inevitable conviction, for example, where an offender has effectively been caught 'red-handed'. Offenders in such situations might otherwise receive a double benefit for pleading guilty.[121]

Co-operation and informing

An offender's co-operation with the authorities, especially volunteering confessions for offences of which the police would otherwise have been unaware,[122] and informing on co-offenders[123] is a significant mitigating factor. There are good public policy reasons for this, including recognition of the additional hardship informers may face[124] and the

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120 *Ben West* (COPS, Cox CJ, 17 February 2003). A Crown appeal against a suspended sentence imposed in almost identical circumstances was dismissed by the New South Wales Court of Criminal Appeal in *R v Remilton* [2001] NSWCCA 546.

121 For discussion of the potential for double discounting, see ALRC, above n 4, [11.55].

122 See for example *Ryan v The Queen* (2001) 206 CLR 267. *Pavlic v The Queen* (1995) 5 Tas R 186 sets out the position in this respect in Tasmania. In many jurisdictions, there is also statutory recognition of the principle: see *Sentencing Act 1991* (Vic), s 5(2AB); *Penalties and Sentences Act 1992* (Qld), s 9(2); *Sentencing Act 1995* (NT), s 429A and *Crimes (Sentencing Procedure) Act 1999* (NSW), s 23. For discussion of the Commonwealth position under the *Crimes Act 1914* (Cth), ss 16A and 21E, see *Timothy Williams* (COPS, Evans J, 24 June 2004); *DPP (Cth) v AB* (2006) 94 SASR 316 and ALRC, n 4, [11.57]-[11.65]; and Recs 6-8(b); 11-3 and 11-4. In particular, the ALRC recommended that the legislation provide that a court may impose a less severe sentencing option when sentencing a Federal offender who undertakes to co-operate: Rec 11-4(a).

123 See *Malvaso v The Queen* (1989) 168 CLR 227 and *R v Stanley* (1998) 7 Tas R 257.

124 *R v Gallagher* (1991) 23 NSWLR 220; *York v The Queen* (2005) 225 CLR 466 and *R v BCC* [2006] NSWCCA 130.

social utility of rewarding them for the information provided.[125] In *Stanley*, however, Slicer J observed, that:

> Ordinarily, the suspension of all or a portion of the sentence affords a sentencing tribunal power to ensure future compliance with conditions or events. But such is neither practicable nor morally defensible in a case where a person is to give evidence against a co-offender. The postponement or suspension of a sentence on condition until the assessment of the quality of evidence, is indefensible in any consideration of the sentence of a prisoner or the subsequent trial of a claimed co-offender.[126]

The offender's past assistance or intention to provide such assistance was referred to in 24 suspended sentence cases. In *Jones'* case,[127] where police conducted a search for stolen property at premises jointly occupied by the offender, unused needles and drug-related paraphernalia were found in the offender's bedroom, at which time the offender volunteered the information that he had been involved in the sale of drugs. He later went to the police station and made full admissions. As Slicer J stated, the offender was not known to police, who did not have any suspicion that he was involved in any way in the drug culture. Accordingly, his conviction depended 'solely on his volunteered information and would otherwise have been impossible to obtain.' This factor, taken together with the fact that he was a young first offender, led Slicer J to wholly suspend his four month sentence.

Effect of offence and sanction

Hardship to offender

Hardship to the offender may be taken into account when considering the effect of the sanction,[128] with the High Court holding in *York*[129] that it was appropriate for a judicial officer to take into account the grave risk that an offender could be killed in prison.

One aspect of such hardship is the impact on the offender's employment, as it has been suggested that loss of employment as a result of the offence 'may well tip the balance in favour of a non-custodial penalty or

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125 See Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112, 113; Warner, above n 12, [3.609] and Edney and Bagaric, above n 9, [7.4.9].

126 *R v Stanley* (1998) 7 Tas R 257.

127 *Nicholas Jones* (COPS, Slicer J, 14 May 2003).

128 See *Sellen v The Queen* (1991) 57 A Crim R 313 (NSWCCA), 318 and *R v Tsiaras* [1996] 1 VR 398. For discussion, see ALRC, above n 4, [6.120]; Rec 6-1 (IV).

129 *York v The Queen* (2005) 225 CLR 466, [23].

suspension of a custodial sentence'.[130] Suspending a prison sentence in such circumstances would seem to be unimpeachable, as there is evidence positively linking unemployment with criminal offending (and conversely, employment with a reduction in criminality),[131] but it has also been suggested that 'the implication is that unemployed offenders are discriminated against, since that source of sentence reduction is not open to them'.[132]

There were 27 suspended sentences where the potential loss of employment was mentioned as a factor justifying suspension, more commonly where the offender had previously been in long-term unemployment.[133] There were a further 38 cases where the sentence was suspended in part due to the offender's previous good employment record, a factor which would arguably also contribute to an assessment of the offender's good character. In *Quinn*,[134] Slicer J imposed a partially suspended sentence, together with a community service order and compensation, 'to take into account the possibility of continued employment'. Although he no doubt placed reliance on a pre-sentence report or submissions, there was no indication in his reasons as to what that employment might be, or the evidence suggesting that his employment would be continued. This is particularly odd, given that there were no other mitigating factors supporting suspension, and indeed, he noted that the offender had previously breached suspended sentences and

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130 Warner, above n 12, [3.702]. See *R v Piercey* [1971] VR 647; *Hauff v Police* (1994) 63 SASR 286; *Coates v The Queen* [2001] TASSC 141, [10] (Slicer J); *Ryan v The Queen* (2001) 206 CLR 267 and *James v Turner* (2006) 15 Tas R 375, [8] (Slicer J).

131 See Christopher Uggen, 'Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism' (2000) 65 *American Sociological Review* 529; Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291 (2004) and Joe Graffam and Lesley Hardcastle, 'Ex-prisoners and ex-offenders and the employment connection: Assistance plus acceptance' in Susan Dawe (ed), *Vocational Education and Training for Adult Prisoners and Offenders in Australia: Research Readings* (2007) 37.

132 Ashworth, above n 17, [3.4.4]. See also the comments relating to good character and how these are more likely to benefit middle-class offenders at [3.1.2]. Note that it has recently been suggested in England that the Sentencing Guidelines Council provide guidance on 'whether and why securing or retaining employment should be regarded as a mitigating factor': Jacobson and Hough, above n 17.

133 Eg *Richard Roberts* (COPS, Evans J, 11 February 2004) and *Timothy Berry* (COPS, Evans J, 2 October 2003). Note a recent South Australian case where the offender's loss of job and probable loss of career was recently deemed a relevant factor in imposing a wholly suspended sentence on a teacher who had had sexual intercourse with a student: 'Teacher Escapes Jail for Sex with Student', *Sydney Morning Herald* (Sydney), 1 March 2006, http://www.smh.com.au/news/national/teacher-escapes-jail-for-sex-withstudent/2006/03/01/1141095782248.html.

134 *Adrian Quinn* (COPS, Slicer J, 12 May 2004).

failed to comply with conditions of community service. In such a case, it may have been preferable for Slicer J to have more fully articulated the basis for the view formed about the offender's employment prospects in his reasons for deciding to partly suspend the sentence in order to make it clear to both the offender and the public that suspension of sentence on this basis is far from a matter of course and to note publicly the desirability of the offender pursuing these prospects.

Hardship to others

Hardship to the offender's family is generally regarded at common law as being of little weight,[135] with Green CJ commenting in *Sullivan*[136] that 'frequently a sentence of imprisonment will impose hardship upon a convicted person's dependants but that consideration must not be permitted to deter a judge from imposing a sentence of imprisonment if he thinks it appropriate'. This principle was recently endorsed in *Gibbins v White*, with Crawford J suggesting that:

> If the contrary was the case, courts would regularly be considering not the necessary punishment for the offender but the extent to which his or her family might be prejudiced by it. Part of the price to pay when committing a serious offence is that imprisonment may well cause hardship to others, and in most cases it should not be one of the factors which can affect what would otherwise be the right sentence. If courts allow the factor to be mitigatory, it can lead to the injustice of offenders without families receiving more severe punishment than those with families.[137]

There is a more merciful approach taken in 'exceptional circumstances', such as where the offender has primary responsibility for dependent

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[135] See for example *Oliver v Tasmania* [2006] TASSC 95. Cf *R v M, H* (2007) 168 A Crim R 557 (SA CCA), where it was stated that the 'effect of imprisonment on the respondent's family is a factor, which when taken into account with other relevant factors, may give rise to a finding of "good reason" to suspend': [30]. Cf *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(n); *Crimes (Sentencing) Act 2005* (ACT) and *Crimes Act 1914* (Cth), s 16A(2)(p), which require the court to take into account the probable effect that any sentence or order under consideration would have on the offender's family or dependants. For comment on the ACT provision, see *Islam v The Queen* [2006] ACTCA. For discussion of the South Australian provision, see *R v Penno* (2004) 236 LSJS 457 and *R v Ivic* [2006] SASC 8. The Commonwealth provision was examined in *R v Hinton* (2002) 134 A Crim R 286 (NSWCCA), where it was declared to be clear that the provision should be read as if it were proceeded [sic] by the words "in an exceptional case"': [31]. See also *R v Togias* (2002) 132 A Crim R 573 (NSWCCA); *R v Berlinsky* [2005] SASC 316; *McAree v Barr* [2006] TASSC 37; *DPP (Cth) v Gaw* [2006] VSCA 51 and *Thomas v The Queen* [2006] NSWCCA 313. The ALRC has recently recommended expanding the provision to require that the court consider 'the likely impact of the sentence on any of the offender's family or dependants': ALRC, above n 4, [6.121.]-[6.127] and Rec 6-1 (VI).

[136] *Sullivan v The Queen* [1975] Tas SR 146 (NC1), 3.

[137] *Gibbins v White* [2004] TASSC 8, [19]. Citations omitted.

children or other family members.[138] This would seem to be backed by research on the deleterious effects of a parent's imprisonment on his or her children[139] and the parsimony principle therefore assumes even greater significance when the future of successive generations is potentially affected.

In *Dinsdale*,[140] Kirby J considered that the impact that an immediate term of imprisonment would have on the offender and his family is a relevant factor to be taken into account in determining whether to impose a suspended sentence. Slicer J recently considered that as part of the process of determining whether to suspend a sentence of imprisonment,

> the court may have regard to the character of the offender and the impact on the family unit, at least as a component of consideration of the prospects for rehabilitation. If the family unit be damaged or destroyed as a consequence of lengthy imprisonment, then the prospects of rehabilitation are diminished

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138 See for example *Boyle v The Queen* (1987) 34 A Crim R 202 (WA CCA); *R v Maslen and Shaw* (1995) 79 A Crim R 199; *Ponsford v Wynwood* [1999] TASSC 21; *Williams v McLaughlin* (2000) 30 MVR 570; *R v Georgiadis (No 5)* [2001] TASSC 88; *R v Clark* [2003] NSWCCA 288 and *Egan v Western Australia* [2007] WASCA 182 and *Payne v The Queen* [2007] NTCCA 10. Cf *Wayne v Boldiston* (1992) 85 NTR 8; *Garnsey v Stamford* (2002) 131 A Crim R 427 (Tas SC); *R v D'Arrigo; ex parte A-G (Qld)* (2004) 42 MVR 54; *R v Schaefer and Schiworski* [2006] SASC 348 and *R v Stewart* (2007) 98 SASR 56. Note also *R v X* [2004] NSWCCA 93, where a wholly suspended sentence imposed on a mother of five young children was set aside, the Court stating that the impact on her family did not constitute exceptional circumstances.

139 See eg Donald West and David Farrington, *The Delinquent Way of Life: Third Report of the Cambridge Study in Delinquent Development* (1977), 109; Katherine Gabel and Denise Johnston (eds), *Children of Incarcerated Parents* (1995), 83; David Farrington, 'The Development of Offending and Antisocial Behaviour from Childhood: Key Findings from the Cambridge Study of Delinquent Development' (1995) 36 *Journal of Child Psychology and Psychiatry* 929; Diane Reed and Edward Reed, 'Children of Incarcerated Parents' (1997) 24(3) *Social Justice* 152, 59; David Rowe and David Farrington, 'The Familial Transmission of Criminal Convictions' (1997) 35 *Criminology* 177; NSW Legislative Council Standing Committee on Social Issues, *Children of Imprisoned Parents* (1997); Ann Cunningham, 'Forgotten Families - The Impacts of Imprisonment' (2001) 59(Winter) *Family Matters* 35; ACT Legislative Assembly Standing Committee on Community Services and Social Equity, *The Forgotten Victims of Crime: Families of Offenders and Their Silent Sentence* (2004); ALRC, n 4, [29.27]-[29.39]; Joyce Arditti and April Few, 'Mothers' Reentry into Family Life Following Incarceration' (2006) 17 *Criminal Justice and Policy Review* 103 and Rosemary Sheehan and Gregory Levine, *Parents as Prisoners: Maintaining the Parent-Child Relationship* (2007). It has recently been suggested in England that the Sentencing Guidelines Council provide guidance on 'whether and why family and childcare responsibilities should be treated as mitigating factors, and whether fathers should be treated differently from mothers': Jacobson and Hough, above n 17.

140 *Dinsdale*, [88]. See also *R v EPR* [2001] WASCA 214.

> and the prospect that others might be, by reason of the destruction or damage, more likely to engage in anti-social conduct.[141]

The offender's family responsibility was mentioned by the judge as a relevant factor in deciding to suspend the sentence in 42 cases, with all but three offenders in this category having the care of dependent children or about to assume such responsibility.[142] Perhaps unsurprisingly, this was much more likely to be a factor for female offenders: although women accounted for only 13% of offenders overall, they accounted for 45% of cases where this factor was mentioned as a reason for suspension. It is also interesting to note that the median age of female offenders was 33, compared with 26 for men, perhaps also pointing to greater parental responsibility.

In *Smart*,[143] the fact that the offender wished to take care of one of his children was considered relevant, while in *Freeman*,[144] two of the offender's children were subject to a care and protection order, but it was considered that continued contact with them might provide the impetus for the offender to get her life in order. The fact of parenthood will not, however, be regarded by the court as a get out of jail free card. In the case of *Dodge*,[145] the offender received a 12 month sentence for stealing almost $16,000 from her employer. Cox CJ suspended seven months of the sentence, stating that because 'of the impact on your younger children, in particular, of a custodial sentence, I feel justified in imposing a slightly lesser penalty in terms of immediate impact on you, but the circumstances do not warrant the total suspension of your sentence.' As Slicer J noted in *Bessell*,[146] before wholly suspending a six month sentence in respect of a single mother whose children would otherwise have had to be taken into care, '[t]he offender ought realise that she can no longer use her own past or the welfare of her children as a reason or excuse for her own irresponsible and violent conduct.'

One final point to note on this issue is that the offender will of course still be exposed to the risk of imprisonment in the event of breach of the suspended sentence, although parental responsibility may also be given weight in any breach proceedings. Nevertheless, caution should be

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[141] *R v Bullock* [2003] TASSC 37, [13].

[142] In two cases, the offender cared for ill parents, while another cared for her ill husband.

[143] *Jamie Smart* (COPS, Slicer J, 13 December 2002).

[144] *Tammy Freeman* (COPS, Slicer J, 21 August 2002).

[145] *Pamela Dodge* (COPS, Cox CJ, 13 April 2003).

[146] *Stacey Bessell* (COPS, Slicer J, 1 April 2003).

exercised in cases where the offender has significant care obligations to ensure that a sentence of imprisonment really is warranted, and that no other lesser penalty would similarly serve the relevant sentencing objectives.

Improper reasons for imposing a suspended sentence

There were also a small number of cases where the decision to suspend appears to have been made on an improper basis.[147] Indeed, some judges at times seem to regard suspended sentences as interchangeable with non-custodial penalties. In *Silczak*,[148] which was handed down some months before *Dinsdale*, Cox CJ, with whom Underwood and Blow JJ agreed, considered the interaction between suspended sentences and community service orders. It was suggested that there 'may well be a public perception that, as a general proposition, probation or community service orders are less punitive measures than suspended sentences of imprisonment'. The Chief Justice then went on to state,

> Notwithstanding, then, that there may be a perception that [community service] orders are a milder form of punishment than a suspended sentence of imprisonment, persons subject to them are still at risk of imprisonment for an uncertain term on breach and have the added penalty of having to work, in any event, for a set number of hours.[149]

This statement was echoed in *Bessell*,[150] where Slicer J suggested that 'it might well be that for certain offenders a community service order may be viewed as involving more punishment of the offender than a suspended sentence'. Such observations serve to highlight a general ambivalence about the suspended sentence's putative status as 'the penultimate weapon in the extensive armoury of graduated penalties available to a judge of this Court for the punishment of crime'.[151]

In *Miller*,[152] Slicer J suggested that because of the offender's 'working week, he is not regarded by the Probation Service as being a suitable candidate for a community service order. Accepting the above, it is not

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147 See ALRC, above n 4, [6.196]-[6.208] and Rec 6-7 in relation to factors irrelevant to sentencing.

148 *R v Silczak* (2000) 116 A Crim R 58.

149 Ibid [5] (Cox CJ).

150 *Stacey Bessell* (COPS, Slicer J, 1 April 2003). Note also the NSW case of *R v Lord* [2001] NSWCCA 533, where Howie J acknowledged 'that it might well be that for certain offenders a community service order may be viewed as involving more punishment of the offender than a suspended sentence': [35].

151 *R v Percy* [1975] Tas SR 62, 72-73 (Neasey J).

152 *Troy Miller* (COPS, Slicer J, 3 September 2003).

appropriate that he be sentenced to an immediate custodial term of imprisonment'. He then proceeded to impose a wholly suspended sentence, notwithstanding the fact that a suspended sentence should only be imposed if an immediate term of imprisonment would also be appropriate.

The perception that a suspended sentence is somehow interchangeable with a fine is apparent in the decision of *Tasmania v O'Mahony*,[153] where Slicer J dealt with an offender who had pleaded guilty to illegal possession of abalone. Justice Slicer observed that the offender's 'income makes a fine inappropriate' and instead imposed a wholly suspended sentence, remarking that if the offender had 'been a processor or possessed assets or means commensurate with those reflective of the returns generated by the industry, a significant pecuniary penalty might be appropriate, but such is not the case here'. This approach is clearly in breach of *Dinsdale* and seems to suggest that a rich offender can buy their way out of prison, while an impecunious offender would have no such hope, 'an outcome which goes directly against the principle of equality before the law'.[154]

In the case of *Artis*,[155] Blow J held that because the offender's working hours made it inappropriate to impose a community service order, in the circumstances, 'the most appropriate course is to impose both a fine and a very short suspended sentence', while in *Hall*,[156] the offender received a suspended sentence because he had no means to pay a fine and wasn't fit enough to perform community service. Although the offender may have been delighted not to be required to participate in community work or part with money, it is essential that judges avoid such fallacious reasoning

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153 *Tasmania v O'Mahony* [2004] TASSC 106 (Unreported, Slicer J, 31 August 2004).

154 Andrew Ashworth, *Sentencing and Penal Policy* (1983), 287, commenting on the decision of *R v Myers* [1980] Crim LR 191, where the Court of Appeal upheld a suspended sentence for a woman who couldn't have paid a fine. This was in direct opposition to that Court's earlier statement in *R v McGowan* [1975] Crim LR 113 that it was wrong in principle to impose a suspended sentence where a fine would have been considered appropriate if the offender had had sufficient means to pay the fine. For discussion in the context of broadcaster John Laws, who received a wholly suspended sentence for contempt of court, see Richard Ackland, 'Thrashed with a Legal Feather', *Sydney Morning Herald*, Sydney, 8 September 2000; 'Separate Law for Laws', *Courier Mail*, Brisbane, 9 September 2000; Kate Warner, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355, 362 and the decision itself: *R v Laws* (2000) 116 A Crim R 70.

155 *Shaun Artis* (COPS, Blow J, 14 May 2003).

156 *Christopher Hall* (COPS, Underwood J, 18 June 2003).

when sentencing if respect for the administration of justice is to be maintained.

In *Evans*,[157] Justice Blow noted that the offender had had sentences of imprisonment in the past, some of them partly or wholly suspended. His Honour stated:

> I do not think it is appropriate to send her back to gaol, provided she stays out of trouble. I do not think it is appropriate to require her to perform community service either. I think the most appropriate course is to impose a suspended sentence. Because of the prior convictions involving harassing and menacing calls, I think it should be a sentence of one month's imprisonment.

He did not elaborate why community service was not appropriate, or how this could justify increasing the severity of the sentence when it was not appropriate to send her to gaol. There may have been very good reasons for assessing the offender as being ill-suited for community service. As the Judicial Commission has observed, the 'inappropriateness or lack of availability of other penalties might also impact greatly on the sentencing decision'.[158] Nevertheless, it is arguable that the reasons why community service was inappropriate, and indeed, why no other non-custodial order would have been appropriate, should have been made explicit. Furthermore, one might infer that Blow J only decided the term of the sentence after deciding that it should be suspended, once again diverging from the two-stage process set out in *Dinsdale*.

My analysis suggests that there may be more cases, including in the Magistrates' Court, where erroneous reasoning processes are invoked and suspended sentences inappropriately used in lieu of community orders.[159] This assessment supports the need for statutory guidance as to the proper process for imposing a suspended sentence, an inference which was echoed recently by the Tasmania Law Reform Institute, which suggested that 'there is a good case for giving some legislative guidance as to when it is appropriate to impose a suspended sentence'.[160]

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157 *Desiree Evans* (COPS, Blow J, 29 July 2002).

158 Poletti and Vignaendra, n 8, 21. See also Hough, Jacobson and Millie, above n 8, 36.

159 See Lorana Bartels, *Sword or Feather: The Use and Utility of Suspended Sentences in Tasmania*, http://eprints.utas.edu.au/7735/, [3.4.2] and [4.3.2.1] for further discussion.

160 TLRI, above n 38, [3.3.31].

Conclusion

Bagaric has suggested that if 'suspended sentences are to remain a viable sentencing option the need for transparency and intellectual honesty requires revision regarding the circumstances in which they may be imposed'.[161]

In this article, I attempt to ascertain, from examining the judges' sentencing comments, the most prominent of the 'multitude of factors account[ing] for the decision to impose a...suspended sentence'.[162] In particular, I examine the significance of factors relevant to the offender, factors relevant to the offence, the offender's response to the charges and the effect of the offence and sanction, although it was not possible to determine the 'worth' of any individual factor in determining whether to impose a suspended sentence. Cases where the court appears to have employed improper reasoning in deciding to suspend the sentence are also examined.

I also discuss the issues surrounding the use of suspended sentences for offenders with substance abuse issues and propose that supervision and/or participation in a drug rehabilitation program be more frequently linked with suspension of the sentence. The use of suspended sentences for offenders with physical and mental health issues is discussed and the potential overuse of suspended sentences for the latter group considered. My findings also indicate that although the vast majority of offenders who received a suspended sentence did so after pleading guilty, the plea was explicitly referred to as a relevant factor in the imposition of a suspended sentence in only a small number of cases. Furthermore, in some cases recognition was given to the offender's remorse, even where there was no manifestation of this other than the guilty plea. I argue that it would be preferable in such cases for there to be some clear manifestation of true contrition, as offenders may otherwise receive a double benefit for pleading guilty.

My analysis also indicates that in some cases, judges cite factors, for example, the offender's poor health or good employment prospects, as relevant to the decision to suspend, but fail to provide any details of the

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161 Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535, 539. See also Edney and Bagaric, above n 9, [13.3.2.3].

162 Poletti and Vignaendra, above n 8, 21.

evidence supporting that decision.[163] The NSW Court of Criminal Appeal, when recently reviewing the principles governing the use of suspended sentences, stated that:

> In determining whether a suspended sentence is an adequate form of punishment and is one which sufficiently reflects specific and general deterrence, it is necessary to have regard to the sentencing judge's reasons for suspending the sentence and, *in particular, whether the reasons given were sufficient to activate the sentencing discretion in that respect.*[164]

The need for clear reasons was also articulated by a majority of the High Court in *Markarian*, asserting that the law 'strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public'.[165] Justice Kirby goes so far as to say that the scope of the duty to provide reasons is defined by

> considerations which go far beyond the proper explanation to the parties, their representatives, the legal profession, judicial peers and the whole community of the decision in the particular case. For me, what is at stake is a basal notion of the requirement imposed upon the donee of public power. Unaccountable power is tyranny. If the exercise of power is accounted for, and is thought unlawful or unjust, it may be remedied. If it is hidden in silence, the chances of a brooding sense of injustice exists, which will contribute to undermining the integrity and legitimacy of the polity that permits it.[166]

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163 Note that in the Northern Territory, the Court of Criminal Appeal held that it is not incumbent upon a sentencing judge to specifically relate particular features to the issue of suspension: *Pappin v The Queen* [2005] NTCCA 2. See also *R v MAH* (2005) 16 NTLR 150, where it was said that 'judges, when imposing sentences, often give brief ex tempore reasons, and I would not wish it to be thought that it was necessary for a sentencing judge to give, in elaborate detail, reasons why a sentence is suspended in every case': [45] (Mildren J, Thomas and Southwood JJ agreeing).

164 *R v BCC* [2006] NSWCCA 130, [57](k). Emphasis added. See also *R v JCE* (2000) 120 A Crim R 18, [19]. Cf *R v Anforth* [2003] NSWCCA 222, where it was held that while the absence of reasons for suspending the sentence added weight to the inference that an erroneous approach was taken, it is not an error in itself. It is interesting to note that there is no general requirement in NSW to give reasons for arriving at a sentence, other than when imposing a non-custodial order or suspended sentence in respect of certain offences to which a standard non-parole period applies: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54C.

165 *Markarian v The Queen* (2005) 215 ALR 213, [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ). In this vein, ALRC has recently recommended that Federal sentencing legislation should require a court to state its reasons for decision when sentencing a federal offender for an indictable or summary offence, whether orally or in writing: ALRC, n 4, Rec 19-1. For discussion on the need to give reasons generally, see [19.1]-[19.14].

166 Justice Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121, 132. Cf Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743 and Michael O'Loghlen, 'Whether Courts Must Give

In my view, the analysis in this article demonstrates a need for judicial officers to more fully enunciate the relevant factors that make it appropriate to suspend a sentence and the evidence on which that decision is based. Hopefully this will serve to minimise the brooding sense of injustice which often surrounds the imposition of such sentences.

Reasons for Decision' (1999) 73 *Australian Law Journal* 630, who suggests that this requirement might result in increased cost and delay and the absence of reasons does not amount to a denial of natural justice.