

# SUSPENDED SENTENCES – A JUDICIAL PERSPECTIVE\*

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*The suspended sentence is a widely used but often misunderstood sentencing disposition. This article presents the findings of in-depth interviews with Tasmanian judges and magistrates on their use of suspended sentences. These interviews provide an invaluable source of information on judicial views on a range of issues pertaining to the use of such sentences. The findings reveal inconsistent views on the main objective of suspended sentences and the difficulty experienced in applying the two-stage process for suspending the sentence. Issues with explaining and communicating the sentence and the role of public opinion and the media are explored. The appropriate response to breaches of sentences is discussed and the policy and reform implications of the research are considered.*

## I INTRODUCTION

The suspended sentence is a controversial sentencing disposition currently available in all Australian jurisdictions.<sup>1</sup> The availability of such sentences was recently restricted in Victoria, with provisional recommendations for abolition,<sup>2</sup> while the recent sentencing review by the Tasmania Law Reform Institute (TLRI) has advocated numerous changes in respect of their use in Tasmania, based in part on the research findings reported in

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<sup>1</sup> Note that there is considerable variation in the legislation and case law regulating suspended sentences in Australia and this article should be read in that context. For background, see L Bartels, 'The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles' (2007) 31 *Criminal Law Journal* 113.

<sup>2</sup> The Sentencing Advisory Council recently completed a long-term review of suspended sentences. In the first part of its final report, the Sentencing Advisory Council recommended phasing out suspended sentences in Victoria by 2009: Sentencing Advisory Council, *Suspended Sentences: Final Report - Part 1* (2006) Recommendation 1. However, the Council subsequently revised its position to suggest that the power to impose suspended sentences should be reviewed following other recommendations to intermediate sanctions as set out in the second stage of its final report: Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders, Suspended Sentences Final Report—Part 2* (2008) [2.107]-[8] and Recommendation 2-1.

this article and other related research.<sup>3</sup> In light of the ambivalent nature of suspended sentences and public reactions to such sentences,<sup>4</sup> this article presents a timely and vital contribution to better understanding this sentencing disposition and sentencing generally.

This article presents the findings of face-to-face interviews with 16 Tasmanian judicial officers on their use of suspended sentences. The interviews were conducted between August 2006 and March 2007. The interview questions focussed principally on wholly suspended sentences and were designed to enable respondents to express their views on a broad range of topics relating to such sentences. In particular, the discussion presented here examines some of the key arguments surrounding the use of such sentences, including:

- the purposes and objectives of suspended sentences;
- the process for imposing a suspended sentence;
- whether the use of suspended sentences contributes to sentence inflation by judicial officers increasing the term of the sentence;
- the role of information and communication with offenders, the court and the public;
- the role of public opinion; and
- difficulties in dealing with breaches.

## II PREVIOUS JUDICIAL RESEARCH ON SENTENCING

Almost as much appears to have been written on the dearth of information on judicial views on sentencing as on the findings of such research,<sup>5</sup> with some even arguing that there is in fact little to be gained from such research.<sup>6</sup> Mackenzie observed in her recent book, *How Judges Sentence*, that '[w]hat judges think about sentencing and how they approach this task are largely missing links in sentencing research',<sup>7</sup> suggesting that '[t]he voices of those who actually sentence offenders are rarely heard, despite the fact that they have much to add to the knowledge and debate in the area'.<sup>8</sup> Ashworth has similarly stated that:

<sup>3</sup> See Tasmania Law Reform Institute (TLRI), *Sentencing*, Final Report No 11 (2008) 151-73. For background information, see Bartels, 'The Use of Suspended Sentences in Australia', above n 1; L Bartels, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania*, Unpublished PhD Thesis, University of Tasmania (2008); L Bartels, 'The Weight of the Sword of Damocles: A Reconviction Analysis of Suspended Sentences in Tasmania' (2009) *Australian and New Zealand Journal of Criminology* 72; L Bartels, 'Suspended Sentences in Tasmania: Key Research Findings', *Trends and Issues in Criminal Justice*, Australian Institute of Criminology (in press); L Bartels, 'To Suspend or Not to Suspend – A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania', *University of Tasmania Law Review* (in press).

<sup>4</sup> See A Freiberg and V Moore, 'Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System' (2009) *Australian and New Zealand Journal of Criminology* 101.

<sup>5</sup> See for example R Hood, *Race and Sentencing* (Oxford University Press, 1992) 37; A Ashworth et al, *Sentencing in the Crown Court: Report of an Exploratory Study* (Centre for Criminological Research, University of Oxford, 1984) 5; A Ashworth, 'The Role of the Sentencing Scholar' in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 251, 263; A Ashworth, 'European Sentencing Traditions' in C Tata and N Hutton (eds), *Sentencing and Society* (2002) 219, 232.

<sup>6</sup> See J Pierce, 'Research Note: Interviewing Australia's Senior Judiciary' (2002) 27 *Australian Journal of Political Science* 131, 132; M Heumann, 'Interviewing Trial Judges' (1989-90) 73 *Judicature* 200.

<sup>7</sup> G Mackenzie, *How Judges Sentence* (Federation Press, 2005) 2.

<sup>8</sup> *Ibid* 11.

the social importance of sentencing is a powerful argument in favour of careful research. More ought to be known about the motivation of judges and magistrates. Such knowledge would assist in the formation of sentencing policy, and might also help to extend a form of accountability into this sphere of public decision-making.<sup>9</sup>

To date, there have been only a handful of interviews with Australian judicial officers about sentencing<sup>10</sup> and none specifically canvassing suspended sentences. Accordingly, the present research findings provide a unique insight into judicial thinking in this area.

### III METHODOLOGY

There are two levels of courts in Tasmania, the Supreme Court and the Magistrates Court. At the time of my study, there were six Supreme Court judges and 12 magistrates appointed. Due to the small size of the Tasmanian judiciary, it quickly became clear that

<sup>9</sup> Ashworth, 'The Role of the Sentencing Scholar', above n 5, 263.

<sup>10</sup> See D Indermaur, 'Perceptions of Crime Seriousness and Sentencing' (1990); R Bray and J Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in NSW* (Judicial Commission of NSW, 1991); R Homel and J Lawrence, 'Sentencer Orientation and Case Details: An Interactive Analysis' (1992) 16 *Law and Human Behaviour* 509; A Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making* (Cambridge University Press, 1997); P Poletti, D Spears and D Span, *Magistrates' Attitudes to Drink-Driving, Drug-Driving and Speeding* (Judicial Commission of NSW, 1997); Mackenzie, above n 7. For questionnaires on sentencing conducted with Australian judicial officers, see Australian Law Reform Commission (ALRC), *Sentencing of Federal Offenders*, Report 15 (Interim) (1980) Appendix B; I Potas and D Spears, *Alcohol as a Sentencing Factor: A Survey of Attitudes of Judicial Officers* (Judicial Commission of NSW, 1994); K McFarlane and P Poletti, *Judicial Perceptions of Fines as a Sentencing Option – A Survey of NSW Magistrates* (Sentencing Council Sydney, 2007). For international interviews with judicial officers on sentencing, see: J Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971); R Hood, *Sentencing the Motoring Offender* (Heinemann Educational Books, 1972); K Clancy et al, 'Sentence Decision Making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity' (1981) *Journal of Criminal Law and Criminology* 524; Ashworth et al, above n 5; K Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations and Sentencing' (1989) 3 *Gender and Society* 9; H Parker, M Sumner and G Jarvis, *Unmasking the Magistrates: The 'Custody or Not' Decision in Sentencing Young Offenders* (Open University Press, 1989); R Henham, 'The Importance of Background Variables in Sentencing Behaviour' (1988) 15 *Criminal Justice and Behaviour* 255; P McCormick and I Greene, *Judges and Judging* (Lorimer, 1990); C Flood-Page and A Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the mid 1990s* (Home Office Research Study, 1998); D Mears, 'The Sociology of Sentencing: Reconceptualizing Decision making Processes and Outcomes' (1998) 32 *Law and Society Review* 667; C Tata and N Hutton, 'What "Rules" in Sentencing? Consistency and Disparity in the Absence of "Rules"' (1998) 26 *International Journal of the Sociology of Law* 339; E Gilchrist and J Blissett, 'Magistrates' Attitudes to Domestic Violence and Sentencing Options' (2002) 41 *Howard Journal of Criminal Justice* 348; A Mackie et al, *Clearing the Debts: The Enforcement of Financial Penalties in the Magistrates' Courts* (Home Office Online Report, 2003); W Searle, *Court-imposed Fines: A Survey of Judges* (Ministry of Justice New Zealand, 2003); M Hough, J Jacobson and A Millie, *The Decision to Imprison* (London Prison Reform Trust, 2003); J Roberts and A Manson, *The Future of Conditional Sentencing: Perspectives of Appellate Judges* (Department of Justice Canada, 2004); J Tombs and E Jagger, 'Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison' (2006) 46 *British Journal of Criminology* 803; J Jacobson and M Hough, *Mitigation: The Role of Personal Factors in Sentencing* (London Prison Reform Trust, 2007). Note that in June 2008, the Centre for Crime and Justice Studies released a report which involved findings from interviews with 13 judges, as well as focus groups with 52 magistrates about the new English suspended sentence order: G Mair, N Cross and S Taylor, *The Community Order and the Suspended Sentence Order: The Views and Attitudes of Sentencers* (London Centre for Crime and Justice Studies, 2008). That study found, *inter alia*, that there were persistent accounts of misuse of the new suspended sentence order by magistrates but that the sentencing option was regarded as helping offenders to avoid custody.

it would not be possible or desirable to conduct any statistical analysis on the responses. Furthermore, a closed-question approach or written questionnaire would not have suited my research purpose of delving into the sentencers' minds. As Roberts and Manson note, '[a] written survey generates information in response to specific questions, but does not permit researchers to probe responses.'<sup>11</sup> Accordingly, open-ended questions were drafted for a semi-structured interview,<sup>12</sup> which, as Mackenzie found in her research, 'allowed the judges to answer according to their own perceptions of the question, and without being influenced by any preconceptions of what the interviewer was asking for'.<sup>13</sup>

A set of 24 open-ended interview questions was drafted in consultation with the Chief Justice and Chief Magistrate.<sup>14</sup> Interviews were audio-recorded and lasted about one hour. All six Supreme Court judges were interviewed, in what is believed to be the first study of its kind to canvass the views on sentencing of all members of a particular court. In addition, ten out of 12 local court magistrates were interviewed, giving a comprehensive view of the Tasmanian magistracy.<sup>15</sup>

#### IV KEY INTERVIEW FINDINGS

##### A *The Sentencing Purposes of Suspended Sentences*

Bagaric argues that 'suspended sentences do not constitute a recognisable form of punishment at all'.<sup>16</sup> In order to explore this issue, I sought to ascertain respondents' views in respect of the objectives of suspended sentences and how they perceive suspended sentences as meeting the primary sentencing objectives. Many of the respondents did not appear to have previously given much consideration to which sentencing objectives underpin their use of suspended sentences, echoing an earlier finding by Ashworth that 'many judges appeared to have devoted little thought to the principles on which they act'.<sup>17</sup> This is perhaps not surprising, for as Hart has observed, 'no one expects judges or statesmen occupied in the business of sending people to the gallows or prison...to have much time for philosophical discussion of the principles which make it morally tolerable to do these things'.<sup>18</sup>

<sup>11</sup> Roberts and Manson, above n 10, 11.

<sup>12</sup> For discussion on qualitative research and interview methodology, see for example: W Foddy, *Constructing Questions for Interviews and Questionnaires* (Cambridge University Press, 1<sup>st</sup> ed, 1993); M Maxfield and E Babbie, *Research Methods for Criminology and Criminal Justice* (Albany, 3<sup>rd</sup> ed 2001); M Walter (ed), *Social Research Methods: An Australian Perspective* (Oxford University Press, 2006).

<sup>13</sup> Mackenzie, above n 7, 9. As Mackenzie went on to note, the downside of this approach is that interview subjects may give different responses to the question, which reflect their understanding of both the question and experience with that particular issue. I sought to minimise the effect of this by using similar terms when prompting respondents or clarifying my questions.

<sup>14</sup> A full copy of the interview questions can be obtained from the author.

<sup>15</sup> Only one magistrate did not agree to being interviewed, without giving any reasons for this decision. The remaining magistrate wished to participate but was unable to do so at the time of the interviews due to personal circumstances.

<sup>16</sup> M Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535, 536.

<sup>17</sup> Ashworth et al, above n 5, 61.

<sup>18</sup> HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1<sup>st</sup> ed, 1968) 2. Note also Fox and Freiberg's observation that the five purposes of sentencing (just deserts, rehabilitation, deterrence, denunciation and protection, or any combination thereof) cannot in logic coexist and that 'uncertainty as to which, if any, should be paramount is reflected judicially in

It emerged that there is no single guiding objective for a suspended sentence, with five respondents referring to rehabilitation as the main objective, four referring to deterrence and a further four saying it was a combination of the two. There was strong support amongst both judges and magistrates for the view that a suspended sentence is at least as effective as immediate imprisonment in aiding rehabilitation and specific deterrence, but suspended sentences were not considered particularly effective in terms of denunciation or general deterrence. It is also of interest to note that several judicial officers expressed their reservations about general deterrence as a sentencing objective, echoing the Australian Law Reform Commission's observation that it is a 'controversial purpose of sentencing'.<sup>19</sup>

### B *The Process for Imposing a Suspended Sentence*

The reasoning process required to impose a suspended sentence has been dubbed the 'penological paradox'.<sup>20</sup> The paradox lies in the requirement that the court must first determine that no sentence other than imprisonment is appropriate, in order to embark upon the second step, namely, the decision to suspend the execution of the sentence.

The leading authority on this issue is the High Court case of *Dinsdale*,<sup>21</sup> where Kirby J, with whom Gaudron and Gummow JJ agreed, stated that the starting point:

is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a "soft option" when the court with the responsibility of sentencing is "not quite certain what to do".<sup>22</sup>

In order to analyse the thought processes involved in applying this test, I asked respondents 'What is your reasoning process in deciding to impose a suspended sentence?' It quickly became clear that there is far from universal application of the two-step process laid down in *Dinsdale*. The majority of respondents appeared not to adopt the reasoning in *Dinsdale*, instead relying on a more instinctive approach to

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vacillation and eclecticism with the justifications for sentence differing between sentencers and varying from offence to offence': R Fox and A Freiberg (eds), *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 203. See also C Tata, 'Accountability for the Sentencing Decision Process' in C Tata and N Hutton (eds), *Sentencing and Society* (2002) 399, who suggests at 419 that it is problematic to expect sentencers to apply a sentencing theory grounded in philosophical justifications for punishment, as their account is necessarily mediated by the particular context.

<sup>19</sup> ALRC, *Same Crime, Same Time*, Report 103 (2006) [4.8].

<sup>20</sup> J Gemmill, 'The New Conditional Sentencing Regime' (1997) 39 *Criminal Law Quarterly* 334, 336. See also Bagaric, above n 16, 538; and A Freiberg, *Pathways to Justice: Sentencing Review*, (Department of Justice Melbourne, 2002) 120.

<sup>21</sup> *Dinsdale v The Queen* (2000) 202 CLR 321 ('*Dinsdale*').

<sup>22</sup> *Ibid* [13]. Justice Kirby also explained at [84] that the court is to revisit 'the same considerations that are relevant for the imposition of the term of imprisonment' in determining whether to suspend that term, which 'means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender'. For discussion of this two-stage test, see Bartels, 'The Use of Suspended Sentences in Australia', above n 1, 117-20. Note also the findings of recent interviews with English judges and magistrates on the legal threshold for imposing a suspended sentence order: Mair, Cross and Taylor, above n 10, 27.

determining the correct sentence. For example, one magistrate said, ‘sometimes you go through an intellectual process, but mostly I think it just hits you. You hear the facts, the circumstances of the offence, and the offender, and it just hits you’. The following is a further illustration of the instinctive synthesis approach:

I never engage in [the thought process] until I consider an actual case. The case will dictate it for me. Young offenders are a good example, the last chance for a young offender. That’s an example of it. But I don’t think about these things unless I’ve got a case. If I had to write an essay for a lecturer I might think about it!

Five sentencers correctly applied the process laid down in *Dinsdale*, although two did not in fact refer to the case on this issue.<sup>23</sup> The three sentencers who did refer to the High Court or *Dinsdale* when correctly applying the test, however, somewhat intriguingly, appeared to be mistaken or uncertain about the interpretation of the High Court’s decision. For example, one judge said ‘I suspect that I don’t quite do a *Dinsdale*, in that I probably still break it up within the first question – is thisailable? Until I’ve answered that one, I don’t go into the suspending’, while a magistrate stated:

For most of my career, I arrived at the conclusion first that actual imprisonment was justified, or required, before then deciding whether or not it can be suspended. But more recently, since the High Court ruled that we can go direct to suspended sentences, I have in some cases gone straight to the conclusion that it’s appropriate to impose a suspended sentence, but still generally, I would go through the long process of going to imprisonment first, and then modifying that.

Finally, there were two sentencers whose approach could not be said to accord with the orthodox interpretation of *Dinsdale*, with one magistrate stating:

I guess the reasoning is – is this something so serious that the offender must go to jail, or should go to jail? If not, then how can I impose a sufficient punishment without the person going to jail? So I guess working down the spectrum the most serious crimes would get imprisonment with none of it suspended. Next worst, partially suspended, next worst wholly suspended plus community service order, next worst suspended sentence, about the same level as community service order.

The foregoing comments suggest that the decision in *Dinsdale* is not well understood or applied by the Tasmanian judiciary. This finding is not entirely surprising, as a previous examination of the Australian case law on this issue<sup>24</sup> indicates that courts around Australia have struggled with the paradoxical reasoning process required to impose a suspended sentence.

I also asked the judges and magistrates whether it would be appropriate to have a legislative provision within the *Sentencing Act 1997* (Tas) which sets out that a suspended sentence may only be imposed if an unsuspended sentence of imprisonment

<sup>23</sup> In this context, it is somewhat surprising to note that in what is described as ‘the only book that examines sentencing law in all Australian jurisdictions’, Edney and Bagaric also omit any mention of *Dinsdale*. They correctly state the two-stage test, but refer instead to the English case of *R v Trowbridge* [1975] Crim LR 295: R Edney and M Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) [13.3.2.1].

<sup>24</sup> Bartels, ‘The Use of Suspended Sentences in Australia’, above n 1, 117-20. The various reasoning processes applied here also reflect the tension analysed in *Markarian v The Queen* (2005) 215 ALR 213.

would be appropriate in all the circumstances.<sup>25</sup> This proposal was universally rejected by the judges, as they felt that this was already clear in the case law and there was no need for it to be enunciated in the legislation. The proposal was also regarded as unnecessary by most of the magistrates, with only two magistrates supporting the proposal. As it emerged, however, there was in fact some confusion as to the current position. One magistrate asked ‘haven’t we got that in our Sentencing Act?’, while another magistrate erroneously asserted that a ‘suspended sentence is a free-floating option’ suggesting that ‘there don’t seem to be the constrictions on it that were there before the Sentencing Act came into effect, and I don’t think that you can read into the Act the previous practice, where you know, that you have to think first that it merited imprisonment’.

As noted above, the TLRI recently finalised a broad-ranging review of sentencing in Tasmania. The judicial responses to my interview questions in this section have prompted the TLRI to suggest that ‘there is a good case for giving some legislative guidance as to when it is appropriate to impose a suspended sentence’, proposing that that guidance be given about the imposition of suspended sentences ‘in a way that does not interfere with judicial discretion but makes it clear that two distinct steps are involved’.<sup>26</sup> This is to be applauded, although any such guidance will clearly need to involve consultation with the judiciary to ensure it is not met with resistance.

### C *Increasing the Term of the Sentence*

A key issue with suspended sentences is whether they cause sentence inflation, which refers to the practice of increasing the term of a suspended sentence in order to reflect the fact that it is being suspended. This is precluded by the majority judgment in *Dinsdale*, which stipulates that the court must first set the term of the sentence and only then decide whether to suspend it. However, there is scope for interpreting the minority judgment of Gleeson CJ and Hayne J as permitting such an approach.<sup>27</sup>

When Tait examined sentencing patterns in the Magistrates’ Court in Victoria, he found an inflation rate of about 50%: in other words, a four month unsuspended sentence appeared to correlate to a six month wholly suspended sentence,<sup>28</sup> with other studies finding similar results.<sup>29</sup> In my analysis of sentencing data in the Tasmanian Supreme and Magistrates’ Court, I found no evidence of sentence inflation.<sup>30</sup>

<sup>25</sup> For examples of similar provisions, see *Sentencing Act 1991* (Vic) s 27(3); *Sentencing Act 1995* (WA) s 76(2); and *Sentencing Act 1995* (NT) s 40(3).

<sup>26</sup> TLRI, above n 3, [3.3.31] and Recommendation 11.

<sup>27</sup> Gleeson CJ and Hayne J referred to the fact that the Court of Criminal Appeal had first dealt with the length of the term of suspended imprisonment and only then turned to consider whether an order for suspension of imprisonment would be appropriate. They asserted that this ‘inverts the order in which the statute requires a sentencing judge to consider matters. The sentencing judge must first decide the kind of punishment to be imposed’: *Dinsdale v The Queen* (2000) 202 CLR 321,[13].

<sup>28</sup> D Tait, ‘The Invisible Sanction: Suspended Sentences in Victoria 1985-1991’ (1995) 28 *Australian and New Zealand Journal of Criminology* 143, 153.

<sup>29</sup> See A Bottoms, ‘The Suspended Sentence in England: 1967-1978’ (1981) 21 *British Journal of Criminology* 1, 6-7; and P Spier, *Conviction and Sentencing of Offenders in New Zealand 1988 to 1997* (New Zealand Ministry of Justice, 1998)

<[http://www.justice.govt.nz/pubs/reports/1998/convict\\_sentence/index.html](http://www.justice.govt.nz/pubs/reports/1998/convict_sentence/index.html)> at 29 June 2009, [8.1].

<sup>30</sup> See Bartels, *Sword or Feather?* above n 3, [4.3.2.1].

In order to explore this issue, further, I asked respondents *‘Would it sometimes be appropriate to extend the term of the sentence to reflect the fact of its suspension?’* There were three broad responses to this question: that it is wrong in principle to extend the length of the sentence; that doing so would pose difficulties in relation to breaches; and that it is permissible to do so, albeit only to a small extent.

For the majority of magistrates and one judge, it is wrong in principle to extend the length of the sentence. Two magistrates suggested that this would create difficulties in terms of proportionality, with one adding, ‘I’m an intuitive sentencer, so if I think something’s worth six months, it’s worth six months whether I’m suspending it or not’. Three magistrates spoke about the ‘temptation’ of increasing the length of the sentence, with one saying ‘I don’t think I have ever consciously done it’. Another two magistrates regarded this approach as ‘dishonest’, while one questioned the point of doing so, stating, ‘I don’t know what you would be trying to achieve there, except to invite more ridicule on your head. To indicate that a suspended term of imprisonment is a feather duster. It’s a feather duster whether it’s 10 months or 30 months – and it’s a bigger feather duster!’

For some, the key issue was having an excessive sentence in the event of activation on breach. One judge said ‘you always have in mind that the sentence may still have to be served so you can’t impose too harsh a sentence’, while another suggested that such a power ‘would come back to haunt us when they came back before us for breaching it’, with a sentencer potentially ‘deeply regretting’ imposing the original term.

Finally, several respondents acknowledged that they do at times extend the term of a sentence – albeit only to the extent of minor adjustments. One magistrate spoke of ‘rounding up’ a short sentence, for example, increasing a six week sentence to two months in order to give it ‘more force and more impact’, adding:

Now whether you would then have given that same person two months in is tricky, because obviously it’s going to have an immediate effect and there might be reasons then to reduce it down because they can get six weeks leave from work and they’re not going to lose their job and of course you don’t have to take into account those considerations if you’re giving a suspended sentence.

One judge stated that ‘it is wrong to increase a term, knowing that you’re going to suspend it’, but went on to say that ‘every now and then you come across a case where you intuitively feel that it is right to jack it up a bit ... So I would without saying anything jack that one up a bit and I wouldn’t be able to justify it other than saying it’s an intuitive process and I feel that it’s right’. Finally, one magistrate went so far as to say that ‘anyone who says that they haven’t taken the latter approach probably is not being utterly frank’.

#### D *Explaining and Communicating the Sentence*

As Freiberg and Moore noted recently, ‘sentencing is a process of communication, both to offender, victims and the public’.<sup>31</sup> A key aspect of this communication is the judicial officer’s explication of the sentence and the reasons for imposing it. Ancel states that traditionally, judges were required to specify and explain in detail the facts and

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<sup>31</sup> Freiberg and Moore, above n 4, 104.



circumstances leading to the decision to suspend.<sup>32</sup> Although there is no legislative requirement in Tasmania for the court to give reasons for imposing a particular sentence, there has been a long-standing practice in the Supreme Court to make comment ‘outlining at least some of the reasons for the orders made’.<sup>33</sup>

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.*<sup>34</sup>

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’.<sup>35</sup> 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.<sup>36</sup>

It is in this context also relevant to note Mackenzie’s comment, following her interviews with members of the Queensland judiciary, that:

<sup>32</sup> M Ancel, *Suspended Sentence* (Institute of Criminology Cambridge, 1971) 30.

<sup>33</sup> K Warner, *Sentencing in Tasmania* (The Federation Press, 2<sup>nd</sup> ed, 2002) [2.508]. Chambers J in *Conlan v Arnol* [1969] Tas SR 194 (NC 9) considered it ‘most desirable that where a sentence of imprisonment is imposed and in the case of all serious offences (irrespective of penalty), a court should announce some reasons for its decision, however shortly expressed they may be’.

<sup>34</sup> *R v BCC* [2006] NSWCCA 130, [57](k) emphasis added. See also: *R v JCE* (2000) 120 A Crim R 18, [19]. Compare with: *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.

<sup>35</sup> *Markarian v The Queen* (2005) 215 ALR 213, [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ). In this vein, the 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, *Same Crime, Same Time*, above n 19, Recommendation 19-1. For a discussion on the need to give reasons generally, see: [19.1]-[19.14]. See also: Fox and Freiberg, above n 18, 24; A Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) [11.3]; and Edney and Bagaric, above n 23, [2.4.3] who suggest, that ‘[r]easons for a decision are a central aspect of a legal order’.

<sup>36</sup> Justice M Kirby, ‘Reasons for Judgment: “Always Permissible, Usually Desirable and Often Obligatory”’ (1994) 12 *Australian Bar Review* 121, 132. For a discussion of the importance of providing reasons and an explanation of the sentence to victims, see: J Roberts, *The Virtual Prison* (Cambridge University Press, 2004) 35. Compare with: B Beaumont, ‘Contemporary Judgment Writing: The Problem Restated’ (1999) 73 *Australian Law Journal* 743; M O’Loughlen, ‘Whether Courts Must Give Reasons for Decision’ (1999) 73 *Australian Law Journal* 630.

with the constant criticism of the courts in the media, both in terms of public accountability and the perceived lack of sensitivity of the court to victims, it is important that the courts do whatever is possible to communicate the reasons for a particular decision, in a language that is understood by all parties. Without sufficient communication by judges of the reasons for sentence, there is greater room for misunderstanding of the sentencing process in general, particularly by the general public.<sup>37</sup>

I sought to explore the issue of giving reasons by asking ‘to what degree do you think it is necessary in your comments on passing sentence to set out the factors which led you to suspend the sentence?’ and found the judges were evenly divided on this question. One judge regarded it as ‘an important function to explain your sentences, to give your reasons in your comments on passing sentence’ while another judge said that there was ‘probably every reason to do it’, adding, however, ‘I’m not sure that everyone necessarily does ... I would normally do that. I would certainly try to [but] I wouldn’t promise that it happens every time’. A third judge declared that where the community has access to ‘what it was I did and [especially] why I did it ... the better the response’.

The other three judges, however, did not actually regard it as important to explain their reasoning when suspending a sentence. One judge considered that this was ‘not particularly significant. In most cases it’s just self-evident,’ while another said:

Generally speaking, I’m not a great one for elaborate reasons for passing sentence because it is after all an intuitive judgment and if you set out the essentials ... that would be sufficient and I think that if we go into more elaborate reasons, pages of it, it just ends up with more appellate work and more scrutiny and upset when it is an intuitive process anyway.

The magistrates were more likely than the judges to regard it as part of their judicial function to set out these factors in their reasons for sentence. This is somewhat surprising, given that magistrates deal with a much larger number of matters in any day, and unlike judges’ sentencing comments, magistrates’ comments are not currently made available on the internet for the benefit of the general public. On the other hand, the vast majority of sentences they impose are non-custodial orders, and there may therefore be a stronger desire to enunciate relevant factors in the more serious cases. It is also important to remember that although magistrates would less commonly impose sentences higher in the sentencing hierarchy, due to the volume of their sentencing practice, they would impose many more such sentences overall.<sup>38</sup>

All but one magistrate spoke of the importance of taking this step, with one suggesting that it is ‘a strong factor’ and ‘incumbent on us ... to say why we do it’. Another magistrate regarded it as ‘an obligation between you and the defendant’ while a third felt it to be ‘of critical importance for the offender to understand that they were at risk of an actual jail term ... [and] why you decided to suspend it in this particular case’.

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<sup>37</sup> Mackenzie, above n 7, 26.

<sup>38</sup> An analysis of all sentencing remarks in the Supreme and Magistrates Courts for the period between 1 July 2003 and 30 June 2004 demonstrates that the judges imposed 119 wholly suspended sentences, compared with 1,028 imposed by magistrates. It is also relevant to note that judges may be comparing their practices with other jurisdictions, where reasons are generally more elaborate, whereas magistrates may be comparing suspended sentence cases with the vast majority of cases where they impose a non-custodial sentence, where reasons would doubtless be very brief.

The only magistrate not to share this view regarded it as somewhat impractical to do so because ‘we’re not like judges, we might deal with 20 matters, chop chop chop, it’s pretty standard stuff’. Accordingly, ‘I just might say, “I’ve considered sending you to prison, however I’ve taken into account your good record, that this is your first time”. Very superficially ... I’m the sort of person who makes a decision and gets on with it’, although this view would still allow scope for each offender to be treated as an individual.

I also sought to determine the extent to which judicial officers communicate directly with offenders about suspended sentences, asking ‘*How do you attempt to communicate the significance of a suspended sentence (as a sentence of imprisonment) to an offender?*’ It should be noted that s 92 of the *Sentencing Act 1997* (Tas) provides that when the court imposes any order with conditions attached to it or which requires an undertaking from the offender, the court is required to explain the purpose and effect of the order, the consequences of failure to comply with it and the process for varying the order,<sup>39</sup> although s 93 provides that failure to perform these functions will not invalidate the order.<sup>40</sup>

The judges were more likely than the magistrates to see the significance of a suspended sentence as something that was readily apparent and did not need to be communicated at length. One judge said ‘usually I don’t, but sometimes I’ll say words to the effect that if you get into trouble again, you can expect to serve the whole of this sentence, plus another sentence for what you do in the future’, while another judge considered that ‘in the main, it’s one of those things ... offenders understand very acutely’.<sup>41</sup>

<sup>39</sup> Similar provisions apply in other Australian jurisdictions either generally or specifically in respect of suspended sentences: see *Crimes Act 1914* (Cth) s 20(2); *Criminal Law (Sentencing) Act 1988* (SA) s 9; *Sentencing Act 1995* (WA) s 34; *Sentencing Act 1995* (NT) s 102; *Sentencing Act 1991* (Vic) s 27(4); *Crimes (Sentencing) Act 2005* (ACT) s 12(4). Section 105 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) relates to the explanation to be given upon imposing a good behaviour bond which attaches to all suspended sentences. Somewhat surprisingly, although the Queensland legislation requires an explanation to be given to the offender in respect of a probation, community service or intensive correction order, it does not do so with respect to suspended sentences: *Penalties and Sentences Act 1992* (Qld) ss 95, 105, 116.

<sup>40</sup> Note that the ALRC recently recommended that federal sentencing legislation should provide that when sentencing an offender who is present at the sentencing proceedings, the court must *itself* give an oral explanation of the sentence at the time of sentencing; and a written record of the explanation if the offender requests it or the court is of the opinion that it is desirable in all the circumstances to provide the offender with a written explanation: ALRC, *Same Crime, Same Time*, above n 19, Recommendation 13-3. Where the offender is not present, it is proposed that the court may delegate this function, although it is suggested that the court should consider the need to make any order to satisfy itself that the explanation has been given: [13.35]-[61]. See also ALRC, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [13.33] for reference to an offender who made a submission that he was given incorrect information about his recognizance release order by his barrister, to whom the judge had delegated the task of explaining the effect of the order.

<sup>41</sup> Compare with the position that offenders going to prison ‘do not need to be provided with information about prison life in advance; they are informed of institutional regulations on arrival, and correctional officers are ever-present to ensure that rules are both understood and obeyed. A Conditional Sentence is quite different in the respect that offenders need to have a clear sense of the nature of the order, its conditions, and, most importantly, the consequences of violating those conditions’: J Roberts, L Maloney and R Vallis, *Coming Home to Prison: A Study of Offender Experiences of Conditional Sentencing* (2003) 6. Although, a conditional sentence in Canada is not identical to a suspended sentence in Australia, the point remains apposite.

Two magistrates spoke of imposing a sentence of imprisonment and then having ‘the pause’ before going on to announce that the sentence was to be suspended,<sup>42</sup> with one suggesting that ‘generally it’s the process of announcing the sentence, that you would hope to impress upon them what it is’. Another magistrate felt that ‘in a lot of cases there is absolutely no need to lecture them about “this is a real sentence”’ because ‘normally they are just so acutely aware that they are in a position where they’re borderline going to jail or not ... the defendants are very savvy, most of them’.

Some magistrates reported asking offenders if they have understood the order, with one adding, ‘[m]ost people say yes, which is either because they’re not prepared to say no or I’ve been particularly lucid in what I’ve said to them’. In this context, it is illuminating to consider the findings of a Canadian study which interviewed offenders on a similar order, the conditional sentence, where several participants said:

they would have liked to have heard more from the judge at sentencing regarding the order that he or she was imposing. When asked why they had not asked any questions in open court when given a chance to speak, one provided a simple explanation: ‘*you’re not going to question a judge when he’s letting you go free*’.<sup>43</sup>

One magistrate spoke of tailoring the wording to the offender, adding that ‘in all cases I would emphasise the consequences of the breach and ... how they may be in breach of their sentence’. Finally, one magistrate spoke about telling an offender about ‘the good things that he’s got going for him, he can take some pride in those things, so he’s not all bad, so he gets some impression that someone thinks he can do it’.

Roberts has commented on research ‘demonstrat[ing] that offenders report that being treated as an individual is one of the most important determinants of “going straight”’.<sup>44</sup> In this context, it is of interest to note that a study by Tait of New South Wales Local Court offenders found that one of the factors which impacts on recidivism is ‘magisterial style’ and that ‘offenders who feel they were treated fairly and could have their say were less likely to re-offend, regardless of what action or penalty was imposed’.<sup>45</sup> Furthermore, Tait found that whereas with prison sentences, it was likely that the sentence itself would have the more profound impact on the offender’s life, ‘with less intrusive penalties the less tangible issues of magistrate style and defendant satisfaction with the court process could come in’.<sup>46</sup> In my reconviction analysis of sentences in the Supreme Court, I found that wholly suspended sentences had the lowest reconviction rates, compared with unsuspended sentences, partly suspended sentences and non-custodial orders, after controlling for gender, age, prior record, offence type and seriousness and sentencing judge.<sup>47</sup> Future research should examine the impact of different modes of judicial communication on reconviction rates.

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<sup>42</sup> An English Crown Court judge similarly said in the context of a drug treatment and testing order that ‘it’s all a bit of drama and showmanship but I like to think that you’re impressing something ... that they are frightened of the consequences of breaching’: Hough, Jacobson and Millie, above n 10, 50. See also D Tait, ‘Sentencing as Performance: Restoring Drama to the Courtroom’ in C Tata and Hutton (eds), *Sentencing and Society* (2003) 469.

<sup>43</sup> Roberts, Maloney and Vallis, above n 41, 7. Emphasis added.

<sup>44</sup> Roberts, above n 36, 100.

<sup>45</sup> D Tait, *The Effectiveness of Criminal Sanctions: A Natural Experiment* (Criminology Research Centre Canberra, Report 33, 2001) 30.

<sup>46</sup> Ibid.

<sup>47</sup> Bartels, ‘The Use of Suspended Sentences in Australia’, above n 1.

## E *The Role of Public Opinion*

The role of public opinion in sentencing is of course a significant – and complex – issue<sup>48</sup> and there are numerous instances of the media describing suspended sentences as a ‘let off’, where the offender ‘walks free’ or ‘gets off’. The international research on public views of suspended sentences confirms these perceptions, with one study indicating that participants regarded a fine of A\$250 as more severe than a six month suspended sentence, while a one year unsuspended sentence was seen as being more severe than a three year wholly suspended sentence.<sup>49</sup> In a recent South Australian study, victims of crime ranked suspended sentence as the least severe community-based sentencing option, leading the study’s authors to suggest that ‘comments from victims of crime ... provide further indication that suspended sentences are viewed as “no punishment at all”’.<sup>50</sup>

The discussion below will examine whether judicial officers regard public opinion as relevant to their sentencing role. I first asked ‘*What do you think public attitudes are to suspended sentences?*’ with the overwhelming majority of judges and magistrates indicating that suspended sentences were very poorly regarded by the public.<sup>51</sup> Three judges said the public regarded them as a ‘slap on the wrist’, another felt that ‘they don’t see them as any punishment at all’, while a further magistrate suggested they left people ‘rolling around on the floor laughing, or they’re compelled to write to the newspaper or ring up the talkback radio show’. Only one judge commented more positively, stating that public attitudes to suspended sentences were ‘mixed. I think many thinking people see the wisdom of them. There’s a very wide range of views about’.

Most of the magistrates also thought the public saw suspended sentences as ‘a joke’, ‘a bit of a let-off’, a ‘soft option’, or ‘no penalty’, with one magistrate suggesting that ‘when I go around to the community and talk about rehabilitation and talk about community based dispositions, you’re lucky to get away with your life!’. On the other hand, one magistrate said that ‘in Tasmania people are remarkably accepting of judicial response, I think, that’s my impression. I could be wrong but most people don’t sort of stop you in the street and [shout at you]’.

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<sup>48</sup> For discussion, see for example: Chief Justice M Gleeson, ‘Public Confidence in the Judiciary’ (2002) 14(7) *Judicial Officers’ Bulletin* 1; J Roberts, ‘Public Opinion and Sentencing Policy’ in S Rex and M Tonry (eds), *Reform and Punishment: The Future of Sentencing* (2002) 18, 26; D Indermaur and L Roberts, ‘Perceptions of Crime and Justice’ in S Wilson et al (eds), *Australian Social Attitudes: The First Report* (2005) 141, 152; Mackenzie, above n 7; D Green, ‘Public Opinion versus Public Judgment about Crime’ (2006) 46 *British Journal of Criminology* 131; J Roberts, ‘Sentencing Policy and Practice: The Evolving Role of Public Opinion’ in A Freiberg and K Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy* (2008) 15.

<sup>49</sup> L Sebba and N Gad, ‘Further Explorations in the Scaling of Penalties’ (1984) 24 *British Journal of Criminology* 221, 231. The study sought rankings for 36 sentence types from police officers, probation officers, prisoners and students. There was unanimity in the rankings for the most severe and lenient sentences: death (1); imprisonment for life (2); A\$50 fine (35); A\$10 fine (36).

<sup>50</sup> J Pearson and Associates Pty Ltd, *Review of Community Based Offender Programs: Final Report* (1999) 40, discussed in Freiberg, above n 20, 136.

<sup>51</sup> See also Hough, Jacobson and Millie, above n 10, 53-4, where it was noted that ‘there is particular skepticism among the public about the value of community penalties, which are typically viewed as a ‘soft option’ or ‘cop out’. This point was vigorously expressed in a majority of the magistrates’ focus groups’.

As an interesting example of the mixed responses which a suspended sentence may engender, one judge described a case of a female teacher who received a partly suspended sentence for having a sexual relationship with boys at her school, reporting that people's responses varied from the punitive to incredulous that such an offender would be required to serve time in custody since 'the boys must have loved it'.<sup>52</sup> Accordingly, 'the bottom line [is] you're not going to be able to satisfy everyone out there. They're all going to be looking at it from a different perspective, and depending on that perspective, you'll have a different view of a suspended sentence'.

Roberts asserts that '[t]he era when courts imposed sentence without any consideration of community views has long passed',<sup>53</sup> a view which reflects the findings of a recent Australian survey that almost two-thirds of respondents thought that 'judges should reflect public opinion when sentencing'.<sup>54</sup> The following findings of an English study of sentencers are also relevant:

It was not uncommon for sentencers to talk of public opinion having a role, but a necessarily limited role, in sentencing decisions. For example, it was suggested that public opinion should 'inform' but not 'constrain' sentencing (senior judge); that it 'is something we can't ignore, but [shouldn't] be the be-all and the end-all' (Crown Court judge); that a sentencer should consider public opinion but not be 'swayed' by it (district judge); that public opinion is a small but not a major factor.<sup>55</sup>

In order to explore this issue, I asked 'Do you ever consider the impact a suspended sentence may have on public opinion? If so, does this influence your decision-making?' It emerged that there was a great divide between the courts on this issue, with eight magistrates of the view that public opinion was irrelevant to the task before them and did not influence their decision-making, while all the judges appeared to consider public opinion of significance to their work in general, although not in individual cases.

One judge asserted that 'in a sense all of our work is done on behalf of the public', adding: 'I sentence having regard to the public, the offender and the [Court of Criminal

<sup>52</sup> For discussion of the response to a wholly suspended sentence imposed on a Victorian school teacher in similar circumstances, see M Moncrief, 'Media Blamed in Teacher Sex Case', *The Age* (Melbourne), 11 November 2004 <<http://www.theage.com.au/news/National/Media-blamed-in-teacher-sex-case/2004/11/11/1100131106680.html?from=top5>> at 29 June 2009]. The sentence was increased on appeal to a sentence of two years and eight months, suspended after six months: *DPP (Vic) v Ellis* (2005) 11 VR 287. Special leave to appeal to the High Court was refused: *Ellis v DPP (Vic)* [2005] HCATrans 751. See also '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-with-student/2006/03/01/1141095782248.html>> at 29 June 2009], which reported on a female teacher who had sex three times with a 15-year-old male student. Barnett J took into account 'the extent of shame' the offender had already suffered and imposed a wholly suspended sentence for two years and four months. The sentence caused the South Australian Premier to call for a report on the sentence: see 'Anger, Sex Teacher's Light Sentence', *Sydney Morning Herald* (Sydney), 2 March 2006 <<http://www.smh.com.au/news/national/anger-at-sex-teachers-light-sentence/2006/03/02/1141191777497.html>> at 29 June 2009; 'No jail for teacher who had sex with student', *ABC Radio* (Adelaide), 1 March 2006 <<http://www.abc.net.au/news/stories/2006/03/01/1581291.htm>> at 29 June 2009.

<sup>53</sup> Roberts, 'Sentencing Policy and Practice', above n 48, 26.

<sup>54</sup> Indermaur and Roberts, above n 48, 153. See also Hough, Jacobson and Millie, above n 10, 55-6.

<sup>55</sup> Hough, Jacobson and Millie, above n 10, 55-6. In this context, it is significant to note that Roberts has recently suggested that in England and Wales, 'there is no real clarity with respect to the legal relevance of public attitudes' and 'public opinion is not a legally recognised factor at sentencing': Roberts, 'Sentencing Policy and Practice', above n 48, 15-16.

Appeal], so yes, the public's opinion is relevant, but it's only one of the factors'. Another judge was not influenced 'in a particular case' but suggested that 'if there is a sufficient uproar over a period of time concerning the level of sentencing for some particular crime, I am sure it affects the severity of sentences'. This was echoed by a third judge, who admitted to having been influenced by the impact a suspended sentence may have on public opinion, as well as having become more punitive in response to public attitudes, adding however that he still did not give offenders as much as the public or victim wants, since 'that's not the task [the public] set me. You didn't set me to be the front row of the lynch mob.'<sup>56</sup>

The magistrates, by contrast, were of the view that it was not their role to take public opinion into account in sentencing. One magistrate said it was 'not relevant to me what the public think' and another felt that public opinion 'genuinely ... plays no role at all', conceding that 'I can envisage the media cases where one day there might be one which is so borderline and there are gangs of media that I might, I will be influenced, but I haven't yet'. For another magistrate, 'informed community views about that crime' should be taken into account in reaching a decision, but not 'that the media is present when you deliver your sentence and that they may present your suspended sentence in a way that looks as if there is really no meaningful sentence being imposed ... That's just of no impact whatsoever'.<sup>57</sup> As to what amounts to 'informed opinion', one observed:

Should we be conducting some kind of census as to what public opinion is? Do we read letters to the editor? Do we read outraged editorials? So once we start to walk down this whole track of public opinion, one would need to divine it in a way that was useful and I think we would be on a very slippery slope indeed ... public opinion is a difficult horse to ride so I prefer to not stay in the saddle.<sup>58</sup>

It is also relevant to note that although most respondents suggested that there was nothing the court could do to improve suspended sentences' media image, there was a general call for more accurate media reporting. To this end, some advocated the appointment of a media liaison officer, a position which has been in place in many Australian courts for several years but has not been introduced in Tasmania.

Many were also enthusiastic about bypassing the media and communicating more – and more effectively – directly with the public. One judge asserted that 'education solves problems [and] the more the Court can do to explain why it's making sentencing orders, the better off the Court is'.<sup>59</sup> To this end, three judges spoke in positive terms about the

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<sup>56</sup> A similar sentiment was recently expressed by an English judge: 'sentencers should be aware of the public mood but not be 'mob-driven'': Hough, Jacobson and Millie, above n 10, 56.

<sup>57</sup> Compare with the statement by an English judge that 'it may be that fear of attracting extremely bad publicity for taking a lenient course means that sentences that pander to that, to a certain extent, are passed': *ibid* 27.

<sup>58</sup> The fact that there are differences in considering the relevance of public opinion to judicial decision-making has been adverted to by the former Chief Justice of the High Court of Australia: see Chief Justice M Gleeson, 'Out of Touch or Out of Reach?' (2005) 7 *The Judicial Review* 241, 241. It is of interest to note that a national survey funded by the Australian Research Council which commenced in 2008 will measure, *inter alia*, perceptions of crime and sentencing, thereby enabling the judiciary to apprise themselves of contemporary views on these issues: see K Warner, 'Sentencing Review 2006-2007' (2007) 31 *Criminal Law Journal* 359, 361.

<sup>59</sup> See the recent decision of the Victorian Court of Appeal which held, when dismissing a Crown appeal against a wholly suspended sentence that 'assuming that the public were armed with a full understanding of the considerations which informed the judge's synthesis in this case, I do not

fact that the Supreme Court, unlike some other jurisdictions, publishes all of its remarks on sentence on the internet, ‘which allows the public to see what we’re doing and get a greater understanding of why we do it’.

### F *Dealing with Breaches*

Another key issue in relation to suspended sentences is the appropriate approach for dealing with breaches. On the one hand, the credibility of the suspended sentence and sentencing as a whole would seem to be dependent on predictability and sentences meaning what they say they mean. On the other hand, there are powerful arguments for discretion and flexibility on breach. Excessively strict enforcement of the breach process may trigger high numbers of breach hearings, which may in turn undermine sentencers’ confidence in the sanction.

The majority of Australian jurisdictions have a presumption of activation on breach,<sup>60</sup> whereas the courts in Tasmania currently have full discretion in the event of breach. In order to ascertain how this discretion is exercised in practice, I asked judicial officers ‘*When an offender is brought back to court for a breach, what factors influence your decision whether to order that the sentence take effect?*’ Interestingly, there was a difference in the approach taken to this question. Nine out of ten magistrates, but only two of the judges, set out specific factors, while the remaining respondent gave a policy position that they would generally activate a breached sentence. The following factors were listed as influencing the decision on whether a suspended sentence would be put into effect:

- the nature of the original/breaching offence (two judges and six magistrates);
- time between suspension and breach (two judges and five magistrates);
- evidence of rehabilitation or compliance with conditions (two judges and three magistrates);
- the circumstances of and aggravating/mitigating factors on breach (four magistrates);
- changes in personal circumstances (one judge and two magistrates);<sup>61</sup> and
- the sentence imposed for the breaching offence (one judge and two magistrates).

Four judges and three magistrates indicated that their general position was that breached suspended sentences would generally be put into effect.<sup>62</sup> One judge would ‘more often than not’ activate a sentence in its entirety because ‘that was the deal. You broke it’, although only part of the sentence might be activated where the breach was a case of not complying with the conditions. For another judge, it was ‘almost inevitable that it will take effect’, a sentiment which was echoed by two other judges, on the basis that

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consider that their collective conscience would be shocked to the point that warrants appellate intervention’: *DPP (Vic) v Samu* [2007] VSCA 191, [25] (Nettle JA, Ashley and Kaye JJA agreeing). See Bartels, ‘The Use of Suspended Sentences in Australia’, above n 1, 128-31 for discussion.

<sup>60</sup> Note that it was not specified, what point in time these circumstances are to be considered. Compare with *DPP (NSW) v Cooke* (2007) 168 A Crim R 379, which specifies that the court is to consider the offender’s circumstances at the time of the breach, not at the time of breach proceedings.

<sup>62</sup> On this point, note the observation of the Tasmanian Director of Public Prosecutions (DPP), Tim Ellis SC, that judges are ‘probably living in a false sense of security about it, because they can say, well, it’s almost always the case that when the review comes before me, the suspended sentence will be activated’, but that he only takes action in respect of serious breaches. He advised me that he did not see it as appropriate to ‘wast[e] everyone’s time’ taking minor matters before the Supreme Court.



otherwise the sentence would lose its force. According to another judge, in order for the sentence not to be activated:

there will need to be really strong extenuating circumstances, and I don't listen to all that usual stuff about pregnant girlfriend and deprived childhood because I got all that before. There may be some new particular thing, let's just say, her husband died and she was distraught and depressed and her house burnt down and in the drama of it she got drunk one night and stole some money. Well, that sort of specific thing I might really relax it, but otherwise, you breach it, you go in. Otherwise they lose their efficacy.

One magistrate said 'I'm a bit sudden death on this. Primarily I look at it from the point of view of – you had your last warning last time, so there's got to be something pretty convincing not to activate it'. Two other magistrates similarly said that because they do not suspend a sentence lightly, they would 'normally' and 'highly probably' activate any breached sentence. Another magistrate, by contrast, said 'I start with no presumptions. Every day that I go into that court, I start with no presumptions about anything, and I listen to what's being said'. This approach would seem to be tacitly adopted by the other respondents who listed the factors to be taken into account in determining this issue, without asserting a general position that a breached sentence should be put into effect.

The issue of the appropriate approach to be taken by the court in breach proceedings is somewhat complicated by the fact that there appears to be a misconception amongst some magistrates about the state of the law in this regard, with three magistrates mistakenly asserting that the case law sets out a proposition that a breached sentence should generally take effect. In fact, even though four out of the six current Supreme Court judges told me their general position that a breached suspended sentence is generally to take effect, there is little recent Tasmanian authority in relation to principles on breach.

The TLRI has recently proposed the introduction of a statutory presumption in favour of activation unless the court decides it would be unjust to do so.<sup>63</sup> If adopted, this approach would bring Tasmania into line with most of the other Australian jurisdictions and would serve to clarify the murky legal waters in respect of breach proceedings, but may not be well received by the Tasmanian judiciary. When asked whether there should be a broad discretion, narrow discretion or no discretion to order a sentence to take effect in the event of breach, five out of the six judges and nine out of the ten magistrates wanted to retain the current position of broad discretion.

Overall, there was a strong desire amongst both judges and magistrates to see a more proactive approach by the prosecuting authorities and better management of breaches was the area which attracted the greatest level of dissatisfaction with the status quo.<sup>64</sup> One of the key findings in this regard is that there is currently very little knowledge

<sup>63</sup> TLRI, above n 3, [3.3.43] and Recommendation 18.

<sup>64</sup> Note *Turner v Driver* [2005] TASSC 85, involving an appeal against a statement by a magistrate that 'my experience in this jurisdiction [is] that the breaches are very rarely brought before the court when they should be'. The offender appealed against the unsuspended sentence he received, arguing, *inter alia*, that the magistrate 'erred in fact and/or law in finding that persons in breach of suspended sentences in Tasmania are very rarely brought before the court'. Evans J stated, dismissing the appeal, that it was not an error for the magistrate to refer 'to his experience in relation to the manner in which a breach of suspended sentence was handled'.

about the process for monitoring and dealing with breached sentences, leading judicial officers – unsurprisingly – to the inference that offenders who are not brought back for breach have complied with their order, whereas my data analysis suggests that breach applications are made in only a very small number of cases of apparent breach: an analysis of 310 offenders in receipt of a suspended sentence imposed in the Tasmanian Supreme Court indicated that less than 6% of offenders apparently in breach of their sentence were brought back to court for breach proceedings.<sup>65</sup> Accordingly, it would seem that judicial officers are currently sentencing on the basis of flawed and overly optimistic assumptions.<sup>66</sup>

It should be acknowledged that the lack of accurate and up-to-date information about breaches is by no means unique to Tasmania. A recent English study found sentencers received no feedback on probation, with the authors finding that ‘[t]here was general support for the principle of improving feedback, although no real consensus as to whether this should be in the form of information on individual cases, aggregated statistics, or both’.<sup>67</sup> In Canada, researchers described the absence of reliable statistical information about conditional sentencing outcomes as ‘sentencing in the dark’ and declared that judges should have better information about the:

- level of supervision of conditional sentence orders;
- ‘failure’ or ‘success’ rate of conditional sentence orders;
- kinds of non-statutory conditions that are imposed;
- conditions most likely to be associated with a breach hearing;
- pattern of judicial response to substantiated allegations of breaches; and
- recidivism rate of offenders who have served conditional sentence orders (compared to offenders sentenced to serve terms of custody in a provincial correctional facility).<sup>68</sup>

## V CONCLUSION

This article presents some key findings from my interviews with 16 out of 18 then-sitting members of the Tasmanian judiciary on their use of suspended sentences. As such, it provides a unique insight into judicial reasoning and an invaluable source of information on judicial views on sentencing.

Respondents were asked to explain their reasoning process in deciding to impose a suspended sentence, in order to determine the convergence or otherwise between sentencing theory and practice. It quickly became clear that the *Dinsdale* two-step process is poorly understood and applied, a finding which has led the TLRI to suggest legislative amendment to clarify the process for imposing a suspended sentence.

Another theme explored in the interviews is the need for effective communication about suspended sentences. Magistrates were more likely than judges to regard it as part of

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<sup>65</sup> L Bartels, ‘Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania’, under revision for publication in *Current Issues in Criminal Justice*, based on data discussed in Bartels, above n 3, *Sword or Feather?*, 272-307.

<sup>66</sup> This misunderstanding was also noted by the DPP, who commented on the small number of breach applications taken that ‘of course that reinforces [the judges’] idea that it’s such a great thing to do’.

<sup>67</sup> Hough, Jacobson and Millie, above n 10, 46-7.

<sup>68</sup> Roberts and Manson, above n 10, 18. For discussion of the utility of ‘aggregate information systems’ to sentencers, see Tata, above n 18, 407.

their judicial function to set out the factors leading them to suspend the sentence and explain the significance of a suspended sentence to the offender. In my view, in light of the fact that suspended sentences are commonly poorly regarded and understood by the public, it may be appropriate for both courts to review this issue, in order to determine whether there are ways of enhancing the flow of communication with offenders and the public generally, without undermining judicial discretion and independence.

Judicial views on public opinion and the media were also considered, with the majority of respondents indicating that suspended sentences are poorly regarded by the public. There was again a division of opinion between the courts as to whether public opinion influenced their decision-making, with judges more likely to see it as part of their function to reflect public opinion.

Another key finding to emerge from these interviews is that there is currently very little knowledge about the process for monitoring and dealing with breached sentences, with most respondents keen to see more information of this nature. This finding suggests a need for the relevant Tasmanian authorities, namely, the Director of Public Prosecutions, police prosecutions, Community Corrections and the Department of Justice, to liaise to determine an appropriate means of gathering, maintaining and disseminating data on breaches. My findings also highlight a strong desire for greater initiation of breach action, with respondents frustrated by prosecutorial inaction. Furthermore, the comments revealed some confusion as to the state of the law in respect of the discretion on breaches, a finding which contributed to the TLRI's recommendation that there be a statutory presumption in favour of activation on breach.

Tata has observed that judges – and one might infer, magistrates – ‘tend to be suspicious of anyone (especially academic researchers), asking questions and exposing the limitations of their practice’, suggesting this may be due in part to ‘a defensiveness about the implications of such enquiry. Judiciaries throughout the western world tend to be highly suspicious of empirical scholarly enquiry, especially in sentencing’.<sup>69</sup> More cynically, Walker has argued that the ‘interrogation of the sentencers themselves, even if they are willing to be interrogated, is not likely to be profitable’.<sup>70</sup> According to Ashworth, however:

Sentencing is a vital realm of public policy, and it should not be shrouded in secrecy simply because of fears about the possible reactions to research findings of the press and of politicians ... The details of sentencing practice are a matter of deep social concern, and they cannot ever be discussed properly until they are made known.<sup>71</sup>

In my experience, the Tasmanian judicial officers were not only enthusiastic about being ‘interrogated’, but gave candid and insightful comments about their use of suspended sentences. Tata has observed that if sentencing is to be ‘coherently

<sup>69</sup> Tata, above n 18, 411. See also Justice M Kirby, ‘Judging: Reflections on the Moment of Decision’ (1999) 18 *Australian Bar Review* 4; Tombs and Jagger, above n 10.

<sup>70</sup> N Walker, *Crime and Punishment in Britain: An Analysis of the Penal System in Theory, Law and Practice* (Edinburgh University Press, 1973) 213.

<sup>71</sup> A Ashworth, ‘Sentencing and Sensitivity: A Challenge for Research’ in L Zedner and A Ashworth (eds), *The Criminological Foundations of Penal Policy: Essays in Honour Roger Hood* (2003) 295, 331.

structured', then sentencers' veil of mystery must be lifted.<sup>72</sup> The judicial perspectives presented in this article provide a significant contribution to lifting the veil of mystery surrounding sentencing, especially in the context of the oft-misunderstood suspended sentence.

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<sup>72</sup> Tata, above n 18, 415. Tata goes on to observe that narrative accounts of the decision process by the decision-maker are not simple factual presentation, but necessarily socially (re)constructed by factors such as the situation and expectations of the audience. Future analyses should therefore examine how judicial responses in interviews conducted by a postgraduate student such as myself might differ from narratives provided to a different audience.