

MENTAL HEALTH LEGAL CENTRE SUBMISSION TO THE SENTENCING ADVISORY COUNCIL INQUIRY INTO SUSPENDED SENTENCES

June 2005

The Mental Health Legal Centre Inc is a Community Legal Centre specialising in legal advice, policy and law reform, advocacy and promotion of the rights of people experiencing mental illness. We have 18 years experience working with and representing people with mental illness in all areas of the law which impact on our clients' lives.

We see a considerable number of people who have criminal records, who are involved in criminal proceedings and who may be adversely affected by any proposal to diminish sentencing options. We encourage the Sentencing Advisory Council to creatively explore and develop new options.

We are concerned that what is perceived to be the community's views of appropriate punishment is driving the agenda of sentencing reform and that suspended sentences are viewed as being a soft option. As practitioners we know that this is not so.

Suspended sentences provide an important option in the sentencing hierarchy, in our submission however a review of their application can only occur within the context of a review of the entire range of dispositions. We need to identify the gaps in sentencing options and address how to fill these gaps; this ought be done in consultation with those who fall between the gaps.

The real issue of concern to us is to ensure that people who are unwell are diverted from the criminal justice system. Suspended sentences are not a diversion from the criminal justice system and in fact offer the hefty penalty of imprisonment. Given the over representation of people in our prison system with mental health issues and drug and alcohol issues, we recommend an expanded range sentencing options that divert these offenders from prison into therapeutic options.

Our clients experience discrimination in all aspects of their lives but in particular in their dealings with the criminal justice system, it is apparent this is influenced heavily by the media portrayal which equates mad=bad=dangerous. Sadly, we cannot trust the community to understand the nature and impact of mental

illness; generally they are ignorant of the service system, the Mental Health Act and the obligations that can be imposed upon those deemed to be in need of involuntarily detention and treatment. Given the significant number of people in our prison system with mental health issues and drug and alcohol issues, we support an expanded range sentencing options that divert these offenders from prison into therapeutic options.

In cases where there is a connection between the illness and the offending conduct, there are limited services available. For people with psychiatric disorders it is appropriate to apply sentences that reflect an understanding of the nature of mental health and its impact upon a persons offending behaviour. We know that those who commit crimes when unwell, when well are at extremely low risk of recidivism. The level of risk that they pose to themselves or others can be monitored by mental health professionals and subject to application of a 'risk assessment ' that is accompanied by a management plan.

In the case of Rv Tsiaras¹ the Victorian Court of Appeal summarised the impact of a psychiatric illness on sentencing. The Court stated that an illness reduces moral culpability, and renders less relevant the punishment and denunciation aspects of sentencing; that general and specific deterrence are often inappropriate objectives in sentencing and further, a particular disposition may have a more harsh impact because of a person's illness. What is left, then, are rehabilitation and community protection.

For people with a psychiatric disability rehabilitation should be the primary objective of sentencing. We do not deny the absolute necessity to assure the community's safety, however, the provision of appropriate support and treatment is the most effective way of preventing re-offending behaviour. Sentencing should not be influenced by the false assumption, carried by many, that the existence of a mental illness of itself increases the danger to the community.

The retention of suspended sentences is crucial to maintain a range of appropriate dispositions. Lamentably, as we will discuss further, it is not a good option for our clients although they may give instructions to seek such a sentence.

The steady increase in incarceration rates in Victoria over the past decade needs to be addressed, any changes to suspended sentences and the sentencing regime that will result in a further increase in incarceration rates is a retrograde step. Importantly the SAC discussion paper fails to address the reasons for breach of suspended sentence, without this data it is futile to attempt to address

¹ [1996] 1 VR 398, 400

the appropriateness of changing this disposition. Indeed an analysis of the reasons for breach may identify some creative sentencing options.

The Attorney General states that community concerns are indicative of a need for reform; these concerns are at present tainted by the media and a fear of terrorism, we believe it is not the time to ask the community how to deal compassionately or even thoughtfully with offenders. The way to address the perceived leniency of suspended sentencing is through community education campaigns, to assist them to understand mental illness, intellectual disability, acquired brain injury, and substance dependence and the role of courts and the sentencing system. Nothing will be achieved by impeding the discretion of the courts and diminishing sentencing options; reforms that remove discretion will only signal to the community a lack of trust in the courts and of alternatives to imprisonment.

The Specifics of the Proposal

Question 1. Should suspended sentences be retained or abolished as a sentencing option in Victoria?

The MHLC supports the retention of suspended sentences as a sentencing option in Victoria.

Question 2. If suspended sentences were to be abolished, what changes (if any) should be made to existing sentencing orders? Should any new forms of orders be introduced?

We oppose the abolition of suspended sentences. We recommend an evaluation of suspended sentences; in the context of all sentencing options ought be conducted. The discussion paper though comprehensive, in an overview of statistics fails to assist, as it doesn't address the fundamental questions – why do people breach? What could prevent them from doing so? We recommend that the Sentencing Advisory Council ask people who breach; their response would identify gaps in health or other service delivery crucial to people with disabilities, including those with substance dependence. The Sentencing Advisory Council needs to be informed about whether the breach is due to a failure of these systems rather than a failure to comply by the person subject to a suspended sentence.

Question 3. If suspended sentences are retained, what should be their proper role?

Suspended sentences are applied where a court considers that an offence warrants a term of imprisonment, but in the particular offender's circumstances an immediate term of imprisonment is inappropriate. A suspended sentence signals to the community that a particular offence is serious enough to warrant a term of imprisonment whilst applying a rehabilitative focus to address the offender's therapeutic needs.

A suspended sentence provides the offenders a chance to prove themselves and participate meaningfully in the community. Whilst denouncing the conduct of the offender and deterring behaviour, it also allows for the rehabilitation of the offender in the community. It also avoids the stigma of imprisonment.

Question 4. Should a statement be included in the Sentencing Act 1991 setting out the purposes of a suspended sentence order? If so, what factors should be included?

The courts should retain absolute discretion to impose a suspended sentence in circumstances that it determines are appropriate. We are concerned that any statement of purpose will be binding and impede the discretion of the courts.

One of the concerns expressed against suspended sentences is that of deferred blow out, when breaches of suspended sentence accumulate resulting in a disproportionate final term of imprisonment. Although this is documented as occurring in Britain, it is certainly not the case in Victoria where magistrates have used common sense in their sentences following a breach and new offence [Tait:1995]. They must keep discretion, to impede decision making may result in deferred blow out which will impact enormously on the correctional system as well as impacting adversely on individuals.

Question 5. Should some other form of guidance be provided to sentencers on the factors, which should be taken into account in making an order to suspend?

The courts must be aware of the following:

- mental health issues and the availability of treatment and rehabilitation in the community compared to prison
- the appropriateness of an immediate sentence given a person's disability and the disability supports available in prison
- drug or alcohol issues and the availability of treatment and rehabilitation in the community compared to prison
- the age of the person and the availability of treatment and rehabilitation in the community compared to prison
- prior criminal history and likelihood of re-offending
- other matters as the court deems appropriate in the circumstances

Action research into the reasons for breaches and an analysis of the failures in rehabilitation service provision must be ongoing and will provide an important education function to the courts. Data on the use, application and impact of the suspended sentence must be available to courts and will serve to guide them. We reiterate however, guidance to decision makers must not restrict discretion.

Question 6. Should the steps involved in making a suspended sentence order be clarified?

Protocols and procedures for taking evidence may assist the court in ensuring that all relevant issues are considered. In matters where there is a disability the courts require the assistance of service agencies. We are concerned that our clients may breach an order not because of any fault of their own but a failure on behalf of the service providers to provide adequate support and rehabilitation.

The courts cannot set guidelines for when a person may become well; they cannot demand service provision or hold the mental health or disability sector accountable for providing ongoing support to people with a mental illness. However without treatment and support people with disabilities may unintentionally, if they become unwell and chaotic or faced with difficulties in daily living, breach.

We know of many situations of breach where both the court and the offender have an expectation that treatment and services will be provided. Conditions on sentences provide a convoluted route to obtain services. DHS resent the courts assessing and prioritising clients; many services are not available unless the person has a case manager and despite a condition on a sentence they may not be a priority for case management. In these cases the breach ought rest with the service system and not with the person.

In our view the courts must, when sentencing of people with disabilities, explore all less restrictive sentencing options before contemplating a sentence of imprisonment such as a suspended sentence. Our recommendation is not for new non-custodial orders in addition to the existing dismissal of charges, community based orders, adjournments and suspended sentences.

Suspended sentences are generally considered to be an inappropriate disposition for offenders with mental illness, as the threat of impending activation of the sentence is not generally an effective deterrent. Conditional CBOs adjournments and bonds are often not ordered in the first place, and people with disabilities are detained either in prison or hospital even though non-custodial orders would be preferable. One possible reason is that courts may not be aware of the connection between the persons offending behaviour and their illness, or the sorts of conditions, which may be attached to the orders, which would be of benefit to the offender. Another is that there may not be sufficient confidence that the conditions attached will meet the objectives of rehabilitation or community protection if relevant.

We recommend the option of provisions comparable to Justice Plans for people with intellectual disability. Under the Sentencing Act, Justice Plans are available for people with Intellectual Disability. Their objective is individualised provision of

appropriate services and support and prevention of further offences. We believe that the option of similar plans, catering specifically for people with mental illness, would usefully supplement and render more appropriate these existing dispositions. These plans serve to bind DHS to provision of services.

Question 7. Should amendments be made to s 27(1) of the Sentencing Act 1991 (Vic) restricting the use of suspended sentences to cases involving 'exceptional circumstances'?

We recommend that the courts retain full discretion to impose a suspended sentence in circumstances that it determines are appropriate. The use of suspended sentences should not be restricted to cases involving "exceptional circumstances".

When an offender has a disability it is almost impossible to establish exceptional circumstances for a number of reasons as follows:

- The prosecution now demand conditions are attached to an order, to ensure they comply with treatment. It is both our experience and that of VLA that the OPP have directed that with such a defence matters should be pushed up to county court; this is to ensure that there is a finding in relation to the matters and treatment conditions imposed. This direction of the OPP is being played out in the magistrate's court where there is a complete defence of mental impairment – i.e. the charges are discharged.
- With a breach of any sentence the court is likely to impose conditions – they err towards caution in trusting that the person will continue with treatment, they want a person responsible in place to monitor a person with a mental illness and oblige them to treatment.
- When it is known that a person has a disability an undertaking by the person is seldom believed or taken seriously.
- The courts do not trust the mental health system to continue to assist and treat offenders with a mental illness and want to enforce ongoing treatment. The courts are concerned that the Mental Health Act does not cover all people with a psychiatric disability appearing before them. For these people the courts want services, out of concern and a frustration with the service system for its failure to provide they may place treatment conditions on a sentence, this is untenable for the offender
- People with disabilities are vulnerable to breach, when unwell they may fail to appear in court and fail to keep appointments. Life can be chaotic and difficult for some people; participation in programmes depends on stability in their circumstances including proper housing, food, regular income, treatment and health care.

Question 8. Are there certain offences for which a partially suspended and/or wholly suspended sentence of imprisonment would never be appropriate? If so:

(a) What offences?

(b) Would your view change if special conditions were attached to suspended sentence orders in Victoria (e.g. supervision and treatment)?

The courts should retain full discretion to impose a suspended sentence in any circumstances it deems appropriate. Legislation must not impede the court's discretion. Legislative amendment and impeding the courts discretion will not alter the situation when a breach is caused because of a failure to provide adequate resources.

Conditions, if attached can set up a person with a psychiatric disability to fail unless they are assured of rehabilitation, treatment and support. If the person becomes well and stable, services may cease to be available. The philosophy behind mental health treatment is to move the person towards managing their own health and wellbeing to move the person towards developing insight and control over their mental state. Obliging people to treatment when they are well, is in contradiction to the involuntary treatment and detention provisions of the Mental Health Act

Question 9. Are there certain offences for which a partially suspended and/or wholly suspended sentence of imprisonment may be appropriate, but only in exceptional circumstances? If so:

(a) What offences?

(b) Would your view change if special conditions were attached to suspended sentence orders in Victoria (e.g. supervision and treatment)?

The courts must retain full discretion to impose a suspended sentence in circumstances that it determines appropriate. Legislation should not in anyway fetter the courts discretion to apply a suspended sentence only for particular offences.

Question 10. If the use of suspended sentences for certain categories of offences were to be restricted in some way, what would be the best way to achieve this (for example, by including a requirement in the legislation that suspended sentences only be permitted in exceptional circumstances, and/or by providing sentencing courts with some form of guidelines)?

We oppose any legislation, which would restrict the courts in imposing an appropriate sentence. Suspended sentences are and must continue an appropriate sentence disposition.

Question 11. Should courts be able to attach conditions to suspended sentence orders? If so:

(a) Should the power to attach conditions be able to be exercised in all cases or only for defined offences

and/or offenders (and how should these be defined)?

(b) What sorts of conditions should be available?

(c) Should some conditions be mandatory?

(d) How could conditional suspended sentences be distinguished from other sentencing options (such as, for example, an intensive correction order or community-based order) and when might their use be appropriate?

(e) How should a breach of these conditions be dealt with? For example, what options should be available to a court on breach of conditions (other than the condition that the offender must not commit another offence punishable by imprisonment during the operational period)?

Dismissal of charges, with or without conviction will sometimes be an appropriate disposition, given the relative lack of culpability, and inapplicability of deterrence, punishment or denunciation. Adjournments, with or without conviction, are often used appropriately, with treatment conditions attached. For example, we know of two cases in which a custodial sentence would have been utterly inappropriate. In both cases the defendants pleaded guilty. One involved a person who while experiencing either a toxic psychosis stemming from drug use, or a stress related reactive psychosis, killed his father². Another concerned a former Vietnam Veteran whose posttraumatic stress disorder meant he suffered from a temporary belief that he was fighting for his life against an acquaintance he believed to be the enemy, and struck him repeatedly with a machete³. Despite the seriousness of the acts involved, the Court in these cases acknowledged that these people, though found guilty, did not act criminally but due to mental condition. Both people were placed on five-year adjournments, with conditions that they receive regular psychiatric treatment.

In reality, however, in many cases simply imposing a condition that a person obtains, or continues to receive psychiatric treatment, is not enough. Whilst the two cases referred to above are not necessarily examples, without adequate support, resources, and more holistic services, people may find themselves in a similar situation to that which brought them before the court in the first place.

We support courts being able to attach conditions to sentences only where they are intended to address a therapeutic need of the offender and adequate

² R v Bryan Rutherford Lysk, Supreme Court of Victoria, Unreported 17 November 1995.

³ Rv John Frederick Sandars, Supreme Court of Victoria, Unreported, 13 August 1996.

supports are put in place to assist the offender to comply with the conditions. We do not support conditions that will make it more difficult for offenders to comply with suspended sentences or that will result in increased breach or incarceration rates.

A suspended sentence with conditions ceases to be a suspended sentence and is a new form of disposition. Conditional orders exist in various forms and ought be further down the sentencing hierarchy than imprisonment.

It is evident to us that there is many inconsistencies in the interaction between the mental health system and the criminal justice system, these need to be properly addressed before tampering with sentencing options which may make it even more difficult for a person to comply with court orders.

Question 12. Should a form of conditional suspended sentence be available for drug-addicted offenders? If so, what sorts of conditions should be available?

We support drug-dependent offenders being provided with sufficient supports and services for rehabilitation, such conditions if attached to a sentence form part of a conditional sentence, not a suspended sentence.

Question 13. If a form of conditional suspended sentence is introduced in Victoria, should there be a power for the court to review and vary conditions? If so:

(a) What types of changes should be permitted?

(b) What restrictions (if any) should there be?

(c) How should the power operate?

Courts must have the power to vary or review conditions so as to make breaches the option of last resort and to ensure that offenders are given a real opportunity to undertake rehabilitation programs. Additional resources should be provided to community support agencies to address the additional burden placed upon them in assisting offenders to report back to court about their progress in complying with the conditions.

People with mental illness must have the option to return to court to vary an order if there is a treatment component that is no longer necessary

In addition, resources should be provided through the legal aid system to compensate lawyers and medical professionals for the extra work involved in seeking and writing reports to the court. Offenders should not be disadvantaged in this process because they do not have the financial capacity to pay lawyers and medical practitioners to prepare court reports.

Legal advocates with specialist skills and knowledge of disability, drug and alcohol dependence and mental illness and familiarity with the mental health and other service systems, can assist the courts to understand the feasibility of community treatment components in an order.

Question 14. Should the maximum term of imprisonment able to be suspended in Victoria be:

(a) kept at three years in the higher courts and two years in the Magistrates' Court;

(b) reduced to a maximum term of 12 months, or 18 months or some other term;

(c) increased to five years or some other term; or

(d) undefined (to allow a sentence of imprisonment of any length to be suspended)?

We support the maximum term of imprisonment able to be suspended in Victoria be kept at three years in the higher courts and two years in the Magistrates' Court.

Question 15. Should amendments be made to impose a lower limit on terms of imprisonment that can be held wholly or partially in suspense? If so, what limit should apply?

We support the introduction of reforms that encourage the courts to impose community based sanctions instead of short sentences, we are concerned that amendments that imposing lower limits on terms of imprisonment that can be held wholly or partially in suspense, will result in longer periods of imprisonment being imposed that would otherwise be the case.

We recommend that Victoria develop more community-based options, where appropriate with therapeutic conditions and where possible divert people with mental health issues from the criminal justice system.

Question 16. Should any changes be made to the maximum operational period of suspended sentence orders? For example, should it be possible to order a longer operational period than currently applies, or should the maximum operational period be reduced?

The maximum operational period ought be maintained. We note that breach rates increase with longer operational periods; as discussed we believe this would be the case for offenders with mental illness.

Question 17. If a form of conditional suspended sentence were to be introduced in Victoria: (a) What should be the maximum period of time during which the offender is subject to conditions? and (b) Should the period during which the offender must not commit another offence be

the same as, or longer than, the period of time during which he or she must comply with special conditions?

The period during which an offender must not commit an offence should be different to the period of time in which the offender is subject to conditions. Conditions may be onerous and may rely on provision of services that may or may not be available. Conditions if attached, provide additional obligations and ought shorten a sentence.

Question 18. Should any changes be made to the options available to a court on breach of a suspended sentence?

The court should retain full discretion to impose any sentence it determines to be appropriate on breach of a suspended sentence. We recommend flexibility and encourage the use of options tailored to individual circumstances.

We recommend removal of 'exceptional circumstances' that impacts unfairly upon people with mental illness; it is our experience that the court errs towards a more custodial option with a breach when there is evidence of mental illness. It is impossible for our clients to establish exceptional circumstances.

The requirements in sections 31(5)(a) and 31(5A) that a court upon finding an offender guilty of a breach, must restore the sentence or part sentence unless it is satisfied that exceptional circumstances have arisen, impedes the court to apply discretion after considering the individual circumstances and should be removed.

Question 19. Should any changes be made to s 31(6) of the Sentencing Act 1991 (Vic)?

The court should retain full discretion to impose any sentence it determines to be appropriate on breach of a suspended sentence. We recommend that the section 31(6) requirements, that sentences should be served immediately and cumulatively, be repealed.

Question 20. Should breach of a suspended sentence order amount to a criminal offence

No, re offending constitutes a new offence which should be dealt with anew, the court to maintain discretion to sentence according to the particular circumstances, and with knowledge of the breach. A breach in itself should not be considered a separate offence, if this occurred it could cause a blow out of the sentence beyond an appropriate time.

Question 21. Should a suspended sentence that is partially restored be suspended against further breaches?

It seems that some clarity is required; we doubt the sentence is lost but rather remains in effect until the operational period of the suspended sentence expires.

In cases where there is a variation of sentencing, such as a partially restores suspended sentence the court must clearly communicate the intention of a suspended sentence and identify the offenders obligations and the circumstances which will be considered a further breach.

Question 22. Should the current availability of suspended sentences for young offenders under s 27 be changed in any way (for example, restricted to offenders who are aged 21 years or over)? If so, would your view change if a form of conditional suspended sentence was introduced in Victoria?

The court should be able to order a young offender who has breached a suspended sentence to serve the sentence activated in a youth training centre or a youth residential centre. Conditional sentences create difficulties for young people as they do for with people with mental illness - they are likely to breach if they miss appointments; don't have active supports and treatment, case managers etc

Question 23. Should a court be permitted to order a young offender who has breached a suspended sentence to serve the sentence activated in a youth training centre or a youth residential centre?

Yes. A court should be permitted to order a young offender who has breached a suspended sentence to serve the sentence activated in a youth training centre or a youth residential centre, where it deems that this is appropriate and in accordance with the dual track system.

Question 24. Should a power be introduced under the Children and Young Persons Act 1989 (Vic) and/or the Sentencing Act 1991 (Vic) to suspend youth training centre orders and/or youth residential centre orders?

No, we do not believe that suspended sentences work for young people, and become increasingly inappropriate with younger offenders. The Children and Young Persons Act has an appropriate range of options and a deferral option s190 that places an obligation on the service system to provide supports to the young offender. This option ought be developed in the adult sentencing hierarchy for offenders with support needs.

We support youth law in their proposal for a probation or supervisory order for young offenders to be supervised by JJ. For young people experiencing mental health issues appropriate services must be part of these supports. Staff must be trained in recognising special needs to make appropriate referrals. Diverting young people with mental health issues from the criminal justice system into the health system is crucial. Early treatment and support and management of a mental illness can have a remarkable impact on the person and prevent further offending behaviour.

Question 25. Should partially suspended sentences be abolished or retained as a sentencing option in Victoria?

The courts should retain full discretion to partially suspend a sentence in circumstances that it determines are appropriate, to that extent we support the retention of partially suspended sentences however we acknowledge the punitive nature of this disposition and the uncertainty and disruption that they cause, and believe they ought be limited in time. They provide an option to conditional release and parole. We reiterate that the courts must have as many options as possible to allow them to tailor make sentences appropriate to the circumstances of the offender and the offence.

Question 26. Should partially suspended sentences be replaced with an imprisonment release order, or some other form of order?

No, an imprisonment release order is a different option and may have different applications; the courts should retain discretion to apply either. We maintain that it is difficult for people with a mental illness to adhere to successfully graduate from any form of suspended sentences unless they have supports available according to the individuals needs i.e. appropriate housing, income support, access to mental health supports and treatment.

Other Issues

Hospital orders, Sentencing Act, s 93, are the only pure mental health diversion disposition in the sentencing hierarchy. The discussion paper provides no exploration of their application and flexibility, although it aims to explore therapeutic conditions as well as punitive. There are at present two forms of orders hospital orders and hospital security orders. Hospital security orders are a step up the hierarchy and revert to imprisonment when the person's illness is no longer deemed to require hospital treatment.

People on hospital orders are diverted away from the prison system and once well enough to be discharged from hospital; they are released into the community, with or without being detained under a restricted community treatment order.

Hospital orders are at present subject to DHS proposed amendments. It is inappropriate that whilst the Sentencing Advisory Council is conducting a significant review of sentencing, changes that will limit discretion, in that they will remove Hospital Orders as an option where a person may have otherwise been sent to prison, are being pursued. The changes also propose to remove the possibility of hospital orders being used in relation to serious offences where imprisonment.

The effective removal of a discretionary diversion disposition in this way is a troubling, retrograde step. In an environment where prisons are struggling to cope with the disproportionately high number of inmates with mental illness, removal of such a discretionary option is particularly concerning. In contrast, we note the comments of the Attorney Rob Hulls at the launch of Victoria's Sentencing Advisory Council to the effect that the foundation of sound sentencing policy is judicial discretion. The proposed amendments only serve to diminish such discretion.

Thank you for the opportunity to respond to this review, we welcome further involvement with the work of the Council.

Please do not hesitate to contact Vivienne Topp 96294422, email Vivienne_Topp@fcl.fl.asn.au with any queries.

Yours Faithfully

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