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VALS submission to the Sentencing Advisory Council: response to Suspended Sentences Discussion Paper (April 2005) - sent 20 June 2005

Thank you for the opportunity to comment on the Suspended Sentences Discussion Paper April 2005 (Discussion Paper).

Overview

VALS believes that the retention of suspended sentences is an important sentencing option which prevents some people from jail, assists the rehabilitation of some people and saves the community considerably higher expenditure by avoiding using the prison system.

It is understandable that some people regard suspended sentences as a soft option however in reality this is not the case.

VALS does not support proposals to make these orders more punitive and believes that greater efforts are needed to explain the social and economic costs of more punitive sentencing

Many Kooris breach these orders however breaches of suspended sentences given at the Koori Court are considerably lower than the average breach rate. This highlights the largely unrecognised potential to make these orders more successful.

VALS believes that some improvements to the level of breach of orders may be achieved by more detailed explanations of the meaning of the order and the high level of risk that a person on a suspended sentence faces if they commit any offence whatsoever

Concerns about the Discussion Paper:

Punitive Tone

VALS is concerned by the tone of the Discussion Paper in relation to the uncritical acceptance of the argument that the punitive element of suspended sentences needs to be enhanced. The suggested reforms in the Discussion Paper imply that suspended sentences are too lenient and need to be made more punitive. This concern applies to the following reforms: restricting the use of suspended sentences to cases involving 'exceptional circumstances', attaching additional conditions to suspended sentence orders and increasing the maximum operational period of suspended sentence orders (see below for further explanation). For instance, it is stated at page 32 of the Discussion Paper that

"one of the criticisms of suspended sentences is Victoria is that provided an offender does not commit another offence, he or she is not subject to any demands on his or her time or resources. This creates that perception that suspended sentences are no punishment at all".

The perception that suspended sentences are no punishment at all is at one level completely understandable however there other levels at which it can be understood as a serious punishment and one with a high level of risk that it will still result in a prison term. Public ignorance about suspended sentences and the name 'suspended sentence' itself contributes to a view that these sentences are a soft option. The term suspended sentence overlooks the other description of the situation which is arguably more accurate and that is the offenders behavior. The offender has to avoid an offence of any kind for up to two years. This is a considerable challenge for many people. Particularly in cases where an offender is well known to the police and the police are vigilant in monitoring the person it is highly likely that an offence will be detected.

A person who may have received a month jail term can receive a longer term with a suspended sentence eg a two or three month suspended sentence and 24 months in which to avoid any further offence. The breach rate of 31 % highlights that many people fail to complete this challenge successfully. However what should this figure be compared to? The fact that 53% of people in prison have been in prison before suggests that imprisonment is an option that often fails to deter a person from reooffending.. The breach rate for juvenile justice orders is 41% for first time clients and 60 % for people who have had a previous order. Overall the reoffending rate for juvenile justice orders was 48.6%. ("How many young people on juvenile justice orders reoffend?" DHS Website)

Keeping a person in jail costs at least $147 per day per person. The fact that the majority of the people on suspended sentences don't reoffend highlights the enormous amount of money which is saved by not jailing these people.

VALS is concerned by the impact of a punitive or law and order campaign on disadvantaged people, such as Indigenous Australians. VALS argues that a tough on crime approach targets disadvantaged Australians resulting in further marginalization, which suggests that punitive sentencing is not a 'smart on crime' approach. According to Professor Arie Frieberg a tough on crime approach does not deter offenders. Instead sentencing rates are increasing ahead of crime rates: "In Australia, as possibly elsewhere, there is little evidence that increasing imprisonment rates have significantly affected crime rates. Victoria's crime rate over the last decade, which has shown small annual increases for the most part, appears to be unrelated to the numbers in prisons" (p. 41, Freiberg 2002).

VALS argues that a smart on crime approach in the context of suspended sentences may be to provide assistance to disadvantaged Australians in meeting their obligations under suspended sentences. A smart of crime approach may involve exploring the

rehabilitative value or potential of suspended sentences, rather than simply increasing the punitiveness of these sentences.
VALS wishes to highlight the experience of Indigenous Australians with suspended sentences as follows:

Due to relatively high levels of breach of these orders suspended sentences are a pathway to jail for some Indigenous Australians. When these orders are used instead of lower levels of sentence they have a net widening effect. Suspended sentences sometimes involve longer periods of imprisonment than a straight prison term would provide.

- Anecdotal evidence is that the majority of Kooris on suspended sentences are breached.. A number of factors impact the high breach rate of suspended sentences by Indigenous Australians and they are as follows, but this list is not exhaustive:

    - In some situations the imposition of a suspended sentence only, without mechanisms in place to help compliance with the order, sets Indigenous Australians up to fail. Breaches of suspended sentences are common for people who do not have support in breaking out of a cycle of extreme disadvantage, addictions or crime.

    - The gap in appropriate and culturally sensitive services for Indigenous Australians impacts on Indigenous Australians breaching suspended sentences. High recidivism rates amongst Indigenous Australians in comparison to non-Indigenous Australians explain why suspended sentences are breached. Criminology Research Council (2005) figures show that "if Aborigines are arrested once, there is a 92 per cent chance they will be arrested again. Once they have been arrested a second time, it is 94 per cent certain that they will be arrested again."[1]

    - Distinct offending patterns of Indigenous Australians in comparison to non-Indigenous Australians explain why suspended sentences are breached. For instance Indigenous Australians commit more petty crime and more likely to breach a suspended sentence in this way.

    - Some Indigenous Australians do not understand what a suspended sentence is or the implications if they re-offend.

- There is one example where the breach rate for suspended sentences is considerably lower, the Koori Court According to Terrie Stewart (Aboriginal Justice Worker at Broadmeadows Koori Court) there have been two breaches of

[1] 'Destiny's children' The Sun-Herald April 10, 2005

suspended sentences at the Koori Court out of a total of 9 since the Court commenced operating in 2002. This low breach rate is a credit to the Koori Court and is attributable to:

- The Magistrate being particular about handing down suspended sentences. Magistrate Ann Collins tends to hand suspended sentences to people who have got their lives on track and/or have support mechanisms in place that enable them to break out of a cycle of crime.

- The Koori Court is able to put mechanisms in place to assist Defendants to comply with suspended sentences (ie case plan to link Defendant in with appropriate services undertaken).

- Participants and observers of the Court state that it is easier to understand and participate in what is happening as there is less formality and more time. spent determining an appropriate sentence

- Anecdotal evidence exists that the Koori Court is successful in reducing recidivism rates.

There are a number of issues about when suspended sentences are used

- In some cases suspended sentences are given when a lesser sentence would be more appropriate. Whenever the client is willing, VALS will appeal these decisions and has regularly succeeded in having a reduced sentence substituted.

- In some cases suspended sentences are not used enough for Indigenous Australians. Indigenous Australians are less likely to be given suspended sentences than non-Indigenous Australians. This is arguably a result of what is identified at page 120 of the Discussion Paper: suspended sentences work to benefit white-collar and middle-class offenders. For instance, sentencers often regard white-collar offenders and those with stable employment, family support as suitable candidates because they are less likely to re-offend than those who do not have this (ie: drug problems). On occasion this means that imprisonment is used rather than a lesser sentence.

- On the other hand, “sometimes it seems that judges are trying everything to avoid sending an Aboriginal offender to jail. It appears that the some corners of the judiciary are aware of the Royal Commission into Aboriginal Deaths in Custody and committed to preventing the unnecessary imprisonment of Indigenous Australians.

- Indigenous Australians commit a high rate of driving offences which brings a mandatory sentence in some situations. Suspended sentences prove useful in preventing driving offenders being imprisoned.

- According to a criminal solicitor in instances of breaches of suspended sentences It is common for police to 'load up' charges against Indigenous Australians (ie: police invoke every possible charge). This is arguably a consequence of poor relations between police and the Indigenous Australian community and works to further divide these two groups.

Discussion Questions

1. Should suspended sentences be retained or abolished as a sentencing option in Victoria? 127

VALS argues that those arguing for the abolition of suspended sentences are placing the objective of more punitive sentencing ahead of objectives such as using prison as a last resort, cost effectiveness and rehabilitation.. VALS argues that suspended sentences should be retained as a sentencing option in Victoria. These sentences help reduce the cost and inhumanity of putting people in jail. They provide an additional opportunity to enable rehabilitation to occur. However, there are ways in which suspended sentences could be improved through reform. VALS agrees with the Frieberg Sentencing Review that suspended sentences be retained, but in conjunction with reforms.[2] VALS believes that the more sentencing options and the greater the flexibility available the better.

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? 129

A concern about including a statement of purposes in the Sentencing Act 1991 is that it will limit the operation of suspended sentences. If a statement is to be included it should be drafted more broadly than general sentencing principles. If the statement simply recites sentencing principles or is narrower than sentencing principles then it should not be introduced.

6. Should the steps involved in making a suspended sentence order be clarified? 129
Clarifying the steps involved in making a suspended sentence order would not provide any assistance. The case law is clear. Simply putting the steps in legislation will not influence the actions and value positions of decision makers. VALS is not aware of what level of feedback is available to magistrates and judges about appeals relating to their sentences. This information could assist the judiciary to reflect on their interpretation of sentencing.

7. Should amendments be made to s27(1) of the Sentencing Act 1991 (Vic) restricting the use of suspended sentences to cases involving 'exceptional circumstances'? 131

Amendments should not be made to s7(1) of the Sentencing Act 1991 (Vic) restricting the use of suspended sentences to cases involving 'exceptional circumstances'. This

[2] Sentencing Advisory Council, 'Suspended Sentences Discussion Paper' (April 2005) 127

would limit sentencing options and create a gap in the sentencing hierarchy. Likewise VALS response to question 8 - 10 is that there should be no restrictions on the availability of a suspended sentence as a sentencing option.

11. Should courts be able to attach conditions to suspended sentence orders?

VALS is concerned that the suggested reform of attaching additional conditions to suspended sentences is driven by the perceived need to make suspended sentences more punitive. For instance, it is stated at page 133 that "some might support introducing a power to attach conditions to suspended sentence orders, to give the order some punitive bite". VALS believes strongly that more punitive sentencing is not cost effective, not humane and does not create a safer community. While governments and oppositions persist with the fiction that more punitive sentencing is simply responding to what (some of) the community want they are abrogating their responsibility to inform the public about the economic and social costs of more punitive sentencing.

In theory attaching conditions to suspended sentences could go someway to addressing the issue of suspended sentences setting people up to fail However there are two problems: there are already orders which can be made which attach conditions eg Intensive Corrections orders and the inclusion of conditions will also create additional triggers to breach the person and have them imprisoned.). The success of the Koori Court with suspended sentences reflects a more meaningful delivery and thinking through of how the suspended sentence might actually help achieve a crime free status for the offender over the required time period. The Koori Court has demonstrated a capacity to achieve better outcomes in this regard..

VALS has come up with the following recommendations:

- Additional conditions to suspended sentences should only be included if they are to rehabilitate the offender rather than simply punish the offender.

- It is only suitable to attach additional conditions to suspended sentences if the sentencer is extremely confident the services/programs the conditions require the offender to use are appropriate and accessible.

    - In the context of Indigenous Australians appropriate services are services that are culturally sensitive.

    - It is important to give Indigenous Australians a choice between Indigenous Australian organisations and mainstream organisations that are 'appropriate services' (ie: mainstream organisation undergo cultural awareness training). For instance, it may be more appropriate for a Koorie person to access a mainstream organisation than a Indigenous Australian organisation due to a conflict of interest situation (ie: related to employee at the Indigenous Australian organisation).

- Unfortunately, it is the experience of Indigenous Australians that mainstream service providers are usually not culturally sensitive It is VALS concerns that if an Indigenous Australian is ordered by the Court to access inappropriate services then the Order will be breached. This is the experience of Indigenous Australians in the context of child protection.

- It is only appropriate to attach additional conditions to suspended sentences if adequate levels of funding to meet the costs identified at page 135 of the Discussion Paper accompany the reform.

  - In the context of Indigenous Australians more services, whether Indigenous Australian or mainstream, that target Indigenous Australians should be funded.

- It is only appropriate to attach additional conditions to a suspended sentence if supports are put in place for offenders to know what their obligations are and how to meet them. Arguably, suspended sentences are complex to understand as it is and additional conditions will serve to further complicate suspended sentences. If people do not understand the order breaches occur. The support could involve asking questions such as how to minimize the chances of a person getting picked up for breaching a suspended sentence. VALS suggests that the supports could be in the form of:
  - Court registrar providing assistance.
  - Funding for organisations independent of the Court, such as VALS, to provide assistance.
- Failure to comply with conditions should not be a basis for breaching the suspended sentence

(c) Should some conditions be mandatory?

The conditions should not be made mandatory but the discretion of judges preserved. VALS argues the conditions should be flexible and depending on the circumstances of the offender.

(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)? 136

The breach of the additional conditions should be dealt with by way of a fine and nothing higher. This approach will enable suspended sentences to have both a punitive and rehabilitative element: (ie convert fine into community based order, hours).

12. Should a form of conditional suspended sentence be available for drug-addicted offenders? If so, what sorts of conditions should be available? 137

A form of conditional suspended sentence should be available for drug-addicted offenders.

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?

It makes sense to give the Court power to review and vary conditions.

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? 142

VALS is concerned that this question is driven by a desire for suspended sentences to be seen to be more punitive. VALS argues that the maximum operational period of suspended sentence orders should be 12 months or 18 months. This is supported by evidence that suspended sentences over 18 months have a higher breach rate (40%) in comparison to suspended sentences 18 months or less (20%).[3] If the maximum operational period of suspended sentences is too long you are increasing the chances of a breach..

18. Should any changes be made to the options available to a court on breach of a suspended sentence, as set out under s 31(5) of the *Sentencing Act 1991* (Vic)? 145

VALS argues that there should be changes made to the options available to a Court on breach of a suspended sentence, as set out under s31(5) of the Sentencing Act 1991 (Vic). VALS is supportive of this reform as it does not appear to have a punitive tone. Currently the power of the Court upon breach of a suspended sentence is too limited. Greater consideration should be given to how 'stale' (old or inappropriate) the original sentence is in light of changed circumstances.

VALS has concerns about the operation of the process whereby the Court decides whether the offender should serve whole or part of the prison term held in suspense unless it would be unjust to do so in view of any exceptional circumstances which have arisen since the order suspending the sentence was made. VALS is concerned by inconsistency and unpredictability in the interpretation of what constitutes exceptional circumstances. The interpretation of exceptional circumstances is too narrow and it is difficult to show exceptional circumstances because it not clearly defined and tends to vary between Magistrates.

VALS recommends that:

- Recommendations of Frieberg Review (2002) should be adopted to enable Courts to be given sufficient flexibility in dealing with breaches of orders to be able to take into account any changes circumstances and the extent to which the offender

[3] Sentencing Advisory Council, 'Suspended Sentences Discussion Paper' (April 2005) 141

has complied with the order. VALS agrees with the Review that the current breach provision be repealed and replaced with new provision that allows for consideration of the offenders behavior during the suspension period and/or revoke the original sentence.[4]

- VALS agrees with considerations mentioned at page 7 of the Discussion Paper summary:
  - The circumstances of the offender may have changed significantly since the original sentence was imposed, making a sentence of imprisonment no longer suitable
  - A longer term of imprisonment may have been imposed than would otherwise have been the case it if was assumed that the sentence would not be served (inflation).
  - The offence which constitutes the breach may be a relatively minor offence.
- If the law surrounding exceptional circumstances is to be retained it should be defined clearly in line with the case law of Snip as opposed to Kent and Wilson. It should be recognized as exceptional circumstances when a person who hitherto had problems is doing well (ie: pick up the pieces).
- In identifying exceptional circumstances cultural issues should be taken into consideration (ie: living with extended family who are dependents).
- It is stated at page 37 of the Discussion Paper that the extent to which Courts are complying with a requirement when making an alternative order under s31(5) is unclear and agrees that the issue should be explored by the Sentencing Advisory Council (Council). It is noted that the Council plans to do this in the next stage of the review and VALS endorses this.

If the 'exceptional circumstances 'provision is abolished that will open way for more flexibility upon breach of a suspended sentence, akin to other States in Australia. VALS is in support of the situation in:

- the ACT which gives the Court power to make any order that it would be empowered to make if the offender was then being sentenced for the offence with which he or she was originally charged [Crimes Act 1900 ACT s404(e)].
- NSW where the Court must activate the original sentence unless the Court is satisfied that the breach was trivial or there are good reasons for excusing the offender's failure to comply [Crimes (Sentencing Procedure) Act 1999 (NSW) s98(3)] (mentioned in relation to Good Behavior Bonds but transferable to suspended sentences).

20. Should breach of a suspended sentence order amount to a criminal offence? 146

Breach of a suspended sentence should amount to a criminal offence.

Questions 22 - 24Young Offenders

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[4] Sentencing Advisory Council, 'Suspended Sentences Discussion Paper' (April 2005) 143

Suspended sentences should be made available to young offenders under 21 years of age. VALS argues that 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 (question 23). VALS argues that a power should 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 (question 24).

It does not make sense to limit sentencing options for young people as in the long run it is in the best interests of young people and the community in general that young people are not imprisoned. The benefit of including suspended sentences on the sentencing hierarchy for all young people is that it takes longer for young people to progress to the top of the sentencing hierarchy, namely imprisonment. It does not make sense for young people who are placed on a suspended sentence and breach it to be imprisoned in an adult prison, in fact this is in breach of the Convention of the Rights of the Child. It is more appropriate that such young people are imprisoned in a Youth Training Centre or Youth Residential Centre.

Given the fear that young people will fail to understand the gravity of suspended sentences and the risk that they face without the support of services is great it is vital that there be some form of counseling by a person respected by the young person.

- If suspended sentences are to be made available to more young people then it is imperative that supports are put in place for them to enable them to meet their obligations under the suspended sentence. This is the case whether or not additional conditions are attached to the suspended sentence. The arguments made above in relation to the availability of services are relevant here under question 11. Also, the suggestion under the heading 'information/education' below is relevant.

Additional issues

Information/Education

The issue of public misunderstanding of suspended sentences was not addressed in the Discussion Paper. There is misunderstanding by:

- The community leading to the perception that suspended sentences is a soft option.
- Offenders as to their responsibility under a suspended sentence.

VALS recommends that better information dissemination about suspended sentences may be a more efficient way of improving their operation, rather than overhauling suspended sentences.

Breach trigger

VALS argues that a breach of a suspended sentence should only be triggered if the offender:
a) re- commits the same offence, not a lesser offence. Breaches should not be triggered by a lesser crime.
b) Commits a similar or more serious offence.

Thank you for considering VALS response to the Suspended Sentences Discussion Paper and if you have any questions please contact Greta Jubb (Research Officer).