# THE USE OF SUSPENDED SENTENCES IN SOUTH AUSTRALIA

## A SUMMARY

BY

C. E. DENGATE

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Prepared For:—

The Department of Correctional Services,
I.A.C. Building,
345 King William Street,
ADELAIDE, S.A. 5000.

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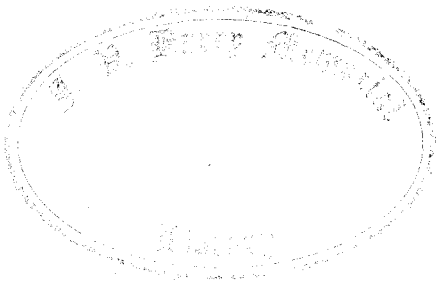
A Summary

Catherine E. Dengate



## THE NATURE OF THE SUSPENDED SENTENCE IN SOUTH AUSTRALIA

The suspended sentence available in South Australia involves the imposition of a period of imprisonment but the suspension of its execution. The power to impose such sentences is found in s.4(2a) of the Offenders Probation Act, 1913-1971:

> Where a person has been convicted of an offence punishable by imprisonment, and the court is of opinion that, having regard to -
> (a) the character, antecedents, age, health or mental condition of the person convicted;
> (b) the trivial nature of the offence; or
> (c) any other extenuating circumstances,
> it is expedient to exercise the powers conferred upon the court by this subsection, the court may impose a sentence of imprisonment upon the convicted person but suspend the sentence upon condition that the convicted person enters into, and observes the terms and conditions of, a recognizance to be of good behaviour for the term of the recognizance.

This section was inserted into the Act in 1969, consequently suspended sentences have been imposed since 1970.

The Act further provides that the term of the recognizance is not to exceed three years[1], although no limit is prescribed as to the period of imprisonment which can be suspended. If the conditions are complied with for the stipulated time the sentence of imprisonment is deemed extinguished.[2]

Under this present legislation, upon any breach of a condition of the suspended sentence recognizance being proved to the court, the suspension must be revoked. This feature of the legislation can be viewed as advantageous insofar as it involves the probationer knowing there is a fixed and certain penalty which will be invoked if he breaches the conditions of his recognizance; but disadvantageous in

that it is inflexible and takes no account of any change in the probationer's circumstances or effort on his part to obey the conditions of his recognizance. Further, the section allows the development of policies and decision-making by the prosecuting authorities in relation to estreatment which may amount to usurpation of part of the courts' sentencing role.

Some other suspended sentence systems give a restricted discretion to courts after a breach of the bond has been proved. The Mitchell Committee in 1973 recommended that South Australia adopt such a system,(3) however, as yet there has been no enactment of this recommendation.

The sentence in South Australia may involve supervision of the offender by a probation officer. The Act provides:

> A recognizance to be entered into under section 4 shall, if the court so orders -
> (a) a condition that the probationer shall be under the supervision of a probation officer during the period specified in the order, and
> (b) such other conditions for securing such supervision as are specified in the order, and
> (c) such additional conditions with respect to residence, abstention from intoxicating liquor, and any other matters, as the court may, having regard to the particular circumstances of the case, consider necessary or desirable for preventing a repetition of the same offence or the commission of other offences. (4)

There is power to vary the conditions of the recognizance including deletion of the requirement of supervision or discharge of the recognizance. The power to vary conditions by deleting supervision does not appear to be often exercised.

From a number of case-files where an application to the court to do this was suggested by the probation officer, it appeared that probationers were somewhat reluctant to seek such variation as it would involve a decision by a court (or by a judge). In some other States (such as New South Wales) the decision that supervision is no longer required in a particular case is left as a matter for the discretion of the Department of Correctional Services (or its equivalent.) A change towards this situation in South Australia might be considered. As it presently stands the court hearing such variation applications must rely heavily on the evidence of the probation officer involved, and preparation of the matter may be time consuming for the probation officer who also has other duties and responsibilities to other clients.

The Numbers of Suspended Sentences Imposed

Since the introduction of the suspended sentence the use of bonds under the other provisions of the Offenders Probation Act has declined. Suspended sentences are now the most frequently imposed form of bond in South Australia. Receipt of a suspended sentence does, however, necessitate revocation of parole which follows automatically on the imposition of a penalty of imprisonment, whether of immediate effect or suspended.

Table 1 provides details of the numbers of the various bonds with supervision assigned to probation officers in the years 1969-70 through 1975-76.

Table 1: Supervised bonds - numbers assigned each year

| | Bonds Under | | | |
|---|---|---|---|---|
| | Suspended Sentences (OPA s.4) | Others under Offenders Probation Act | Justices Act | Criminal Law Consolidation Act |
| 1969-70 | 61 | 638 | 59 | 77 |
| 1970-71 | 281 | 332 | 68 | 40 |
| 1971-72 | 488 | 365 | 84 | 60 |
| 1972-73 | 540 | 399 | 76 | 69 |
| 1973-74 | 510 | 361 | 157 | 76 |
| 1974-75 | 507 | 337 | 94 | 54 |
| 1975-76 | 540 | 296 | 83 | 59 |

Source: Annual Reports of the Department of Correctional Services.

In addition there were a number of bonds imposed which did not include a condition of supervision by a probation officer. In 1974-75 there were approximately 327 unsupervised suspended sentences imposed; in 1975-76, 374; and in 1976-77, 334.(5)

## The Offences for which suspended sentences have been imposed

Most suspended sentences are imposed in cases involving offences against property.

Of a total sample of the 915 supervised suspended sentence bonds in the computerised caseload records of the Department of Correctional Services in November 1977,[6] 194 bonds (21.2 per cent) involved offences of breaking and entering, and a further 251 bonds (27.4 per cent) had been imposed for other thefts, and 18 more (1.9 per cent) for either Receiving or Unlawful Possession.

The other half of that sample included 115 cases of Assaults (12.5 per cent), 73 cases of False Pretences and other fraud offences, 11 of drink-driving offences (1.2 per cent), 55 of other driving offences (including driving under suspension) (6.1 per cent), and 81 drug offences (8.8 per cent).

Sometimes the suspended sentence is imposed for violent offences such as Manslaughter (5 in that sample), Rape (1) Carnal Knowledge (5), Indecent Assault (9), and Robbery (13). There have also been occasional instances of unsupervised suspended sentences being imposed for Manslaughter, Robbery and other violent offences. Unsupervised suspended sentences appear to be imposed for a similar range of offences as are the supervised.

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(1) Offenders Probation Act, 1913-1971 (South Australia) s.4 (2c)

(2) ibid. s.4 (2b)

(3) Criminal Law and Penal Methods Reform Committee of South Australia - First Report (Sentencing and Corrections) July 1973 page 143.

(4) Offenders Probation Act, 1913-1971 (S.A.) s.5

(5) It is possible that these figures are incomplete. They relate to the bond papers received by the Department of Correctional Services, but there is no means of being certain that all such papers do reach that Department.

(6) This 'current caseload' sample consists of supervised bonds with details entered into the computer file. All current cases are not necessarily included as there may be some delay between the date of bond and details being obtained and entered in the computer file, but there is no reason to suspect any bias in the sample through it being incomplete.
That used in this study refers to the caseload as at November, 1977.

## THE OFFENDERS WHO RECEIVE SUSPENDED SENTENCES

Those offenders with supervised suspended sentences do not differ markedly in such characteristics as age, level of educational attainment, occupation and whether employed or not, from the remainder of the supervised caseload of the Department of Correctional Services.

### Age

Sixty five per cent of the 'current caseload' suspended sentence sample were aged under 25 years at the date of entering the bond. (40.6 per cent were aged under 21 years).

The offenders receiving unsupervised suspended sentences tended to be slightly older than this. Obviously in general a younger person can be expected to be more responsibe to, and benefit more from, the guidance offered by a probation officer supervising him, than his older, more experienced counterpart.

### Marital Status

This was not studied as it tends to fluctuate somewhat over time and it is often difficult to obtain accurate and meaningful data in the light of de facto relationships.

### Occupation

The most frequently listed occupations were 'Tradesman' and 'Labourer'. These together comprised 69 per cent of the current caseload sample.

Usual occupation must, however, be distinguished from whether the probationer was in fact actually employed. There appears to be a very high degree of unemployment experienced by probationers. Of the supervised suspended sentences in the 'current caseload' sample in 50.8 per cent of cases the person involved was unemployed; 33.7 per cent of these were regarded (by their probation officers) as 'seeking work' and the other 17.1 per cent as "not seeking work".

Many have erratic employment records. Of a sample of 389 persons in the supervised suspended sentence group in the 'current caseload', 9 persons had held 20 or more jobs in the previous three years, a further 12 had had between 11 and 19 jobs and another 60 had had between 6 and 10. The number of jobs held in that period was not known in a further 59 cases.

Sex

Approximately one eighth of the supervised caseload of the Department is female. Most of the offenders who receive suspended sentences are male. In October 1977 there were 897 supervised suspended sentences in the 'current caseload' sample, and of these 108 related to female offenders.

The predominant offences for which these women received their suspended sentences were Larceny (51 instances - 47.2 per cent of these cases), False Pretences or other fraud offences (18 instances; 16.7 per cent) and Drug related offences (14 cases; 12.9 per cent).

Educational attainment

Most of the current caseload sample had left school by age 15. Only about 15 per cent were aged 17 years or more when they left school. The level of schooling attained in most cases was 3rd Year High or less.

Where further training is known to have taken place it was most commonly formal or informal trade training.

Similar characteristics were displayed by a sample of the offenders who received supervised suspended sentences in 1974.

Previous record

This was only available in relation to 380 of the 'current caseload' sample as this data was collected at a later stage than most of the other social data.

Of this 380, 102 had no previous record at all (known to their probation officers). A further 59 cases (15.5 per cent) had a juvenile record of some sort, but no previous record as an adult (which is not surprising in view of the ages of the offenders receiving suspended sentences). There were a further 62 cases (16.3 per cent) with an adult record but no known juvenile record. In 50 cases (13.2 per cent) the offender had a previous record both as a juvenile and an adult. (Previous record in this context includes convictions without penalty, fines and unsupervised bonds).

The high incidence of the suspended sentence being imposed where the offender has no previous criminal record may indicate the use of the suspended sentence where some other penalty might be appropriate, and might have been used had the suspended sentence not been available. However, it is used in cases where imprisonment is available as a penalty, and it is for the court to determine whether imprisonment is the appropriate penalty for the particular offence before it (see page 9).

Other characteristics

In 266 of the 915 'current caseload' offenders, the probation officers considered that debts and finance presented problems for the clients. In 16 cases 'medical problems' were perceived as present. However, in 73 cases (8 per cent) the probationers were considered to have some physical disability, in 88 cases (9.6 per cent) some mental disability, and in 36 cases (3.9 per cent) both mental and physical disabilities.

The types of conditions imposed (see Page 10) reflect the courts' impressions of these offenders.

Before the introduction of the computerised statistics collection, probation officers were required to record on the relevant case-files whether they regarded certain 'significant factors' as present in the particular case, or not. These factors were not recorded in all cases, and any number of factors could be recorded in any particular case.

From a sample of 428 cases in which a supervised suspended sentence was imposed in 1974, the most frequently listed factors were: Excessive drinking (listed on 104 occasions; 24.3 per cent); Anti-social behaviour (104 cases; 24.3 per cent); Unsatisfactory social relationships (98; 22.9 per cent); Unsatisfactory employment pattern (91; 21.3 per cent); Financial irresponsibility (67; 15.7 per cent); Factual variation from normal family history (66); Other family difficulties (49); Previous contact with psychiatric services (49); Marital discord (41); Unsatisfactory home conditions (44); Drug addiction (27); Significant physical health factor (26); Suspected (or evidence of) mental retardation (18 instances; 4.2 per cent).

While other treatment agencies will generally not attempt treatment if the client is unwilling to co-operate (even if the client is required to undertake treatment by agreeing to a condition in a bond imposed by the court), the probation service has no such choice; it is required to 'treat', whether or not the client is co-operative, and if the client is bound by a suspended sentence. The probation officer may be reluctant to bring the matter of lack of co-operation before the prosecuting authorities, as the potential consequences (i.e. estreatment) are so severe for the client.

Mental retardation, psychiatric problems, drug addiction, illiteracy, language difficulties, and itinerant lifestyles are characteristics of some probationers and may present special problems for the supervising probation officer. The realistic aims of supervision will differ greatly from case to case; and the ability and preparedness of different probationers to accord with those expectations is also an individualized matter. The lack of any present power in the Department of Correctional Services to dispense with the requirement of supervision tends to produce a great deal of tolerance in some cases where the probationer is unwilling to report.

How offenders view the suspended sentence

In higher courts the offender is told by the judge just what is involved for him in the suspended sentence. In Magistrates Courts such explanations of the nature of the suspended sentence do not always come from the bench, and another research study conducted by the Department indicated that many offenders did not understand their obligations under the suspended sentence when it was imposed, but that it was usually explained to them in such cases by the clerk of court who typed up the bond papers. This seems somewhat disturbing in view of the high degree of legal representation of the offenders who receive supervised suspended sentences (68 per cent of the suspended sentence 'current caseload' sample had been represented) as it should be normal for the lawyer to explain to the client the likely penalties for

the offence, and what each would involve.

In cases where supervision is imposed the probation officer is instructed to explain to the client what the bond involves, and normally there is a probation officer present in the major courts to perform this duty.

However, as with other forms of probation, the suspended sentence relies on a contractual notion, and the offender should be aware of what he is agreeing to before accepting the recognizance with its conditions that will bind him.

Other special problem situations

Language difficulties may make supervision very difficult; they may also cause problems in ensuring that the probationer understands his obligations under the sentence.

Interstate problems can arise through many probationers being somewhat itinerant. Supervision may be possible only by letter in some cases where the probationer tends to move from one area to another. The goals of supervision in such situations can only be minimal, and the effectiveness of supervision by letter may be limited. Many probationers are barely literate, and although they may make an effort to write regularly as required at first, the intensity and regularity of contact by letters usually declines after the first few months. In such situations, a suspended sentence with supervision is possibly not a realistic or appropriate penalty.

There are also problems in these cases of how to treat knowledge of further offences committee interstate. The cost of extraditing an offender may prevent estreatment action being undertaken when it would seem justified if the offender had remained in the jurisdiction.

IMMEDIATE IMPRISONMENT COMPARED WITH SUSPENDED SENTENCES

It is difficult to determine whether the periods of imprisonment that are suspended are longer than those imposed to take effect immediately. Often an accused is charged with more than one count of the offence, and this will affect the sentence imposed. Similarly the offender may ask the court to take into effect a number of other uncharged offences. Sometimes, too, immediate imprisonment may be imposed on one count and a suspended sentence on another.

Often immediate imprisonment is combined with some other penalty such as a fine or bond. Sometimes similarly with the suspended sentence. It is also difficult in such a comparison to evaluate the effect of conditions such as supervision or conditions relating to medical treatment which are an integral part of the suspended sentence bond.

Further, it is difficult to discover 'identical' offences. The offender's previous record, his social background, his occupation, whether he is currently employed, and his demeanour in court are some of the factors which individualise his sentence.

There are inherent logical difficulties in the decision making process under the O'Keefe[1] principle (which has been adopted in relation to the suspended sentence in South Australia) which involves the sentence first finding that imprisonment is the appropriate penalty in the particular case, determining the length of the appropriate sentence and only after that deciding whether the sentence ought to be suspended.

There is provision to appeal if a sentence appears to be excessive, however, as several lawyers pointed out, few offenders appeal against a suspended sentence.

Examination of the sentences passed by the higher courts over a period of several months indicated that the length of sentences that are suspended are not longer than the periods of imprisonment imposed to take effect immediately. However, it must be noted that there is a great range of conduct covered in a class of offence such as Robbery, or Housebreaking and Larceny, and it does not seem unrealistic to assume that a suspended sentence would be inappropriate for serious or extreme cases of the conduct charged, although suitable for a first offender committing a minor (or less serious) crime within the range of that named offence.

(1) (1969) 2 Q.B. 29

TYPES OF CONDITIONS IMPOSED

Various conditions can be included in the suspended sentence recognizance (see Page 2). Despite judicial recognition that conditions need to be capable of being recognised in their breach and that they need to be relevant, conditions are sometimes imposed that are extremely difficult, if not impossible to enforce through either being unrealistic or vague or imprecise.

Of the 915 'current caseload' sample, apart from the condition of being under the supervision of a probation officer and conditions relating to obeying the probation officer's directions as to employment and residence, in 245 cases (26.7 per cent) Medical or Psychiatric treatment conditions were included; in 18 cases (2.0 per cent) conditions relating to abstention from alcohol were included; in 94 cases (10.3 per cent) conditions relating to avoiding criminal associates were present; and in 73 cases other specific conditions were included.

Restitution is occasionally included as part of the penalty. However, since the decision in Adams v. Samuels (1) the law in South Australia has been that failure to pay this is not a breach of the conditions of the recognizance. Before this decision the prosecuting authorities placed far greater weight upon insignificant amounts of restitution which were unpaid than other breaches such as failure to maintain contact with or obey the directions of a probation officer.

Driving licence suspensions are sometimes associated with suspended sentences for breaking and entering and various driving offences.

The courts hearing estreament matters have tended to take a very narrow interpretation of the maning of conditions, which has made it very difficult to estreat a suspended sentence on the basis of breaches which do not involve the commission of further offences. This means that some care should be exercised by the sentencing court in selecting the wording of the conditions imposed.

Possibly, if a discretion was given to the court (hearing a matter involving breach of conditions of a suspended sentence) to impose some penalty other than revoking the suspended sentence this overprotection of the probationer who has breached conditions might decrease.

(1) (1974) 9 S.A.S.R. 352

MONETARY RECOGNIZANCES

In most suspended sentences a monetary recognizance is required. It takes the form of a debt acknowledged to be due to the Crown if the conditions of the recognizance are not complied with.

There is considerable variation in the amounts required. In 21.0 per cent of the (supervised) 'current caseload' sample the amount set was less than $50. In a further 39.6 per cent of these cases it was less than $200, and in another 21.7 per cent it was less than $300.

The most frequently required amount imposed in relation to the unsupervised suspended sentences imposed during 1976-77 was $100 (40.1 per cent of those cases) and in a further 29.9 per cent the amount set was less than $100.

Occasionally sureties are required in addition to, or as well as the monetary recognizance.

Forfeiture of the monetary recognizance

The amount is normally forfeited and payable immediately if the bond is estreated, the usual order of the court being that the amount of the recognizance be paid forthwith, and in default, imprisonment for some specified period. There is power in the court to spare the amount in full or in part, but this power is used only sparingly.

If imprisonment in default is not expressed to run concurrently with the revoked suspended sentence, variations in the amounts of recognizance set can cause substantial

variations as to the actual sentence served.

Some commentators have argued that the imposition of a monetary recognizance is undesirable as it effectively involves the imposition of a double penalty if the bond is breached.

There are also problems in relation to the use by some courts of multiple suspended sentences, each with a separate monetary recognizance set. If these are estreated at once, while the periods of imprisonment that have been suspended may be served concurrently (due to the rules about the numbers of sentences which can be served consecutively in South Australia), each of the periods of imprisonment in default for non-payment of the forfeited recognizance must be served consecutively in full (as with any other imprisonment in default of paying a debt due to the Crown).

Multiple suspended sentences

At present there is no restriction on the number of times a suspended sentence may be imposed on an individual. There have been occasions when an individual has received a series of suspended sentences each causing the previous one to be estreated, (for a series of similar offences.)

Estreatment where more than one sentence is involved may present special problems. Occasionally attempts have been made to estreat only one or two of the suspended sentences by which a particular offender is currently bound.

(This may happen either deliberately or through bureaucratic oversight). Occasionally it may appear a desirable ploy to the authorities, but it appears not only undesirable, but also to conflict with the law as to the number of sentences which may be made cumulative.

Occasionally a later offence for which another suspended sentence is imposed may cause an earlier suspended sentence to be estreated. Occasionally parole is granted in such cases after part of the sentence has been served. Powers to allow the offender to serve part only of the suspended sentence that has been estreated might well prove useful to the court. The object of rehabilitation of the offender is best served by having available to the court the greatest possible range of sentencing options, so that an individualised 'ideal' sentence can be selected for the offender.

The present situation of the probation service being expected to deal with whoever the courts consider require supervision is possibly somewhat unrealistic, and the desirability of some account being taken of the value of the probation experience to the offender appears clear.

Pre-Sentence Reports

The use of pre-sentence reports enables the court to have comprehensive factual information relating to the background and situation of the offender.

Pre-sentence reports are ordered in some cases in which a suspended sentence is eventually imposed. In 1973-1974 pre-sentence reports were prepared in 141 of the cases in which a supervised suspended sentence was imposed (27.6 per cent); in 1974-75, 109 (21.5 per cent); in 1975-76 146 (27.0 per cent).

In those years occasionally pre-sentence reports were ordered in cases where ultimately an unsupervised suspended sentence was imposed. (In 1973-74, this was so in 14 cases; in 1974-75 in 14 cases; and in 1975-76, in 8 cases).

The Mitchell Committee made a number of recommendations about the use of pre-sentence reports, including that the court should give particular consideration to ordering such reports in certain cases.(1) That Committee also recommended that the compiler of a pre-sentence report be entitled to express expert opinion as to the probable effect of a non-custodial sentence, although not to recommend the sentence to be imposed.(2)

When examining "success rates" of those cases who received supervised suspended sentences in 1974, it appeared that there was a higher proportion of cases in which a pre-sentence report had been ordered by the sentencing court in the groups of offenders who suspended sentence bonds had been

estreated, or about whose bonds applications for estreatment had been made, than should be expected from the overall numbers of pre-sentence reports ordered and suspended sentences imposed. A sample of 70 case-files relating to suspended sentence bonds that had been estreated was examined, and it was found that in 25 cases there was a pre-sentence report that had been prepared in 1974, and in a further 5 cases there had been a pre-sentence report prepared about that individual within the previous two years.

In some of those cases the pre-sentence report had recommended against the use of a bond and supervision. The probation service, however, is in an unenviable position in such situations. Other treatment agencies may refuse to attempt to deal with clients unless the clients are submitting to treatment willingly. Although nominally the suspended sentence is based on a contractual notion, even the Regulations seem to recognise that the bond is imposed on the offender, rather than him contracting with the court.(3) Only very seldom does an offender refuse to enter into a suspended sentence recognizance.(4)

Possible changes in relation to pre-sentence reports

Greater use of pre-sentence reports might well result in a better selection of persons likely to 'benefit' from being given a suspended sentence, with a consequent increase in the "success" of this measure.

Perhaps it would be appropriate to appoint several probation officers who would specialize in preparing such reports and recommendations?

Although an increase in the numbers of pre-sentence reports being required by the courts would put considerable pressure on the present resources of the probation service, expansion in this direction would result in avoidance of much of the present difficulty in supervising so many unwilling clients (especially those who have proved to be unsuited to, or unco-operative on a suspended sentence in the past.)

Perhaps too, the possibility of all suspended sentences being imposed with supervision as a condition unless the Director of the Department of Correctional Services orders otherwise should also be viewed from this perspective in that it would enable a realistic assessment to be made as to whether supervision is likely to be necessary, useful, valuable or significant in each individual case, by those who should be able to realistically assess the likely results in that case.

(1) Criminal Law and Penal Methods Reform Committee - op. cit. page 58.

(2) ibid. page 59

(3) Offenders Probation Regulations, Regulation 7

(4) e.g. Macpherson v. Beath (1975) 12 S.A.S.R. 174

Upon any breach of condition of the suspended sentence recognizance being proved to the court, the suspension of the period of imprisonment must be revoked.(1) Regulation 7 imposes a duty on probation officers to report any breach of condition to the court for example, the commission of any further offence during the bond period breaches the condition 'to be of good behaviour.'

The Branch Manual of the Probation and Parole Branch of the Department of Correctional Services instructs the probation officer:

'... where the probationer has committed a subsequent offence, then only special circumstances would be present to prevent a request for estreatment...'

The Manual also stresses the need to take the appropriate action without unnecessary delay, and notes that:

'...The whole question of estreatment is weighing up our legal obligations as noted in the legislation - with our concern and desire to help the probationer....'(2)

The probation officer advises his superiors of the breach, and makes a recommendation for either estreatment or non-estreatment of the bond. However, the prosecuting authorities appear to exercise their own discretion after receiving these estreatment or non-estreatment applications.

There are a number of difficulties present in the existing estreatment procedure, and in many cases the operation of the estreatment process appears erratic.

1. Initiating estreatment

Estreatment of unsupervised suspended sentences is undertaken by the prosecuting authorities. Normally the Department of Correctional Services is not involved in these estreatments, but occasionally, when a probationer is simultaneously on a supervised bond and an unsupervised suspended sentence, the probation officer may make application for non-estreatment of the unsupervised suspended sentence.

Estreatment of supervised suspended sentences is usually commenced by application from the Department of Correctional Services to the prosecuting authorities (i.e. the Police Department (if the sentence was imposed by a summary court) or the Crown Law Department (if it was imposed by a higher court)). There is provision under the legislation for the probation officer supervising the particular case to commence estreatment actions by swearing an information to the court, but this is seldom used (largely because it can be very time consuming, and the probation officer is likely to have other heavy demands placed on his time by his other clients.)

There have been occasional instances of estreatment taking place although no formal application has been made by the Department of Correctional Services for estreatment or non-estreatment. This can be due to either the prosecuting authorities being unaware that supervision is a condition of that bond, or Correctional Services being unaware of the commission of further offences.

Not all further offences are acted upon, and there are some deficiencies in the operation of the existing arrangements. In one case of a suspended sentence with supervision imposed in 1974, for example, the probationer actually served six months imprisonment ( a nine months sentence) during the bond period, for an offence committed during the bond period, yet the closing comments on the probation file indicated that he was not known to have committed any offences during the bond period.

No action regarding estreatment or non-estreatment had been taken by the prosecuting authorities or by Correctional Services in that case.

All applications for estreatment or non-estreatment from Correctional Services are forwarded through the Chief Secretary's office to the appropriate prosecuting authorities. This apparently sometimes leads to delay in the docket's arrival at its destination.

At present there is no individual within Correctional Services responsible for keeping track of the progress of estreatment matters that have been forwarded from the Department. Although the dockets are supposed to be returned to Correctional Services after action has been taken, in many cases they do not arrive back at the Department. It is often very difficult to determine whether the bond has been estreated other than by checking in the Master Register cards (at Adelaide Gaol or the Womens' Rehabilitation Centre) as to whether the probationer has been imprisoned since the estreatment application was made, and if so, to check in the individual's dossier or record card for the relevant year to determine whether the reason for imprisonment is an estreated suspended sentence.

2. Delays

There is often some delay between an estreatment application being forwarded from Correctional Services and the matter being heard by the relevant court.

Delay is understandable in cases where the probationer has absconded, but less so in the more usual situation of the probationer being in prison under sentence for some subsequent offence.

At present, there is no reason why an estreatment application should not be heard towards the end of a long subsequent sentence, some years after the bond would have expired normally, or the revoked suspended sentence been served had the bond been estreated immediately after conviction for the subsequent offence. The prosecuting authorities have a policy that the probationer should experience a 'taste' of the revoked suspended sentence and so the sentence should not be served at the same time as some other sentence. The result is that estreatment actions are frequently not heard until shortly before the completion of the period of imprisonment imposed for some subsequent offence.

Investigation of delays experienced in relation to a sample of 78 estreated supervised suspended sentences indicated that in 31 cases (39.7 per cent) more than three months elapsed between the dates of the estreatment docket being forwarded from the Department and the estreatment being heard by the court. In four of these cases (5.1 per cent) the delay was of more than twelve months.

3. Reasons for estreatment

The basis expressed on the dockets seeking estreatment is usually the commission of further offences during the bond period. Of 231 applications for estreatment of supervised suspended sentences forwarded from the Department from 1974 to 1976, 160 relied on the commission of further offences. Of 56 non-estreatment applications made in the same period 51 (91.1 per cent) were in cases where further offences had occurred.

4. Prosecuting authorities and their policies

The prosecuting authorities possess considerable discretion and have developed their own policies. Crown Law for instance, believes that the offender whose suspended sentence has been revoked should have a 'taste' of that sentence as well as any later sentence he may have received.

Since normally the suspended sentence imprisonment commences from the date of revocation of the suspension, the tendency is to have the estreatment heard towards the end of the former sentence. However, there is another device sometimes employed whereby once a plea of guilty is accepted, and a conviction recorded in a higher court, the earlier suspended sentence is estreated, and the later sentence is ordered to commence at the end of the term of imprisonment 'now being served'.

Occasionally delays occur with the prosecuting authorities so that an estreatment action is not heard until the offender has been released from gaol after serving a sentence for some later offence.

The operation of the present estreatment system often appears erratic. There have been cases where Crown Law has discontinued estreatment action following submissions from a probationer's solicitor without consulting Correctional Services to verify the basis of the estreatment application. In other cases Crown Law has proceeded with estreatment actions despite later requests for non-estreatment from Correctional Services.

The prosecuting authorities appear to have adopted something like the English policy of not estreating where the subsequent offence is 'trivial' or of a 'different nature' to that for which the suspended sentence was imposed. However, in England, this policy is implemented by the courts and not by the prosecuting authorities.

While it does seem appropriate that the prosecuting authorities can exercise a discretion not to act with respect to minor breaches, it appears desirable that the court be empowered to impose fines or other penalties such as variation in the period of imprisonment suspended or in the length of the bond period.

The prosecuting authorities have appeared reluctant to seek estreatment in many cases where breaches other than the commission of further offences have occurred. Courts hearing estreatment applications made on the basis of breaches of conditions have sometimes taken extremely narrow views as to what compliance with the conditions of the recognizance involves. This in turn has influenced Correctional Services' sending dockets seeking estreatment to the prosecuting authorities in later but similar cases.

While at law any offence committed during the bond period appears to be cause for estreatment of the suspended sentence, during 1977 there were instances of estreatment dockets being returned to Correctional Services by the prosecuting authorities, the latter having noted that no action would be taken because the bond period had expired before the date that the estreatment application came to the attention of the prosecuting authorities, although there had been an offence committed during the bond period. There has also been a tendency for some time not to observe the strict requirements of the legislation in this regard, and to be hesitant about estreating on the basis of offences committed late in the bond period. Sometimes probationers have sought to delay the court's finalization of some subsequent offence matter in the legally mistaken (but occasionally viable) belief that by this means they can avoid having a suspended sentence bond estreated.

The operation of the estreatment system appears erratic. Similar cases may have quite disparate results flowing from breaches. This is especially so in cases where wither an offender has disappeared or where there have been subsequent offences committed interstate.

5. Interstate problems

Although the costs of extradition of a probationer (who has breached his bond) from some other state to which he has moved may be prohibitive, there is no reason why estreatment action should not be started against him, with a warrant being issued which would be in existence should he return to South Australia and again come under police notice. The prosecuting authorities have displayed inconsistent behaviour, however, as to whether they will request the issue of a warrant in such circumstances. Sometimes, for example, they have refused estreatment requests in such circumstances on the basis that there was no specific instruction given that the offender must not quit his residence and employment; and that his doing so was not therefore a breach of his bond (although being under the supervision of a probation officer, and obeying the directions of that probation officer as to residence and employment, were included as conditions of the bond.) This is also despite the obligation cast on the supervised probationer by the Regulations to notify changes of residence to his probation officer.

Under the present system, however, once a warrant is issued it has a very long shelf-life, and the court has no discretion if a breach of the bond is proved to have occurred even if the probationer has matured and not offended for a number of years. The only discretion present at that stage is with the prosecuting authorities - who may withdraw the matter (or elect not to adduce evidence.) This is one area where a discretion exercisable by the courts may well be appropriate.

There may also be delays and difficulties in obtaining information about subsequent offences committed interstate by probationers.

6. Non-contact

In the past there have been problems experienced by Correctional Services in seeking estreatment in cases where the probationer had failed to contact the Department at all. The prosecuting authorities tended to the view that the Regulations cast a duty on the probation officer to visit the probationer rather than on the probationer to report to the probation officer. At one stage a request was made to the courts that a direction be included in supervised suspended sentence recognizances providing that the probationer report to the Probation Service.

Normally, now, however, this sort of non-contact situation is avoided, through the practice of probation officers being rostered to court duty. If the total non-contact situation does occur, the view has been taken that the probationer may not be breaching the bond, as he may be unaware of his obligations.

Where contact has been lost the prosecution authorities have sometimes taken a similarly restrictive view as to whether the bond conditions have been breached. One estreatment request alleging that the probationer had "failed to notify change of address and employment and his present whereabouts are unknown" was returned to Correctional Services with advice that the recognizance (which involved

"supervision") "cannot be estreated until "good behaviour" becomes the issue.

7. Restitution

Restitution is sometimes imposed as part of the penalty imposed under the Offenders Probation Act. There has been a judicial decision to the effect that failure to pay restitution is not a grounds for estreating a recognizance under that Act; and that the order for payment of restitution is separate from the conditions involved in the recognizance. The prosecuting authorities have taken a similar view in relation to estreatment requests for failure to pay any other costs.

Prior to that decision the prosecuting authorities tended to place greater reliance on failure to pay even an insignificant amount of restitution than on failure to maintain contact with or obey the directions of the probation officer, where such breaches were also present.

It is unfortunate that the opportunity to bring the probationer to terms with a sense of responsibility by making restitution as a condition of his bond has thus been negatived. Another effect is that although the person to whom the restitution is due would normally have a civil action against the probationer for its payment, that person may well find himself put to considerable expense (for example, in lawyer's fees) in order to obtain the amount ordered.

8. Estreatment and "success"

The relatively low proportion of suspended sentences which are ultimately estreated is not necessarily an indication of the suspended sentence being a particularly "successful" penalty. It appears that in a much higher proportion of cases some breach of the conditions involved does occur, but for various reasons estreatment is not sought. To some extent this may be due to attempts by various parties involved in that process to somehow compensate for what they may perceive as "unfairness" or "inflexibility" in the existing system.

9. Parole and estreatment

In some cases the Parole Board may be able to modify the full impact of the present inflexible estreatment situation. However, it can only exercise its powers where the offender makes application for parole to be granted.

Parole obliges the offender to be under supervision, and the grant of parole can be revoked if its conditions are breached; it is also analogous to the suspended sentence in that it does not involve any concept of 'remissions' of sentence being available, or 'clean street time' being taken into account in the event of a breach of condition occurring. In practice, having previously breached the conditions of a suspended sentence (for example, not co-operating with supervision) may be a reason given by the Board for refusing to grant parole.

Potential grants of parole may also be delayed while there is an estreatment application outstanding concerning that offender, as the Parole Board is reluctant to grant parole in such circumstances.

It appears that only rarely is parole granted in cases where a supervised suspended sentence has recently been estreated. There have been occasional grants in cases where there has been a long delay in estreatment proceedings being heard, for example, the offender may have completed a term of imprisonment for the breaching offence and found employment before the estreatment application is heard by the court. Alternatively the probationer may have disappeared and a warrant been issued against him for estreatment of the suspended sentence, yet he did not come under notice until the circumstances of the breach are long past. Under the present system the prosecution has a discretion not to lead evidence of the breach, and so the matter can be withdrawn, however, if the prosecution does go into evidence and the court finds the breach proved, the court has no alternative but to revoke the suspended sentence.

In cases where the offender has found employment and appears to have matured since the breach occurred and where imprisonment may have a very detrimental effect on these factors, it appears preferrable that a discretion be

present in the estreating court, rather than the mitigating decision being left to the Parole Board (which can only act after the imprisonment has begun). At that stage, the Parole Board might well find that an embittered reaction on the part of the offender towards the estreatment causes him to be unready for parole.

(1) Offenders Probation Act s.9 (4)

(2) Department of Correctional Services - Branch Manual: Probation and Parole page 34

SUCCESS RATES

Determining the 'success rate' of any correctional measure is very difficult, and there are problems in relying too heavily on any one indicator of success. There are also difficulties in reaching valid conclusions from the evidence which is available. For example, in several English studies, probation was demonstrated to be followed by a higher reconviction rate than imprisonment, however, this does not necessarily indicate that probation is not a worthwhile measure; it could equally indicate that it is used with a group of offenders more likely to reoffend than the sample of prisoners involved.

Such measures as reconviction or subsequent imprisonment must be recognised as only limited indicators of 'success'. It may in fact be some sort of success that an offender is offending less often, or is committing less serious crimes. With the political structure of Australia, that is the division between States there is further scope for misleading conclusions with regard to success in these regards, as the offender may have for example. left South Australia and have committed further offences interstate, and perhaps been imprisoned there without those details being listed on his South Australian records. There does appear to be a considerable interstate movement of probationers and parolees and there seems little evidence that this movement ceases when the individuals involved cease to be subject to probation or parole.

Supervision, or even the use of a suspended sentence rather than some other penalty cannot be attributed overweening significance in the evaluation of 'success'. There is a gradual maturation process which affects most offenders; the extent to which this has been hastened or slowed by external factors would be virtually impossible to determine. In other cases entering some married or de facto domestic arrangement may produce a sudden stabilizing effect (although it could have the opposite effect).

Individual cases tend to produce different expectations, and success would best be judged by attempting to relate those expectations to the actual achievement. Such a study would probably prove impossible to undertake in practice.

Several different indicators were used in relation to a sample of offenders who had received supervised suspended sentences in 1974. The simple criteria of whether there had been a breach and the bond estreated proved highly unreliable as an indication of 'success'.

Experience of the 1974 sample

In December 1977, 388 cases in which a supervised suspended sentence had been imposed during 1974 were examined to determine the means of termination of the suspended sentence order and whether the probationer had committed further offences during the bond period.

In 82 of these cases estreatment had taken place. In another 36 an estreatment application had been made by the probation service prior to 30 June 1977 but estreatment had not been completed by December.

Of the other 270 cases in the sample, 3 persons were deceased (2 after allegedly committing further offences, although they had not been convicted of these by the date of death), 24 cases had expired after non-estreatment applications had been made (i.e. there had been some breach involved), and in 4 more cases estreatment applications had been withdrawn at the court stage by the prosecuting authorities or not put on by them. In another case the court found the bond invalid. In 5 cases estreatment applications were later followed by non-estreatment applications. In another 5 cases contact with the probationer was lost or the probationer 'disappeared' but no estreatment action was taken.

In at least a further 87 cases there was some offence committed within the bond period but no action taken regarding estreatment or non-estreatment. Of the remaining 137 cases, 17 had been admitted to prison at some stage during the bond period. (Some of these admissions could have been due to unpaid fines or remands in relation to offences committed before entering into the suspended sentence bond).

This does illustrate the difficulty of viewing success in terms of simple measures such as re-offending or estreatment.

Those 'not known' to have committed further offences within the bond period

The offences for which these offenders had received their suspended sentences showed some interesting features.

The original sample of 388 cases which had received supervised suspended sentences in 1974 amounted to 84.5 per cent of the total number of supervised suspended sentences imposed during that year (459 cases).

The "not known" to have committed further offences group included 26 cases where the sentence had been imposed for larceny (for which offence 69 of the total of 459 bonds had been imposed), 26 cases where the bond had been for breaking and entering (of an original total of 119), 11 for false pretences (of originally 29), 15 for Assault (of 51), 12 (of 23) for Indecent behaviour, 6 (of 13) for Indecent assault, 9 (of 21) for Drug offences, and 5 (of 31) for Illegal use of or interference with a motor vehicle. There were 2 cases where the bond had been imposed for Wilful damage (of a total of 11 of the 459 bonds that year.)

This appears to support the suggestion made by some lawyers that there are really two forms of suspended sentence imposed in South Australia - one a form of bond 'with teeth in it' used by the Magistrates courts, and another (used by the higher courts) involving a real decision to impose a period of imprisonment, but to suspend it because of mitigating circumstances.

The Supreme Court proportionately estreats fewer of its Suspended Sentence bonds than do the courts overall although that is not necessarily an indicator of those bonds being much more 'successful' than those imposed in the other courts.

THE SIGNIFICANCE OF REMAND IN CUSTODY

It is sometimes suggested by various lawyers, probation officers and members of the judiciary that a short 'taste' of imprisonment can be very useful in providing a strong deterrent effect, especially on those offenders arriving before an adult court for the first time, and whose life-styles may change dramatically upon discovering the realities of imprisonment and supervised probation to be rather different from the sanctions they had previously experienced from juvenile courts.

The experience of being remanded in custody is ascribed great effect, especially in relation to some (including older) first offenders. As with evaluation of 'success' of the suspended sentence overall, it is difficult in the case of many first offenders to determine how far the 'success' may be due to the totality of being caught and punished, and how far success is due to the suspended sentence being the mode of punishment imposed.

Study of a sample of 946 supervised suspended sentences imposed in the first half of 1973, all through 1974, and in the first half of 1975 revealed that of this sample 592 (62.6 per cent were remanded in custody before receiving this sentence, and of these 291 (49.2 per cent of 592) had been admitted to prison subsequently. (Subsequent imprisonment for these purposes includes any admission to prison whether under sentence, on remand or in default of paying a fine, and would include serving the suspended sentence if the suspension has been revoked and the recognizance estreated.)

Of the 354 persons not remanded in custody before receiving the suspended sentence, 115 (32.5 per cent of 354) had been admitted to prison subsequently.

There is a slight distortion in these figures in that they include a few instances of persons being under sentence or serving time for unpaid warrants in the 'remand' category where the offender was in prison prior to and at the date of the bond. There was some difficulty in obtaining precise details from the records as to whether the individuals were imprisoned due to being under sentence, or for failing to pay a fine, or being unable to raise sufficient money for bail. However, the effect of experiencing imprisonment immediately before entering the suspended sentence recognizance would appear to be similar, no matter what the circumstances.

(It might make an interesting study at some future date to investigate how frequently persons spend the period awaiting trial in gaol on remand through failure to raise sufficient bail rather than through their dangerousness to the community; it would seem unlikely that offenders who ultimately receive suspended sentences would pose such a risk to the community by being at large that bail should not be allowed to them if they can raise it. The proportion spending the remand period in prison may then be an indication of the amounts of bail being set at unrealistic levels, or the (until recently) possibility of persons spending the remand period in prison being able to receive government social security benefits. Similarly, being able to serve time in relation to unpaid warrants during the remand period, may exercise some influence.)

Inspection of the records relating to the sample of 946 offenders to determine previous and subsequent imprisonment experience to the suspended sentence indicated that a total of 725 had been admitted to prison at some time prior to the date of receiving the suspended sentence (including any admission to prison, and including those in custody prior to receiving the suspended sentence). This was 76.6 per cent of the sample. Of these, 426 (58.8 per cent of 725) had been admitted to prison subsequently to the court appearance at which they received the suspended sentence.

Of the 221 who had not been admitted to prison on any occasion before receiving the suspended sentence 55 (24.9 per cent of 221) had been imprisoned since.

It should be noted that the data obtained relates only to imprisonment in South Australia and the figures as to previous and subsequent imprisonment would be expected to increase slightly if accurate information was available as to previous experience in other States. There appears to be a substantial movement of offenders between the various Australian States.

Comparable figures relating to 562 unsupervised suspended sentences imposed during the years 1973-74 and 1974-75 indicated that 185 (32.9 per cent) were in custody before receiving the sentence, and of them 84 (45.4 per cent of 185) had been imprisoned subsequently.

Of the 562, 327 had experienced being admitted to prison before the date of the suspended sentence, and of these 129 (39.5 per cent of 327) had been subsequently admitted to prison. Of the 235 never admitted to prison before the date of the suspended sentence 46 (19.6 of 235) had subsequent imprisonment experience.

It appears that offenders who spend the time immediately preceding the court appearance in gaol are more likely to be subsequently admitted to gaol than those not in custody during the 'remand 'period; and that similarly, those with experience of imprisonment before receiving the suspended sentence are more likely to be imprisoned subsequently to receiving the suspended sentence than those with no experience of imprisonment before the date of receiving the suspended sentence.

Thus, while remand in custody may have a value and significance in some individual cases, overall it does not appear to have much deterrent effect on the class of offenders who receive suspended sentences.

## POSSIBLE AREAS FOR CHANGE

### 1. Discretionary powers

It seems appropriate that discretionary powers be given to the courts (as was recommended by the Mitchell Committee), rather than, as at present, effectively belonging to the prosecuting authorities. Power to increase the period of imprisonment suspended, or to vary the bond period, or impose fines (and maybe even to defer sentencing for some breaches), could usefully be made available. This would provide scope for mitigation of the suspended sentence in appropriate cases, rather than the present mandatory revocation on proof of breach.

Possibly too, powers could be given which would allow the court (if of similar or higher level than that which imposed the suspended sentence) hearing some subsequent matter, and at the same time revoke the suspended sentence and make these sentences cumulative. This might be a means of avoiding some of the delays and inconvenience which can occur under the present system where estreatments are heard by the court which imposed the suspended sentence.

### 2. Estreatments

As the estreatment process essentially involves the transfer of responsibility for an individual between two arms of the same Department, it appears not unrealistic that administrative changes could be implemented which would enable any change in an individuals status to be ascertained quickly and accurately.

Some administrative changes could easily be implemented. The Department could possibly keep complete copies of the dockets it forwards to the prosecuting authorities; it could also forward them there directly, with some memorandum to the chief secretary noting that they have been sent. This appears less cumbersome than the present arrangement whereby the dockets are forwarded to the prosecuting authorities through the Chief Secreatry's Office.

In order that there is a truely consistent policy towards estreatment perhaps it would be feasible that only one prosecuting authority be involved, or that the Department of Correctional Services undertakes estreatments itself. This would require accurate information about subsequent offences and convictions to be available, but should make the operation of the estreatment process somewhat more predictable than at present.

3. Conditions

It is essential that conditions that are included in the suspended sentence recognizance be realistic and enforceable. Perhaps use could be made of the conditions which the Probation Service has agreed are workable, even if this involved delaying sentencing for several days while checks that a proposed condition was viable were made.

In relation to those bonds which include conditions requiring the offender to reside outside of South Australia during the bond period, perhaps consideration could be given to having some short-term warrant, which would expire at the end of the bond period, but would act against the probationer if he were to breach his bond conditions by returning to South Australia within the prescribed time.

Maximum use of standardised conditions might avoid the difficulties which have developed up to this time through narrow interpretations frequently being placed on the wording of conditions by courts hearing estreatment applications.

4. Supervision

Some of the difficulties in the present system might be overcome if all suspended sentences were made nominally "supervised", with Correctional Services then determining the intensity of supervision which is required or necessary in each individual case. South Australia prides itself on having a professional probation service, and the experience and knowledge present there should enable some realistic assessment to be made of the usefulness, importance of (and even viability of) supervision in the particular case. This would impose on all offenders given suspended sentences the obligation to notify their residence and employment to the probation service and to maintain some contact with a probation officer. It should also enable more effective identification of where supervision is necessary and desirable,

with the resources of the Probation Service being directed where appropriate. Power such as that presently given to the Director of the equivalent Department in New South Wales could also usefully be granted to the Director in South Australia to free individuals from the need to attend for regular supervision.

Greater use of pre-sentence reports might also enable better identification of those offenders likely to benefit from the suspended sentence and on the basis of information available to the court through the pre-sentence report the court might then strongly recommend that supervision be attempted in a particular case.

5. Effectiveness

For the suspended sentence to be really effective the probationer must remain aware of the bond conditions he had agreed to obey during the whole of the bond period. He must realise that he has a choice as to whether he accepts the suspended sentence. If he has no intention of co-operating with its conditions then it would sometimes be preferrable that he opt for the period of imprisonment to take effect immediately, rather than signing the bond paper which he has no intention of being bound by.

Real sanctions should be clearly present if the conditions are breached. It must be clear to many probationers at present that the operation of the estreatment system tends to be somewhat erratic. There should be, then, changes made to ensure that action is taken regarding breaches of bond.

## CONCLUSION

Should the problem aspects of supervision and estreatment of these bonds be eliminated and it become known that definite consequences will follow breaches of bond conditions, then the suspended sentence in South Australia could become even more effective.