

**CRIMINAL LAW (SENTENCING) (ABOLITION OF SUSPENDED
SENTENCES FOR SUBSEQUENT SERIOUS OFFENCES)
AMENDMENT BILL
18 June 2008**

The Hon. D.G.E. HOOD: I move:

That this bill be now read a second time.

I rise today to move this bill as a Family First proposal for reform to the criminal justice system. I want to start the debate on this bill with the words of Chief Judge Terry Worthington, the Chief Judge of the District Court of South Australia. On the Courts Administration Authority website he has issued an undated statement, which is a defence of suspended sentences. It is a somewhat lengthy statement that concludes as follows:

'It is not surprising that views will differ about whether a sentence should be suspended. Sometimes people say a suspended sentence is like being thrashed with a warm lettuce leaf. It is probably easier to say that if you are not the one who has a two and a half year prison sentence hanging over your head, with the prospect of losing everything, including the job you have trained hard to get, if you slip up. A suspended sentence is a real sentence but it gives a last chance.'

The reference to a warm lettuce leaf is a surprisingly candid statement from the Chief Judge, but also a welcome one. I begin by congratulating the Chief Judge on having a public statement explaining the judiciary's view on suspended sentences readily accessible on the website, yet I think there is something revealing in that last sentence. The Chief Judge says:

'A suspended sentence is a real sentence but it gives a last chance.'

How many last chances can a person have? If I am driving from Sydney to Adelaide and I reach Hay and I see a sign which states, 'Last chance to get petrol for the next 200 kilometres', how many more chances do I have to get

petrol in the next 200 kilometres? Obviously, it is my last chance, unless I want to get stranded somewhere in the middle of the Outback.

I will quote a specific example of the matter of Richard John Francis Hinckley, decided on Tuesday 29 April this year at about 2pm: the offender in question got his fifth last chance. Let me summarise the facts of this case, from the sentencing remarks: police found 23 grams of amphetamines at his home; this is a trafficable quantity under the act, attracting maximum penalties of some 25 years imprisonment and/or a \$200,000 fine. So, it is a very serious offence indeed. The jury found that he was in possession of these amphetamines for sale. He was 44 years of age at the time, with no dependants. He was a regular amphetamine user and had a record of dishonesty offences dating back to 1991.

Shockingly, he has had the benefit of some four suspended sentences previously. He had also served time previously (after 1993) on four charges of selling and possessing cannabis and amphetamines for sale and, yet, the sentence—which was very lenient in the first place; some two years and six months' gaol—was wholly suspended. The man in question is free today because the court gave him another last chance, another suspended sentence—his fifth suspended sentence; his fifth so-called 'last chance'. Clearly, the deterrent effect of the fear of a gaol term hanging over his head was no fearful matter for this person because surely, if he had such a fear, he would never have needed a second last chance let alone a fifth last chance.

Drug offenders are amongst the worst repeat offenders. They reoffend time and again and are given last chance after last chance—so-called—by the courts. I received a call from a constituent who claims his neighbour grows cannabis crop after cannabis crop in his house, despite having been on a suspended sentence bond for some time. Last Thursday's *Advertiser* ran a story about a case where a Hell's Angels bikie, convicted of theft and extortion, was granted a suspended gaol term of four years and three months even though he had had the benefit of a suspended gaol sentence in 2006 for having a loaded, high-powered pistol in his car—a second last chance in two years.

On 21 April this year another individual walked from court with a 24-month, 16-month nonparole suspended gaol term. He had been convicted of carrying an offensive weapon, aggravated assault by use of an offensive weapon, and committing aggravated assault where the victim of the offence was over 60 years of age. This defendant had grabbed a woman by the hair and held a knife to her throat while making—to quote from the transcript—'cutting motions as though you intended to slit her throat'. He swore at the victim calling her a whole series of names, including a 'mole', and threatened to kill her. He kicked her and continued to make threats against her life. He had previously, according to Justice Clayton, been convicted of similar offences in May 2005, just three years before; namely, common assault on a person other than a family member, for which a gaol term had been suspended and replaced with a good behaviour bond for 18 months. Despite the prior record, yet another suspended sentence was given.

On 9 May, Judge Tilmouth granted a further suspended sentence to a person who had set fire to a house belonging to the South Australian Aboriginal Housing Authority in Blair Athol, despite having a record of prior suspended sentences. In another case on 17 April in the District Court, Judge Millstead granted a further suspended sentence to a person after he assaulted his de facto partner, hitting her in the head, pushing her into an oven and spitting on her face. He had previously been granted a suspended sentence for similarly assaulting his partner (and child) and threatening her life in 2004. I have zero tolerance for men engaged in domestic violence, and it is particularly disappointing that this violent man was allowed to offend again—and I am sure it is very disappointing for his victims.

In some cases it is not the court's fault but perhaps the DPP is somewhat to blame for not pushing hard enough for actual sentences and actual imprisonment. I note the comments in support of this by Judge Kelly in the Supreme Court in the matter of Graham on 5 May this year. This was an appeal against a suspended sentence rightly refused by the courts. In light of Mr Graham's prior record and the fact that he was on parole for other offences

of violence and dishonesty when he and two others mugged someone outside the casino, the judge said:

'The prosecutor's concession that a suspended sentence was appropriate was not only generous but surprising.'

So there are clearly examples where the DPP is not asking for imprisonment in the appropriate circumstances and, indeed, this is recognised in the comments of Judge Kelly, as I have just quoted.

This bill is about ensuring that a suspended sentence is a last chance, a genuine last chance—no second-last chances; just one in any 10-year period. Judges like to tell offenders that they are on their last chance but criminals get to know pretty quickly that it is sometimes a hollow threat and that there are more last chances on offer, if necessary, as is often the case. It makes a mockery of threats made during sentencing and, in fact, makes this state a laughing stock when convicted violent offenders especially are told that they have one last chance but then continue to be given subsequent so-called 'last chances'—and then another and another and another.

South Australian courts overuse suspended sentences. In fact, 48 per cent of all so-called imprisonment sentences in South Australia are wholly suspended. This is the highest in Australia by a large margin. Other jurisdictions are slowly freeing themselves of the farce of suspended sentences—or repeated suspended sentences, to be fair. In fact, New Zealand abolished the use of suspended sentences back in June 2002 and, contrary to dire predictions, the results were not disastrous at all. There was a modest increase in actual imprisonment of some 8 per cent, and two years later New Zealand was announcing the lowest crime rates in more than 20 years. Sexual offences were down 4 per cent, property abuse was down 6 per cent, and homicide was down 7.4 per cent. This is clearly a good result, which must have been at least partly due to the toughening up of those laws.

In Victoria the Sentencing Advisory Council (VSAC) has recommended sweeping changes to court penalties in a bid to eventually have suspended

sentences wiped from their law books for serious crimes—wiped off, Mr President; not merely reformed; not retained for true last chances, but wiped off. The New Zealand and Victorian measures go much further than my proposal and, as such, there is nothing at all extreme about what is being proposed here.

The VSAC's chair Professor Ari Freiberg said, in comments recorded by AAP regarding the Victorian proposal, that 'the council believes that suspended sentences are flawed and have been overused in the past'. Professor Freiberg went on to say that, to facilitate abolishing suspended sentences, reforms to other forms of so-called 'intermediate sentencing orders' was required. I will say three things about that. First, I believe we have plenty of scope in the non-custodial orders system to deal with the specific circumstances of offenders. Secondly, I am not now advocating abolition of suspended sentences, as is the VSAC: I am giving these last chance orders a last chance, if you like, to show their usefulness. Thirdly, these reforms are aimed only at serious offending; that is, I propose that the reforms be aimed only at serious offending and not at lesser offending, for which a variety of orders remain appropriate and are appropriately used by our court system.

Supporters of suspended sentences make the claim that actual imprisonment does little for recidivism rates. In other words, if you go to prison statistically you are more likely to reoffend than if you had been given the opportunity of a suspended sentence. The problem with the logic of this argument is that we send only the worst to prison in the first place, so it is no wonder that these people regularly reoffend upon their release. I have little doubt that reducing the number of suspended sentences granted will see less recidivism from prison parolees.

Some members may have noticed that the president of the Law Society recently wrote an opinion piece criticising or, to be fair, commenting on my efforts to reduce the operation of suspended sentences. It was a carefully written and informative opinion, and I thank him for putting his view on record. He claimed that my proposal would, in effect, increase the length of all suspended sentence bonds to 10 years. I have no trouble with that. The

current limit, which I understand is three years, does not operate as a sufficient disincentive; indeed, in the future I may even introduce a bill to increase the maximum terms allowed on good behaviour bonds.

However, the bill proposed today goes a step further than this by negating the possibility of a subsequent sentence of imprisonment if the bond is breached by certain serious offending. In essence, the current loophole where a judicial officer will decide not to breach a suspended sentence bond will be removed, so long as it is clear that imprisonment is warranted—and 'so long as it is clear' is the important phrase there. Of course, if the triggering event is of a minor technical nature then other sentencing options, such as simple bonds or fines, are open to the court, and these measures will not be put into play. That is appropriate.

Despite the criticism, one thing I do know is that while a violent offender or drug dealer is behind bars they are not attacking innocent members of the public or selling drugs on the streets. Quite simply, it is impossible. In prison they should be receiving mandatory rehabilitation and counselling to more properly ensure that when they are released they can be reintegrated into society. I would like to add here that I believe our current system of rehabilitation in prisons is simply not up to scratch and that we need to spend more on quality rehabilitation within prisons. We should not just lock people away and forget them; I am not a supporter of that philosophy. We should invest in decent rehabilitation while people are incarcerated because, if they are invested in well and wisely and if the people themselves are willing participants in the program, studies have shown that outcomes are better. So, I am a strong advocate of such investment in rehabilitation.

In short, we used to call prisons penitentiaries—that is, for penitence—and cells were originally copied from the cells used by monks in monasteries. Sadly, the concept of rehabilitation behind bars needs to be put under the focus again. Our current prison rehabilitation program is seriously lacking, as I have just said, but I will leave that argument for another day.

Turning now to the specifics of this bill, it works as follows. First, there is a new section 37A of the Criminal Law (Sentencing) Act in which:

- Subsection (1) defines what a serious offence is for the exclusive purpose of this new reform. These serious offences mean drug trade offences, home invasion offences, offences that kill or permanently incapacitate people, sexual offences, bushfire arson, high speed police chases and any other deliberate acts that genuinely put lives at risk.
- Subsection (2) clarifies that a serious offence is not serious for the purpose of this reform if it carries less than five years' maximum penalty of imprisonment, and offences committed over 10 years ago do not count. The reason for that will be apparent in a moment.

Changes to section 38 will now only allow suspended sentences for the first serious offence a person commits within a 10-year period as an adult.

Offences as a minor will not count. But, if as an adult, a person commits a serious offence, they may not commit another within the next 10 years and expect a suspended sentence. There will be no judicial discretion in that regard. The second judicial officer's hands will have been tied by the first, if you like.

If the first imposed a suspended sentence for the serious offence, then the second has no discretion but to impose an immediate term of imprisonment. The offender has had their last chance and must pay the price. However, if the first judge did not impose a suspended sentence, the second judge is not bound to do so. The second judge might choose to impose an immediate custodial term, anyway, if all relevant circumstances in sentencing merit that result. However, it is open to that second judge to impose a suspended sentence, because the first judge did not provide the suspended sentence that ought to have served as a 'last chance' to the offender, and that should rightly be a matter for the courts.

The aim of this proposal is to ensure that a convicted serious offender is not granted one suspended sentence after another, as is occurring far too often in

our court system today. As I said, South Australia has the highest number of suspended sentences nationally at some 48 per cent, and I have highlighted a number of cases where up to five suspended sentences have been given for very serious crimes, indeed. It is my expectation, if this bill becomes law, that judges will give very stern warnings to offenders of these reformed sections 37A and 37B. Indeed, we hope that lawyers let their clients know, and ultimately amongst the criminal elements, the words '37A' and '37B' are widely understood, as will be their implications. That, I believe, is the intended deterrent effect of criminal sentencing and, indeed, suspended sentences.

Something else is not immediately apparent in the drafting of this bill, but it is the legal effect, according to parliamentary counsel. I want to spend some time on this issue to make it absolutely crystal clear for members and also the judiciary and legal profession who, in some years to come, look at the second reading contributions on this bill so as to understand how this reform should work in my estimation. This 'something else' is the issue of relevant prior offending. I was shocked when I was advised that, for example, if I sell drugs and am sentenced for that offending, but then light a bushfire and am sentenced for that offending, the drug offence has virtually no relevance to how I ought to be sentenced for the bushfire offending, because I have not, in the eyes of the courts, lit fires before.

I find this logic astonishing, and this parliament should reject that sort of thinking outright. It is little wonder that the public is upset with the sentencing that we see commonly. Members of the public only see criminal offending as antisocial behaviour, not as one kind of offending and then another kind of offending irrelevant to the first. A person who commits sex offences and then leads police on a dangerous high speed pursuit, indeed, is showing a serious pattern of criminal behaviour and should not get the benefit of two suspended sentences. If the court gave him or her his or her last chance to reform their behaviour after the sex offence by issuing a suspended sentence, then any over criminal behaviour should result in the appropriate prison term.

There is this nonsense promoted in the legal community that, once a person has served their time under a suspended sentence, they are a free person

under the law and ought to be treated as if they have never broken the law. I do not agree. I do not think the community agrees either. People who commit subsequent serious offences ought to be subject to a much higher standard in sentencing, simply because they have been through the sentencing process before and know what is at risk. We simply cannot have cases like those I have outlined; namely, people who reoffend on a periodical basis lie low while serving their suspended sentence—the so-called warm lettuce leaf floggings, if you will—and then offend again expecting the same treatment.

A time must come when a court must decide that, if a person is not reforming, they need to be taken out of community circulation to learn their lesson and, indeed, to protect the community at large. Indeed, in some cases the courts have failed to appreciate what the community expects in this regard, so this bill proposes changing the balance to ensure that suspended sentences are well and truly the last chance.

I commend this measure to members and look forward to hearing contributions from other members on the use of suspended sentences in Australia. I strongly believe that the debate over the appropriate use of suspended sentences needs to occur and should do so sooner rather than later. No doubt there will be conflicting opinions and members in this chamber will see things very differently, and I welcome those opinions. I look forward to the debate. The public is generally dissatisfied with what we see at the moment. A suspended sentence should be as it was originally intended. As the Chief Judge himself has stated, it should be a last chance and not a series of last chances: that simply does not make sense.