

## Report on Reforming Suspended Sentences in Hong Kong

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## Introduction

This report is from a study of the suspended sentence power in Hong Kong undertaken by the Centre for Comparative and Public Law at the request of the Law Society of Hong Kong (LSHK). Members of the LSHK's Criminal Law and Procedure Committee have been concerned about the list of exceptions to the suspended sentence power. The purpose of this report is to inform members of that Committee of the background and law on the suspended sentence power and to aid their ongoing discussion of the topic with the Law Reform Commission of Hong Kong. The study focuses specifically on the exceptions to the power of the courts of Hong Kong to impose suspended sentences under the Criminal Procedure Ordinance (Cap 221) (CPO). The study will consider arguments for maintaining, abolishing or reforming the list of excepted offences for which offenders cannot receive a suspended sentence of imprisonment regardless of circumstances. In doing so, the project will examine the nature of judicial power to order suspended sentences or their equivalent in the following jurisdictions: Australia (Victoria), New Zealand, Canada, Singapore, and the United Kingdom (UK). It will also provide the historical context in which Hong Kong introduced the suspended sentence of imprisonment, and the rationale for excepting the offences listed in Schedule 3 of the CPO.

In summary, the study concludes that there are substantial reasons for eliminating the list of exceptions altogether or at least removing those offences that do not invariably cause serious physical violence to others. The points that support this position include the following:

1. The original rationale for having exceptions no longer applies. Hong Kong is now a much safer place than before and the prevalence of violent offences has decreased significantly since the 1970s.
2. Some of the excepted offences, such as attempted indecent assault and the weapons related offences, can occur in a wide range of circumstances, including exceptional circumstances (e.g. offence occurring without circumstances of aggravation, first-time remorseful offender with little risk of re-offending) which would ordinarily justify a suspended sentence. Imprisoning such offenders for lack of a better sentencing alternative is an injustice.

3. The exceptions restrict sentencing discretion and impair the court's ability to do justice in individual cases. Removing such constraints on discretion is consistent with human rights norms against disproportionate and arbitrary imprisonment.
4. There is no reason to believe that repealing the exceptions will lead to either more offending or an increased risk of harm to the community. Suspension will continue to be reserved for only exceptional cases. Hong Kong courts can be trusted to continue to imprison offenders who pose a substantial risk to the community.
5. The list of excepted offences is not comprehensive. Other violent and serious offences have been left out. This means those convicted of such offences, in theory, can be entitled to a suspended sentence of imprisonment. This illogicality can give rise to a general sense of unfairness and arbitrariness.
6. None of the overseas jurisdictions reviewed has as wide a list of exceptions to suspended or community sentences powers. If exceptions exist, they are normally confined to offences of serious violence.

### **Suspended Sentences: An Overview**

The suspended sentence of imprisonment is often described as the 'Sword of Damocles', hanging over the offender as an effective deterrent while avoiding the human and financial costs of imprisonment. Since its first appearance in France in the late 19<sup>th</sup> century, it has been adopted in various common law jurisdictions, primarily as a rehabilitative option to keep first or minor offenders out of prison.<sup>2</sup> Australia was at the forefront of enacting provisions for suspended sentences, with Victoria introducing them as early as 1915.<sup>3</sup> They were first introduced in the UK in 1967, but did not find favour with Canadian lawmakers until 1995.<sup>4</sup> Common to each of these jurisdictions, however, is the chequered history of the application, breadth, and degrees and levels of conditionality of such sentences since their inception.

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<sup>2</sup> Don Weatherburn and Lorana Bartels, "The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia" (2008) 48 *British Journal of Criminology* 667.

<sup>3</sup> Sentencing Advisory Council, *Suspended Sentences Final Report Part 1* (2006).

<sup>4</sup> Bill C-41, now S.C. 1995 c. 22 proclaimed in force on 3 September 1996.

Suspended sentencing as an option available to the courts of these jurisdictions has been modified either by way of reduction, abolition, modification and in rare instances expansion, over the course of time, and it is generally the case that in the jurisdictions which democratically elect their representatives, clear shifts in penal policy can be associated with reformist governments and their quest to appear more responsive to public opinion.<sup>5</sup> Political platforms often seize on public perceptions of crime, in particular where cases arise which provoke public outcry.<sup>6</sup>

## Hong Kong

### *Introduction of suspended sentencing power in Hong Kong*

The introduction of suspended sentences in Hong Kong came as a result of the Criminal Procedure (Amendment) Bill 1971 (the Bill). This piece of legislature was itself an effort to locally legislate such parts of the UK Criminal Law Act 1967 and the Criminal Justice Act 1967 as thought to be appropriate to the needs of Hong Kong.<sup>7</sup>

Clause 11 of the Bill proposed the introduction of seven new sections dealing with suspended sentences of imprisonment, ultimately enacted as sections 109B-109H of the CPO.<sup>8</sup> Section 109B<sup>9</sup> provides that a court which passes a sentence of imprisonment of not

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<sup>5</sup> Arie Freiberg, “The Victorian Sentencing Advisory Council: Incorporating Community Views into the Sentencing Process” in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Sydney: Hawkins Press, 2008) 148.

<sup>6</sup> For example, in Australia, the case of *Director of Public Prosecution v Sims* [2004] VSCA 129, where a young man convicted of two counts of lingual and digital rape, one count of indecent assault and one count of aggravated burglary was given a sentence of two years’ and nine months imprisonment suspended for three years. The sentence was upheld on appeal by a 2-1 majority. In an example from Canada, *R v Rego*, 2010 ONSC 2937, an employee who committed a serious breach of trust by planning and initiating an offence against his employer had his ‘conditional’ (i.e. suspended) sentence overturned by the Ontario Superior Court of Justice on the grounds that the aggravating factors seriously outweighed the mitigating factors, and thus the court saw fit to impose a fit and proper sentence to meet the necessary deterrence and denunciation required by the nature of the offence.

<sup>7</sup> Hong Kong Legislative Council, 2 December 1970, Criminal Procedure (Amendment) Bill 1971, second reading. Available at <http://www.legco.gov.hk/yr70-71/h701202.pdf>.

<sup>8</sup> Section 109H (repealed 74 of 1976 s. 2) provided that sections of the 1971 Amendment Bill which dealt with suspended sentences (109B-109G) would expire at the end of 1973 unless the Council appointed a later date by resolution. The section was enacted to reflect the controversy of the measure and the difficulty of assessing the extent to which the system would assist in prevention of crime and dealing with offenders. Council resolved in December of 1973 that all seven provisions (109B – 109H) be extended by an additional three years. See: <http://www.legco.gov.hk/yr73-74/h731212.pdf>. In 1976 section 109H was repealed, and the provisions relating to suspended sentencing made permanent.

(See [http://www.legco.gov.hk/yr76-77/english/lc\\_sitg/hansard/h761208.pdf](http://www.legco.gov.hk/yr76-77/english/lc_sitg/hansard/h761208.pdf))

<sup>9</sup> Section 109B in full provides as follows:

more than two years may (unless a probation order is made on the same occasion in respect of another offence), order that the sentence shall not take effect unless, during a period specified in the order, which must not be less than one year or more than three years from the date of the order, the offender commits another offence punishable with imprisonment.<sup>10</sup> On passing a suspended sentence, the court may impose such conditions as it thinks fits and must explain to the offender “in ordinary language” his liability if during the operational period he commits an offence punishable with imprisonment or breaks any condition imposed.<sup>11</sup>

By section 109C, the courts are empowered to order suspended sentences to take effect where during the operational period of a suspended sentence an offender is either convicted of an offence punishable with imprisonment or in breach of a condition imposed. The norm is for the suspended sentence to take effect with the original term unaltered “unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent

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(1) A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect. (Amended 39 of 1999 s.3)

(2) A court which passes a suspended sentence on any person for an offence shall not make a probation order in his case in respect of another offence of which he is convicted by or before the court or for which he is dealt with by the court.

(3) On passing a suspended sentence the court-

(a) may impose such conditions as it thinks fit;

(b) shall explain to the offender in ordinary language his liability under section 109C if during the operational period he commits an offence punishable with imprisonment or breaks any condition imposed under paragraph (a).

(4) If a court has passed a suspended sentence on any person, and that person is subsequently sentenced to detention in a training centre, he shall cease to be liable to be dealt with in respect of the suspended sentence unless the subsequent sentence or any conviction or finding on which it was passed is quashed on appeal.

(5) Subject to any provision to the contrary contained in this or any other Ordinance-

(a) a suspended sentence which has not taken effect under section 109C shall be treated as a sentence of imprisonment for the purposes of all Ordinances except any Ordinance which provides for disqualification for or loss of office, or forfeiture of pensions, of persons sentenced to imprisonment; and

(b) where a suspended sentence has taken effect under section 109C, the offender shall be treated for the purposes of the said excepted Ordinances as having been convicted on the ordinary date on which the period allowed for making an appeal against an order under section 109C expires or, if such an appeal is made, the date on which it is finally disposed of or abandoned or fails for non-prosecution.

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<sup>10</sup> “It should be made absolutely clear that if a suspended sentence of imprisonment is imposed it is a sentence of imprisonment, and that any offence committed during the currency of the suspension will usually result in that sentence being served”, per Silke VP, *Attorney General v Wu Chi-sing* [1989] 2 HKC 76, 79.

<sup>11</sup> CPO, s. 109B(3).

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offence”.<sup>12</sup> Reasons must be stated if the court is of the opinion that full activation of the suspended sentence would be unjust.<sup>13</sup> The court also has power to order that the sentence take effect with the substitution of a greater or lesser term for the original term, and to vary the original order by substituting for the operational period specified a period not later than three years from the date of the variation.<sup>14</sup> It can also choose to make no order at all with respect to the suspended sentence.<sup>15</sup> While these latter three options may fall short of full activation, none may be chosen unless full activation would be unjust in view of all the circumstances.

Section 109D addresses the question of which court should deal with an accused who is subject to a suspended sentence. It provides that an offender may be dealt with in respect of a suspended sentence by any court before which he appears or is brought, and empowers magistrates to activate or deal with otherwise an offender who appears before him who has committed an offence punishable with imprisonment during the operation period of a suspended sentence passed by the Court of First Instance or the District Court, except where it would be more convenient to be dealt with by the court which passed the suspended sentence.

Sections 109E deals with the process for bringing the offender before the court to have his suspended sentence dealt with upon the discovery of further offences or breaches of condition. Section 109F provides that an offender who breaks a condition imposed on him by the court which passed the suspended sentence shall be dealt with as if he had been convicted of an offence punishable with imprisonment.

### *Test to be applied by Hong Kong courts in deciding whether to suspend a sentence of imprisonment*

In deciding whether to suspend a sentence of imprisonment, the court should first decide whether any appropriate alternative to imposing a sentence of imprisonment, such as a fine or

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<sup>12</sup> CPO, s. 109C(1). While it is accepted that there is a residual discretion in the magistrate not to activate suspended sentence, it is equally accepted, as was stated by Sir Denys Roberts CJ, in *Attorney General v Wong Ho-ming* [1988] 1 HKLR 317, 320, that in the great majority of cases, it is the duty of a court to activate a suspended sentence.

<sup>13</sup> CPO, s. 109C(1). I Grenville Cross and Patrick WS Cheung, *Sentencing in Hong Kong*, 5<sup>th</sup> ed (Hong Kong: LexisNexis, 2007): “Activation should occur ‘save in rare and exceptional circumstances’: *HKSAR v Chiu Wai-sing*, *Carman* MA, 839/2005. If the suspended sentence is not taken seriously by the courts it will forfeit its credibility.”

<sup>14</sup> CPO, s. 109C(1)(b) & (c).

<sup>15</sup> CPO, s. 109C(1)(d).

probation order, is appropriate. If the court answers this question in the negative, it should then determine the proper term of imprisonment. Only after the court has determined that there is no appropriate alternative to imprisonment, and determined the appropriate custodial sentence, should the court then decide whether it is appropriate to suspend the term of imprisonment.

The test normally applied by the courts when deciding to suspend a sentence of imprisonment is one of ‘exceptional circumstances’.<sup>16</sup> The term has been interpreted as being wide enough to take account of all the relevant circumstances surrounding the offence, the offender and the background. The courts have endorsed a ‘holistic approach’ to determining whether circumstances are exceptional, noting that there may be cases where a single striking feature would amount to exceptional circumstance, or where, in the absence of a single factor, the collective impact of all the relevant circumstances would make the case exceptional.<sup>17</sup>

*The debate on second reading: Provisions distinct from UK Criminal Justice Act 1967 and arguments advanced in favour of the system of suspended sentences*

While the sections introduced under the 1971 Bill generally followed sections 39 to 42 of the UK Criminal Justice Act 1967, the Hong Kong legislation contained a number of significant differences, which were thought to make the provisions concerning suspended sentences “more suitable to our needs here in Hong Kong.”<sup>18</sup> Under the 1967 UK Act, custodial sentences of six months or less were automatically suspended unless “the act or any of the acts constituting [the] offence consisted of an assault on or threat of violence to another person, or of having or possessing a firearm, an imitation firearm, an explosive or offensive weapon or of indecent conduct with or towards a person under the age of sixteen years”.<sup>19</sup> This amounted to a *de facto* abolition of short sentences of imprisonment, unless the exception applied. But even where the exception applied or in respect of longer imprisonment terms of not more than two years, suspension remained at the discretion of the trial judge and there were no excepted offences. Such provisions were not adopted in the Hong Kong Bill.

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<sup>16</sup> *HKSAR v Hsueh Cheng-kang, Peter*, MA 135/2004.

<sup>17</sup> *R v Zekir Rahman* [2006] 1 Cr App R (S) 404, 411.

<sup>18</sup> Hong Kong Legislative Council, 2 December 1970, Criminal Procedure (Amendment) Bill 1971, second reading. Available at: <http://www.legco.gov.hk/yr70-71/h701202.pdf>

<sup>19</sup> Criminal Justice Act 1967, s. 39(3)(a).

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Another important difference in the Hong Kong Bill was the power of the court under section 109B(3)(a) to impose conditions as it thought fit upon the offender subject to the suspended sentence. Examples of conditions include an order that the convicted person not undertake certain kinds of work, not attend specific places, or not mix with ‘undesirable characters’. At the debate on second reading of the CPO (Amendment) Bill in December, 1970, Acting Attorney General GR Sneath clarified the rationale for the addition of this provision by noting they were necessary to make clear to persons upon whom a suspended sentence has been passed that “the courts retain an interest in their behavior and the means for effective supervision of their activities.”<sup>20</sup> Any breach of court-imposed conditions would be dealt with by the court in the same manner as if it amounted to a conviction of the accused of a subsequent offence during the operational period by virtue of section 109F.

In support of the implementation of the system of suspended sentencing, the Acting Attorney General cited the most important argument that it would confer on a court a wider choice when faced with the difficult task of assessing the correct sentence for offenders appearing before it. Notice was given to the two major considerations a court must balance in exercising its sentencing powers: the extent to which the sentence must reflect the gravity of the offence and the question of how far the punishment should be related to the particular circumstances of the offender. The power to order a sentence of imprisonment and to then suspend it would enable the court “to pass a sentence which reflects the seriousness of the crime, but at the same time to exercise a measure of leniency if the individual circumstances of the offender appear to justify such a course.”<sup>21</sup>

Reference was also made to the findings of the English experience during the first year of the operation of the suspended sentence system in England. Over 90 percent of individuals with suspended sentences who offended again during the operational period were required to serve the original sentence of imprisonment, indicating a reluctance by the courts to let a man off if in fact he offended again. Approximately 60 percent of offenders sentenced to a suspended sentence did not offend again during the operational period. Using the English experience as a guide, it was also predicted that about half the cases in which the courts imposed suspended sentences were those in which presently a custodial sentence

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<sup>20</sup> Hong Kong Legislative Council, 2 December 1970, Criminal Procedure (Amendment) Bill 1971, second reading. Available at: <http://www.legco.gov.hk/yr70-71/h701202.pdf>

<sup>21</sup> Ibid.

would be imposed, while the other half would be comprised of those where at the time a fine or probation was imposed.

Turning to the issue of public confidence, it was emphasized that the public should not be misled into thinking a system of suspended sentencing was a weak method of dealing with an offender, but rather an opportunity for the courts to give “a further chance to offenders who appear to want it and in order to keep them out of prison, an environment which may turn a young man against the community and make him into a professional criminal.”<sup>22</sup>

*Resumption of the debate on second reading: Creation of ‘excepted offences’*

The question of the suspended sentence provisions was revisited in the resumption of the debate on second reading of the Bill in January 1971. On this occasion Council members turned against the idea of enacting the Bill in its present form, which would make the sentencing option available to all manner of crimes provided the custodial sentence imposed was one of two years or less.

Foremost among the concerns expressed by Council members was the sharp increase in violent crime, in particular as committed by young offenders, in the years immediately preceding the introduction of the Bill. The Council had only recently enacted section 109A of the CPO (Ordinance No 66 of 1967), which provided that “no Court shall sentence a person of over 16 and under 21 years of age to imprisonment unless the Court is of the opinion that no other method of dealing with such person is appropriate.” It was said that this provision was introduced “at a time when we could afford to be optimistic in view of the low rate of crimes of violence by young persons”,<sup>23</sup> but that the then present crime wave required the Council to consider modification of the section by excluding from its operation certain specified crimes of violence. It was proposed that these crimes be listed in a Schedule to the Ordinance, such Schedule being subject to amendment from time to time by a resolution of the Council without the need for the passage of a further amending bill.

The widespread feeling of the Members of Council and members of the public generally was that owing to the increase in violent crime, it would be unwise to pass

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<sup>22</sup> Ibid.

<sup>23</sup> Mr. Wilson Wang, Hong Kong Legislative Council, 20th January 1971, Criminal Procedure (Amendment) Bill 1971, resumption of debate on second reading. Available at <http://www.legco.gov.hk/yr70-71/h710120.pdf>

legislation which might appear to be advocating leniency towards violent offenders. Council member and barrister Mr. Oswald Cheung went so far as to call for a withdrawal of section 109A in addition to the rejection of Clause 11 of the Bill. It was thus in the face of strong legislative opposition and widespread public anxiety over the perceived growth of violence that the Government conceded that it would be difficult to persuade the public that the purpose of the suspended sentence was not to provide a soft way of dealing with criminals, but to give the courts a wider choice of methods of dealing with offenders.

The addition of the “excepted offences” schedule (Schedule 3 of the CPO) to “exclude from the operation of the provisions which empower the courts to impose suspended sentences those kinds of offence which are causing particular concern” was, in view of the firm opposition from within Government, a necessary concession to enacting the new suspended sentencing power. The Unofficial Members of the Legislative Council were said to be unified in their opposition to the passing of the Clause without provisions for the exemption of violent crimes from its operation.<sup>24</sup>

In addition to the power to amend the Schedule by resolution of the Council, amendment by way of the order of Governor in Council was approved, so that the list might be amended quickly when necessary. Indeed, the Attorney General, Mr Denys Roberts, also added that it was hoped that it might not be long before it was “possible to do away with it [the Schedule]” altogether.<sup>25</sup> Since the enactment of the Bill however, in addition to one amendment (in section 6) and one replacement section relating to Part III of the Firearms and Ammunition Ordinance, three additional offences (section 33 of the Public Order Ordinance (Cap 245) and sections 4 and 10 of the Weapons Ordinance (Cap 217)) have been added to the Schedule, while no offences have been removed from the schedule. A provision for removal of offences is found in section 124 of the CPO, which provides that the “Legislative Council may, by resolution, from time to time amend Schedule 3.”

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<sup>24</sup> Mr. Oswald Cheung, Hong Kong Legislative Council, 20th January 1971, Criminal Procedure (Amendment) Bill 1971, resumption of debate on second reading. Available at <http://www.legco.gov.hk/yr70-71/h710120.pdf>

<sup>25</sup> Attorney General Mr. Roberts, Hong Kong Legislative Council, 20th January 1971, Criminal Procedure (Amendment) Bill 1971, resumption of debate on second reading. Available at <http://www.legco.gov.hk/yr70-71/h710120.pdf>

*List of Excepted Offences*

The original list of excepted offences included the offences of manslaughter, rape, attempted rape, affray, indecent assault and attempted indecent assault under the then Protection of Women and Juveniles Ordinance, and other offences under the Dangerous Drugs Ordinance, Offences against the Persons Ordinance, Arms and Ammunition Ordinance and Theft Ordinance. Comparing the original list to the terms of the UK exceptions clause, what appears to have happened is that the Hong Kong architects borrowed the UK clause to create a general exceptions list that became Schedule 3. But this was hardly the intention of the UK clause, which was to limit mandatory suspension in favour of judicial discretion. It was never the intention of the UK Act to limit judicial discretion in sentencing.

Despite the legislative intent to facilitate changes to the scheduled list, there have been few changes to the list. The last change occurred in 1981 when new firearms and weapons offences were added. No offences have come off the list. For details of the maximum imprisonment terms and historical background to the excepted offences, see Appendix 1. The current list of excepted offences (referring only to the section heading when offences against specific provisions is listed) is as follows:

1. Manslaughter
2. Rape
3. Attempted rape
4. Affray
5. Trafficking in dangerous drugs
6. Supplying dangerous drugs
7. Manufacture of dangerous drugs
8. Administering poison or wounding with intent to murder
9. Destroying or damaging building with intent to murder
10. Setting fire or casting away ship with intent to murder
11. Attempting to administer poison, or shooting, or attempting to shoot or drown, etc. with intent to murder
12. Attempting to commit murder by means not specified
13. Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm
14. Wounding or inflicting grievous bodily harm
15. Attempting to choke, etc. in order to commit indictable offence
16. Using chloroform, etc. in order to commit indictable offence
17. Administering poison, etc., so as to endanger life or inflict grievous bodily harm
18. Administering poison, etc., with intent to injure, etc.
19. Causing bodily injury by gunpowder, etc.
20. Causing gunpowder to explode, etc., or throwing corrosive fluid, with intent to do grievous bodily harm

21. Placing gunpowder near building, etc., with intent to do bodily injury
22. Assault with intent to commit offence, or on police officer, etc.
23. Forcible taking or detention of person with intent to sell him
24. Indecent assault
25. Attempted indecent assault
26. Possession of arms or ammunition without license
27. Dealing in arms or ammunition without a license
28. Giving possession of arms or ammunition to unlicensed person and obtaining possession by false pretences
29. Possession of arms or ammunition with intent to endanger life
30. Resisting arrest with or committing offence while in possession of arms or ammunition or imitation firearm
31. Carrying arms or ammunition or imitation firearm with criminal intent
32. Trespassing with arms or ammunition or imitation firearm
33. Possession of an imitation firearm
34. Converting imitation firearm into firearm
35. Dangerous or reckless use of a firearm, etc.
36. Failure to comply with terms and conditions of licence, etc.
37. Robbery
38. Aggravated burglary
39. Possession of offensive weapon in public place
40. Possession of prohibited weapons
41. Offences relating to martial arts weapons

While most of the offences on the list are indictable offences (and many punishable by life imprisonment), there are some offences that must or can be tried summarily, where the maximum punishment would be two or three years imprisonment (e.g. trafficking in dangerous drugs, supplying dangerous drugs, assaulting a police officer, giving possession of arms or ammunition to unlicensed persons, possession of imitation firearm, failure to comply with terms and conditions of a firearms licence, possession of an offensive weapon in a public place, possession of a prohibited weapon and offences relating to martial arts weapons).

It is also important to note that the list includes only two inchoate offences: attempted rape and attempted indecent assault. For all other offences it is the complete offence that has been excepted. So, for example, a person convicted of attempted wounding or conspiracy to traffic in dangerous drugs can in theory receive a suspended sentence of imprisonment.

## **Other Common Law Jurisdictions**

This study examined the sentencing provisions in five common law jurisdictions to find comparisons for the Hong Kong suspended sentence power. The following jurisdictions

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were considered: Australia (Victoria), New Zealand, Canada, Singapore, and the United Kingdom. The study tried to determine if the criminal courts in these jurisdictions had a similar suspended sentence power and if so whether it was subject to the same list of exceptions. If the jurisdiction did not have a similar suspended sentence power, comparable sentencing measures were analyzed. For those jurisdictions that either reformed or abolished the judicial power to order a suspension of a sentence of imprisonment, the study considered the historical and statutory backdrop for the reform and describes the new reform measures. The following is a brief summary of the findings relating to the five jurisdictions. Appendix 2 provides a more detailed study of each of the five jurisdictions.

In Australia (Victoria), the Sentencing Act 1991 provides the legislative basis for suspended sentences. Section 27(1) details the matters the court must have regard to when considering whether it is desirable to make an order suspending a sentence of imprisonment. These include the impact on the victim, the adequate manifestation of denunciation by the court of the conduct of the offender, the gravity of the offence, whether the offender has a previous suspended sentence of imprisonment imposed on him and is in breach of that order, and the degree of risk of the offender committing another offence punishable by imprisonment during the operational period of the sentence. The Sentencing Further Amendment Act of 2010 meanwhile deemed that suspended sentences were no longer available for ‘significant offences’, i.e. offences where the offender had caused serious injury recklessly against section 17 of the Crimes Act, where the offence was that of aggravated burglary, where the offence was arson-related (contrary to ss197 or 197A of the Crimes Act), or where the offence was related to trafficking, contrary to sections 71 or 71AA of the Drugs, Poisons and Controlled Substances Act.

In New Zealand, the option of suspending sentences of imprisonment was abolished by the Sentencing Act 2002. Previously the suspended sentence power was similar to the 1967 UK and current HK provision, but without excepted offences. The 2002 Act introduced a statutory hierarchy of sentencing and orders, from the least restrictive (a discharge or order to come up for sentence if called on) to the most restrictive (i.e. imprisonment). In 2007 further amendments were made to the Act to enhance the number of community-based sentences available to the court when sentencing. Offenders can now be subject to curfews at specific addresses; electronic monitoring of curfews was introduced and the court was empowered to sentence offenders to home detention immediately where it would otherwise

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have sentenced an offender to a short term of imprisonment. Prior to the amendments, the decision of whether home detention would be a suitable alternative to imprisonment was left to the Parole Boards.

In Canada, the term ‘conditional sentencing’ is used to denote the imposition of a suspended sentence of imprisonment that is served in the community with conditions.<sup>26</sup> There are four criteria that must be met before a conditional sentence can be considered by the sentencing judge: the offence for which the person has been convicted cannot be an expressly excluded one; the sentencing judge must have determined that the offence should be subject to a term of imprisonment of less than two years; the sentencing judge must be satisfied that serving the sentence in the community would not endanger the safety of the community; and the sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in the Criminal Code.<sup>27</sup> The list of excluded offences include serious personal injury offences defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment. Sexual assault is within the definition of ‘serious personal injury offence’ and when prosecuted on indictment could not be sentenced by way of a conditional sentence.

As in Hong Kong, in the United Kingdom suspended sentences count as custodial sentences, and are thus only appropriate where imprisonment is the only option available to the court. Following the passing of the Legal Aid, Sentencing and Punishment of Offenders Act in 2012, courts are empowered to suspend sentences for custodial periods of up to 24 months. The 2012 Act also gave courts more discretion with regard to whether or not to impose community requirements (such as programme participation requirements, curfew requirements, mental health treatment requirements) on offenders. The Act also introduced the option of fining offenders who breach the terms of their suspended sentence. The fine may be imposed while allowing the original order to continue, giving the courts more options

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<sup>26</sup> The term ‘suspended sentence’ in Canada refers to a sentence which is passed under section 731(1)(a) of the Criminal Code. It refers to the suspension of the passing of sentence (i.e. no custodial sentence is imposed) and directs that the offender be released on such conditions as prescribed in the offender’s probation order. A breach of the suspended sentence is a new offence under this arrangement, whereas a breach of a conditional sentence is not a new offence, but one which will trigger the power of the court to compel the offender to serve the remaining term of imprisonment.

<sup>27</sup> Criminal Code, s. 742.1.

when dealing with offenders who breach the conditions of their suspended sentence. There are no excepted offences in relation to the UK power.

There is no legal provision allowing Singaporean courts to suspend a sentence of imprisonment after it has been passed. An offender may, however, after having been convicted of an offence for which the sentence has been held in abeyance, seek to obtain a conditional discharge. Under the terms of a conditional discharge, an offender is discharged from the requirement to serve the sentence associated with the offence, provided he commits no offence during such period not exceeding 12 months from the date of the order. Only offenders convicted of offences ‘not being an offence the sentence for which is fixed by law’ (i.e. either a mandatory minimum or a mandatory maximum) can avail themselves of the provisions pertaining to conditional discharges.

## **Arguments in Favour of Reform**

The main argument in favour of maintaining the list of excepted offences appears to be historical. It was the concern in the early 1970s with the prevalence of violent crime in the community that required exceptions to what appeared to local legislators then as being a soft sentencing option being introduced by the colonial government. This rationale is hardly persuasive today to justify the continued maintenance of the list of excepted offences. Times have changed considerably, and it appears complacency has taken over our system of sentencing. As this study has found, the list of exceptions has not been reviewed or updated for several decades. There are now many substantial reasons in favour of abolishing the list entirely or, in the alternative, removing those offences that do not invariably cause serious physical violence to others. Six reasons are discussed below.

### *1. Fall in prevalence of violent crimes*

The significant fall in the prevalence of violent crimes in Hong Kong since the 1970s is an important societal circumstance to consider when evaluating the need to maintain or reform list of excepted offences to the suspended sentence power. Historical data on the incidences of reported violent crime in the years 1975, 1985, 1995 and 2005 show that the numbers have

fallen significantly in that three-decade period.<sup>28</sup> For example, in 1975, there were 20,912 reports of violent crime. In 2005, the number had fallen to 13,890. Moreover, in this 30-year period, the population grew substantially from 4,366,600 to 6,813,200,<sup>29</sup> meaning that the per capita rate of reported violent crime had decreased by 43 percent. Indeed it is not a mere accident that Hong Kong has a reputation of being regarded amongst the safest cities in the world.<sup>30</sup>

This reality undercuts the historical basis for having the list of exceptions to the suspended sentence power when it was first enacted in 1971. In accepting the compromise of excepted offences, the Attorney General in 1971 had said that he hoped someday it was no longer necessary to have the list. In view of the social and economic progress that Hong Kong has made in the past 40 years, one suspects the list is long past its expiry date.

## 2. Possible injustice: too harsh or too soft

In the absence of a suspended sentence option, offenders, whose circumstances could merit a suspension, will normally be imprisoned. It is well known that the offences in Schedule 3, though serious, can occur in a wide-range of circumstances. Even manslaughter in certain exceptional cases may merit a non-custodial sentence. This is what occurred in the 2011 sentence review case of *Secretary for Justice v Chan Man Yum Candy*, where the Court of Appeal refused the application for a more severe sentence.<sup>31</sup> In this case, the offender, who was suffering from a mental illness at the time, had killed her 13-month-old adopted daughter. The Court of Appeal upheld the trial judge's sentence of three-years probation with treatment conditions.

Before 1997, the Court of Appeal had expressed concern with the lack of discretion to order a suspended sentence for excepted offences. *Attorney General v Ng Chak Hung* was a case where the trial judge had quite clearly erred in suspending the sentence in a case of wounding with intent.<sup>32</sup> However the Court of Appeal was sympathetic, remarking that it

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<sup>28</sup> The absolute numbers are as follows: 20,912 (1975), 23,214 (1985), 17,087 (1995), 13,890 (2005). See Tables 20.7, 21.1, 21.2, 23.3 and 26.1 in Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (London: Routledge-Cavendish, 2007).

<sup>29</sup> *Hong Kong 1976* (Hong Kong: Government of HK, 1976) 234 (App. 24); *Hong Kong 2006* (Hong Kong: HKSAR Government, 2006) 476 (App. 25).

<sup>30</sup> Hong Kong ranked 31 in Mercer's Personal Safety Ranking 2011, see website of Marsh & McLennan Companies, [www.mercer.com](http://www.mercer.com).

<sup>31</sup> *Secretary for Justice v Chan Man Yum Candy*, unreported, CAAR1/2010, 14 July 2011, CA.

<sup>32</sup> *Attorney General v Ng Chak Hung*, unreported, CAAR1/1994, 2 Sept 1994, CA.

was “unfortunate that the Legislature [had] seen fit to remove the option of a suspended sentence from a sentencing judge in relation to a S. 17 offence which can vary greatly in its gravity”.<sup>33</sup> In the end, the Court of Appeal ordered a sentence of probation to give the offender a “chance of rehabilitating himself”.<sup>34</sup> This case points to a counter-tendency that can occur due to the lack of a middle road. This is to order probation (or a community service order) when a more suitable disposition is a suspended sentence of imprisonment. Whether it is to sentence too harsh (imprisonment) or too soft (probation), it is inevitable for there to be cases involving excepted offences that will push the court in either of these directions given the lack of a suspended sentence alternative. In this sense, injustice results.

Table 1 below shows four cases of indecent assault decided in the past two years where sentences of less than 2 years imprisonment were made. These are all cases where the first-time offender would be unlikely to re-offend. While sentences ranged from imprisonment to probation, it is arguable that the offenders were all good candidates for a suspended sentence. We will never know in practice whether they would have received a suspended sentence. But if the list of excepted offences did not exist, there was a real possibility that these cases may have been decided differently.

**Table 1: Possible Candidates for Suspended Sentence**

Case	Circumstances	Sentence
<i>HKSAR v Li Cheung-Shing</i> (D2), DCCC143/2012, 23 May 2012, A. Tse DDJ	-PG to Making Child Pornography (charge 1) and Indecent Assault (charge 2)  -D2 met X (a 15-year old girl) in a motel room (meeting arranged by D1) to photo and video her in the nude; during the photo session, which lasted 1 hour, D2 molested her legs, breasts and private parts; X was paid \$1,500  -D2 was a 45-year-old teacher, first time offender, but had 10 similar paid encounters with 16-year-old girls in the past; he was remorseful; wife and father-in-law had forgiven him; risk of re-offending was not high; he thought she was 16; will lose job and substantial pension; never teach again	<b>Imprisonment 7m</b> (7m for Charge 1; 6m for Charge 2, concurrent)
<i>HKSAR v Choi Donny</i> , DCCC410/2011, 24 Aug 2011, A Pang J	-PG to Obtaining Access to a Computer with Dishonest Intent (2 charges) and Indecent Assault (1 charge)  -video-taped two former students (aged 16 (X) and 18 (Y) at the time) while they were inside the toilet of D’s premises, on two separate occasions; X captured showering; Y captured urinating; when confronted by Y, D tried to embrace her,	<b>Imprisonment 14m</b> (7m consecutive for each of the access to a computer charges and 5m

<sup>33</sup> Ibid., para 6.

<sup>34</sup> Ibid., para 18.

	<p>pulled her head to his chest, stroked her head and neck, tried to kiss her, hugged her and attempted another kiss then let go</p> <p>-29 years old, university educated teacher who had taught at secondary and primary schools; showed some suicidal tendency; first time offender; letters described him as diligent, competent, dedicated and responsible, showing care and concern for students</p>	<p>concurrent for the indecent assault)</p>
<p><i>HKSAR v Cheung Chun-sin</i>, DCCC1164/2011, 5 Mar 2012, Geiser J</p>	<p>-PG to Indecent Assault (2 charges)</p> <p>-caressed thighs of 7 and 9 years old girls in computer room at school by school computer technician; asked them the colour of their underwear and caused girls great distress; admitted offences when arrested</p> <p>-24-years old with a clear criminal record; risk of re-offending moderate and treatment highly recommended; deep remorse; served 8m pre-sentence custody</p>	<p><b>Probation 18m</b></p>
<p><i>HKSAR v Chan Chi-hin</i> (D2), HCCC206A/2011, 7 Feb 2012, D Pang J</p>	<p>-PNG. Convicted of Indecent Assault (1 charge)</p> <p>-victim was intoxicated and sleeping; D2 pulled up her clothes and unbuttoned her pants; D2 fondled victim's chest and inserted finger into her private parts; touched victim's breasts again and then left room at D1's instructions whereupon D1 raped victim</p> <p>-27-years old salesman, educated to Form 5, no previous convictions; background unremarkable; degree of indecency limited; immediate imprisonment unnecessary</p>	<p><b>Community Service Order (240 hrs)</b></p>

### 3. Maintaining judicial discretion

Another important consideration is the need to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence. This is consistent with the right to be free from disproportionate and arbitrary punishment and the approach of the Court of Final Appeal to sentencing matters generally.<sup>35</sup> Historically our legislature has not adopted controversial minimum sentencing laws, and the approach post-1997 is to maintain a wide degree of discretion that will allow the judge to fashion an appropriate sentence in light of the individual circumstances of each case.

The exceptions to the suspended sentence power are not only anachronistic (unanchored by their historical justification) but also apply across-the-board in a disproportionate manner to all offenders charged with certain offences irrespective of circumstances. As already noted, the range of possible circumstances involving indecent assault, for example, is quite vast and serious violence is not a necessary ingredient of the

<sup>35</sup> See generally *Mark Anthony Seabrook v HKSAR* (1999) 2 HKCFAR 184; *Wong Chung Cheong v HKSAR* (2001) 4 HKCFAR 12; *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415.

offence. Thus the excepted offences straitjacket judicial discretion and impair the ability of courts to do justice in individual cases.

#### *4. No increased risk to the community*

There is no reason to believe that repeal of Schedule 3 will result in an increased incidence of violent crime in the Hong Kong community. Courts will continue to reserve suspended sentences for exceptional cases where there is little if any risk of recidivism. English experience with suspended sentences and indecent assault is instructive. English courts have been careful to restrict suspended sentences in sexual offence cases to only circumstances that are truly exceptional.<sup>36</sup>

It is also important to bear in mind that the Hong Kong suspended sentence power allows for the imposition of conditions, which if breached during the operational period can trigger the court's jurisdiction to order that the suspended sentence be served in its entirety. In this way, it is not necessary to wait until the offender commits another offence before the threat of the suspended sentence can materialize and the person is taken into custody.

#### *5. Illogical list of exceptions*

As mentioned above, the list of offences in Schedule 3 was last amended in 1981. The main consequence of this inattention is the illogicality and anomalies that can be seen when the list is closely reviewed against the underlying purpose of excepting violent crimes. The illogicalities are of two kinds. First, there is the omission of many other serious and violent offences from the list. Some obvious omissions are offences in the Crimes Ordinance (Cap 200) such as treason, incitement to mutiny, piracy with violence, causing explosion likely to endanger life or property, and arson endangering life – all offences punishable by life imprisonment. Perhaps these were left out because it was felt that if convicted of such offences, a suspended sentence would normally be out of the question. But the same might also be said about some of the serious offences that already appear on the Schedule 3 list, such as those that involve the intention to murder. Another anomaly is the omission of many

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<sup>36</sup> For cases where a suspended sentence was granted, see *Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41 (CA); *R v Arnold Weston* [1996] 1 Cr App R(S) 297 (CA), and refused in *Attorney General's Reference (No 39 of 2006)* [2007] 1 Cr App R(S) 34 (CA); *Attorney General's Reference (No 97 of 2003)* [2004] EWCA Crim 1626 (CA); *Attorney General's Reference (No 67 of 2003)* [2004] EWCA Crim 403 (CA).

other serious sexual offences<sup>37</sup> such as non-consensual buggery, assault with intent to commit buggery, gross indecency, bestiality, intercourse with a girl under 13 or under 16, intercourse with mentally incapacitated person, abduction of unmarried girl under 16, trafficking in persons to or from Hong Kong and so on. There is no coherent rationale to keep indecent assault on the list while leaving out all these other sexual offences. Many other examples of omitted serious offences can also be found in other ordinances.

The second kind of illogicality concerns the less serious offences that already exist on the Schedule 3 list. These are the summary conviction offences for which the maximum punishment is three years imprisonment or less. Many of these offences can be committed without any actual physical violence inflicted on another person. For example many of the firearm and weapons offences fall within this category. The inchoate offence of attempt indecent assault would also fall within this category. A person can be convicted of attempt indecent assault without any actual sexual touching (so long as more than merely preparatory steps were taken). It would seem that restricting the availability of this sentencing option in such cases overshoots even the historical rationale for having the list of exceptions.

The illogicalities can give rise to a sense of unfairness and arbitrariness in that offenders who are guilty of serious offences committed in exceptional circumstances may be treated differently in terms of sentence because the offence for which they have been convicted may or may not be listed in Schedule 3.

#### *6. Comparative law supports removing or reducing list*

Of the jurisdictions studied that have a similar suspended sentence power (Victoria (Australia), Canada, UK), none have maintained exceptions as wide and extensive as those under the current Hong Kong law. To be excepted in these other jurisdictions, the offence must typically involve significant violence or an element of organized crime. In Canada, although sexual assault is included on their exceptions list, it appears to only apply when the offence is prosecuted on indictment but not when it is prosecuted by summary conviction.

New Zealand has tried new and innovative sentencing reforms that give the judge a wider range of discretion to order non-custodial sentences that have sufficient safeguards to protect the public. Singapore has not adopted the suspended sentence power nor

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<sup>37</sup> See Crimes Ordinance (Cap 200).

demonstrated new reform ideas in this area; it does not appear to offer much by way of comparative experience for Hong Kong.

## **Conclusion**

This report concludes that there is a substantial case for abolishing the excepted offences to the suspended sentence power in Hong Kong. The historical justification of not wanting to appear to be soft on violent crime when prevalence was high is no longer viable. The important question is whether restoring judicial discretion to suspend sentences for excepted offences will contribute to more re-offending or violent crime generally. There is no evidence to support such a belief. Judges and magistrates in Hong Kong today can be relied upon to continue to imprison violent offenders or those who present a risk of re-offending. Suspending the sentence of someone who under current law would be sent to prison has its benefits both to society (e.g. rehabilitation and cost savings) and to the offender and his/her family (e.g. continue to work and provide for family). For many offenders the criminal process itself and the suspended sentence regime are sufficient to deter the individual from re-offending.

This study recommends repealing Schedule 3, but one caveat needs to be mentioned. Schedule 3 also serves to list excepted offences in relation to section 109A of the CPO. This section provides the norm that young offenders, aged between 16 and 20 years, should not be imprisoned unless there is no other appropriate method of dealing with the offender. This norm however does not apply to excepted offences. The study has not considered the implication of repealing Schedule 3 for the purposes of section 109A and a further study of this issue in the context of a general review of youth justice in Hong Kong is warranted. However, it should be noted that Schedule 3 was introduced for both suspended sentencing and the norm against youth imprisonment at the same time in 1971 as a result of the common concerns with the rise in youth violent crime at that time.

Moving one's focus beyond the list of exceptions and having regard to overseas experience, it is also worthwhile to consider the question of more substantial reform, by asking whether the toolbox of non-custodial sentencing options is sufficient to do justice in current circumstances. Hong Kong currently has a limited range of non-custodial sentencing options (e.g. discharges, probation, community service, fines, suspended sentences). Other

jurisdictions have shown more innovation in this area, and Hong Kong may wish to consider whether any of these options should be adopted. Some of the possible options for further discussion include

- Paying a fine instead of being imprisoned where a suspended sentence condition has been breached or reoffending has occurred;
- Deferred sentencing until after a period of rehabilitation has occurred;
- More restrictive conditions imposed including home detention;
- Intermittent sentences that allow prison sentences to be served on weekends, etc.

The Law Reform Commission of Hong Kong may want to consider undertaking a more comprehensive study of non-custodial sentencing options.

## Appendix 1: Historical Background to Excepted Offences

EXCEPTED OFFENCE	MAXIMUM IMPRISONMENT SENTENCE	HISTORICAL BACKGROUND
1. <a href="#">Manslaughter</a>	Life imprisonment.	Enacted in 1971 as part of the original bill introducing the suspended sentence power to Hong Kong (Criminal Procedure (Amendment) Bill 1971).
2. <a href="#">Rape</a> or <a href="#">attempted rape</a>	Conviction on indictment: life imprisonment.	The addition of the ‘excepted offences’ Schedule (Schedule 3 of the CPO) to “exclude from the operation of the provisions which empower the courts to impose suspended sentences those kinds of offence which are causing particular concern” was, in view of the firm opposition from within Government, a necessary concession to enacting the amendments. <sup>38</sup> The Unofficial Members of the Legislative Council were said to be unified in their opposition to the passing of the Clause without provisions for the exception of violent crimes from its operation. <sup>39</sup>
3. Affray	Conviction on indictment: 7 yrs imprisonment. <sup>40</sup>	
4. Any offence against <a href="#">section 4</a> , <a href="#">5</a> or <a href="#">6</a> of the <a href="#">Dangerous Drugs Ordinance (Cap 134)</a>	<p><b>Section 4 (Trafficking in dangerous drug):</b> Conviction on indictment: life imprisonment. Summary conviction: 3yrs imprisonment.</p> <p><b>Section 5 (Dangerous drug not to be supplied except to person authorized or licensed to be in possession thereof):</b> Conviction on indictment: 15 yrs imprisonment. Summary conviction: 3yrs imprisonment.</p> <p><b>Section 6 (Manufacture of dangerous drug):</b> Conviction on indictment: life imprisonment.</p>	
5. Any offence contrary to <a href="#">section 10</a> , <a href="#">11</a> , <a href="#">12</a> , <a href="#">13</a> , <a href="#">14</a> , <a href="#">17</a> , <a href="#">19</a> , <a href="#">20</a> , <a href="#">21</a> , <a href="#">22</a> , <a href="#">23</a> , <a href="#">28</a> , <a href="#">29</a> , <a href="#">30</a> , <a href="#">36</a> or <a href="#">42</a> of the Offences against the Person Ordinance ( <a href="#">Cap 212</a> )	<p><b>Section 10 (Administering poison or wounding with intent to murder):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 11 (Destroying or damaging building with intent to murder):</b> Conviction on indictment: life imprisonment.</p>	

<sup>38</sup> Attorney General, Hong Kong Legislative Council, 20 January 1971, Criminal Procedure (Amendment) Bill 1971, resumption of debate on second reading. *Hong Kong Hansard*, 20 January 1971, p 356, available at <http://www.legco.gov.hk/yr70-71/h710120.pdf>

<sup>39</sup> Mr. Oswald Cheung, Hong Kong Legislative Council, 20 January 1971, Criminal Procedure (Amendment) Bill 1971, resumption of debate on second reading. *Hong Kong Hansard*, 20 January 1971, pp 349-350, available at <http://www.legco.gov.hk/yr70-71/h710120.pdf>

<sup>40</sup> In Hong Kong, the offence of affray remains a common law offence. See further *The Queen v Le Van Luong* [1989] HKCA 88; CACC210/198.

	<p><b>Section 12 (Setting fire or casting away ship with intent to murder):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 13 (Attempting to administer poison, or shooting, or attempting to shoot or drown, etc., with intent to murder):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 14 (Attempting to commit murder by means not specified):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 17 (Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 19 (Wounding or inflicting grievous bodily harm):</b> Conviction on indictment: 3yrs imprisonment.</p> <p><b>Section 20 (Attempting to choke, etc., in order to commit indictable offence):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 21 (Using chloroform, etc., in order to commit indictable offence):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 22 (Administering poison, etc., so as to endanger life or inflict grievous bodily harm):</b> Conviction on indictment: 10 yrs imprisonment</p> <p><b>Section 23 (Administering poison, etc., with intent to injure, etc.):</b> Conviction on indictment: 3 yrs imprisonment</p> <p><b>Section 28 (Causing bodily injury by gunpowder, etc.):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 29 (Causing gunpowder to explode, etc., or throwing corrosive fluid, with intent to do grievous bodily harm):</b></p>	
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	<p>Conviction on indictment: life imprisonment.</p> <p><b>Section 30 (Placing gunpowder near building, etc., with intent to do bodily injury):</b> Conviction on indictment: 14 yrs imprisonment</p> <p><b>Section 36 (Assault with intent to commit offence, or on police officer, etc.):</b> Conviction either summarily or on indictment: 2 yrs imprisonment</p> <p><b>Section 42 (Forcible taking or detention of person with intent to sell him):</b> Conviction on indictment: life imprisonment.</p>	
<p>6. Any offence or attempted offence against <a href="#">section 122</a> of the <a href="#">Crimes Ordinance (Cap 200)</a>. (Amended 1 of 1978 s. 8)</p> <p>[Originally, “Any offence or attempted offence against section 7 of the Protection of Women and Juveniles Ordinance.”]</p>	<p><b>Section 122 (Indecent assault):</b> Conviction on indictment: 10 yrs imprisonment</p>	<p>Enacted in 1971 as part of the original bill introducing the suspended sentence power to Hong Kong (Criminal Procedure (Amendment) Bill 1971), but originally referred to indecent assault as criminalized in s 7 of the Protection of Women and Juveniles Ordinance.</p> <p>The Crimes (Amendment) Bill of 1977 enhanced the maximum for indecent assault to 5 yrs imprisonment on indictment. The amendment was part of a parcel of enhanced maximums for sexual offences passed in the Legislature as a means of deterring the exploitation of women for sexual purposes.<sup>41</sup></p> <p>No debate or comments on the prevalence or manner of indecent assaults being committed in Hong Kong occurred during the readings of the Bill, or any discussion of why the enhancement of the maximum for this offence was packaged with a set of amendments largely enacted in response to public concern over the issues surrounding prostitution, abuse and trafficking of women in the city, and, in particular, the role of the triads in this scenario.</p> <p>The penalty for indecent assault was raised further, increasing the maximum to</p>

<sup>41</sup> The discussion of the Members on the thrust of the Bill and the impetus for enhanced tariffs can be seen in the Second Reading, at: [http://www.legco.gov.hk/yr76-77/english/lc\\_sitg/hansard/h770119.pdf](http://www.legco.gov.hk/yr76-77/english/lc_sitg/hansard/h770119.pdf), and the Resumption of the debate on the Second Reading, available at: [http://www.legco.gov.hk/yr77-78/english/lc\\_sitg/hansard/h771221.pdf](http://www.legco.gov.hk/yr77-78/english/lc_sitg/hansard/h771221.pdf)

		<p>10yrs imprisonment in 1991 as part of the series of reforms of the Crimes Ordinance made to decriminalize homosexual acts. The legislature repealed the common law offence of buggery as well as the provisions of the Offences Against the Person Ordinance relating specifically to homosexual acts (ss 49 – 53), and it was deemed necessary as a result to extend to men and boys the protections offered to women and girls under the Crimes Ordinance in relation to sexual exploitation. The enhancement of the maximum for indecent assault under s 122 was necessary in order to bring it in line with the penalty for indecent assault on a man under s 50(b) of the Offences Against the Person Ordinance, a section repealed by the Bill.<sup>42</sup></p>
<p>7. An offence under any section in Part III of the <a href="#">Firearms and Ammunition Ordinance (Cap 238)</a>. (Replaced 68 of 1981 s. 56)</p> <p>[Originally, “Any offence against section 4 of the Arms and Ammunition Ordinance.”]</p> <p>[NB: Offences in Part III include the following ss <a href="#">13</a>, <a href="#">14</a>, <a href="#">15</a>, <a href="#">16</a>, <a href="#">17</a>, <a href="#">18</a>, <a href="#">19</a>, <a href="#">20</a>, <a href="#">21</a>, <a href="#">22</a>, and <a href="#">23</a>.]</p>	<p><b>Section 13 (Possession of arms or ammunition without licence):</b> Conviction on indictment: 14 yrs imprisonment</p> <p><b>Section 14 (Dealing in arms or ammunition without a licence):</b> Conviction on indictment: 10 yrs imprisonment</p> <p><b>Section 15 (Giving possession of arms or ammunition to unlicensed person and obtaining possession by false pretences):</b> Conviction on indictment for knowingly permitting or allowing another to obtain possession without licence: 5 yrs imprisonment (sub-s 1)</p> <p>Summary conviction for knowingly producing a false licence: 2 yrs imprisonment (sub-s 4)</p> <p><b>Section 16 (Possession of arms or ammunition with intent to endanger life):</b> Conviction on indictment: life imprisonment.</p> <p><b>Section 17 (Resisting arrest with or committing offence while in possession of arms or ammunition or imitation firearm):</b></p>	<p>The original 1971 ordinance excepted offences in one section of the Arms and Ammunition Ordinance. In 1981, this item was replaced with many new offences under the Firearms and Ammunition Ordinance.</p> <p>The replacement arose as a result of the question of restricting the sale of toy pistols. The matter was highlighted as a result of an increase in robberies committed with such imitation firearms, and increasing public concern over the increase in incidents involving the use of firearms and/or imitation firearms.</p> <p>The issue of imitation, or ‘toy’, pistols which could be converted into real firearms, was previously considered within the Government, but presented problems of legal definition and enforcement. The Arms and Ammunition Bill, as it was originally called, presented problems, in that the Government sought, through legislative reform, to separate and define imitation firearms from ‘weapons’ (as they would henceforth be dealt with under the Weapons Ordinance). The Bill was renamed the ‘Firearms and Ammunition Ordinance’ as a result. The creation of two separate ordinances was an effort to modernize the 1933 Arms and Ammunition Ordinance,</p>

<sup>42</sup> The Second Reading of the Crimes (Amendment) Bill 1991 is available at: [http://www.legco.gov.hk/yr90-91/english/lc\\_sitg/hansard/h910417.pdf](http://www.legco.gov.hk/yr90-91/english/lc_sitg/hansard/h910417.pdf). Resumption of the Debate on Second Reading at: [http://www.legco.gov.hk/yr90-91/english/lc\\_sitg/hansard/h910710.pdf](http://www.legco.gov.hk/yr90-91/english/lc_sitg/hansard/h910710.pdf)

	<p>Conviction on indictment for making use of arms or ammunition or imitation firearm to resist or prevent lawful arrest: life imprisonment (sub-s 1)</p> <p>Conviction on indictment for having in possession any arms or ammunition or imitation firearm at the time of committing an offence: 14 yrs imprisonment (sub-s 2)</p> <p><b>Section 18 (Carrying arms or ammunition or imitation firearm with criminal intent):</b> Conviction on indictment: life imprisonment</p> <p><b>Section 19 (Trespassing with arms or ammunition or imitation firearm):</b> Conviction on indictment: 14 yrs imprisonment</p> <p><b>Section 20 (Possession of an imitation firearm):</b> Summary conviction: 2 yrs imprisonment</p> <p>Subsequent conviction under s 20 of an offence within Schedule III or under this Ordinance within 10 yrs: 7 yrs imprisonment</p> <p><b>Section 21 (Converting imitation firearm into a firearm):</b> Conviction on indictment: 14 yrs imprisonment</p> <p><b>Section 22 (Dangerous or reckless use of firearm, etc.):</b> Conviction on indictment: 7 yrs imprisonment</p> <p><b>Section 23 (Failure to comply with terms and conditions of licence, etc.):</b> Conviction on indictment: 10 yrs imprisonment. Summary conviction: 6 m imprisonment. (sub-s 1)</p> <p>Summary conviction of person holding an exemption under sub-s (3) but fails to comply with term or condition: 6 m imprisonment (sub-s 2)</p> <p>Summary conviction of person who fails</p>	<p>the provisions and penalties of which did not reflect modern challenges.<sup>43</sup></p> <p>Under the new Firearms and Ammunition Ordinance, imitation firearms would be dealt with in a more severe manner than weapons.</p>
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<sup>43</sup> Second Reading Firearms and Ammunition Bill 1981, available at: [http://www.legco.gov.hk/yr80-81/english/lc\\_sitg/hansard/h810730.pdf](http://www.legco.gov.hk/yr80-81/english/lc_sitg/hansard/h810730.pdf)

	to comply with term or condition imposed by the Commissioner: 6 m imprisonment (sub-s 3)	
8. Any offence against <a href="#">section 10</a> or <a href="#">12</a> of the <a href="#">Theft Ordinance (Cap 210)</a>	<p><b>Section 10 (Robbery):</b> Conviction on indictment: life imprisonment</p> <p><b>Section 12 (Aggravated burglary):</b> Conviction on indictment: life imprisonment</p>	Enacted in 1971 as part of the original bill introducing the suspended sentence power to Hong Kong (Criminal Procedure (Amendment) Bill 1971).
9. Any offence against section <a href="#">33</a> of the <a href="#">Public Order Ordinance (Cap 245)</a> . (Added L.N. 250 of 1972)	<p><b>Section 33 (Possession of offensive weapon in public place):</b> If of the age of 25 yrs or more, summary conviction or conviction on indictment: 3 yrs imprisonment</p> <p>If under the age of 14, to be dealt with under the provisions of the Juvenile Offenders Ordinance (<a href="#">Cap 226</a>)</p> <p>If the offender is not less than 14 yrs of age but has not yet attained 17 yrs of age:</p> <ul style="list-style-type: none"> <li>(i) to imprisonment for not more than 3 years;</li> <li>(ii) to a detention order under the provisions of the Detention Centres Ordinance (<a href="#">Cap 239</a>), but subject to the provisions of that Ordinance;</li> <li>(iii) subject to the provisions of the Training Centres Ordinance (<a href="#">Cap 280</a>); or</li> <li>(iv) subject to the provisions of the Rehabilitation Centres Ordinance (<a href="#">Cap 567</a>).</li> </ul> <p>If the offender is not less than 17 yrs of age but has not yet attained 25 yrs of age:</p> <ul style="list-style-type: none"> <li>(i) to imprisonment for not more than 3 years;</li> <li>(ii) to a detention order under the provisions of the Detention Centres Ordinance (<a href="#">Cap 239</a>), but subject to the provisions of that Ordinance; or</li> <li>(iii) subject to the provisions of the Rehabilitation Centres Ordinance (<a href="#">Cap 567</a>).</li> </ul>	<p>Motion for the addition of this offence to Schedule 3 was made by the Attorney General, Mr. Denys Roberts, in the Legislative Council on 15 November 1972.</p> <p>The Attorney General spoke on the steady and substantial growth of the volume of crimes of violence in his Motion, and noted that the welfare of the inhabitants of Hong Kong was perhaps the main concern citizen’s looked toward in assessing the effectiveness of Government.</p> <p>The situation regarding public safety was of such concern that the Attorney General proposed to move a resolution, under s 124 of the Criminal Procedure Ordinance, to add the offence of possession of an offensive weapon to those in relation to which a sentence of imprisonment may not be suspended.</p> <p>The object of this amendment was to act as a substantial deterrent in the effort to prevent the carrying of offensive weapons. During the motion, mention was also made of the possibility of introducing mandatory minimum sentences also for robbery or serious assaults should the efforts to curb offences of this nature fail, and alternatively to consider the return of ‘a form of rigorous imprisonment for use in the case of those convicted of crimes involving violence’. The object of such a regime would be to introduce a tougher and more exacting prison regime than applicable to ordinary prisoners.<sup>44</sup></p>

<sup>44</sup> Legislative Council Proceedings, Wednesday, 15 November 1972. Available at: <http://www.legco.gov.hk/yr72-73/h721115.pdf>

		The debates on the 1971 Corporal Punishment Amendment (Amendment) Bill 1971, which added s 33 offences to the list of those cases for which corporal punishment might be awarded to persons aged 16 or more, also pointed to the increase in the number of individuals tried for this type of offence. The offence was added to the list of offences covered under the Bill in the hope that it would act as a deterrent. <sup>45</sup>
10. Any offence under <a href="#">section 4</a> or <a href="#">10</a> of the <a href="#">Weapons Ordinance (Cap 217)</a> . (Added 69 of 1981 s. 19)	<p><b>Section 4 (Possession of prohibited weapons):</b> Summary conviction: 3 yrs imprisonment</p> <p><b>Section 10 (Offences relating to martial arts weapons)</b> Summary conviction: 2 yrs imprisonment</p> <p>Summary conviction on the sub-s 2 offence: 3 years imprisonment</p>	<p>Added to list in 1981 with the enactment of the Weapons Ordinance (Cap 217), Ord. 69 of 1981.</p> <p>For a discussion of the addition of weapons-related offences in 1981, see above on the creation of separate ordinances for firearms and weapons related offences. With separate ordinances, came the need to update the provisions under Schedule 3 to reflect the new offences.</p>

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<sup>45</sup> Second Reading, Corporal Punishment (Amendment) Bill 1971, available at: <http://www.legco.gov.hk/yr70-71/h710324.pdf>

## Appendix 2: Comparative Study

### 1. Australia (Victoria)

#### *Introduction*

A suspended sentence in Australia is a sentence which is, like its Hong Kong counterpart, a sentence of imprisonment which is not put into effect. It allows judges to decide that while an offence might be serious enough to attract a jail term, owing to the particular circumstances of the offence, all or some of the imprisonment should be suspended. If an offender breaches the term(s) of the suspended sentence by committing another offence, they are liable to serve the remainder of the suspended sentence in prison.

#### *Recommendations of the Sentencing Advisory Council*

In 2006 and 2008, the Sentencing Advisory Council (SAC) – a Victorian statutory body which researches sentencing and advises the government – published reports on suspended sentences. In its first report, the Council recommended phasing out suspended sentences over three years, along with changes to other community based orders. In its second report, the Council did not recommend abolishing suspended sentences. Instead, it suggested changes to a number of sentencing options, and the monitoring of the impact of these changes before any decision was made on the future of suspended sentences.

The findings of the SAC and the election of new State Governments elected on platforms of deterrence of crime through retributive mechanisms (such as imprisonment) have informed numerous changes to the laws surrounding suspended sentences in recent years. In 2006, limitations were enacted restricting the use of suspended sentences for serious offences – including murder, manslaughter, intentionally causing serious injury, armed robbery, rape and some other sexual offences to cases where there are exceptional circumstances.<sup>46</sup>

In October 2010, the Government further removed suspended sentences for all ‘serious offences’, including armed robbery, sexual penetration of a child under 16 and trafficking in a commercial quantity of a drug of dependence. The Sentencing Further Amendment Act

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<sup>46</sup> Sentencing (Suspended Sentences) Act 2006 Act No. 82/2006

2010 also created a new intensive correction management order as an alternative to a suspended sentence. This order quickly fell out of favour and was replaced as of January 2012 with the community correction order (CCO). The distinction between the intensive correction management order and the CCO is that the latter, while served in the community, can also include up to three months' imprisonment.

#### *Legislative basis for suspended sentences*

Section 27(1A) of the Sentencing Act 1991 describes the circumstances under which courts in Victoria may order or refrain from ordering a suspended sentence. That section provides:

27(1A) In considering whether it is desirable in the circumstances to make an order suspending a sentence of imprisonment, a court must have regard to—

- (a) the need, considering the nature of the offence, its impact on any victim of the offence and any injury, loss or damage resulting directly from the offence, to ensure that the sentence—
  - (i) adequately manifests the denunciation by the court of the type of conduct in which the offender engaged; and
  - (ii) adequately deters the offender or other persons from committing offences of the same or a similar character; and
  - (iii) reflects the gravity of the offence; and
- (b) any previous suspended sentence of imprisonment imposed on the offender and whether the offender breached the order suspending that sentence; and
- (c) without limiting paragraph (b), whether the offence was committed during the operational period of a suspended sentence of imprisonment; and
- (d) the degree of risk of the offender committing another offence punishable by imprisonment during the operational period of the sentence, if it were to be suspended.

#### *Limitations restricting the use of suspended sentences*

As noted above, the Sentencing Further Amendment Act of 2010 deemed that suspended sentences were no longer available for 'significant offences'. These offences have been defined in section 3 of the 2010 Act as meaning —

- (a) an offence against section 17 of the [Crimes Act 1958](#), (causing serious injury recklessly) unless heard and determined summarily;
- (b) an offence against section 77 of the [Crimes Act 1958](#), (aggravated burglary) unless heard and determined summarily;

- (c) an offence against section 197 of the [Crimes Act 1958](#), where the offence is one of destroying or damaging property by fire (arson) unless heard and determined summarily;
- (d) an offence against section 197A of the [Crimes Act 1958](#), (arson causing death);
- (e) an offence against section 71 of the [Drugs, Poisons and Controlled Substances Act 1981](#), (trafficking in a large commercial quantity of a drug of dependence);
- (f) an offence against section 71AA of the [Drugs, Poisons and Controlled Substances Act 1981](#), (trafficking in a commercial quantity of a drug of dependence)...

#### *Abolition of intermediate orders*

The 2010 Amendment Act has abolished the four intermediate sentencing orders (i.e. those orders sitting between fines and imprisonment). Courts may now no longer sentence offenders to a combined custody and treatment order; to home detention; to an intensive community order; nor to a community-based order. The abolished intermediate orders have been replaced with the community correction order (CCO).

#### *Deferral*

As of January 2012, the Magistrates and County Courts in Victoria may now defer sentencing for up to 12 months for offenders of any age.<sup>47</sup> Deferral of sentence gives offenders the opportunity to take part in programs designed to curb the risk of re-offending and address the cause of their behavior. The courts can then take into account offender participation and rehabilitation efforts when sentencing.

#### *Community correction order (CCO)*

The Magistrates Courts are empowered to impose a CCO for a maximum of two years. In addition, a CCO can be imposed by higher courts for up to the statutory maximum term of imprisonment for that offence. For example, for the offence of theft the maximum length of a CCO could be up to 10 years – the same as the maximum term of imprisonment available for that offence.

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<sup>47</sup> This option was previously only available in the Magistrates Courts for up to 6 months and for offenders between the ages of 18 – 25.

### Conditions<sup>48</sup>

All those sentenced to a CCO must abide by basic conditions, such as not reoffending, not leaving Victoria without permission and abiding by any order of the Secretary of the Department of Justice.

Each CCO will also include at least one other ‘optional’ condition chosen according to the purposes of sentencing for that offender and that offence. Optional conditions that may be attached to a CCO for all or part of its duration can require the offender to:

- undertake medical treatment or other rehabilitation
- remain free of alcohol and/or drugs
- not enter, remain within or consume alcohol in a licensed premise (hotel, club, restaurant)
- complete unpaid community work up to a total of 600 hours
- be supervised, monitored and managed by a corrections worker
- abstain from contact or association with particular people (e.g. their co-offenders)
- live (or not live) at a specified address
- stay away from nominated places or areas
- abide by a curfew, remaining at a specified place for two to 12 hours each day
- be monitored and reviewed by the court to ensure compliance with the order
- pay a bond – a sum of money that may be forfeited wholly or partly if the offender fails to comply with any condition imposed.

An offender who breaches the conditions of their CCO may be resentenced for the original offence and face an additional three months’ imprisonment or a fine of 30 penalty units.

Optional conditions may be imposed for only part of a CCO. The court may fix a part of the total length of the CCO as an ‘intensive compliance period’ during which one or more of the conditions must be completed.

### Intensive compliance

If a court imposes a community correction order of six months or longer, the court can set an intensive compliance period for part of the order. For example, if a community correction order is imposed for one year, an intensive compliance period might be fixed for a lesser period, such as six months. The court will order that one or more of the conditions attached to the community correction order must be completed during this intensive compliance period.

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<sup>48</sup> Ibid.

## 2. New Zealand

### *Suspension of sentences under the Criminal Justice Amendment Act 1993*

In New Zealand, the suspended prison sentence was introduced as a new sentencing option by the Criminal Justice Amendment Act 1993 (the 1993 Act).<sup>49</sup> Under the provisions of the 1993 Act, prison sentences of not less than six months and not more than two years could be suspended for a period not exceeding two years. If the offender was convicted of another imprisonable offence within the suspension period, the suspended sentence could be activated. There were excepted offences to the suspended sentence power. In one of the first Court of Appeal judgments to consider the new provision, the following statements were made:

Section 21A affords the Court an important additional discretionary power in attempting to meet the often conflicting demands requiring consideration on sentencing. It is we think plain that the principal purpose of the new provision is to encourage rehabilitation and provide the Courts with an effective means of achieving that end, by holding a prison sentence over the offender's head. Put another way it enables the Court to give the offender one last chance in a manner which clearly spells out the consequences if he offends again. It is available to be used in cases of moderately serious offending but where it is thought there is a sufficient opportunity for reform, and the need to deter others is not paramount. Although not so limited, it may be particularly useful in cases of youthful offenders. To avoid any perception that the sentence is a soft option the legislature has given it teeth by providing that the length of the sentence of imprisonment is fixed at the time the suspended sentence is imposed, that it is to correspond in length to the term that would have been imposed in the absence of power to suspend, and that the Court before whom the offender appears on further conviction is to order the suspended sentence to take effect, unless of the opinion it would be unjust to do so. So there is a presumption that upon further offending punishable by imprisonment the term previously fixed will have to be served.<sup>50</sup>

A statistical analysis conducted two years following the enactment of the 1993 Amendments<sup>51</sup> indicated that overall, 3.6% of offenders with proved cases in 1995 received a suspended sentence, either alone or in combination with another sentence. The factor most strongly predictive of a suspended sentence was the seriousness of the offence, with over

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<sup>49</sup> See Criminal Justice Act 1985, s. 21A.

<sup>50</sup> *R v Petersen* [1994] 2 NZLR 533, 537 (CA).

<sup>51</sup> *Sentencing in New Zealand: A Statistical Analysis*, available at: <http://www.justice.govt.nz/publications/global-publications/s/sentencing-in-new-zealand-a-statistical-analysis/suspended-prison-sentences>

20% of offences where the average length of imprisonment was 150-300 days resulting in suspended sentences.

### *Sentencing Act 2002*

In the lead up to the 1999 election, a Referendum on the criminal justice system in New Zealand was held, with the public being asked: "Should there be a reform of our Justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?" The public response was an 84% voter turn-out, with over 91% of voters agreeing to the question.<sup>52</sup>

In response, the Government passed two acts, the Sentencing Act 2002, and the Parole Act 2002, which served as substitute for the Criminal Justice Act 1985. Among the sweeping changes to the sentencing provisions of courts was the abolition of suspended sentences.

Hansard records on Questions to Ministers during the debates over the abolition of suspended sentences indicate that the primary reason they had fallen out of favour as a sentencing option was owing to their 'net-widening' effect.<sup>53</sup> It was thought that people who would not otherwise receive a sentence of imprisonment were receiving suspended sentences, and that when these individuals breached the conditions attached to their suspension and activated the period of imprisonment attached to the suspension, the result was that these offenders, who would not normally spend time in prison for their offences were doing so, and in large numbers.

The 2002 Sentencing Act also introduced a statutory hierarchy of sentences and orders, which delineated the range of sentences and orders available to the courts.<sup>54</sup> These include

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<sup>52</sup> *Sentencing reform in New Zealand: An analysis of the Sentencing Act 2002*, available at: [http://findarticles.com/p/articles/mi\\_hb3370/is\\_3\\_36/ai\\_n29057975/](http://findarticles.com/p/articles/mi_hb3370/is_3_36/ai_n29057975/)

<sup>53</sup> See, *Hansard*, Questions to Ministers 14 September 2001, Question number 12913.

<sup>54</sup> The Hierarchy of sentences and orders, of the Sentencing Act 2002, s 10A provides:

10A Hierarchy of sentences and orders

(1) The hierarchy of sentences and orders set out in subsection (2) reflects the relative level of supervision and monitoring of, and restrictions imposed on, an offender under each sentence or order.

(2) The hierarchy of sentences and orders, from the least restrictive to the most restrictive, is as follows:

- (a) discharge or order to come up for sentence if called on;
- (b) sentences of a fine and reparation;

the power to order fines and reparations, the power to order community-based sentences with work or intensive supervision requirements attached, and the power to commit an offender to a period of home-detention.

### *Criminal Justice Reform Bill 2006*

Despite Ministerial concerns expressed over the net-widening effect of suspended sentences, however, statistics indicate that in the six years leading up to 2005 (the latter three of which no power to suspend sentences existed), New Zealand's prison population increased by 23%, with almost half of the increase being made up of offenders on custodial remand, awaiting trial.<sup>55</sup> By May of 2006, the number of prison inmates had reached a record high of 8076.<sup>56</sup> In an attempt to address this trend, Parliament introduced the Criminal Justice Reform Bill in December 2006.

### *Sentencing Amendment Act 2007*

The Sentencing Amendment Act 2007 was one of those Acts to come out of the Criminal Justice Reform Bill. One of its most useful features is that it provides a greater number of community-based sentences available to the court when sentencing. In addition to the existing sentences of community work and supervision, new and more restrictive sentences of community detention and intensive supervision were added. Offenders sentenced to community detention are subject to a curfew at a certain address, which the court can impose at certain times to prevent further offending occurring. Electronic monitoring of curfews was also introduced, so that any breaches could be detected as soon as possible.

Another major change under the Sentencing Amendment Act is the way in which home detention is administered. Under the previous system, the court was able to grant offenders sentenced to a term of imprisonment of two years or less leave to apply for home detention, but the ultimate decision lay with the Parole Board. Now the process has been streamlined to reduce the number of offenders sentenced to imprisonment, by giving the court the ability to

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- (c) community-based sentences of community work and supervision:
  - (d) community-based sentences of intensive supervision and community detention:
  - (e) sentence of home detention:
  - (f) sentence of imprisonment.

<sup>55</sup> *Effective Interventions*, Cabinet Policy Committee, Paper 1 Overview, at para 30.

<sup>56</sup> O'Driscoll DCJ, Prof Hall, G, Mellor, T, Sentencing Update, New Zealand Law Society, 2007, 2.

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sentence offenders to home detention immediately where it would otherwise have sentenced the offender to a short-term sentence of imprisonment. The use of home detention in the past has also shown that offenders serving terms of imprisonment by that method have had lower rates of reconviction than even those completing community-based sentences.<sup>57</sup>

#### *Impact of custody on women and their children*

Criminologists in New Zealand have noted that the abolition of suspended sentences has had a profound impact and unintended contribution to the spiralling rates of imprisonment of women in the country in recent years.<sup>58</sup> A disproportionate number of those receiving suspended sentences when they were available to the courts were women.<sup>59</sup> The situation has been attributed to the fact that women were more likely to be first time offenders, to commit minor offences, to have responsibility for young children and are perceived as generally less likely to re-offend. The wider costs of unnecessary remand on women has also been noted in the UK, where it has observed that women are more likely than men to be remanded to prison for offences which would not lead to a custodial sentence. According to the UK Ministry of Justice Criminal Statistics, in 2010 almost half of all women imprisoned were received on remand for example.<sup>60</sup>

#### *Community-based sentences*

It has been noted that the New Zealand sentencing provisions reiterate the concept of parsimony with regard to imprisonment in several ways. In section 8(g) of the 2002 Act for example, one of the principles of sentencing states that the court: "must impose the least restrictive outcome that is appropriate in the circumstances". Furthermore, section 16(2) of the Act states that:

The court must not impose a sentence of imprisonment unless it is satisfied that:

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<sup>57</sup> Ibid., 14

<sup>58</sup> Tolmie Julia, *Women and the Criminal Justice System*, Criminal Justice in New Zealand, 2007, LexisNexis New Zealand.

<sup>59</sup> The Ministry of Justice *Forecasts of the Male and Female Sentenced Prison Populations* published in 2004 indicated that 300-350 female offenders were receiving suspended sentences prior to their abolition, a very high number relative to the total prison population of female offenders of just 400-500.

<sup>60</sup> Ministry of Justice (2010) *Offender Management Caseload Statistics 2009*, London, Ministry of Justice.

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(a) a sentence is being imposed for all or any of the purposes in section 7(1)(a) to (c), (e), (f), or (g);<sup>61</sup> and

(b) those purposes cannot be achieved by a sentence other than imprisonment; and

(c) no other sentence would be consistent with the application of the principles in section 8 to the particular case.

These principles, when combined with the addition of the statutory hierarchy of sentencing options, seek to alleviate the over-use of imprisonment in New Zealand. To avoid public perception that the courts may be going soft on criminals, protections have been put in place in ss46 and 47 of the 2002 Act, which deem that a court may impose a sentence of supervision only if it is satisfied that a sentence of supervision would reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender, and that where a court imposes a sentence of supervision in respect of 2 or more offences (whether on the same occasion or on different occasions), the sentences must be served concurrently.

### 3. Canada

#### *Conditional sentences*

‘Conditional sentencing’, introduced in Canada in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility.<sup>62</sup> It is a

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<sup>61</sup> Section 7(1) of the Act states that the purposes for which a court may sentence or otherwise deal with an offender are:

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) to promote in the offender a sense of responsibility for, and acknowledgement of, that harm; or
- (c) to provide for the interests of the victim of the offence; or
- (d) to provide reparation for harm done by the offending; or
- (e) to denounce the conduct in which the offender was involved; or
- (f) to deter the offender or other persons from committing the same or a similar offence; or
- (g) to protect the community from the offender; or
- (h) to assist in the offender's rehabilitation and reintegration; or
- (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

<sup>62</sup> Conditional sentences were introduced by Bill C-41, now S.C. 1995, c. 22, proclaimed in force on 3 September 1996, amending the *Criminal Code*, R.S.C. 1985, c. C-46. Amendments to the conditional sentencing regime were made by Bill C-51, An Act to amend the Criminal Code, the Controlled Drugs and

midway point between imprisonment and sanctions such as probation or fines, and is the equivalent of what Hong Kong courts would consider a provision enabling the suspension of a sentence of imprisonment.<sup>63</sup> The conditional sentence was introduced as part of a review of the sentencing provisions in the *Criminal Code*. These provisions included the fundamental purpose and the principles of sentencing. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, but allowance is made for specific aggravating circumstances, which should increase sentences notwithstanding. During a conditional sentence, the offender is supervised and must follow the rules set by the judge or risk going to prison. Since a conditional sentence is a prison term that the offender is allowed to serve in the community, according to set conditions, if the offender does not follow the conditions, he or she will be brought back to court and the judge can order the offender to serve the rest of the sentence in prison.

A 2005 report by the Law and Government Division of the Canadian Parliamentary Information and Research Service describes the primary function of conditional sentencing as “reduc[ing] the reliance upon incarceration by providing an alternative sentencing mechanism to the courts. In addition, the conditional sentence provides an opportunity to further incorporate restorative justice concepts into the sentencing process by encouraging those who have caused harm to acknowledge this fact and to make reparation.”<sup>64</sup>

#### *Comparison of conditional sentences, suspended sentences and probation orders*<sup>65</sup>

There are several important differences between conditional sentences, suspended sentences, and probation orders. Firstly, unlike the suspended sentence under section 731(1)(a), the court acting under the conditional sentences provision actually imposes a sentence of

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Substances Act and the Corrections and Conditional Release Act, S.C. 1999, c. 5. The relevant part (clauses 39-42) came into force on 1 July 1999.

<sup>63</sup> The term ‘suspended sentence’ in Canadian law refers to a sentence which is passed under section 731(1)(a) of the Criminal Code. It differs from the use of the term in Hong Kong in that it does not impose a sentence of imprisonment, but rather refers to the suspension of the passing of the sentence and directs that the offender be released on such conditions as prescribed in the offender’s probation order. In Canada, the term ‘conditional sentence’ is used to denote the imposition of a suspended sentence of imprisonment that is served in the community, rather than in a correctional facility.

<sup>64</sup> Library of Parliament, Conditional Sentences, available at:

<http://www.parl.gc.ca/Content/LOP/researchpublications/prb0544-e.htm>

<sup>65</sup> Ibid.

imprisonment. This sentence, however, is served in the community, rather than in a correctional facility.

Secondly, under section 742.3(2)(e) the court may order the offender to attend a treatment program as part of a conditional sentence. There is no statutory requirement for the offender's consent as there is under section 732.1(3)(g) for probation orders.

Thirdly, the wording of the residual clause in section 732.1(3)(h) dealing with optional conditions in probation orders states that one of their goals is to facilitate the offender's successful reintegration into the community. This is unlike the residual clause in section 742.3(2)(f) dealing with conditions of conditional sentences, which does not focus principally on the rehabilitation and reintegration of the offender and therefore authorizes the imposition of punitive conditions such as house arrest or strict curfews. This again emphasizes that conditional sentences are considered to be more punitive than probation orders.

Finally, the punishment for breaching the conditions of a conditional sentence range from the court taking no action to the offender being required to serve the remainder of his or her sentence in custody. By contrast, breach of a probation order is made its own offence, with imprisonment a possible punishment. The differing consequences for breach of a condition is related to the fact that breaches of conditional sentence orders need be proved only on a balance of probabilities, while breaches of probation orders, since they constitute a new offence, must be proved beyond a reasonable doubt.

#### *Legislative basis for conditional sentencing*

The provisions governing conditional sentences are set out in sections 742 to 742.7 of the *Criminal Code*. These sections set out four criteria that must be met before a conditional sentence can be considered by the sentencing judge:

1. The offence for which the person has been convicted must not be punishable by a minimum term of imprisonment;
2. The sentencing judge must have determined that the offence should be subject to a term of imprisonment of less than two years;
3. The sentencing judge must be satisfied that serving the sentence in the community would not endanger the safety of the community; and

4. The sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in sections 718 to 718.2 of the *Criminal Code*.<sup>66</sup>

In addition to meeting the criteria set out above, conditional sentences involve a number of compulsory conditions, as set out in section 742.3 of the *Criminal Code*. Under these conditions, the offender is compelled to:

- Keep the peace and be of good behaviour;
- Appear before the court when required to do so;
- Report to a supervisor when required;
- Remain within the jurisdiction of the court, unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- Notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

*When is a conditional sentence possible?*

A judge can give an offender a conditional sentence when:

- the *Criminal Code* does not set a minimum prison term for the offence;
- the judge decides that the sentence should be less than two years;
- the judge setting the sentence is convinced that allowing the offender to remain in the community is not a danger to the public; and
- the judge is convinced that a conditional sentence is consistent with the purposes and principles of sentencing set out in the *Criminal Code*.

The judge has the authority to decide on the appropriate punishment for the offender and could decide to send an offender to prison even if a conditional sentence is possible.

*What types of conditions can a judge set?*

All conditional sentences have compulsory conditions. Under these conditions, the offender is compelled to:

- keep the peace and be of good behaviour;

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<sup>66</sup> With regard to the fourth criterion, among the objectives of sentencing are:

- The denunciation of unlawful conduct;
- The deterrence of the offender and others from committing offences;
- The separation of the offender from the community when necessary;
- The rehabilitation of the offender;
- The provision of reparation to victims or the community; and
- The promotion of a sense of responsibility in the offender.

- go to court when required;
- report to a criminal justice system supervisor regularly;
- stay in the area under the court's authority and get written permission to travel outside this area; and
- tell the court or criminal justice system supervisor before moving or when changing jobs.

In addition, a judge can tailor the conditions of the sentence to the needs of the offender, the victim and the community by setting other conditions that the offender has to follow. For example, the offender might be required to:

- pay the victim restitution;
- make other reparations to the victim or to the community;
- participate in a treatment program (for example an alcohol, drug or anger management program);
- provide support for any dependents (such as a child or spouse);
- do up to 240 hours of community service work; or
- respect a curfew, for instance by staying at home except to go to work or to approved activities, such as a treatment program or community service.

As well, an offender could be prohibited from:

- using alcohol or drugs, and
- possessing a gun, rifle or other weapon.

The Canadian Courts have made it clear that conditional sentences should generally include punitive conditions that restrict an offender's liberty, such as house arrest. The Court has said that a conditional sentence is a punishment, which also promotes a sense of responsibility in the offender and has the objectives of rehabilitation and reparation to the victim and the community.<sup>67</sup>

### *Victims' rights and conditional sentences*

A victim can prepare a victim impact statement, describing the harm done and the loss suffered. Although the victim impact statement should not include the victim's views on a punishment, it may help the judge to decide on appropriate conditions to include in a conditional sentence, if a conditional sentence is being considered. Judges must take victim impact statements into account when deciding the appropriate punishment for offenders.

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<sup>67</sup> A list of summarized, pertinent case law can be found in Appendix 1: Canadian Case Law, at page (Placeholder1)

### *Breaches of conditional sentences*

Section 742.6 of the *Criminal Code* sets out the procedure to be followed when one or more of the conditions of a conditional sentence is breached. The section contemplates that the allegation of the breach may be made out by documentary evidence. The allegation must be supported by a written report of the supervisor including, where possible, signed witness statements. The offender must be given a copy of this report. If the court is satisfied that a breach of a condition has been proved on a balance of probabilities, the burden is then on the offender to show a reasonable excuse. Where the breach is made out, the court may: take no action; change the optional conditions; suspend the conditional sentence for a period of time and require the offender to serve a portion of the sentence, and then resume the conditional sentence with or without changes to the optional conditions; or terminate the conditional sentence and require the offender to serve the balance of the sentence in custody.

### *Conditional sentence case law*<sup>68</sup>

The criticism that has been directed at sentencing practices in Canada tends to focus on the nature of the offence. It often omits consideration of how the courts weigh the aggravating and mitigating factors relevant to the offender, and the circumstances surrounding the offence, in crafting an appropriate sentence. Through the sentencing provisions of the *Criminal Code*, Parliament has placed a major emphasis on a “least restrictive measures” approach and has directed the courts to use incarceration only where community sentencing alternatives are not adequate. This is consistent with Parliament’s concern to address the overuse of incarceration as a response to crime in Canada and to provide for a restorative justice approach to sentencing. Collectively, these principles encourage flexibility in the exercise of judicial discretion. Over time, the Courts of Appeal and the Supreme Court of Canada are providing more detailed guidance as to how the various principles should be applied to categories of offences and offenders. Examples of the cases that have considered various aspects of conditional sentencing are set out below.

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<sup>68</sup> Cases summarised by the Law and Government Division of the Library of Parliament, available at: <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0544-e.htm#aproulxtxt>

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**Canadian Conditional Sentencing Cases***R v Proulx*<sup>69</sup>

The most important case to consider conditional sentencing is the decision of the Supreme Court in *R v Proulx*. Here, the Court examined the issue of conditional sentences in a case that concerned a charge of dangerous driving causing death and bodily harm. Prior to this decision, judges had little guidance on when it was appropriate to impose a conditional sentence, outside of the criteria set out in the *Criminal Code*. The Supreme Court made it clear that a number of changes needed to be made to the way in which the sanction was used. But the judgment also consists of a strong endorsement of conditional sentencing. The Supreme Court set out a number of principles, which may be summarized as follows:

1. Unlike probation, which is primarily a rehabilitative sentencing tool, a conditional sentence is intended to address both punitive and rehabilitative objectives. Accordingly, conditional sentences should generally include punitive conditions that restrict the offender's liberty. Therefore, conditions such as house arrest or strict curfews should be the norm, not the exception.
2. There is a two-stage process involved in determining whether to impose a conditional sentence. At the first stage, the sentencing judge merely considers whether to exclude the two possibilities of a penitentiary term or a probationary order as inappropriate, taking into consideration the fundamental purpose and principles of sentencing. At the second stage, having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.
3. "Safety of the community," which is one of the criteria to be considered by a sentencing judge, refers only to the threat posed by a specific offender and not to a broader risk of undermining respect for the law. It includes consideration of the risk of any criminal activity, including property offences. In considering the danger to the community, the judge must consider the risk of the offender re-offending and the gravity of the damage that could ensue. The risk should be assessed in light of the conditions that could be attached to the sentence. Thus, the danger that the offender might pose may be reduced to an acceptable level through the imposition of appropriate conditions.
4. A conditional sentence is available for all offences in which the statutory prerequisites are satisfied. There is no presumption that conditional sentences are inappropriate for specific offences. Nevertheless, the gravity of the offence is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances.
5. There is also no presumption in favour of a conditional sentence if the prerequisites have been satisfied. Serious consideration, however, should be given to the imposition of a conditional sentence in all cases where these statutory prerequisites are satisfied.
6. A conditional sentence can provide a significant amount of denunciation, particularly when onerous conditions are imposed and the term of the sentence is longer than would have been imposed as a jail sentence. Generally, the more serious the offence, the longer and more onerous the conditional sentence should be.
7. A conditional sentence can also provide significant deterrence if sufficient punitive conditions are imposed, and judges should be wary of placing much weight on deterrence when choosing between a conditional sentence and incarceration.
8. When the objectives of rehabilitation, reparation and promotion of a sense of responsibility may realistically be achieved, a conditional sentence will likely be the appropriate sanction, subject to considerations of denunciation and deterrence.
9. While aggravating circumstances relating to the offence or the offender increase the need for denunciation and deterrence, a conditional sentence may be imposed even if such factors are present.
10. Neither party has the onus of establishing that the offender should or should not receive a conditional sentence. However, the offender will usually be best situated to convince the judge that such a sentence is appropriate. It will be in the offender's interest to make submissions and provide information establishing that a conditional sentence is appropriate.
11. The deference to which trial judges are entitled in imposing sentence generally applies to the decision whether or not to impose a conditional sentence.
12. Conditional sentencing was enacted both to reduce reliance on incarceration as a sanction and to increase the principles of restorative justice in sentencing.

<sup>69</sup> (17) [2000], 1 S.C.R. 61.

The key result of the *Proulx* decision, therefore, is that there is no presumption against the use of a conditional sentence if the crime does not have a mandatory period of incarceration.

*R v Wells*<sup>70</sup>

Another key decision of the Supreme Court concerned the role that conditional sentencing should play in relation to Aboriginal offenders. The case of *R v Wells* involved a sentence of 20 months' imprisonment imposed on an Aboriginal man convicted of sexual assault. In upholding this sentence as appropriate in the circumstances, the Supreme Court found that the proper approach to considering a conditional sentence for an Aboriginal offender involves the following sequential considerations:

- A preliminary consideration and exclusion of both a suspended sentence with probation and a penitentiary term of imprisonment as fit sentences;
- Assessment of the seriousness of the particular offence with regard to its gravity, which necessarily includes the harm done, and the offender's degree of responsibility;
- Judicial notice of the "systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large"; and
- An inquiry into the unique circumstances of the offender, including any evidence of community initiatives to use restorative justice principles in addressing particular social problems.

While no offence is presumptively excluded from the possibility of a conditional sentence, as a practical matter, and notwithstanding s. 718.2(e) of the *Criminal Code*, particularly violent and serious offences will result in imprisonment for Aboriginal offenders as often as for non-Aboriginal offenders. Although counsel and pre-sentence reports will be the primary source of information regarding the offender's circumstances, there is a positive duty on the sentencing judge to inform himself or herself.<sup>71</sup> In this case, the sentencing judge did properly inform himself. The application of subsection 718.2(e) does not mean that Aboriginal offenders must always be sentenced in a manner that gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation. The offence in this case was a serious one, so the principles of denunciation and deterrence led to the imposition of a term of imprisonment.

*R v Knoblauch*<sup>72</sup>

Mentally ill offenders are not excluded from access to conditional sentences. In the case of *R v Knoblauch*, an offender with a long history of mental illness was found to be in possession of a substantial arsenal capable of causing great harm to the public and damage to property. He pleaded guilty to unlawful possession of an explosive substance and to unlawful possession of a weapon for a purpose dangerous to the public peace. In its decision, the Supreme Court upheld the imposition by the trial judge of a conditional sentence of two years less a day to be followed by three years of probation. The offender was required to spend the period of the conditional sentence in a secure psychiatric treatment unit, unless and until a consensus of psychiatric professionals made a decision to transfer him from the locked unit.

The focus of the analysis in the *Knoblauch* case was on the risk posed by the individual offender while serving his sentence in the community. Danger to the community is evaluated by reference to the risk of re-offence and the gravity of the damage in the event of re-offence. While the gravity of the damage in this case could be extreme, the conditions imposed by the trial judge, including that the accused reside in a secure psychiatric facility, reduced the risk to a point that it was no greater than the risk that the accused would re-offend while incarcerated in a penal institution. *Knoblauch* expanded the scope of conditional sentences by using the new sanction to produce what is essentially confinement, albeit in a psychiatric facility rather than in a prison or penitentiary.

In this case, the optional conditions that may be imposed as part of a conditional sentence order were used to assess an

<sup>70</sup> [2000] 1 S.C.R. 207.

<sup>71</sup> Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) 274-275.

<sup>72</sup> [2000] 2 S.C.R. 780.

offender's dangerousness and reduce the threat of recidivism. This is in contrast to the optional conditions of a probation order that are directed towards "facilitating the offender's successful reintegration into the community."<sup>73</sup> The appropriateness of confining the offender to a secure psychiatric facility flows from the intent of Parliament, in creating conditional sentences, to hold offenders accountable for offending while respecting the statutory purpose and principles of sentencing; this is to be done without subjecting the offender to penal confinement.<sup>74</sup> The importance of *Knoblauch* may lie in the ability of courts to send more offenders to mental health facilities and not prisons.

#### *R v Fice*

In the case of *R v Fice*, the Supreme Court ruled that a woman who attacked her mother with a baseball bat and strangled her with a telephone cord should have been sent to prison rather than allowed to serve her sentence in the community. This case should serve to restrict the availability of conditional sentences across the country. Ms. Fice pleaded guilty to aggravated assault on her mother after the pair's argument turned violent. She also pleaded guilty to fraud, personation, forgery and breach of recognizance. The Supreme Court held that the time Ms. Fice had spent in pre-trial custody was not a mitigating factor that can affect the range of sentence and, therefore, the availability of a conditional sentence. The Court held that, in considering whether to impose a conditional sentence, a court must first decide that a sentence of less than two years is appropriate. The conditional sentence regime was not designed for those offenders for whom a penitentiary term is appropriate. When a sentencing judge considers the gravity of the offence and the moral blameworthiness of the offender and concludes that a sentence in the penitentiary range is warranted and that a conditional sentence is therefore unavailable, time spent in pre-sentence custody ought not to disturb this conclusion.

#### *R v F(GC)*<sup>75</sup>

The case of *R v F(GC)* is illustrative of the manner in which the Courts of Appeal in Canada have developed guidelines for the use of conditional sentencing by the lower courts. In this case, the accused was convicted of sexual assault and sexual interference for his grooming of two 13-year-old girls to become sex objects. This eventually led to the offender having sexual intercourse with one of the complainants. The trial judge imposed a conditional sentence of 12 months. The Crown successfully appealed this sentence to the Ontario Court of Appeal, which varied it to one year in custody, after giving credit for the one-year sentence already served. In its reasons for decision, the Court of Appeal pointed out that it had repeatedly indicated that a conditional sentence should rarely be imposed in cases involving sexual assault of children, particularly where the accused was in a position of trust. Moreover, cases that involve multiple sexual activity over an extended period of time and escalating in obtrusiveness generally warrant a severe sentence. The trial judge had also failed to take into consideration the fundamental sentencing principle in section 718.1 of the *Criminal Code* that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

#### *R v Bhalru; R v Khosa*<sup>76</sup>

The case of *R v Bhalru; R v Khosa* is an example of a Court of Appeal upholding a trial judge's imposition of a conditional sentence in the face of a Crown appeal. Here, two individuals were convicted of criminal negligence causing death arising out of a street race in which they participated. In the course of the race, a pedestrian was struck and killed. The trial judge ordered the two drivers to serve conditional sentences of two years less a day, followed by probation for three years. The terms imposed as part of the conditional sentences included house arrest with limited exceptions and an order to perform 240 hours of community work over a period of 18 months. A five-year driving prohibition was also imposed.

The Crown argued that the sentences were unfit. This appeal was denied by the Court of Appeal. The Court followed the principles articulated in *Proulx* and the judicial recognition that conditional sentences may, in some circumstances, achieve general deterrence and denunciation in relation to driving offences; consequently, it concluded that the sentence was consistent with the sentencing principles and was not demonstrably unfit. The Court of Appeal also found that there was an

<sup>73</sup> Criminal Code, s. 732.1(3)(h).

<sup>74</sup> Julian V. Roberts and Simon Verdun-Jones, "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing after the Judgment in *Knoblauch*" (2002) 39 *Alberta Law Review* 788-809.

<sup>75</sup> [2005] 1 S.C.R. 742.

<sup>76</sup> (2004) 71 O.R. (3d) 771 (C.A.).

absence of aggravating factors beyond the street racing in this case; that finding, in addition to the strict nature of the conditional order that the trial judge fashioned, indicated that it was not unreasonable to order the two convicted persons to serve their sentence in the community.

## 4. Singapore

### *Conditional discharges and probation*

Singaporean courts are limited in their powers to suspend sentences imprisonment. They may do so only in cases where the imposition of the sentence has been held in abeyance after an offender's conviction. There is no legal provision allowing Singaporean courts to suspend a sentence of imprisonment after it has been passed.<sup>77</sup> Where the case falls within the ambit of court powers, that is, where it is a sentence in which the imposition has been held in abeyance, the court has the power to suspend the sentence by either ordering probation or a 'conditional discharge'. The 'conditional discharge' provision describes a mechanism by which an offender is discharged from the requirement to serve the sentence associated with the offence, provided he commits no offence during such period not exceeding 12 months from the date of the order. It is unique from the provisions in Hong Kong in several regards including the 12 month maximum prescribed period, the lack of attachment of any conditions aside from the prohibition on committing a further offence within the duration of the sentence, and the provision in section 11 which provides that any probation or discharge order made by the court will not be deemed a conviction for any other purpose than the proceedings in which the order is made.<sup>78</sup> The statutory mechanism which provides for these offences is the Probation of Offenders Act (Cap 252, 1985, Rev Ed).

Section 8(1) of the Probation of Offenders Act (POA) deals with 'conditional discharge' of offenders and provides as follows:

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<sup>77</sup> *Mary Lwee Ling v Public Prosecutor* [2003] 2 SLR 151, per Yong Pung How CJ. The President has the sole prerogative to suspend (in the sense of commuting) the execution of an imprisonment sentence, by virtue of his office.

<sup>78</sup> Except where an offender has during the period of his probation or conditional discharge been subsequently charged under the Act for an act in breach of conditions or for a further offence. In both instances, that Court may deal with him for the offence in respect of which the probation order was made in any manner in which the Court could deal with him if he had just been convicted before that Court of that offence.

Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law<sup>79</sup>) is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order... discharging him subject to the condition that he commits no offence during such period, not exceeding 12 months from the date of the order, as may be specified therein.

The provisions of the POA are limited to offenders who have attained the age of 16 but have not attained the age of 21 at the time of their conviction and who have not previously been convicted of an offence referred to in the proviso. The provisions regarding conditional discharge are considered less onerous than probation, as reflected in the chart below.

*Conditional discharges under section 8 and comparison with probation*<sup>80</sup>

	<b>PROBATION</b>	<b>CONDITIONAL DISCHARGE</b>
Triggering consideration	Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do impose probation: section 5(1)POA.	Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, it may grant a conditional discharge: section 8(1) POA.
Pre-sentence report	As a matter of practice, courts call for a probation report before deciding whether to impose probation.	No practice of calling for a pre-sentence report before imposing conditional discharge.
	<b>PROBATION</b>	<b>CONDITIONAL DISCHARGE</b>

<sup>79</sup> The Singaporean Penal Code (Cap 224, 2008, Rev Ed) defines such offences as ‘Offence with specified term of imprisonment’ and provides as follows:

41. An offence described in this Code or in any written law for the time being in force as being punishable with imprisonment for a specified term or upwards includes an offence for which the specified term is the maximum term of imprisonment.

<sup>80</sup> Kow Keng Siong, *Sentencing Principles in Singapore*, Academy Publishing, Singapore Academy of Law, 2009, 951.

Supervision	Offender is placed under the supervision of a probation officer or a volunteer probation officer: section 5(1).	Offender is not placed under any form of supervision.
Types of condition(s)/ requirements(s)	<p>“[S]uch requirements [as may be considered] necessary for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences” –except a requirement to pay damages for injury or compensation for loss – within a prescribed period: section 5(2) POA.</p> <p>A probation order may include requirements relating to the offender’s residence: section 5(3).</p> <p>Offender must consent to the conditions of probation: section 5(4).</p>	<p>Offender not to commit any offence within a prescribed period: section 8(1).</p> <p>Offender’s consent not required.</p>
Prescribed period	Not less than six months nor more than three years: section 5(1).	Not exceeding 12 months from the date of the order: section 8(1).
Power to discharge, amend and review conditions	Power exists under section 6.	<p>No such power.</p> <p>In the event of a breach, the court may deal with the offender for the original offence without risk of double jeopardy: sections 7(2)(a) and 7(3)(b); sections 9(5) and 9(6) POA.</p>

*Probation of Offenders (Amendment) Bill 1984*

From 1972 to 1978 the overall crime rate in Singapore generally fluctuated within the narrow range of between 900 and 800 offences per 100,000 population. In 1978, the crime rate was 823 offences per 100,000 population, but by 1983 had reached 1,635 offences per 100,000 citizens.<sup>81</sup> In 1983, the Government response to this alarming rise in incidents of crime by proposing Amendments to the Probation of Offenders Bill to address the publicly perceived leniency of the penalties being handed to offenders, the failure of current sentencing provisions to sufficiently deter would be offenders, and the general distrust of the justice system by the public.

In the Parliamentary debates concerning the Probation of Offenders, Parliament was asked to propose minimum mandatory sentences for six offences considered prevalent and lacking proportionality in terms of severity of sentence in relation to severity or potential fruits of the offence. These offences included all classes of robbery, housebreaking and theft, vehicle theft,

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<sup>81</sup> Singapore Parliament Reports, 11 October 1983, Probation of Offenders (Amendment) Bill, second reading. Available at: <http://sprs.parl.gov.sg/search/report.html>

snatch theft, extortion, rape and outraging of modesty. Recognising that the latter offence encompassed a range of activities, Clause 2 of the Bill introduced a new aggravated form of outraging modesty (*'Outraging modesty in certain circumstances'*, section 354A) to cover cases in which hurt, wrongful restraint or fear is caused to the victim.

In explaining the creation of the new offence of aggravated outrage of modesty, the Minister for Home Affairs, Mr Chua Sian Chin, explained, "The existing law does not differentiate the various degrees of severity of the acts involved in committing an outrage of modesty... It is thus necessary to introduce this section to cover a range of aggravated instances of outraging of modesty." The result of the addition of this provision is that the original provision, section 354 *'Assault or use of criminal force to a person with intent to outrage modesty'*, could attract a suspended sentence or probation for offenders meeting the requisites of the POA generally, as it is not an offence which has a mandatory minimum sentence as in the case where aggravating factors are present.<sup>82</sup>

#### *Offence not being an offence the sentence for which is 'fixed by law'*

Prior to the decision in *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338 (Samad), the High Court approached the question as to what amounted to a sentence 'fixed by law' as one which was fixed both in quantum and in kind. In *Samad*, however, the court departed from this approach, with Yong Pung How CJ reasoning that the expression was merely indicative of the fact that the court's discretion to make a probation order is subordinated to the power of legislature to provide that certain offenders suffer certain forms of punishment. He explained:

The provision of a mandatory minimum sentence is a clear instance of the exercise of this power by the legislature and the court ought not to usurp this power by an

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<sup>82</sup> The relevant Penal Code provision,(section 354 Cap 224, 2008, Rev Ed) provides:  
(1) Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.

Although section 354 requires the involvement of assault or the use of criminal force in the act, that does not mean that other perverted acts that do not require physical contact go unpunished. Section 509 takes care of words or gestures intended to 'insult the modesty' of a woman. Taking 'upskirt' pictures of females' underwear would generally fall under this section, which provides:

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

unjustifiably wide reading of an unambiguous provision. Therefore the expression ‘an offence (not being an offence the sentence for which is fixed by law) cannot and should not be given the excessively broad meaning of any offence other than the one which attracts a single inflexible sentence for which the exact quantum and kind of punishment are expressly provided in the statutory provision concerned.

It was held that where an offence under the Penal Code prescribes a mandatory minimum sentence, it is compulsory for the court to impose a particular type of punishment (custodial) and further to ensure that the quantum of such punishment complies with the minimum levels expressly stipulated by Parliament.<sup>83</sup>

#### *Legislative amendments in 1993*<sup>84</sup>

In response to the decision in *Samar*, in 1993 Parliament moved legislative amendments to enhance judicial discretion to apply the PAO to offences where a mandatory minimum sentence is prescribed for that offence. Members noted that 94% of young offenders on probation were first time offenders and that of these, approximately 84% completed it successfully. It was noted that the primary objective of sentencing young offenders was rehabilitative rather than deterrence or retribution, save in the gravest cases. Probation enabled young offenders to continue in their employment or studies and to benefit from the personal care, guidance and supervision of a Probation Officer and to complete the requirements with the knowledge that no conviction would stand on their permanent record. The courts, in exercising their discretion to sentence offenders under the PAO would have regard to a myriad of factors, including, the offender’s prospects of reform and rehabilitation, the seriousness of the offence, reasons mitigating against granting probation, the offender’s age and home environment, and the offender’s character and sense of remorse. Offenders who committed serious offences would continue to be exempt from sentences available under the PAO, as would those with prior antecedents.

The assessment of the gravity of the offence would include the court’s consideration of: i) the nature of the offence; ii) the effects of the offence; iii) the offender’s reason and motivation for committing the offence; iv) the circumstances of the offence; and v) policy considerations.

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<sup>83</sup> *Lim Li Ling v Public Prosecutor* [2007] 1 SLR 165 at 80.

<sup>84</sup> Singapore Parliament Reports, 10 November 1993, Probation of Offenders (Amendment) Bill, second reading. Available at: <http://sprs.parl.gov.sg/search/report.html>

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<sup>85</sup> Offences which the courts have indicated as inappropriate for PAO sentencing options include robbery or other violent crimes, rape, drug offences, and offences under the Computer Misuse Act.

## 5. United Kingdom

### *Suspended sentences before 2012*

Prior to 1 May 2012, suspended sentences in the UK were governed by sections 189 to 191 of the Criminal Justice Act (CJA) of 2003.<sup>86</sup> As is the case in Hong Kong, these sentences counted as custodial sentences, and were thus appropriate only for cases where imprisonment was the only option. But unlike Hong Kong, there were no excepted offences to the power.

Custodial terms for any offence that attracted a sentence of up to 12 months in the Crown Courts, or six months in the Magistrates Courts could be suspended. The sentence of imprisonment would not take effect unless either (i) during the ‘supervision period’ the offender fails to comply with a requirement under the order, or (ii) during the ‘operational period’ the offender commits another offence (whether or not punishable with a custodial sentence): section 189(1)(b).

The court was to specify both an ‘operational period’, the time for which the sentence is suspended and a ‘supervision period’, the time during which the offender has to comply with community sentence requirements when it passes a suspended sentence. Section 189(3) of the CJA provided that both the supervision period and the operation period must run from six months to two years, and that the supervision period could not run longer than the operation period.

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<sup>85</sup> Kow Keng Siong, *Sentencing Principles in Singapore*, Academy Publishing, Singapore Academy of Law, 2009, 951

<sup>86</sup> The 2003 CJA marked the return of wider powers to suspended sentences, with the addition of elements of a community order to be imposed at the same time. Provisions were also made for sentences of intermittent custody and custodial sentences followed by periods of community work and supervision. The 2003 came into force in April 2005. Prior to this date, the provisions of the 1991 CJA governed the powers of the courts to impose suspended sentences. The 1991 Act was severely restrictive, the legislature having removed the power to partly suspend a prison sentence and the use of wholly suspended sentences confined to cases where ‘exceptional circumstances’ could be shown: Criminal Justice Act 1991 (UK) s 5(1). The result of the restriction was huge upsurge in penal populations and the finances associated therewith.

Section 190 detailed the types of additional requirements which offenders might be required to comply with, including:

- a) an unpaid work requirement;
- b) an activity requirement;
- c) a programme requirement;
- d) a prohibited activity requirement;
- e) a curfew requirement;
- f) an exclusion requirement;
- g) a residence requirement;
- h) a mental health treatment requirement;
- i) a drug rehabilitation requirement;
- j) an alcohol treatment requirement;
- k) a supervision requirement; or
- l) in a case where the offender is less than 25 years of age, an attendance center requirement.

*Breaking the Cycle: The findings of the 2010 Ministry of Justice report on effective punishment, rehabilitation and sentencing of offenders*<sup>87</sup>

In December 2010, the UK Ministry of Justice published a green paper on Criminal Justice Reform. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (the ‘Green Paper’) set out plans for fundamental changes to the UK criminal justice system. The Foreword to the Green Paper described the function of the UK justice system at the time as “an expensive way of giving the public a break from offenders, before they return to commit more crimes.” It was noted that despite a 50% increase in the previous ten years in the budget for prisons and management of offenders, almost half of all adults released from custody went on to reoffend within one year. The call was thus made for an intelligent sentencing framework, which, coupled with more effective rehabilitation would break the cycle of crime and prison. In addition to measures designed to make the administration of punishment more robust and efficient, the Legal Aid, Sentencing and Punishment of Offenders Bill 2010-2011 (‘the Bill’) would make it an express duty of the court (rather than the current power) to consider making compensation orders where victims

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<sup>87</sup> *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Ministry of Justice, December 2010. Available at: <http://offlinehbpl.hbpl.co.uk/NewsAttachments/PYC/Breaking%20the%20Cycle.pdf>

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have suffered harm or loss. The Bill was introduced in the House of Commons on 21 June 2011 and received Royal Assent on 1 May 2012.<sup>88</sup>

*Legal Aid, Sentencing and Punishment of Offenders Act 2012*<sup>89</sup>

Changes to the provisions on suspension of sentences are outlined in ss 68 and 69 of Part 3 of the Act. Having noted the utility of the power to suspend sentences where the threat of custody would be sufficient to incentivize an offender to reform, s 68 of the Act empowered the courts to suspend a sentence for a custodial period for a period of 24 months, representing a 12 month increase on the powers conferred in the 2003 Act. The courts were also given a new choice as to whether or not to impose community requirements. This choice was afforded so that it would give the courts more discretion to make best use of suspended sentences, and to target resources spent on community requirements on those who would most benefit from them in respect of punishment and rehabilitation.

The community requirements the court is empowered to impose on an individual upon whom a suspended sentence of imprisonment is passed are detailed in ss 70-77 of the Act and include programme requirements, curfew requirements, foreign travel prohibition requirements, mental health treatment requirements, drug rehabilitation requirements, alcohol treatment requirements, and alcohol abstinence and monitoring requirement.

Under the provisions of s 69 of the Act, the courts now have the option of fining offenders who breach the terms of their suspended sentence.<sup>90</sup> The fine may be imposed while allowing the original order to continue, giving courts more options when dealing with offenders who have breached conditions of suspended sentences.

*The 'no real prospect' test*

In addition to the substantial reforms surrounding suspended custodial sentences, the Act also makes changes to the law on bail and remand, aimed at reducing the number of those who are unnecessarily remanded into custody. Under the new “no real prospect” test, the court would assess the reasonable probability that the offence is imprisonable as a criterion of whether the

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<sup>88</sup> See <http://www.justice.gov.uk/news/press-releases/moj/royal-assent-for-legal-aid,-sentencing-and-punishment-of-offenders-bill>

<sup>89</sup> The full text of the Act is available at: <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

<sup>90</sup> In the case of a breach or conviction, the court may order the offender to pay a fine of an amount not exceeding £2500.

court could deny bail. If it is unlikely that the offence committed would attract a custodial sentence, bail would be granted. The provision is intended to remedy the misuse of custodial remand, where such remand would be considered unnecessary or unjust.

In welcoming the establishment of the ‘no real prospect’ test, the Prison Reform Trust noted in an October 2011 report,<sup>91</sup> that over 55,000 people, representing more than half of all first-time receptions to custody were remanded to prison each year in the UK to await trial.<sup>92</sup> Such pretrial detention, on charges which would not lead to a custodial sentence is potentially disproportionate, damaging and wasteful of public funds. Importantly, the test would not restrict custodial remand for serious offences such as murder, manslaughter or rape, nor where there is any risk that the person will engage in domestic violence if released on bail.

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<sup>91</sup> <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Remand%20Briefing%20FINAL.pdf>

<sup>92</sup> The Prison Reform Trust estimates the average time served on pre-trial remand as 12 weeks in Crown courts, i.e. effectively longer than a 6-month prison sentence, and the average cost per prison place approximately £45,000.

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