Section 12 Bonds: Breach Offences and (non) Revocation under Section 98 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW)

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[A] Overview

1. Where a court imposes a sentence of imprisonment on an offender, it has the power to make an order to wholly suspend the execution of the sentence on the condition that the offender enter into a good behaviour bond pursuant to s. 12 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) (a "*s. 12 bond*").

2. If any of the conditions of the s. 12 bond are breached, the court "*must*" revoke the bond unless it is satisfied that the breach was "*trivial in nature*", or alternatively, that there are "*good reasons*" for excusing the offender's non-compliance: s. 98(3) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). Thus there is a "*presumption*" that the bond will be revoked in the event of non-compliance by the offender: *Binge, Raymond v D.P.P* [2010] NSWDC 288 at [23] per Nicholson DCJ.

3. The commission of a further offence by the offender whilst subject to the imposition of a s. 12 bond is a breach of the condition to be of good behaviour.

4. The purpose of this paper is to review the principles permitting the court to take no action where a s. 12 bond is breached by the commission of further offences. The relevant provision is s. 98, which provides:

> **98 Proceedings for breach of good behaviour bond**
>
> (1) If it suspects that an offender may have failed to comply with any of the conditions of a good behaviour bond:
> (a) the court with which the offender has entered into the bond, or
> (b) any other court of like jurisdiction, or
> (c) with the offender's consent, any other court of superior jurisdiction,
> may call on the offender to appear before it.
> …
> (2) If it is satisfied that an offender appearing before it has failed to comply with any of the conditions of a good behaviour bond, a court:
> (a) may decide to take no action with respect to the failure to comply, or
> (b) may vary the conditions of the bond or impose further conditions on the bond, or
> (c) may revoke the bond.
>
> (3) In the case of a good behaviour bond referred to in section 12, a court must revoke the bond unless it is satisfied:
> (a) that the offender's failure to comply with the conditions of the bond was trivial in nature, or

(b) that there are good reasons for excusing the offender's failure to comply with the conditions of the bond.

[B] "*Trivial in nature*": s. 98(3)(a)

5. There is a paucity of case law on the meaning of the expression "*trivial in nature*".

6. In circumstances where a court is satisfied that an offence has been proven by the prosecution, s. 10 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) allows for the dismissal of charges, or alternatively, the conditional discharge of an offender upon entering into a good behaviour bond. In making the determination, the court is to have regard to "*the trivial nature of the offence*": s. 10(3)(b). In the decision of *Walden v Hensler* [1987] HCA 54, Brennan J considered an equivalent Queensland provision and held that:

> Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed. It was erroneous to ascertain the triviality of the offence by reference simply to the statutory provision which prescribes the maximum penalty.

7. Subsection 98(3) employs the words "*trivial in nature*". It is suggested that the language is practically equivalent to the provision considered by Brennan J such that such his Honour's remarks equally apply to the concept of triviality under s. 12.

8. In the decision of *GREEN, Brett John v R* [2008] NSWDC 378 the offender's index offence was drive whilst disqualified. He breached the terms of his bond by committing the further offence of damage to property. He had been out at night drinking alcohol with his friends, returned home to find his clothes packed in two suitcases, which had been placed outside the house, and refused entry into the house by his partner. He engaged in an argument with his partner, commenced "*banging*" on the front window and in doing so "*smashed*" it. The police attended, he confessed and immediately offered compensation. Cogswell DCJ stated:

> [16] It seems to me that the correct approach is to focus on the facts which amount to the alleged non-compliance with the conditions of the bond. In this case the facts are that a man returned home to his partner's house… after being out all night, to find his belongings in a bags *[sic]* outside. Understandably, that resulted in some friction between the man and his partner….
>
> [20] … with the bare facts which I have, I am confronted with a situation where there is an unremarkable verbal argument between a couple, one of whom has stayed out overnight, resulting in a broken window, which was brought about in a manner that we know nothing about. With that evidence before me, I am of the view that the failure to comply with the conditions of the s. 12 bond was trivial in nature.

9. Thus the "*unremarkable*" context and relatively inane conduct of the offending were sufficiently trivial to permit the court to take no action on the s. 12 bond. Relevantly, such a finding was open to the court notwithstanding that it was considering a breach offence with a maximum penalty of 5 years imprisonment: s. 195 of the *Crimes Act* 1900 (NSW).

[C] "*Good reasons*": s. 98(3)(b)

[C1] Principal consideration regarding good reasons: conduct giving rise to the breach

10. The principal consideration is the conduct that gives rise to the failure to comply with the conditions of the s. 12 bond: *DPP v Cooke & Anor* [2007] NSWCA 2 at [15] per Howie J (Sully and Price JJ agreeing). In the context of further offending, the relevant conduct is the conduct of the offending itself. It must be determined whether that conduct can be excused.

11. Howie J in *DPP v Cooke & Anor* [2007] NSWCA 2 laid down a general guidepost with respect to breaches by way of further offending, at [16]:

> [T]he court is considering whether the conduct represents a contumelious act of defiance or disregard of the conditions of the bond entered into with the court.

Thus the focus of the court is on the attitude underpinning the breach conduct.

Attitude of the offender at the time of the breach offence

12. The decision of *R v James Mervyn HILLHOUSE* [2009] NSWDC 427 concerned an offender who had been subject to multiple s. 12 bonds. One of the index offences was drive whilst disqualified. The breach offences were drive whilst disqualified and driving with the midrange prescribed concentration of alcohol (arising from the one incident). Those offences arose out of the offender's concern that his neighbour may damage his motor vehicle, which presumably was parked somewhere accessible to members of the public. He therefore operated the vehicle over a short distance with a view to parking it securely in his garage.

13. Cogswell DCJ considered the alternative that a sober and licenced driver could have moved the vehicle. Nevertheless, the deliberate conduct which gave rise to the breach offences, without any extenuating circumstances, was not a contumelious act. Rather, it was "*stupid*": at [15]. A finding of good reasons was not prevented in such circumstances.

Extenuating circumstances at the time of the breach offence

14. In the decision of *DPP v Cooke & Anor* [2007] NSWCA 2 Howie J considered further offending in "*extenuating circumstances*": at [16]. His Honour provided the example of an offender committing the breach offence of driving under the influence of alcohol in an emergency situation. In the decision of *DPP v Burrow and Anor* [2004] NSWSC 433 the Crown provided the example of a man who drives with the prescribed concentration of alcohol in his blood, but only for the purpose of taking his pregnant wife to hospital after she has unexpectedly gone into labour: at [24].

15. It is clear that the presence of extenuating circumstances may dispel the suggestion of a defiant attitude. However, it is not necessary that the offending conduct take place as a result of an urgency, emergency or necessity: *DPP v Burrow and Anor* [2004] NSWSC 433 at [24] per Hidden J, *R v James Mervyn HILLHOUSE* [2009] NSWDC 427 at [15] per Cogswell DCJ.

16. The focus remains on the offender's attitude to the s. 12 bond at the time of the breach offence. Of course, any breach offence is suggestive of a defiant attitude, but that suggestion is rebuttable and is so even absent extenuating circumstances.

The period of the s. 12 bond served and attitude

17. It is suggested that the longer the period of the bond served, the more readily a court can find that the breach offence does not demonstrate a defiant attitude. In the decision of *Binge, Raymond v D.P.P* [2010] NSWDC 288 the offender committed a breach offence when he was subject to two s. 12 bonds of seven months duration with only three days left until their expiration.

18. The index offences were resist police officer in execution of duty and intimidate police officer in execution of duty. The breach offence was driving with the high range prescribed concentration of alcohol. Notwithstanding that the breach offence "*constitutes a serious breach of the road rules and strikes at public safety on the roads*", Nicholson DCJ was not prevented from finding good reasons.

19. Equally, the shorter the period of the bond served, the more readily a court can find that the breach offence does demonstrate a defiant attitude. However, brevity does not necessitate such a finding.

[C2] Good reasons: revocation of the s. 12 bond and impact on the offender

20. There is a question over whether the court can consider factors other than the breach conduct in the calculus of good reasons under s. 98(3)(b). In particular, the question concerns the relevance of the disproportionate impact on the offender.

21. In the decision of *DPP v Cooke & Anor* [2007] NSWCA 2, Howie J remarked at [20]:

> [A]ssuming that a court could take into account the impact of the revocation of a good behaviour bond, it would be a rare case indeed in which it would be appropriate to do so in this State.

However, this proposition must be seen in light of his Honour's other comments at [20]:

> Secondly, and perhaps more significantly, the impact of revocation of the bond can be ameliorated in this State by ordering that the sentence that is enlivened by the breach be served by periodic detention or home detention.

And further, at [15]

> [T]he principal consideration, if not the only one, is upon the conduct giving rise to the breach.

22. It is thus suggested that, in the calculus of good reasons, an appellate court in NSW has not barred consideration of something other than the breach conduct. Howie J did not actually confine consideration solely to the conduct giving rise to the breach of the bond. In the decision of *Binge, Raymond v D.P.P* [2010] NSWDC 288 Nicholson DCJ, after considering the authorities, remarked at [29]:

> [T]here is no prohibition on my finding "good reason" in matters going beyond the behaviour associated with the breach.

23. Indeed, various courts have considered the impact of revocation on the offender in the determination of good reasons: see *DPP v Burrow and Anor* [2004] NSWSC 433, which applied *R v Marston* (1993) 65 A Crim R 595.

Disproportionate punishment upon revocation

24. In the decision of *DPP v Burrow and Anor* [2004] NSWSC 433 Hidden J stated at [25]:

> Where the offence is relatively minor, it might be appropriate to weigh its gravity against the consequences of revocation of the bond, particularly where the suspended sentence is a long one.

25. Relevantly, the maximum length for a s. 12 bond is 2 years: s. 12(1). It is observed that Hidden J used the words "relatively minor" as opposed to "minor". It is suggested that the adjective "relatively" means the court should put on the scales the seriousness of the index offence and the breach offence. It is not necessary that the breach offence is minor or indeed, 'trivial', which is the purview of s. 98(3)(a).

26. Accordingly, the court would weigh the conduct underpinning the breach offence against the penalty that would flow upon revocation of the bond for the index offence, and thereby determine whether the punishment is disproportionate. This would appear to be the approach taken by Cogswell DCJ in the decision of *R v James Mervyn HILLHOUSE* [2009] NSWDC 427. However, the court can not have regard to the severity of the penalty to be imposed for the breach offence: *DPP v Burrow and Anor* [2004] NSWSC 433 at [26] per Hidden J.

27. Hidden J followed the South Australian decision of *R v Marston* (1993) 65 A Crim R 595. In that decision the offender had been convicted for an offence of armed robbery and received a suspended sentence. She breached the bond by committing a larceny offence involving two muffins and a butter knife. King CJ (Perry and Duggan JJ agreeing) wrote at 597:

> It is clear that the appellant's impulsive actions were not motivated by any settled resolve to behave dishonestly, although, of course, necessarily there was dishonesty involved in the offence, but rather by a foolish and somewhat irresponsible inclination to satisfy her hunger by means of the muffins which were displayed on the breakfast table, and of course by using the knife to spread the butter on them…
>
> The marked disproportion between the seriousness of the breaching offence and the length of the sentence which is activated if the suspension is revoked, is a very important consideration in deciding this case.

28. The decision of *R v Marston* (1993) 65 A Crim R 595 is instructive and its application to the s. 12 bond regime has not been excluded by an appellate court in NSW: see *DPP v Cooke & Anor* [2007] NSWCA 2 at [20] per Howie J.

Disproportionate punishment and the inability to ameliorate the disproportion

29. In the decision of *DPP v Cooke & Anor* [2007] NSWCA 2 Howie J's "*more significant*" basis to not readily adopt the position in *R v Marston* (1993) 65 A Crim R 595 was the ability of the courts in NSW to revoke the s. 12 bond and order execution of the sentence by way of home detention or periodic detention (the latter is no longer available; since replaced by Intensive Correction Orders ("ICO")). In short, any disproportionate impact on the offender could be mitigated by alternatives to full-time custody in the prison system.

30. However, often the disproportionate punishment cannot be ameliorated by legislative alternatives due to their non-availability. For example, the offender may not be eligible for an ICO because of an ongoing substance addiction. Similarly, in many regional parts of NSW home detention and ICOs are not readily available as a sentencing option. Thus Howie J's *"more significant"* basis to downplay consideration of the impact of revocation on an offender may not be as forceful in such circumstances: see the decisions of *R*

v Michelin [2008] NSWDC 204 at [7] per Cogswell DCJ and *Binge, Raymond v D.P.P* [2010] NSWDC 288 at [34] per Nicholson DCJ.

Inability to ameliorate the disproportion: geographic discrimination and equality before the law

31. The alternatives to full-time custody noted above are often not available in regional parts of NSW. The court's inability to ameliorate the disproportionate punishment in such circumstances may be productive of "*geographic discrimination*": *Binge, Raymond v D.P.P* [2010] NSWDC 288 at [28] per Nicholson DCJ.

32. Nicholson DCJ posited that the total denial of the opportunity to ameliorate the punishment could subject an offender to inequality within the sentencing regime in NSW. In determining to not revoke the s. 12 bond before him, his Honour observed:

> [1] The notion of equality before the law embraces the concept of equal access for all to the range of sentencing dispositions that may be imposed by a judge in any given case…
>
> [2] Those offenders in rural and regional New South Wales may well feel discriminated against, while lacking in quality before the law, based upon their geographical location. A discrimination that may result in harsher penalties being imposed in rural and regional regions because more therapeutic sentencing options are unavailable.
>
> …
>
> [36] I acknowledge the tensions between just deserts and punishment at some level, required by the application of the usual principles, in dealing with individuals for breach of s 12 bonds, and the finding of good reasons in this case. In my own view, the more important doctrine of equality before the law, should be given greater weight in the face of the geographical discrimination.

Disproportionate impact: subjective circumstances of the offender

33. In the decision of *DPP v Burrow and Anor* [2004] NSWSC 433, Hidden J posited that the subjective circumstances of the offender are relevant to the determination of the seriousness of the breach offence. The subjective circumstances are relevant as at the time of the breach and not during the breach proceedings: at [26]. These views were followed in the decisions of *DPP v Cooke & Anor* [2007] NSWCA 2 at [34] per Howie J and *R v Jukes* [2008] NSWSC 126 at [17] per Hoeben J.

34. The Supreme Court has held that an offender's drug addiction, when paired with a general reluctance to engage in counselling, does not constitute good reasons: *R v Jukes* [2008] NSWSC 126 at [16] per Hoeben J. However, it is suggested the situation is markedly different with an addict offender who displays a positive attitude towards, and genuine prospects of, rehabilitation as at the time of the breach offence.

35. Given the focus on the offender's attitude to the conditions of the s. 12 bond, it is suggested that conduct which is symptomatic of low intellectual functioning or psychological disorder is capable of rebutting a suggestion of a poor attitude; again, as at the time of the breach offence and not at the time of the breach proceedings.

36. However, the decision of *R v Mark John Doyle* (1996) 84 A Crim R 287 allows for some scope in considering the offender's subjective circumstances as at the time of the breach proceedings. The offender had been convicted in the District Court for multiple dishonesty offences and received custodial sentences. He successfully appealed to the Court of Criminal Appeal and received a recognisance order. He breached that order by further committing multiple dishonesty offences. The Court of Criminal Appeal thus called up the order. Smart, Badgery-Parker and Simpson JJ took no action on the basis that the offender was suffering from the debilitating effects of AIDS; he had a remaining life expectancy of two to eighteen months; it was understood that his health would only further deteriorate, and the relevant treatment he needed was not available in prison.

37. It should be noted that the Court took no action based on "*the very special circumstances*" of that case: at 292. Nevertheless, that decision was cited with approval in the decision of *Binge, Raymond v D.P.P* [2010] NSWDC 288 where Nicholson DCJ, in deciding to take no action on the s. 12 bond, took into account the offender's early positive signs of drug rehabilitation and the physical and mental health issues concerning one of his three children as at the time of the breach proceedings.

[C3] Good reasons: would non-revocation offend the policy / Parliamentary intention underlying suspended sentences?

38. The court must bear in mind the policy behind suspended sentences in determining the course of action to take upon the occurrence of a breach: *DPP v Cooke & Anor* [2007] NSWCA 2 at [25] per Howie J. The starting point of a suspended sentence is that no sentence other than imprisonment is appropriate: s. 5 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

39. The form of punishment must be perceived as one which is severe: *R v Zamagias* [2002] NSWCCA 17 at [32] per Howie J. It is not an alternative to a good behaviour bond under s. 9 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), but an alternative to full-time custody in the prison system: *DPP v Cooke & Anor* [2007] NSWCA 2 at [25] per Howie J.

40. The suspension of the sentence is "*an act of mercy designed to assist the offender's rehabilitation*" and can itself achieve "*the protection of the community*": *DPP v Cooke & Anor* [2007] NSWCA 2 at [25] per Howie J and *R v Zamagias* [2002] NSWCCA 17 at [32] per Howie J respectively.

41. There is much authority on the point that non-revocation of s. 12 bonds in circumstances of clear non-compliance can bring the form of punishment into disrepute: *Lawrie v The Queen* (1992) 59 SASR 400 at 403 per Perry J; *DPP v Cooke & Anor* [2007] NSWCA 2 at [23] per Howie J; *Dinsdale v The Queen* [2000] HCA 54 at [80] per Kirby J. Accordingly, against the statutory presumption of revocation, the decision of non-revocation should not be made lightly.

42. In the calculus of "good reasons", the court must therefore be satisfied that taking no action on a s. 12 bond upon the commission of a breach offence is unlikely to undermine the form of punishment as one which is severe.

[D] Summary

Trivial in Nature

- Look to the circumstances of the offending conduct.
- How serious is the actual conduct?
- Is the conduct foolish, stupid or unremarkable, albeit worthy of criminal sanction?
- Ignore the maximum penalty of the offence – it does not provide insight into the seriousness of the offending conduct itself.

Good reasons

- Is the offending conduct a contumelious act against the imposition and conditions of the s. 12 bond?
- Does the offending conduct reveal a defiant attitude to the imposition and conditions of the s. 12 bond?
- Is the offending conduct merely stupid?
- Are there extenuating circumstances, such as urgency, emergency or necessity?
- How much of the s. 12 bond has already been served in relation to the period left as at the time of the offence? (Put differently, what percentage of the bond has been served?)
- Would revocation of the s. 12 bond signify a disproportionate punishment when considering the seriousness of the breach offence?
- In the event of revocation, are alternatives such as an ICO or home detention available?
- What signs of rehabilitation had the offender demonstrated up to the time of the breach offence?
- Ignore the possible penalty that may be imposed for the breach offence.