**Legal Aid NSW**
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Legal Aid NEW SOUTH WALES

# Defended Breach of Bond Proceedings

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## Outline

This paper was originally delivered to the Legal Aid NSW Criminal Law Conference in 2013 and focused on adult offenders. It has now been updated for the Legal Aid NSW Children's Legal Service Conference in 2015 and has been expanded to include juvenile offenders.

The paper is designed to provide guidance and tips for practitioners whose clients are facing breach of bond proceedings where the breach *is not admitted*. This will routinely occur in circumstances where the alleged breach is one of unsatisfactory compliance with the supervision and guidance of Community Corrections or Juvenile Justice.

Where the breach is constituted by a proven fresh offence, particularly an offence punishable by imprisonment, then the battle ground generally shifts to persuading the court to take either no action or a lenient approach to re-sentencing upon revocation. This is where the bulk of authority and commentary exists, for example the leading case of *Cooke*[1] and a paper by fellow Legal Aid lawyer, Riyad El-Choufani, entitled *Suspended Sentences – Breach Proceedings and the Consequences of Revocation* – which I highly recommend.

The rationale for this paper is to redress the dearth of information about breach proceedings themselves and consider: what constitutes a breach, what is the standard of proof, what is good behaviour, what are reasonable directions, procedural questions, relevant authorities, attention to comparable foreign jurisdictions and practical tips.

## Legislative Framework

### Report 79 of the NSW Law Reform Commission – Sentencing

In April 1995 the Attorney-General gave a reference to the NSW Law Reform Commission requesting that it inquire into the laws relating to sentencing in NSW.

In 1996 the NSW Law Reform Commission released Report 79 entitled *Sentencing* in which the following recommendations were made, *inter alia*:

- The term "bond" should replace the term "recognizance"
- That there be a consolidation of probation orders
- The common law power to impose bonds should be abolished
- The maximum time limit for a bond should be five years
- Suspended sentences should be reintroduced in NSW

[1] *Director of Public Prosecutions v Cooke* (2007) 168 A Crim R 379.

### *Crimes (Sentencing Procedure) Bill 1999* (NSW) – Second Reading Speech

On 28 October 1999 the Honourable Bob Debus delivered the Second Reading Speech of the *Crime (Sentencing Procedure) Bill* and informed the House that, in accordance with the recommendations of the NSW Law Reform Commission, the Bill would amalgamate and re-enact provisions in several existing Acts.[2]

All of the recommendations listed above were implemented by the Bill. Unfortunately, however, no assistance with respect to *defended breach of bond proceedings* can be found in the text of the Second Reading speech as the Minister chose the following approach:

> I do not propose to work my way through each clause and to provide a commentary. Members should avail themselves of the time between this speech and the debate to read the bills carefully and apprise themselves of the Law Reform Commission recommendations where appropriate.

In this sense it is Report 79 of the NSW Law Reform Commission, rather than the Second Reading Speech, which is an important resource for practitioners who are looking for the legislative intent behind the relevant provisions.

### *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA)

Part 2, Division 3 of the CSPA is entitled *Non-custodial alternatives* and allows a sentencing court to place an offender on a good behaviour bond under ss 9, 10, 11 or 12 as well as a community service order under s 8.

Part 8 of the CSPA, comprised of ss 94 to 100, is entitled *Sentencing procedures for good behaviour bonds*. The primary legislative provisions for practitioners whose clients are facing breach proceedings are ss are 95 and 98.

Section 95 provides for the conditions of a good behaviour bond:

> (a) must contain a condition to the effect that the offender to whom the bond relates will appear before the court if called on to do so at any time during the term of the bond, and
> (b) must contain a condition to the effect that, during the term of the bond, the person under bond will be of good behaviour, and
> (c) may contain such other conditions as are specified in the order by which the bond is imposed…

Section 98 is entitled *Proceedings for breach of good behaviour bond* and it provides, *inter alia*:

> (1) If it suspects that an offender may have failed to comply with any of the conditions of a good behaviour bond:

[2] *Community Service Orders Act 1979*, *Crimes Act 1900*, *Criminal Procedure Act 1986*, *Home Detention Act 1996*, *Justices Act 1902*, *Periodic Detention of Prisoners Act 1981* and *Sentencing Act 1989.*

(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.

***Crimes Act 1914* (Cth) (CCA)**

Part IB, Division 5 of the CCA is entitled *Conditional release on parole or licence* and allows a sentencing court, usually a state court exercising federal jurisdiction, to place an offender on a recognizance under ss 19B or 20. Respective state penalties can also be imposed pursuant to s 20AB of the CCA, such as community service or intensive correction orders.

Section 20A of the CCA is entitled *Failure to comply with condition of discharge or release* and it relevantly provides, under sub-s (5):

> Where, in accordance with this section, a person who has been discharged in pursuance of an order made under subsection 19B(1), or released in pursuance of an order made under subsection 20(1), appears or is brought before the court by which the order was made, the court (whether or not constituted by the judge or magistrate who made the order), **<u>if it is satisfied that the person has, without reasonable cause or excuse, failed to comply with a condition of the order, may</u>** [my emphasis]:
> (a) in the case of a person who has been discharged in pursuance of an order made under subsection 19B(1):
> (i) revoke the order...; or
> (ii) take no action; or
> (b) in the case of a person who has been released in pursuance of an order made under paragraph 20(1)(a):
> (i) without prejudice to the continuance of the order, impose a pecuniary penalty not exceeding 10 penalty units on the person; or
> (ii) revoke the order...; or
> (iii) take no action; or
> (c) in the case of a person who has been released by an order made under paragraph 20(1)(b):
> ...
> (i) revoke the order and deal with the person for the offence or offences in respect of which the order was made by ordering that the person be imprisoned for that part of each sentence of imprisonment fixed under paragraph 20(1)(b) that the person had not served at the time of his or her release; or
> (ii) take no action.

Section 20AC of the CCA is entitled *Failure to comply with sentence passed, or order made, under subsection 20AB(1)* and it relevantly provides, under subs-s (6):

> (6) Where, in accordance with this section, a person in respect of whom a sentence has been passed, or an order has been made, under subsection 20AB(1) appears or is brought before the court by which the sentence was passed or the order was made, the court (whether or not constituted by the judge or magistrate who passed the sentence or made the order), **if it is satisfied that the person has, without reasonable cause or excuse, failed to comply with the sentence** [my emphasis] or order or with any requirements made in relation to the sentence or order by or under the applied provisions, may:
>
> (a) without prejudice to the continuance of the sentence or order, impose a pecuniary penalty not exceeding 10 penalty units on the person;
> (b) revoke the sentence or order and, subject to subsection (7), deal with the person, for the offence in respect of which the sentence was passed or the order was made, in any manner in which he or she could have been dealt with for that offence if the sentence had not been passed or the order had not been made and he or she was before the court for sentence in respect of the offence; or
> (c) take no action.

***Children (Criminal Proceedings) Act 1987* (CCPA)**

Section 41 of the CCPA is entitled *Enforcement of conditions of good behaviour bond or probation or compliance with outcome plan* and is generally analogous with the provisions of the CSPA for adults.

Section 41(1) allows for an authorised justice to issue a court attendance notice or warrant in prescribed circumstances where, with reasonable cause, it is believed that a person has failed to comply with a condition of their bond, probation or outcome plan.

Section 41(1A) provides that the Children's or Local Court may call on a person to appear if it is suspected that the person has failed to comply with a condition of their bond, probation or outcome plan.

Section 41(4) sets out the relevant test for breach as follows:

> A person who is brought before the Children's Court shall, **if it is proved** [my emphasis] that the person has failed to comply with a condition of the person's good behaviour bond or probation or has failed to comply with the outcome plan, be dealt with by the Children's Court in any manner in which the person could have been dealt with by the Children's Court in relation to the offence for which the person entered into the good behaviour bond or was released on probation or on condition that the person comply with the outcome plan, as the case may be.

***Children (Criminal Proceedings) Regulation 2011* (CCPR)**

The CCPR[3] contains a clear but not exhaustive list of the types of conditions that may be imposed under bonds and probation orders in the Children's Court. Regulation 35(1) sets out the kinds of allowable conditions as follows:

> (a) conditions requiring the child to attend school regularly,
> (b) conditions relating to the child's employment,
> (c) conditions aimed at preventing the child from committing further offences,
> (d) conditions relating to the child's place of residence,
> (e) conditions requiring the child to undergo counselling or medical treatment,
> (f) conditions limiting or prohibiting the child from associating with specified persons,
> (g) conditions limiting or prohibiting the child from frequenting specified premises,
> (h) conditions requiring the child to comply with the directions of a specified person in relation to any matter referred to in paragraphs (a)–(g),
> (i) conditions relating to such other matters as the court considers appropriate in relation to the child.

***Criminal Procedure Act 1986, Evidence Act 1995, Crimes (Sentencing Procedure) Act 1999 and other Acts apply in the Children's Court***

Section 27 of the CCPA is entitled *Application of Criminal Procedure Act 1986 and other Acts* and it provides, *inter alia*:

> (1) Subject to Part 2 and to the rules of the Children's Court, any Act or other law relating to the functions of the Local Court or Magistrates or to criminal proceedings before them applies to:
> (a) the Children's Court, and
> (b) any criminal proceedings before the Children's Court.

Section 33C of the CCPA is entitled *Application of Crimes (Sentencing Procedure) Act 1999 to children* and it provides, *inter alia*:

> (1) Subject to this Act, the provisions of Parts 3 and 4 of the Crimes (Sentencing Procedure) Act 1999 apply to the Children's Court in the same way as they apply to the Local Court …

Therefore the balance of this paper is relevant to breach proceedings before the Children's Court.

[3] Unlike the adult instruments: see *Crimes (Sentencing Procedure) Act 1999* and *Crimes (Sentencing Procedure) Regulation 2010*.

## Relevant Case Law

### What are reasonable conditions of a bond or recognizance?

The leading Australian authority is the decision of *R v Bugmy*[4] (*Bugmy*) in which the NSW Court of Criminal Appeal (CCA) analysed the relevant authorities and formulated the following principles to which all discretionary conditions of bonds must comply, per Kirby J (with whom Bryson JA and James J agreed) at [61]:

> First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation.
>
> Secondly, the conditions must each be certain, defining with reasonable precision conduct which is proscribed.
>
> Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.

In *Bugmy* the CCA cited with approval, at [53], the Chief Justice of the South Australian Supreme Court, Bray CJ, as he then was, in *Macpherson v Beath*[5] when he stated, at [181]:

> I have more than once deprecated the tendency to insert unusual conditions into recognizances designed to control the defendant's private life in contexts only indirectly related, if at all, to the crime for which he is being punished. I have allowed appeals against such conditions: see *Neil v Steel* (1973) 5 SASR 67; *Baddock v Steel* (1973) SASR 71. To my mind they tend to savour of excessive paternalism and in extreme cases of tyranny.

*Bugmy* was cited with approval by the NSW CCA in *R v JJS*[6] (*JJS*) which is a case where a condition prohibiting a juvenile offender from having unsupervised contact with children under the age of 12 was set aside due to the lack of precision in defining the proscribed conduct. Studdert J (with whom James and Howie JJ agreed) stated:

> [20] It is desirable that a court when imposing conditions of a bond to do so in terms which define with reasonable precision the ambit of forbidden conduct: see *Bugmy* …
>
> [21] … There was a lack of precision in defining precisely what conduct was proscribed.

*Moefili v State Parole Authority*[7] is an interesting case which turned on the same principles but with respect to conditions of parole as opposed to good behaviour

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[4] *R v Bugmy* [2004] NSWCCA 258.
[5] *Macpherson v Beath* (1975) 12 SASR 174.
[6] *R v JJS* [2005] NSWCCA 225.
[7] *Moefili v State Parole Authority and Anor* [2009] NSWSC 1146.

bonds. In this case the plaintiff, Moefili, had his parole revoked because, *inter alia*, he did not comply with conditions of his parole which prohibited his association with any member of any outlaw motorcycle gang or his attendance at any place where members of outlaw motorcycle gangs gather.

The plaintiff challenged the validity of those parole conditions on the basis that the term *outlaw motorcycle gangs* was so imprecise that it rendered the conditions "ultra vires" because they prohibited conduct which "… was so uncertain as to be invalid."[8] The authorities relied upon included *Bugmy* and *JJS* which Hall J cited with approval before ultimately finding against the plaintiff, stating at [98]:

> The terms of the disputed conditions are, in my opinion, sufficiently precise for the reasons stated earlier. In my opinion, there is no uncertainty or ambiguity.

In 2013 the Supreme Court of the Northern Territory considered the appropriateness of conditions attaching to suspended sentences in *Mamarika v Ganley*[9] where Barr J stated the following, at [29]:

> In relation to the conditions attaching to suspended sentences, it has been held that conditions must reasonably relate to the purpose of the sentence, either to the character of the offence or to matters such as deterrence or rehabilitation. Conditions should not be unduly harsh or unreasonable or needlessly onerous.

As to conditions not being needlessly onerous, see *R v Harvey*[10] where the Court set aside a condition requiring the offender to report to Police.

Most recently, in 2014 the Supreme Court of the Australian Capital Territory considered the appropriateness of a condition imposed under a good behaviour bond in *Byrne v Mingay.*[11] In *obiter* Refshauge J made the following remarks:

> [104] I make one final comment. The good behaviour order included a requirement that Mr Mingay
>
> > is to attend such educational, vocational, psychological, psychiatric or other programs or counselling as the offender is directed to, particularly in relation to: referred to in p.s.r of 18 November 2013.
>
> [105] This appears to be a condition without any particular basis in the material before the court. For example, it is entirely unclear why Mr Mingay should attend any educational or vocational courses. It is clear that he may benefit from a Sex Offenders Course and that would be appropriate. That may include psychological or psychiatric programs but the direction is entirely open-ended. This is inconsistent with the need for individualised sentencing. As Ipp AJA pointed out in *R v Hoang* (2002) 128 A Crim R 422 at 426; [16] "[t]he system of justice in this country works on the basis each individual is entitled to individualised justice".

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[8] Ibid at 59.
[9] *Mamarika v Ganley* [2013] NTSC 6.
[10] *R v Harvey* (1989) 40 A Crim R 102.
[11] *Byrne v Mingay* [2014] ACTSC 126.

> [106] Conditions to good behaviour orders should not be more onerous than the actual circumstances require: *R v Harvey* (1989) 40 A Crim R 102 at 103.

These principles are consistent with the thread of authority which says that while a sentencing court possesses a wide discretion with respect to the imposition of conditions on good behaviour bonds, the scope of the conditions which may be imposed is not unfettered: *R v Ingrassia*.[12]

**What Constitutes "Reasonable Directions" of Community Corrections or Juvenile Justice?**

Authoritative pronouncements in Australia regarding what exactly is a "reasonable direction" of a probation service[13] are difficult to find.

It is suggested, therefore, that the principles enunciated in *Bugmy*, and all of the above authorities relating to reasonable court ordered conditions, apply equally to directions given by a probation service under delegated authority from the court. It would be illogical to confer a wider power on the probation service than the court.

It would be absurd, for instance, if a probation service could validly issue directions and conditions which are: punitive in character, broad, imprecise, uncertain, bear no nexus with the subject offence, do not possess a legitimate sentencing aim, are too onerous, harsh or oppressive – in circumstances where the sentencing court which enlivens the authority of the probation service could not have done the same.

Ultimately it will be for the sentencing court to determine during breach proceedings if the directions and guidance of the probation authority were unreasonable – each case will turn on its own facts, circumstances, merits and evidence; it will always be a matter of degree.

Practitioners should look closely at breach reports to see whether the directions of the probation authority were objectively reasonable. The words of then Justice Cox of the Supreme Court of South Australia spring to mind when he said in *Williams v Marsh* (1985) 38 SASR 313, at [316]:

> … Obviously any additional conditions that a court might decide to include in any particular case should be appropriate to the circumstances of the offence and the offender in question and, as with all forms of punishment, be no more than the circumstances reasonably require. It will never be proper to impose conditions that will operate harshly or unreasonably, or which may fairly be thought to be merely intrusive or officious. Certainly they will need to be directly related to the offence which led to their imposition. **It would not be a proper use of s 70ab for the court to merely take the opportunity by a man's conviction to attempt a general reform of**

[12] *R v Ingrassia* (1997) 41 NSWLR 447 citing *R v Keur* (1973) 7 SASR 13 and *Bantick v Blunden* (1981) 36 ALR 541.

[13] Here, “probation service” is used generically and means either Community Corrections or Juvenile Justice.

> **his character that might be thoroughly desirable. It is a power to be used with circumspection** [my emphasis].

The legislature of Queensland was reasonably progressive in enacting s 135 of the *Penalties and Sentencing Act 1992* (QLD) which is entitled *Directions under community based order* and provides:

> (1) A direction given by an authorised corrective services officer under a requirement of a community based order must, as far as practicable, avoid –
>     (a) conflicting with the offender's religious beliefs; and
>     (b) interfering with any times during which the offender usually works or attends school or another educational or training establishment; and
>     (c) interfering with the offender's family responsibilities.

This statutory protection from the whim of a probation officer would serve offenders well from the oft heard refrain, *"Just play ball!"*

The other way in which the validity of "reasonable directions" of a probation service might be challenged is in the Supreme Court pursuant to the principles of administrative law.

**Administrative Law Principles and Prerogative Relief in the Supreme Court Common Law Division – Administrative Law List**

A close examination of the Department of Corrective Services website and its governing legislation, *Crimes (Administration of Sentences) Act 1999* and *Crimes (Administration of Sentences) Regulation 1998*, discloses no legislative basis for the supervision of community based good behaviour bonds by the Community Corrections Service or its predecessors the Probation and Parole Authority and the now defunct Community Compliance and Monitoring Group.

The functions of Community Corrections appear therefore to be endorsed by the sentencing court, internal policy and certainly contemplated by the NSW sentencing regime. The practical consequence is that no formal right of administrative review is enshrined in the legislation to allow, for example, internal review or appeal to the NSW Civil and Administrative Tribunal (NCAT) against a direction or decision of Community Corrections – think drug-testing undertaken without an express court order in circumstances where it appears harsh and unreasonable. NCAT does not appear to have jurisdiction over the decisions or directions of Juvenile Justice either.

Despite this gap in NCAT's jurisdiction, decisions and directions of Community Corrections and Juvenile Justice are still administrative decisions which are subject to judicial review by the Supreme Court pursuant to any of the following established grounds:

- "ultra vires" – lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;

- real or apprehended bias;
- inflexible application of policy;
- taking into account irrelevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith; and
- "Wednesbury" unreasonableness.

If you consider that a decision or direction by Community Corrections or Juvenile Justice might be invalid on any of these grounds then prerogative relief may be obtained in the Supreme Court Common Law Division – Administrative Law List.

For an interesting case involving a successful administrative law action against a decision to transfer juvenile offenders to adult prisons, see: *ID, PF and DV v Director General, Department of Juvenile Justice and Anor* [2008] NSWSC 966.

## What Constitutes "Good Behaviour"?

Good behaviour does not appear to be expressly defined by statute in any Australian jurisdiction – see: *Crimes Act 1994* (Cth), *Crimes (Sentencing Procedure) Act 1999* (NSW), *Children (Criminal Proceedings) Act 1987* (NSW), *Sentencing Act 1991* (VIC) *Sentencing Act 1995* (NT), *Penalties and Sentences Act 1992* (QLD), *Sentencing Act 1995* (WA), *Criminal Law (Sentencing) Act 1988* (SA), *Crimes (Sentencing) Act 1995* (ACT), or *Sentencing Act 1997* (TAS).

**Fresh Offence – Punishable by Imprisonment?**

The NSW statutory regime is silent on the issue of whether an offence which is not punishable by imprisonment can constitute a breach of the condition to be of good behaviour.

Section 107 of the *Crimes (Sentencing Administration) Act 2005* (ACT) provides that an offender guilty of an offence committed during the term of the offender's good behaviour order, necessarily means that the offender has breached their good behaviour obligations. There is no distinction between summary or indictable offences.

Section 86 qualifies this, however, by defining the core condition of being of good behaviour as, *inter alia*:

(a) the offender must not commit –
    (i) an offence against a territory law, or a law of the Commonwealth, a State or another Territory, **<u>that is punishable by imprisonment</u>** [my emphasis].

Section 42(4) of the *Sentencing Act 1997* (TAS) provides:

> If a court finds an offender guilty of an **offence punishable by imprisonment** [my emphasis] committed during the period a probation order is in force in respect of the offender… an authorised person –
> (a) may make an oral application to the court, while the offender is before the court in relation to the new offence, for an order under this section; and
> (b) is to provide the offender in writing with the grounds for the oral application, if directed to do so by the court.

In the South Australian case of *Moore-McQuillan v Registrar of the Supreme Court*[14] the appellant, Mr Moore-McQuillan, had been previously placed on a suspended sentence in the Supreme Court by Nyland J for contempt of court. A condition of the bond was that the appellant be of *good behaviour for the duration of the bond*. At the time of making the order Nyland J warned the appellant about behaving inappropriately in court.

The original contempt was grounded in the following exchange between Perry J and Mr Moore-McQuillan:

| | |
|---|---|
| His Honour: | In this matter both applications are dismissed with costs. I publish my reasons. |
| Mr Moore-McQuillan: | Thank you for being an arsehole and thank you for being prejudicial and thank you for being a cunt. |
| His Honour: | That's enough from you. |
| Mr Moore-McQuillan: | Hope you have a good fucking retirement you stupid fucking idiot. Thank Christ we are getting rid of a fucking cunt like you. |

Within a month of the suspended sentence being imposed the appellant was abusing opposing counsel and the bench in the Workers Compensation Tribunal. The question of whether this constituted a breach of the requirement to be of good behaviour was resolved in the affirmative and the suspended sentence was revoked, notwithstanding the absence of a fresh offence (he was not charged with a fresh contempt).

The subsequent conduct which breached the condition to be of good behaviour was grounded in the following exchange between Mr Moore-McQuillan, the Workers Compensation Tribunal and opposing counsel:

| | |
|---|---|
| Mr Moore-McQuillan: | Listen, you just shut the fuck up and fucking sit down and don't be a dickhead and instead of fucking turning around and dictate the terms… |
| His Honour: | That's… |
| Mr Moore-McQuillan: | I'm talking to you and I don't need this fuckwit interrupting. |

[14] *Moore-McQuillan v Registrar of the Supreme Court* [2009] SASC 265.

Mr Moore-McQuillan appealed against, *inter alia*, the revocation and the appeal was dismissed, with Gray J (with whom Bleby and Layton JJ agreed) stating, at [12]:

> Whether taking place in a court or tribunal, the behaviour was undeniably a failure to be of good behaviour.

**Conclusion regarding "Good Behaviour"**

Like the issue of reasonable directions of a probation authority, each case of an alleged breach of the condition to be of good behaviour will ultimately turn on its own particular facts and merits and be a question of evidence and degree. Given the position in the ACT and Tasmania, it appears reasonably open to practitioners to make the submission before a court in NSW that a conviction for an offence which is not punishable by imprisonment, for example, *enter enclosed lands*, ought not substantiate a breach of the condition to be of good behaviour. If the court is against that submission then there would be clear grounds to argue against revocation on the grounds of triviality.

For an uncompromising approach to breach and revocation, especially *extenuating circumstances* and temporal considerations, see the decision of Chief Magistrate Henson: *Police v Larkins* [2009] NSWLC 12.

Practitioners should also be mindful of circumstances where conduct which is not subject to a conviction or finding of guilt, such as Mr Moore-McQuillan's additional tirade before the Workers Compensation Tribunal, can substantiate a breach of the condition to be of good behaviour and enliven the revocation of a bond.

The analysis further below of comparable foreign jurisdictions may provide additional assistance to practitioners wishing to test the waters in NSW.

## Defending Alleged Breach of Good Behaviour Bond Proceedings – Hearings

**Preliminary Considerations**

The typical discretionary condition imposed on a good behaviour bond is supervision, for example:

> *That the offender accepts the supervision and guidance of Community Corrections (or Juvenile Justice) and follows their reasonable directions.*

An allegation that an offender has breached such a condition is the principal focus of this paper. Most practitioners will be familiar with the "call up" notice and "breach report" which form the basis of this type of alleged breach of bond proceeding.

The legislative guidance in NSW as to defended breach proceedings for adult offenders is confined to the form of words under s 98(2) of the CSPA:

> **<u>If it is satisfied</u>** [my emphasis] that an offender appearing before it has failed to comply with any of the conditions of a good behaviour bond…

For juvenile offenders the test is prescribed under s 41(4) of the CCPA:

> **<u>if it is proved</u>** [my emphasis] that the person has failed to comply with a condition of the person's good behaviour bond or probation…

The form of words under ss 20A(5) and 20AC(6) of the CCA provides more assistance:

> the court ... **<u>if it is satisfied</u>** [my emphasis] hat the person has, **<u>without reasonable cause or excuse</u>** [my emphasis], failed to comply with a condition of the order, may...

There is little by way of authority on the law and procedure where a breach is denied. A logical place for guidance, you might therefore think, is the Judicial Commission Bench Books.

**JIRS – The Sentencing Bench Book**

It is unfortunate that the central questions raised by this paper are not answered in the Sentencing Bench Book. The relevant parts are extracted as follows (breach of bond proceedings in the Children's Court are not considered in the Bench Book):

> **Breach of bond [4-770]**
>
> If a court suspects that an offender has failed to comply with the conditions of a good behaviour bond, the court that sentenced the offender (or a court of like jurisdiction) may call on the offender to appear before it and, if necessary, issue a warrant for the offender's arrest: s 98 *Crimes (Sentencing Procedure) Act* 1999. Section 98(1)(c) requires the express consent of the offender to allow a court of superior jurisdiction to deal with a suspected breach of s 9 bond imposed by a lower court: *Yates v The Commissioner of Corrective Services, NSW* [2014] NSWSC 653 at [43]. Informal or implied consent will not suffice: *Yates v The Commissioner of Corrective Services, NSW* at [43]. The consent must occur at a time when the offender is called upon to appear before the court rather than at the appearance: *Yates v The Commissioner of Corrective Services, NSW* at [41].
>
> Breaches should be dealt with swiftly and in a manner that demonstrates how seriously they are regarded. However, the sentence imposed must not exceed the sentence that is appropriate for the original offence. It may however reflect the fact that the offender has rejected the trust placed in him or her by the previous sentencing court, that this shows a lack of remorse and casts doubt on the offender's prospects for rehabilitation: *R v Morris* (unrep, 14/7/95, NSWCCA). Kirby ACJ, Badgery-Parker and Bruce JJ added:
>
> Two things need to be borne in mind by any court which is called upon to sentence an offender in circumstances where that offender is called before the court by reason of such a breach. The first and fundamental is that that offender comes to be punished not for the breach but, following the breach, for his other original offence in respect of which the recognisance was imposed. Secondly, in assessing the appropriate

punishment for that original offence, the court must not ignore whatever penalty, whether by way of imprisonment or otherwise, may have been imposed by it or by some other court in respect of the conduct constituting the breach. The principle of totality clearly applies to the sentences to be imposed in respect of the breach and thereafter in respect of the original offence.

Where satisfied that an offender appearing before it has failed to comply with the conditions of a good behaviour bond, the court may:

- decide to take no action: s 98(2)(a);
- vary the conditions of the bond: s 98(2)(b);
- impose further conditions on the bond: s 98(2)(b); or
- revoke the bond: s 98(2)(c) *Crimes (Sentencing Procedure) Act* 1999.

**Failure to comply with condition of discharge or conditional release: s 20A [16-020]**

Section 20A sets out the consequences of failing to comply with a condition of discharge without conviction under s 19B(1) or conditional release after conviction under s 20(1).

Where a person has been conditionally discharged under s 19B(1) and has failed to comply with a condition of the order without reasonable excuse, the court may:

(i) revoke the order, convict the person of the offence, and resentence the person,
(ii) take no action: s 20A(5)(a).

An additional option exists for a person who has been conditionally released under s 20(1) but has failed to comply with a condition of the order without reasonable excuse. The court may impose a fine not exceeding 10 penalty units: s 20A(5)(b).

In *DPP (Cth) v Seymour* [2009] NSWSC 555, Simpson J concluded that s 20A does not permit a magistrate to set aside a duly executed conviction and substitute an order under s 20BQ: at [8]–[9]. Her Honour then said at [10] that the conviction can only be set aside by a proper appeal process.

**Failure to comply with sentencing order made under s 20AB [16-020]**

Section 20AC outlines the procedure when an offender fails to comply with a sentence passed or an order made under s 20AB. The court — if satisfied that the offender has, without reasonable cause or excuse, failed to comply with the sentence or order or any requirements related to it — may impose on the offender a pecuniary penalty not exceeding 10 penalty units; revoke the alternative sentence and re-sentence the offender; or take no action: s 20AC(6).

Section 20AC does *not* authorise the court to amend or revoke the order when the offender has a reasonable excuse for experiencing problems with compliance. The options in s 20AC only apply when the offender *lacks* a reasonable excuse. This situation was illustrated by the case of Rene Rivkin, who was convicted of the federal offence of insider trading and sentenced to 9 months imprisonment, to be served by way of periodic detention: *R v Rivkin* (2003) 198 ALR 400. When Rivkin had difficulty complying with periodic detention, for medical and psychiatric reasons, a leave of absence was sought

from the Commissioner of Corrective Services (NSW). In the absence of a judicial option, the problem was dealt with by the Commissioner agreeing to allow Rivkin to serve the 8 remaining weekends of his periodic detention in one 16-day block.

Generally, there is no procedure under Pt IB allowing the review of an alternative sentencing order, such as a community service order/intensive correction order, where it is no longer feasible for the offender to continue.

It is clear upon reading these relevant parts of the Sentencing Bench Book that the procedures and laws governing the defence of alleged breaches of bonds are simply not addressed.

**What is the Standard of Proof?**

***"If it is satisfied" and "If it is proved"***

The proper construction of these words is critical to the task of defending breach of bond allegations. The first issue is the standard of proof.

It is not unknown for a Local or Children's Court Magistrate to express the view that breach of bond allegations need only be proved on the civil standard, and for the prosecution to agree with that conclusion. This is something that practitioners must be alive to especially where the express language of the CSPA, CCPA and CCA omits any reference to the standard of proof.

**Criminal Proceedings or Sentencing Proceedings?**

All sentencing proceedings are criminal proceedings but the opposite is not necessarily true (just as all apples are fruit but not all fruit are apples). The authority for this proposition is to be found in the provisions of *Evidence Act 1995* (NSW).

***The Evidence Act 1995* (NSW)**

Part 1 of the Dictionary provides that:

> ***criminal proceeding*** means a prosecution for an offence and includes:
> (a) a proceeding for the committal of a person for trial **or sentence for an offence** [my emphasis]; and
> (b) a proceeding relating to bail…

This definition was given judicial consideration by the Full Bench of the Federal Court in *Fitz-Gibbon v Wily*[15] in which the following was said of the words "or sentence for an offence", at [110]:

> … does no more than ensure that the whole spectrum of a criminal prosecution is covered from beginning to end, that is to say, from committal to sentence and is not limited to the formal trial when the accused has pleaded not guilty

[15] *Fitz-Gibbon v Wily* (1998) 87 FCR 104.

Section 141 of the *Evidence Act* provides the following:

> **Criminal proceedings: standard of proof**
> (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
> (2) In a criminal proceeding, the court is to find the case of [a defendant/an accused] proved if it is satisfied that the case has been proved on the balance of probabilities.

This is confirmed in the High Court case of *R v Olbrich*[16] which provides that a sentencing court cannot take into account matters adverse to the accused unless they were proved beyond reasonable doubt but matters in favour of the accused need only be proved on the balance of probabilities.

See also *May v O'Sullivan*[17] which is the leading authority for the proposition that the court must be satisfied beyond reasonable doubt as the guilt of an accused person; and also *Briginshaw v Briginshaw*.[18]

**Report 79 of the NSW Law Reform Commission – Sentencing – Standard of Proof to Determine Breach**

In Report 79 the following was written with respect to community service orders, entitled *Standard of proof to determine breach*:

> [5.19] Breach of a CSO would, on normal principles, be required to be established beyond reasonable doubt. The Probation and Parole Service has suggested that breaches of CSOs should be determined according to the civil standard of proof if a breach is not to constitute a separate criminal offence. It was submitted that this would be consistent with the standard applied by the Parole Board to determine breach of a parole order.
>
> [5.20] The majority of submissions opposed this suggestion. **The crucial objection was that because breach of a CSO may result in re-sentencing the offender to a term of imprisonment, the breach should be required to be proved according to the criminal standard** [my emphasis]**.** Any lessening of the standard was contemplated only for breaches which attracted less serious consequences, but not for fundamental breaches resulting in re-sentencing.
>
> [5.21] In the Commission's view, there is no compelling reason why, contrary to normal principle, the elements required for breach of a CSO should be established to the civil standard.

While the above passage is dealing only with community services orders, the concepts are analogous to any breach of bond proceedings where the offender is liable to be re-sentenced upon revocation.

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[16] *R v Olbrich* (1999) 199 CLR 270.
[17] *May v O'Sullivan* (1955) 92 CLR 654.
[18] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Most pertinently, perhaps, is the decision of the NSW CCA in the Commonwealth matter of *R v Grimm*[19] which considered the onus and standard of proof where an offender is alleged to have failed to comply with a community service order imposed under s 20AC of the CCA. In *Grimm,* Allen J stated at [5]:

> I do agree with Simpson J that the Crown bore the ultimate burden of establishing, in respect of each of the breaches charged, that it was committed without reasonable cause or excuse. **Proof beyond reasonable doubt was required** [my emphasis].

Considering the above legislation and authorities, it can be said with considerable certainty that alleged breaches of bonds must be proved by the prosecution beyond reasonable doubt before the issue of revocation and re-sentencing arises.

**Does the Evidence Act apply to a Defended Breach of Bond Hearing?**

What is not so clear is whether the *Evidence Act* automatically applies to a defended breach of bond hearing. This depends upon whether such proceedings are accurately characterised as criminal proceedings (which are not necessarily sentencing proceedings) or sentencing proceedings (which are always criminal proceedings).

Section 4 of the *Evidence Act* provides the following:

> (1) This Act applies to all proceedings in a NSW court, including proceedings that:
> (a) relate to bail, or
> (b) are interlocutory proceedings or proceedings of a similar kind, or
> (c) are heard in chambers, or
> (d) subject to subsection (2), relate to sentencing.
> **(2) If such a proceeding relates to sentencing:**
> **(a) this Act applies only if the court directs that the law of evidence applies in the proceeding…** [my emphasis]
> (3) The court must make a direction if:
> (a) a party to the proceeding applies for such a direction in relation to the proof of a fact, and
> (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.
> (4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.

**Chapter 4 – Summary Procedure – *Criminal Procedure Act 1986* (NSW) (CPA)**

Chapter 4 of the CPA will be familiar to NSW practitioners who run summary trials in the Local Court; Part 2 prescribes the statutory framework for *trial procedures in lower courts,* and Part 3 prescribes the statutory framework for the *attendance of witnesses and production of evidence in lower courts.*

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[19] *R v Grimm* (1995) 124 FLR 372; 83 A Crim R 259.

Section 170(2) CPA provides:

> Parts 2 and 3 apply to the following proceedings:
> (a) proceedings before the Local Court,[20]
> …

It is therefore reasonable to conclude that defended breach of bond hearings in the Local and Children's Courts should proceed exactly as summary trials do. See also section 38 CPA which provides for *hearing procedures to be as for Supreme Court.*

Given the potential for different interpretations, however, it is recommended that practitioners canvas the view of the bench with respect to the *Evidence Act* and the *Criminal Procedure Act* at the outset of any defended breach of bond hearing:

- If the judicial officer is of the view that the defended breach of bond hearing is a criminal proceeding, analogous to a summary trial, then the *Evidence Act* and CPA will automatically apply.

- If, however, the judicial officer is of the view that the defended breach of bond hearing is strictly a sentencing proceeding, then the practitioner should consider making an application for a direction under section 4(3) and (4) that the *Evidence Act* apply.

It is worth noting that where a direction under section 4 is not made then the common law continues to apply as the default position: *R v Bourchas*.[21]

**"Reasonable Excuse" as Defence of Breach**

The following jurisdictions have enacted an express statutory defence of "reasonable excuse" for an alleged breach of bond: Commonwealth,[22] Western Australia,[23] Queensland,[24] and Victoria.[25] The NSW legislature has only enshrined a "reasonable excuse" defence in relation to community service orders,[26] but not for good behaviour bonds.

As with the issue of "good behaviour" and offences which are not punishable by imprisonment, practitioners should be willing to make submissions in defended breach of bond proceedings in NSW that by necessary implication, having regard to the position in other parts of Australia, an offender who has a reasonable excuse cannot be found to be in breach of a bond to the criminal standard; to find otherwise,

[20] The CPA applies in the Children's Court pursuant to s 27 CCPA.
[21] *R v Bourchas* (2002) 113 A Crim R 413.
[22] Sections 20A(5) and 20AC(6) *Crimes Act 1914* (Cth).
[23] Section 131(1) *Sentencing Act 1995* (WA).
[24] Section 123(1) *Penalties and Sentences Act 1992* (QLD).
[25] Section 83AD *Sentencing Act 1991* (VIC).
[26] Section 115 *Crimes (Administration of Sentences) Act 1999* (NSW).

you might argue, would be irrational and unjust[27] and result in the absurd.[28] See below for further relevant cases with respect to statutory interpretation.

## Bail

Sections 8 and 4 of the now repealed *Bail Act 1978* (NSW) appeared to confer a right to bail upon persons who were called up under section 98 CSPA for breach proceedings.

Unfortunately, the equivalent s 21 of the new *Bail Act 2013* (NSW) contains no such right for persons called up for breach proceedings.

## Warrants

It is prudent for practitioners to closely examine any warrant issued under section 98(1B) CSPA (or equivalent provisions of the CCA or CCPA) which provides:

> If, however, at the time the court proposes to call on an offender to appear before it, the court is satisfied that the location of the offender is unknown, the court may immediately:
>
> (a) issue a warrant for the offender's arrest, or
>
> (b) authorise an authorised officer to issue a warrant for the offender's arrest.

There may be circumstances in which the purported use of this power is invalid, for example where there is no evidence that the offender had moved. In such circumstances an application to the Attorney-General for an *ex-gratia* payment on behalf of your client may be appropriate.

## Statutory Interpretation

Keep the following cases in your arsenal when analysing alleged breach of bond proceedings:

- Where the legislation is ambiguous, a penal statute should be resolved in favour of the subject: *Murphy v Farmer*.[29]

- Liberty is regarded as a most precious right. Legislation which has the effect of derogating from the right of an individual to enjoy liberty is conventionally accorded (in the case of ambiguity) a strict construction which favours liberty: *DPP v Serratore*.[30]

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[27] *Public Transport Commission (NSW) v Murray More (NSW) Pty Ltd* (1975) 132 CLR 336.
[28] *DPP v Fuller* (1994) 34 NSWLR 233.
[29] *Murphy v Farmer* (1998) 165 CLR 19.
[30] *DPP v Serratore* (1995) 38 NSWLR 137.

- Where two meanings are open it is proper to adopt the meaning that will avoid consequences that appear irrational and unjust: *Public Transport Commission (NSW) v Murray More (NSW) Pty Ltd*.[31]

- The avoidance of absurd, incongruous and highly inconvenient results in legislation is a function of the courts, derived from the presumption that parliament would not intend such results: *DPP v Serratore*.[32]

## International Law and Comparative Foreign Jurisdictions

International law and the decisions of foreign courts can provide assistance and be persuasive, if not binding.

The High Court gave consideration to this issue in *Cook v Cook*[33] when it said, per Mason, Wilson, Deane, and Dawson JJ, at [390]:

> The history of this country and of common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts.

As for treaties which have been incorporated into Australian law, see: *Dietrich v The Queen*;[34] and for the use of treaties not incorporated into Australian law, see: *Teoh*.[35]

The following is a collection of miscellaneous relevant materials relating to international law and comparative foreign jurisdictions.

Article 22 of the *International Criminal Court Act 2002* provides, *inter alia*:

> (2) The definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of **ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted** [my emphasis].

## The United Kingdom of Great Britain

The Halsbury's Law of England[36] makes the following observations about the requirement to be of "good behaviour":

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31 *Public Transport Commission (NSW) v Murray More (NSW) Pty Ltd* (1975) 132 CLR 336.
32 *DPP v Serratore* (1995) 38 NSWLR 137.
33 *Cook v Cook* (1986) 162 CLR 376.
34 *Dietrich v The Queen* (1992) 177 CLR 292.
35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
36 Halsbury's Laws of England, Sentencing and Disposition of Offenders (Volume 92 (2010) 5th Edition)/6 Fines, Recognisances and Surcharges, at [151].

> The power to bind over to be of **good behaviour** does not meet the requirement of certainty under the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 because it fails to give any reliable indication of what would constitute a breach of the order (*Hashmam v United Kingdom (Application 25594/94)* (2000) 30 EHRR 241, 8 BHRC 104, [2000] Crim LR 185, ECtHR), and in light of this judgment courts should no longer bind an individual over **'to be of good behaviour**', and rather than binding an individual to 'keep the peace' in general terms, the court should identify the specific conduct or activity from which the individual must refrain… The power of a magistrates' court to bind persons over to be of **good behaviour** in respect of their conduct in court should cease to be exercised: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] All ER 904, [2002] 2 Cr App Rep 533 at V.54.5,CA.

Breach of a recognisance which renders a person liable to be sentenced for an offence of which they were convicted when they were entered into the recognisance must be proved as any other allegation is proved in a criminal court: *R v Smith* [1925] 1 KB 603, 18 Cr App Rep 170, CCA.[37]

## Canada[38]

Canada is a criminal code jurisdiction which provides interesting guidance with respect to general principles of probation, terms, conditions and breach proceedings.

An order for probation under the Canadian Criminal Code must prescribe, *inter alia*, that the offender be of good behaviour;[39] the court may prescribe additional conditions;[40] and those conditions must:

- set a clear and definitive standard of conduct which the offender can understand and comply with;[41]
- be enforceable;[42]
- be relevant to the offence;[43]
- designed to secure rehabilitation;[44]
- not be discriminatory or infringe unduly on basic rights;[45]
- be "reasonable" and ordered for the purpose of protecting society and facilitating the offender's successful reintegration into the community… what is required is a nexus between the offender, the protection of the community and his or her reintegration;[46]
- not be imposed as punishment;[47] and

[37] Halsbury's Laws of England, Sentencing and Disposition of Offenders (Volume 92 (2010) 5th Edition)/6 Fines, Recognisances and Surcharges, at [153].
[38] Information provided by Westlaw and the Canadian Encyclopedic Digest.
[39] *Criminal Code, R.S.C. 1985,* c. C-46, s. 732.1(2) [en. 1995, c. 22, s. 6].
[40] Ibid, s. 732.1(3).
[41] *R. v. Doiron* (1972), 1972 CarswellBC 366 (B.C. S.C.).
[42] *R. v. Shorten* (1975), 1975 CarswellBC 237 (B.C. C.A.).
[43] *R. v. Stennes* (1975), 1975 CarswellBC 12 (B.C. S.C.).
[44] *R. v. Gladstone* (1978), 1978 CarswellBC 395 (B.C. Co. Ct.).
[45] *R. v. Caja* (1977), 1977 CarswellOnt 1007 (Ont. C.A.).
[46] *R. v. Shoker* (2006), 2006 CarswellBC 2458 (S.C.C).
[47] *R. v. Ziatas* (1973), 1973 CarswellOnt 1093 (Ont. C.A.).

- not attempt to delegate power unlawfully to a probation officer or other person.[48]

The obligation to be of "good behaviour" is to abide by existing laws – see *R v R*[49] where a young person did not fail to be of good behaviour by twice running away from a group home.

In Canada there exists a defence of "reasonable excuse" to an alleged breach of a recognizance which must be proved on the balance of probabilities and the onus rests on the offender.[50]

In the Newfoundland case of *R v Tapper*[51] the accused was charged with breach of probation after having been made subject to a probation order which prohibited his use of alcohol or being in a place where alcohol was sold. The accused was found to have purchased beer and he was subsequently convicted of breach of probation. The court found that the accused's conduct clearly constituted a violation of the terms of the probation order.

In the Ontario case of *R v Lueck*[52] it was a condition of the accused's probation that he not be alone with any person under 18 unless that person was "in the presence of" a parent or guardian. The accused was subsequently found to be in a basement with an 8 year old boy while his mother was in the kitchen; the accused was never more than four feet from stairs connecting the two rooms and he believed the mother was similarly close. The accused was charged with breach of probation but was acquitted because the Court had reasonable doubt that the accused did not have the mens rea for the offence.

In the Newfoundland case of *R v Osmond*[53] the accused was thrown out of a bar by the owner who followed him outside; the accused pulled on the door several times and was charged with mischief for damaging the door but was acquitted. The accused was also charged with breach of probation for failing to "keep the peace and be of good behaviour". The accused was acquitted with the court finding that he did not fail to be of good behaviour as he did not fail to comply with any legal obligation in statute or regulation; merely yelling outside the bar while other people were coming and going did not constitute failing to keep the peace; there was no disruption or disturbance of public tranquility, peace and order.

In the Ontario case of *R v Palumbo*[54] the accused appealed against his conviction for breach of probation; the accused was required to attend and actively participate in

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[48] *R. v. Beam* (1954), 1954 CarswellOnt 25 (Ont. C.A.).

[49] *R. v. R. (D.),* 1999 CarswellNfld 219, 27 C.R. (5th) 366, 138 C.C.C (3d) 405 (Ffld. C.A.).

[50] *R. v. Flores-Rivas*, 2008 BCSC 1595, 2008 CarswellBC 2536 (B.C. S.C.).

[51] *R. v. Tapper* (2010), 2010 NLTD 24, 2010 CarswellNfld 35, 294 Nfld. & P.E.I.R. 316, 908 A.P.R. 316, Robert A. Fowler J. (N.L. T.D.) [Newfoundland & Labrador].

[52] *R. v. Lueck* (2011), 2011 CarswellOnt 15844, 2011 ONCJ 870, R.E. Jennis J. (Ont. C.J.) [Ontario].

[53] *R. v. Osmond* (2011), 314 Nfld. & P.E.I.R. 223, 977 A.P.R. 223, [2011] N.J. No. 326, 2011 CarswellNfld 308, Wayne Gorman Prov. J. (N.L. Prov. Ct.) [Newfoundland & Labrador].

[54] *R. v. Palumbo* (2012), [2012] O.J. No. 2559, 2012 ONSC 3365, 2012 CarswellOnt 7129, Timothy D. Ray J. (Ont. S.C.J.) [Ontario].

counselling recommended by his probation officer; the probation officer delivered a letter to the accused instructing him to take part in a spousal abuse program; the accused told the probation officer during meetings that he did not think the program was necessary. At the hearing the accused argued he did not possess requisite mens rea for commission of the offence, as he never actually refused to attend counselling. The accused did not give evidence and the court accepted the evidence of the probation officer and dismissed the appeal.

## The United States of America[55]

The American Law Reports 87 ALR4th 929 contains an article entitled, *Propriety of conditioning probation on defendant's submission to drug testing*. The author, Anne M. Payne. J.D., gives an insightful overview of the approach in the United States to conditions of probation generally:

> In imposing conditions of probation, it has been recognized that courts may restrict certain constitutional rights if they bear a reasonable relationship to the criminal activity of the probationer. However, conditions found to be vindictive, vague, or overbroad, or as restricting a valuable right, have been stricken from a probation order. Similarly, a punitive condition of probation may not be imposed in lieu of a sentence where the condition has no relationship to rehabilitation or protection of the public.[56]
>
> These concerns and policies set the boundaries for judicial analysis of the propriety of conditioning probation on drug testing. At least in some states, this type of testing appears to have become a common condition of probation, particularly for probationers convicted of drug-related crimes, although it is also used in other instances. It is generally agreed that a request by a law enforcement official that a person submit to drug testing by the production and submission of his bodily fluids to such official constitutes a search and seizure subject to constitutional scrutiny at both state and federal levels.[57]

The American Law Reports 58 ALR3d 1156 contains an apposite article entitled, *What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon.* The author, William S. Roby, III, concludes that the general principle in the United States is that "good behavior" means abstention from criminal conduct:

> In most jurisdictions speaking to the question, "good behavior", in the context of suspensions of sentences for crime, is taken to mean law-abiding behavior, behavior not inconsistent with the provisions of the criminal law.[58]

The corollary rule expressed in the article is that failure of good behavior can be shown only by conviction for crime:

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[55] Information provided by Westlaw and the American Law Reports.

[56] *State v Smith* (1988) 207 Conn 152, 540 A2d 679, 87 ALR4th 901.

[57] *Jones v. State*, 2002 WY 35, 41 P.3d 1247, 99 A.L.R.5th 761 (Wyo. 2002).

[58] *Hartley v State* (1931) 184 Ark 237, 42 SW2d 7.

> Absent a conviction for crime there can be no revocation of suspension of sentence for failure of good behavior.[59]

Of course one of the fundamental differences between the experience in Australia and that of the United States is the latter's constitutionally guaranteed rights which feature in each of the cited cases. Notwithstanding the lack of a constitutionally recognised bill of rights, Australian courts can seek guidance in the approach taken by courts in the United States.

## New Zealand

In New Zealand, a court may impose additional special conditions of supervision if it is satisfied that there is a significant risk of the offender committing further offences and the standard conditions alone do not adequately address that risk, and the offender requires a program to reduce the likelihood of further offending through their rehabilitation and reintegration.[60]

Breach proceedings in New Zealand are also subject to an express statutory defence of "reasonable excuse" such that an offender is only in breach if they fail without reasonable excuse to comply with a condition of the sentence.[61]

[59] *Holman v State* (1966) 43 Ala App 509, 193 So 2d 770.
[60] Sections 50 and 52(1) *Sentencing Act 2002* (NZ).
[61] Ibid, subsections 70(a) and (b).

## Practical Tips for Running Defended Breach of Bond Hearings

1. Read the breach report carefully and take detailed instructions on the allegations of non-compliance, especially with respect to appointments, drug tests and issues surrounding alleged poor attitude and lack of insight.

2. If the alleged breach is on the basis of a proven offence which is not punishable by imprisonment, consider submissions that the offence does not constitute a breach of the condition to be of good behaviour – refer comparable jurisdictions.

3. Does your client have a reasonable excuse for the breach, if so, consider defending the breach on that basis as opposed to admitting the breach and seeking no action.

4. Be alive to inadmissible material and uncharged acts in the breach report – the same goes for a pre-sentence report.

5. Analyse the discretionary conditions of the bond and whether they offend the test prescribed in *Bugmy*.

6. Analyse the directions of Community Corrections or Juvenile Justice as to whether they are reasonable, proportionate and bear some nexus to the subject offence – administrative law principles apply and prerogative relief may be sought.

7. Consider carefully whether the admissible evidence substantiates a breach to the criminal standard, if so, consider advising your client to admit the breach with a view to arguing against revocation on the established bases, if not – **DEFEND!**

8. Where defending an alleged breach consider issuing a subpoena for the Community Corrections or Juvenile Justice file and, if necessary, relevant staff (i.e. the manager or a particular caseworker) for cross-examination.

9. Make all the usual forensic judgment calls regarding whether to simply test the prosecution case or mount a positive defence case by calling your client and other evidence.

10. Test the waters at the beginning of the breach hearing with respect to the standard of proof, status of the *Evidence Act* and general hearing procedure so that you, the bench and the prosecutor are all on the same page.

11. Consider Supreme Court appeal on any error of law; an appropriate vehicle could yield some much needed appellate guidance in this area.

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