NSW Suspended Sentences

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Intro

Suspended sentences can be one of the more challenging features of a Local Court criminal practice. They also come up in the Children's Court and the District Court, both on appeal and upon indictment.

The history of suspended sentences in NSW shows some marked changes in policy and there still seem some unexplored areas. However, presently accepted practice in this area is settled and it's possible to make a pretty clear survey of the relevant law on the topic.

The sharp end of dealing with a suspender comes when the client breaches, usually by a further offence. But to understand all the implications of dealing with a s12 – including the breach proceedings – it is necessary to understand the complete 'life-cycle'; from imposition through to appeal rights.

This paper deals with suspended sentences in four stages:

1. Sentencing
2. Revocation
3. Re-sentencing
4. Appeal

There is also a short comment on bail rights at the end, and throughout there are supplementary sections dealing with suspenders as they apply in the Children's Court.

Sentencing

Basics

Is a suspended sentence available at all?

Being a gaol term a s12 can only be imposed where the offence carries imprisonment. It can be as short as a day but cannot exceed two years in length.

Section 12(2) provides that a suspender cannot be imposed where the offender is subject to some other period of gaol that is not suspended. *R v Edigarov* [2001] NSWCCA 436 is authority that this rule extends to a defendant serving balance of parole. *R v Finnie* [2002] NSWCCA 533, on the other hand, is authority that a court can impose a suspender first, then for another offence impose a full time term, all during the same sentencing hearing.

Three Steps – Gaol, How Long, Suspend?
Those entry criteria established, the next question is how a court should approach imposing a suspended sentence. The leading authorities in this area are *Zamagias*[1] in the NSWCCA and *Dinsdale* in the High Court.

The cases agree that the process involves first a determination that only a gaol sentence will be adequate punishment (per section 5 of the *Crimes (Sentencing Procedure) Act,* hereafter the Sentencing Act). The second step is to ask how that sentence should be served; s12, HD, PD or full time, in ascending order of severity. *Zamagias* goes a step further allowing that a third question stands between these two determinations, the setting of the head sentence. *"The determination of the term is to be made without regard to whether the sentence will be immediately served or the manner in which it is to be served."*[2]

This last point from *Zamagias* is important and can be very useful. At times a sentencing court will refer to the inherent leniency in a s12 and it can seem that the length of the sentence is increased in view of the fact that the court intends to suspend. *Zamagias* at paragraph 26 is authority that this is an error.

In considering the term of imprisonment it is worth remembering that upon revocation a court will have to set a non parole period, and that sentences under 6 months must be fixed. A six month suspended sentence leaves the revoking court very little room to move. Criminal records do from time to time show gaol terms of six months and one day, although less adventurous courts may be more easily persuaded to adopt seven months.

So much for the bare bones; why would a court suspend at all?

Broad discretion to suspend
Dinsdale is authority that prospects for rehabilitation should not "wholly, mainly or specially"[3] determine the decision to suspend. The notion that rehabilitation was the primary consideration in the decision to suspend had some currency in WA whence Dinsdale appealed, and His Honour Kirby J expressly overruled that line of authority in his judgment.

However, that is not to say that Kirby, or any other appellate judge, has offered a list of proper considerations. Appellate judges seem averse to limiting discretion in this area. Kirby J does mention some in Dinsdale's case: the nature of the offence and surrounding circumstances; the low likelihood of re-offending; and the impact on offender and family of a prison term.[4]

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[1] This and other major cases referenced in this paper have been case noted in Appendix B. Where possible those case notes will also hyperlink to a free to air web copy of the judgment.
[2] *Zamagias* p26.
[3] Per Kirby J p84.
[4] Per Kirby J p88. See also *R v Kruger* (1977) 17 SASR 214 at 221-2.

There are some acknowledged areas in which suspenders have been held to be inappropriate, including where; an offender has previously been the subject of a s12; where an offender has breached a bond; or where an offender has engaged in a course of criminality over time.[5] These principles seem more honoured in the breach than in the observance.

The term of the bond - Room to move?

Universally the practice of courts seems to be to order that the offender be subject to a period of imprisonment of – say – 12 months, wholly suspended upon entry into a bond to be of good behaviour for 12 months. That is; the bond and term suspended are of the same length. Read closely, that is not what the section requires:

S12 Suspended Sentences

(1) A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:

*(a) suspending execution of the whole of the sentence for such period (**not exceeding the term of the sentence**) as the court may specify in the order, and..*

What then is wrong with a 12 month term suspended upon entry into a bond of six months?

Some obiter consideration of this question occurred in the judgments in *R v Gamgee* [2001] NSWCCA 251. The DPP had appealed from a decision of the District Court purporting to order that an offender serve 6 months of his two year gaol term, but that the balance be suspended upon his entry into a bond under s12. Mason P and Dowd J refused the appeal finding that the terms of s12 as it then stood permitted the orders in the DC, notwithstanding that a two year term with a non parole period of six months ordered subject to Part 4 might have been more straight forward.

The current form of s12, requiring suspension of the whole of the sentence, is a legislative response to *Gamgee*[6]. The orders imposed in the DC in Gamgee would now fall foul of s12 in that the whole of the term must be suspended.

However, this is not to say that the term suspended and the period of the bond must be identical. Their Honours Mason P and Dowd J specifically endorse the idea of, *"…specifying a period that is less than the term of the sentence".*[7]

Perhaps more persuasive though is that His Honour Sully J was in the minority, being minded to allow the DPP appeal, and it is his view that was endorsed by the Parliament in amendments to the Act requiring suspension of the whole of the sentence. His Honour also observed:

[5] See Butterworths loose-leaf commentary to s12 for references.
[6] See the second reading speech to Crimes Legislation Amendment Bill 2003.
[7] At paragraph 11.

> *The intention behind s12(1)(b) is, presumably, that the term of the good behaviour bond should be such as will provide a real and substantial sanction in aid of the achievement of that rehabilitation which is, presumably, the objective of the suspension authorised by s12(1)(a). If that be so, then it would make sense to provide specifically that the term of the sanctioning good behaviour bond is to be the same as the term of the suspended execution of sentence.*[8]

While the parliament legislated in accordance with His Honour's view about partially suspended sentences, it did not with respect to this last suggestion, despite a specific suggestion.

Kids
The same considerations as those set out above apply to children.

If it were possible to persuade a court to impose a s12 with a bond shorter than the sentence, it may be that the Children's Court would be the appropriate place to try. The sentencing regime under s33 allows for greater increments in the severity of sentences than does the adult jurisdiction. In practice children receive greater leniency in breaches of bonds, parole and bail.

Adding a sentencing option comprising a full gaol term denunciation of the conduct, but a foreshortened bond bring completion of it within the reach of a child, would further augment the range of options open to a Children's Court Magistrate. Putting the issue another way, where a 12 month suspender might 'set up the child to fail', such a sentence with a two month bond would address that concern of the sentencing court.

Revocation

Proceedings for breach
Section 98 of the sentencing Act allows a court that suspects an offender has breached a good behaviour bond to call that offender back before the Court, by warrant if needs be. Section 100 allows that this may occur after the bond has expired, provided the conduct constituting the breach occurred during its currency.

Generally speaking these proceedings will commence in one of two ways. Either the Probation and Parole service will have formally advised the Court via a Breach Report of the offender's *alleged* breach, or the court will accept a plea to a further offence occurring during the currency of the bond, and itself call up the bond. It is not unusual for both to occur.

Bench papers
Whether the breach is said to be a new offence or not, it is always worthwhile to seek access to the bench papers. In the case of a probation and parole breach you will need to review the breach report and take specific instructions from your

[8] At para 26 [2].

client as to whether the breach or breaches alleged are admitted. If they are not it may be necessary to challenge the Breach Report. The Probation and Parole Officer can be called for cross examination and the Probation and Parole file subpoenaed. Essentially the process is as described in the Legal Aid *Criminal Law Solicitor's Manual*.[9]

Even where there is no breach report the bench papers from the original offence may reveal comments by the Magistrate, references, MERIT reports and PSRs. You may also detect errors on the face of the record that might invalidate the original suspended sentence; a children's sentence in the Local Court, a child sentenced to a suspender absent a JJR[10], a child sentenced in the Children's Court for a traffic offence, a non-parole period being set after 29 November 2006.

Where error is present, your first application – before admitting any breach or proceeding to sentence submissions – might be that the court correct the error under s43. If that occurs then there was no breach as the orders previously purported to have been made were in fact in error and as such a nullity. At least that is a way of approaching the problem, which may produce a very favourable outcome for the client.

Admitting the breach

More often than not admitting the breach will be a formality. If there is a new offence or your client took off interstate, there may not be much to say. But where issues are complex or the breach report is challenged, it may be best to formally not admit, or deny, the breach. If you are instructed to admit, you should get clear instructions on what exactly is admitted and put that with precision to the court.

Apart from anything else, what you say about the breach will affect your client's bail position. See below.

Section 98 - Trivial good reasons

If breach is established the next question is whether the court will revoke. Section 98 makes it clear that the court must revoke unless satisfied that the conduct constituting breach is trivial or that there are good reasons to excuse that conduct.

As you think about these issues it is important to tease out three questions and keep them separate in your preparation and submissions:

1. Is the breach admitted and how?
2. Is there an argument under s98?
3. Are there compelling arguments on sentence once the bond is revoked?

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[9] See page 63.

[10] There is specific authority that it is an error requiring re-sentencing with a JJR, for a court to impose a control order without a JJR: ***R v CVH* [2003] NSWCCA 237**

If your client failed to inform the registry of his move interstate, but that was because he'd travelled interstate to attend to a funeral and assist clearing up an estate, then likely you'd admit the breach and offer good reasons. Courts and prosecutors will from time to time conflate these issues and you can assist by keeping them separate and being clear when you submit.

Beyond these comments it is difficult to say much about how a court will deal with the question of revocation without basically paraphrasing the *Cooke* decisions. The case notes in the appendix give more details but the essential principles that emerge are:

1. The revoking court should deal first with the suspender, then with the new offence. These two exercises are discrete and should not be mixed.
2. The court will look to trivial conduct or good reasons to excuse the conduct. The court does not look for good reasons not to revoke.
3. The reasons or triviality will be found in the objective circumstances of the conduct at the time of breach. Usually the subjective features of the offender at the time of revocation will be irrelevant.
4. In a very rare case the subjective features of the case might point to good reasons.

How you approach each case will obviously depend on all its circumstances, but as likely it will depend on the bench. Some Magistrates routinely find finable offences or minor drug possession trivial. Others take a very different view.

I've seen the following arguments succeed:

- The offence is inherently minor; PPD, EIL, fail to quit, technical AVO breaches.
- Different offence (This one is undoubtedly an appealable error, but that doesn't stop it succeeding in the Local Court from time to time.)
- No supervision was ordered on the s12, despite being clearly needed. Therefore, the new offence is, at least in part, a consequence of the failure to appropriately supervise the offender.
- The dirty urine during drug rehabilitation is a breach, but is to be expected as a normal part of the rehabilitation process in a chronic drug user. That consideration and evidence of continued positive work by the offender taken together provide good reasons to excuse the lapse.
- The offender's remote residential address made communication with and visits to Probation and Parole so hard as to explain the offender's failure to maintain contact with PPS.
- The *Marston* defence. See below.

Subjectives
The two *Cooke* cases stand as authority for the propositions extracted above, including the harsh principle that subjective features of the defendant at the time of revocation are irrelevant. However, they also leave the door ajar for reliance on subjectives in certain limited circumstances.

Both *Cooke* cases offer comment on a particular argument adopted by the South Australian Supreme Court in *Marston* and endorsed by His Honour Mr Justice Hidden in the NSW Supreme Court in *Burrow.* In *Marston* the court found that it would be disproportionate to revoke a three year suspender for robbery upon a breach constituted by stealing a couple of muffins to satisfy hunger.

Both the CCA and Court of Appeal in *Cooke*, clearly faced with the occasion to overrule the line of cases, left the door open to *Marston* type reasoning; barely.[11] Where the reasoning of the appellate courts might be distinguished, scope to have the court take subjective features into account might be widened.

HH Howie J found that in a rare case the *Marston* – *Burrow* line of authority might apply in NSW, but that it would be less applicable here because of certain material differences in the regimes. In SA a three year sentence can be suspended whereas in NSW the maximum is two. In NSW the revoked sentence can be served by HD or PD and the court can adjust the NPP, all of which are not available options in SA.

However, in rural and regional NSW particularly, HD and PD may not be available, through no fault of the client. If the sentence is of less that six months or was imposed with a non-parole period (Before 29 November 2006 for adults and 3 November 2008 for kids) then the court has no scope to ameliorate the sentence by varying the NPP. If any or all of these circumstances obtain, then *Cooke* can be distinguished and, at least, the cases in which the *Marston* approach might be appropriate is widened from being, ‘a very rare case indeed’.

Kids
When dealing with children of course, HD and PD will never be available. And the amendment dispensing with the requirement to fix a NPP when imposing the suspender came later in the Children’s Court; 3 November 2008. Arguments can always be made to distinguish the situation in the Children’s Court form the reasoning in *Cooke*.

Taking “no action” – Proper exercise of the jurisdiction
If you mount a s98 argument and the bench seems persuaded, the last thing to ensure is that the orders made by the court are appropriate.

In *Nouata* the magistrate was persuaded by the fact that the breaching offence occurred late in the s12 and that there were special circumstances, which seems

[11] See case note.

to indicate that subjective features of the offender were taken into account. However, rather than couching the orders of the court in terms of s98 or some consideration of *Cooke* or *Marston*, the court simply purported to take no action.

On appeal to the Supreme Court the DPP's contention that the magistrate had effectively failed to exercise the jurisdiction of the court was upheld, and the matter remitted.

If a judge or magistrate seems inclined 'not to take action' on a s12 it is unlikely you will want to resist that course. But you can protect your client from appeal – to some extent – if you are able to guide the bench to make appropriate orders involving a finding of good reasons under s98, perhaps with *Marston* or *Cooke* as authorities.

Re-sentencing

Preparing submissions on re-sentencing – or more accurately the completion of the sentencing – involves looking all the information on the old s12 that you can get, just as in the case of revocation proceedings. Get hold of the old bench papers and check for references, PSRs MERIT reports and so on.

For the sentencing it will also be relevant if your client ever spent time in custody in connection with the suspender. So it is worth getting a copy of the custodial record from sentence administration too. [Call 8346 1310 or email sentence.admin@dcs.nsw.gov.au]

Setting a Non-Parole Period

Until 2006 the court that imposed the s12 was required by law to also set a non-parole period. But, effective 29 November 2006, the parliament amended s12 to indicate that, subject to s99(1), part 4 of the sentencing act does not apply to a suspended sentence. Part 4 deals with the setting of a non-parole period or fixed term, back-dating and commencement.

There are some transitional provisions canvassed in the Butterworths commentary to s12, and the case of *Rickard* considered the position of a defendant subject to a s12 with a set non-parole period imposed before 29 November 2006, but breached after. Effectively, because the original court had acted within the law in fixing the non-parole period, the matter is *res judicata* and the revoking court has no power to intervene. The defendant is stuck with the validly set NPP. *Rickard* doesn't help much in the re-sentencing, but might be a plank in an argument not to revoke at all. See above.

Of course when setting the NPP the court will be bound to follow the usual statutory ratio between the NPP and time on parole. The usual principles relation to special circumstances warranting departure form the statutory ration will also apply. Very often you could rely on the same factors as warranted the s12 in

seeking a finding of special circumstances. In addition to the usual arguments, there are other factors that might affect the NPP determined upon revocation. See below.

Back-dating and time served

Occasionally a judge or magistrate will, in imposing a s12, purport to take into account the time that the defendant has spent in custody in relation to the charge. I think this is wrong in law as those steps are mandated in Part 4, and the act very specifically defers those matters to be dealt with by the revoking court.[12]

Unfortunately the CCA disagrees with me.

In *Pulitano* the CCA was called to consider exactly this issue. Mr P had served six months years before being sentenced to a s12. Upon revocation the court did not backdate for this early time served.

On appeal the CCA looked to the sentencing remarks of the imposing judge and determined that the old time served had been taken into account in imposing the s12. This was despite there being no explicit remark to that effect, and despite some cogent contextual arguments against that finding of fact.

Pulitano sends a warning that ambiguity in the sentencing may well lead to an adverse finding on the revocation. I would suggest that seeking an explicit direction in the remarks on sentence is the best way to prevent this ambiguity and the damage it can cause your client later. I'd also suggest that the preferable outcome would be that the time already served is **not** taken into account.

Where the imposing court did not take time served into account, it is appropriate to ask the breaching or appeal court to backdate the sentence under s99(1)(c)(ii).

Section 99(1)(c)(ii) directs the breaching court to apply Part 4 and s24.

Part 4 includes s47 *Commencement of Sentence*, which at (3) directs that the court MUST take into account time spent in custody in relation to the charge.

The imperative to take time served into account is repeated in s24 (a); directing the breaching court to take into account anything done by the offender in compliance with the bond, **and** the mere fact that the offender has been on a bond. While the legislation is pretty clear, there is further authority that this approach is correct: *Tolley,* para 27.

[12] Consider this scenario: If you spend three months in then get a six month s12, you've really been sentenced to nine months. But if you breach the s12 you'll have to do all six months full time rather than a shorter NPP on a nine months sentence.

Not infrequently the breach report will reveal that the client did comply with terms of the bond, maybe even spent time in a residential rehabilitation facility subject to Probation and Parole direction.

Back-dating should be a simple enough matter of asking the court to backdate the sentence to account for time served both before the bond was imposed, and for any period of remand during the revocation proceedings. A failure to do so should be an immediate trigger to strongly consider an appeal.

As well as forming part of some general subjective observations, compliance with particularly a residential rehab programme may also found a submission that the sentence be back-dated to account for quasi custody. That goes equally for time in rehab during supervision and leading up to the imposition of the bond, say if your client was on MERIT. Again, it could readily become an issue that such compliance or quasi-custody was taken into account in fixing the s12. Again it might be worth seeking a clear indication from the judge as to whether these factors have been taken into account.

Time compliant with the bond

While s24 requires the court to take account of any compliance with the bond and further separately requires that account be taken of the fact the person was subject to the bond, I have found it difficult to persuade magistrates to give this part of the s12 regime real force.

Often a client will breach their s12 with an unrelated further offence late in the s12, in circumstances where the bond required no supervision, and only compliance with the requirement of good behaviour can be said to be compliance with the bond. Surely such an offender who has re-offended a week before the end of the bond should be treated markedly differently to the offender who breaches in the first week? Yet often enough 12 with nine will be the result for both.

I suggest an appropriate way to distinguish the two cases above would be to substantially reduce the NPP required of the compliant offender to reflect that compliance. I don't suggest that the actual term suspended be reduced on revocation on the basis that effectively each day served compliant with a bond is a day served off the sentence. This approach – though apparently then lawful on a strict view of a law – was considered and roundly rejected in *Tolley*, see Howie J at p43. If the sentence to be imposed were reduced by a day for each day that the offender was compliant with the bond, then indeed the sword of Damocles would shrink daily until is was but a butter knife.

The closest authority that I am aware of for the suggested approach comes from the last paragraph of *Zamagias*, where the ultimate PD sentence was reduced rather than back dated, to allow day for day reduction in the sentence in view of the fact that Mr Zamagias had been subject to the bond. Having railed against

the logic of such a view, His Honour nonetheless felt constrained at law to give weight to the period Mr Zamagias had been on the bond. The difficulty with this as an authority is that the particular circumstances of the appeal and then current principles of double jeopardy on Crown inadequacy appeals also intrude on the Court's reasoning.

> *44 I propose that the appeal be allowed and the sentence imposed in the District Court be quashed. In my opinion the sentence that should now be imposed is imprisonment for 3 years with a non-parole period of 2 years 3 months. It is not possible to backdate the sentence but the respondent should receive the benefit of the period during which he has been subject to the good behaviour bond. The sentence and the non-parole period, therefore, should be reduced by 6 months. I propose that the respondent be sentenced to imprisonment for 2 years 6 months with a non-parole period of 1 year 9 months. There should be an order that the sentence be served by way of periodic detention. The sentence is to commence on Friday 22 February 2002. The non-parole period is to expire on 21 November 2003 the date upon which the respondent is to be released to parole.*

It might also be possible to advocate this argument by analogy with the situation of breaches of parole before the State Parole Authority. The SPA will calculate the balance of parole period owed by the offender by first taking off the sentence any day served on parole before the breach. Day for day, time on parole comes off the sentence. Why should the s12 be different?

Consider John and Mary. They each receive a 12 month term. John's is suspended but Mary gets 6 to serve. They each breach in the 11th month. Mary serves her remaining one month balance of parole while John goes before the court for breach proceedings. Assume John too gets a 6 month NPP.

They both breached the terms of their conditional liberty but Mary serves a total of 7 months inside with 5 on parole and on release after her breach the sentence is over. John, on the other hand serves 6 months inside and a total of 17 months conditional liberty subject to the bond and parole. And, he is still subject to breach by SPA on his parole.

The court originally found that John's case warranted a more lenient suspended sentence than Mary. Yet having breached at a similar stage the ultimate outcome for John seems worse. I suggest that this apparent injustice in the approach can be ameliorated if the breaching court looks to John's lengthy s12 compliance in setting the non-parole period at say 1 month. He will still be subject to the whole sentence for 23 months, but will have served only 1 full time. Now the comparison with Mary seems a little fairer, and 23 months ain't no butter knife.

PD or HD

Regardless of any available back-dating arguments, separate consideration should be given to the suitability of PD or HD. Neither can be imposed without a PSR, and before proceeding to the re-sentencing hearing you should take instructions and consider these options, seeking a new PSR or options only report to address these alternatives to full time.

Kids

The observations regarding kids really flow from what is set about above.

I can see no reason why the argument in *Rickard* does not apply to children, but the amendment date is later, 3 November 2008. If your child was placed on a s33(1B) before that date then the NPP should have been set. If it was then that NPP is not subject to review upon revocation. Conversely if a NPP was set but after 3 November 2008, *Rickard* is authority that this NPP does not bind the breaching court.

Appeal

Since *Barrett* and its consequent amendments there is no doubt that the imposition of the s12 and the later revocation are each the subject of appeals as of right to the DC. The result then is that you should advise your client of their one month appeal as of right and three month time limit with leave.

A tangential advantage of the appeal is that it operates as an automatic stay of execution if lodged within the 28 days. Particularly for clients likely to breach, and who might avoid the s12 on appeal, the stay is important.

All of the arguments discussed above – s98 arguments and sentencing issues – can be re-litigated on appeal. As the appeal is heard *de novo* there is not – to my knowledge – any reason why you could not agitate a s98 argument on appeal even though you had not in the local court proceedings.

There is one potentially complicated situation that attracts some ire from the bench: What to do with a client on a s12, charged with a new offence to which they are likely to plead, but who is within time to appeal the s12 they would otherwise breach? My own view is that you would be negligent if you did not advise the client of their appeal rights having reconstructed the chronology from the record.

While magistrates may be irked to see their suspended sentences undermined in this way the law simply allows the appeals as of right. On one view the intervening breaching offence is simply of no concern to the appeal court, and certainly often that court will not be made aware of any alleged breach.

While the breach of conditional liberty will remain an issue for the local court when it comes to deal with the breaching offence, there can be no question that the appeal puts the breached s12 beyond the power to the LC. Some magistrates will adjourn the breach offence to allow the appeal to run its course. Any different sentence, including a variation in the terms or length of the s12 will mean that the new s12 following the appeal is a DC bond imposed after the commission of the breaching offence. Indeed, even in the case where the DC is unmoved on the appeal but imposes a new s12 of the same duration effective from the appeal date, that may sideline the revocation issue.

Of course the deliberate manipulation of appeal rights without any other purpose, simply to defeat the revocation, would be an abuse of process. But in my view you have to draw all options to your client's attention and if they instruct you to appeal, having understood their rights, then those are your instructions.

Bail

The presence of a suspended sentence on your client's criminal record can be a factor on bail. There are myriad ways in which the prior suspender might be relevant, but there is only one I want to focus on here. There is an argument, based on a close reading of the Bail Act, that a client against whom a breach of s12 is alleged but neither proved nor admitted, has an absolute right to bail.

Section 8 of the Bail Act provides for a right to release on bail for persons charged under the Summary Offences Act; with other offences not carrying gaol terms or with such other offences provided for in regulations. Additionally the right to bail is also extended to persons who are, 'accused persons' within the meaning of that term as defined in s4(2) (e) or (f).

Section 4(2)(e) defines a person brought before court pursuant to s98 of the Sentencing Act (or section 116 of the Crimes (Administration of Sentences) Act[13]) [*C(AS)A*] as an accused person for the purposes of the bail act. The only way for a person alleged to have breached their s12 to be called to appear before the court is pursuant to s98.

Section 8(2) then provides that a person is entitled to bail if the section applies to them, and certain other exclusions do not:

(2) A person accused of an offence to which this section applies:
(a) is entitled to be granted bail in accordance with this Act unless:
(i) the person has previously failed to comply with a bail undertaking given or bail condition imposed in respect of the offence,
(ii) the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,
(iii) the person stands convicted of the offence or the person's conviction for the offence is stayed, or…

In my view then, provided your client answered bail in the substantive proceedings before the bond was imposed, is not intoxicated and has not admitted the breach, they are entitled to a grant of bail. All this turns on a reading of the meaning of 'conviction' in s8(2).

Conviction is also defined in the dictionary to the *Bail Act*, but really only to confirm that dismissals under s10 and s33(1)(a) count as convictions. Where

[13] This is the mechanical provision for call up of an allegedly breached CSO.

does that leave s8(2)(a)(iii)? Surely anyone who has been called before the court under s98 or s116 *C(AS)A* 'stands convicted of the offence'?

I would submit that the only construction which can be placed on the term conviction, in the context of s8(2)(a)(iii), is the finding that the breach is proved by a court before which the accused is called under s98 or s116 *C(AS)A.* If conviction has its ordinary meaning, then all persons brought before the court under s98 and s116 would be 'convicted', and accordingly none enjoy a right to release on bail. Section 4(2)(e) in the definitions and 8(1)(c) in the Act proper would have no work to do. Apart from the irrationality and absurdity of such a construction, the common law clearly also supports interpretation of ambiguity in favour of liberty when analyzing penal statutes; *DPP v Serratore* (1995)38 NSWLR 137.

Kids

Sections 8 and 4 make no mention of the parallel provisions applicable to children. If pushed reliance could be placed on section 6 of the Children (Criminal Proceedings) Act:

6 Principles relating to exercise of functions under Act

A person or body that has functions under this Act is to exercise those functions having regard to the following principles:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Appendix A- Legislation

Crimes (Sentencing Procedure) Act 1999

5 Penalties of imprisonment

(1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.
(2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:
  (a) its reasons for deciding that no penalty other than imprisonment is appropriate, and
  (b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).
(3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
(4) A sentence of imprisonment is not invalidated by a failure to comply with this section.
(5) Subject to sections 12 and 99, Part 4 applies to all sentences of imprisonment, including any sentence the subject of a periodic detention order or home detention order.

12 Suspended sentences

(1) A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:
  (a) suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as the court may specify in the order, and
  (b) directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.
(2) An order under this section may not be made in relation to a sentence of imprisonment if the offender is subject to some other sentence of imprisonment that is not the subject of such an order.
(3) Subject to section 99 (1), Part 4 does not apply to a sentence of imprisonment the subject of an order under this section.
(4) An order under this section may be made after a court has decided not to make a home detention order in relation to the sentence of imprisonment.

24 Court to take other matters into account

In sentencing an offender, the court must take into account:
(a) any time for which the offender has been held in custody in relation to the offence, and
(b) in the case of an offender who is being sentenced as a result of failing to comply with the offender's obligations under a community service order, good behaviour bond or intervention program order:
  (i) the fact that the person has been the subject of such an order or bond, and
  (ii) anything done by the offender in compliance with the offender's obligations under the order or bond, and
(c) in the case of an offender who is being sentenced as a result of deciding not to participate in, or to continue to participate in, an intervention program or intervention plan under an intervention program order or good behaviour bond, anything done by the offender in compliance with the offender's obligations under the intervention program order or good behaviour bond, and
(d) in the case of an offender who is being sentenced following an order under section 11 (1) (b2):
  (i) anything done by the offender in compliance with the offender's obligations under the order, and

(ii) any recommendations arising out of the offender's participation in the intervention program or intervention plan.

44 Court to set non-parole period

(1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
(2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).
(3) The failure of a court to comply with subsection (2) does not invalidate the sentence.
(4) Schedule 1 has effect in relation to existing life sentences referred to in that Schedule.

45 Court may decline to set non-parole period

(1) When sentencing an offender to imprisonment for an offence (other than an offence set out in the Table to Division 1A of this Part), a court may decline to set a non-parole period for the offence if it appears to the court that it is appropriate to do so:
(a) because of the nature of the offence to which the sentence relates or the antecedent character of the offender, or
(b) because of any other penalty previously imposed on the offender, or
(c) for any other reason that the court considers sufficient.
(2) If a court declines to set a non-parole period for a sentence of imprisonment, it must make a record of its reasons for doing so.
(3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
(4) The failure of a court to comply with the requirements of subsection (2) with respect to a sentence does not invalidate the sentence.

46 Court not to set non-parole period for sentence of 6 months or less

A court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less.

47 Commencement of sentence

(1) A sentence of imprisonment commences:
(a) subject to section 70 and to any direction under subsection (2), on the day on which the sentence is imposed, or
(b) if the execution of the sentence is stayed under section 80, on the day on which the court decides whether or not to make a home detention order in relation to the sentence.
(2) A court may direct that a sentence of imprisonment:
(a) is taken to have commenced on a day occurring before the day on which the sentence is imposed, or
(b) commences on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment.
(3) In deciding whether or not to make a direction under subsection (2) (a) with respect to a sentence of imprisonment, and in deciding the day on which the sentence is taken to have commenced, the court must take into account any time for which the offender has been held in custody in relation to the offence to which the sentence relates.
(4) The day specified in a direction under subsection (2) (b) must not be later than the day following the earliest day on which it appears (on the basis of the information currently available to the court) that the offender:

(a) will become entitled to be released from custody, or
(b) will become eligible to be released on parole,
having regard to any other sentence of imprisonment to which the offender is subject.

(5) A direction under subsection (2) (b) may not be made in relation to a sentence of imprisonment imposed on an offender who is serving some other sentence of imprisonment by way of full-time detention if:
(a) a non-parole period has been set for that other sentence, and
(b) the non-parole period for that other sentence has expired, and
(c) the offender is still in custody under that other sentence.

(6) A sentence of imprisonment starts at the beginning of the day on which it commences or is taken to have commenced and ends at the end of the day on which it expires.

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.

(1A) If the offender fails to appear, the court may:
(a) issue a warrant for the offender's arrest, or
(b) authorise an authorised officer to issue a warrant for the offender's arrest.

(1B) 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.

(1C) For the purposes of subsection (1) (c), a court is of superior jurisdiction to the court with which an offender has entered into a good behaviour bond if it is a court to which the offender has (or has had) a right of appeal with respect to the conviction or sentence from which the bond arises.

(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 s12, 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.

(4) (Repealed)

99 Consequences of revocation of good behaviour bond

(1) If a court revokes a good behaviour bond:
(a) in the case of a bond referred to in section 9, it may re-sentence the offender for the offence to which the bond relates, or
(b) in the case of a bond referred to in section 10, it may convict and sentence the offender for the offence to which the bond relates, or
(c) in the case of a bond referred to in s12:
(i) the order under s12 (1) (a) ceases to have effect in relation to the sentence of imprisonment suspended by the order, and
(ii) Part 4 applies to the sentence, as if the sentence were being imposed by the court following revocation of the good behaviour bond, and section 24 applies in relation to the setting of a non-parole period under that Part.

(iii) (Repealed)

(2) Subject to Parts 5 and 6, a court may, on revoking a good behaviour bond referred to in s12, make an order directing that the sentence of imprisonment to which the bond relates is to be served by way of periodic detention or home detention.

(3) An order made under subsection (2) is taken to be a periodic detention order made under section 6 or a home detention order made under section 7, as the case requires.

(4) This Act applies to the sentencing or re-sentencing of an offender under this section in the same way as it applies to the sentencing of an offender on a conviction.

(5) An offender who under this section is sentenced by a court for an offence has the same rights of appeal as the offender would have had if the offender had been sentenced by that court on being convicted of the offence.

100 Action may be taken after good behaviour bond has expired

Action may be taken under this Part in relation to a good behaviour bond even if the term of the bond has expired, but in respect only of matters arising during the term of the bond.

Children (Criminal Proceedings) Act 1987

33 Penalties

(1) If the Children's Court finds a person guilty of an offence to which this Division applies, it shall do one of the following things:

(a) …

(g) it may, subject to the provisions of the *Crimes (Sentencing Procedure) Act 1999*, make an order committing the person for such period of time (not exceeding 2 years) as it thinks fit:

(i) in the case of a person who is under the age of 21 years, to the control of the Minister administering the *Children (Detention Centres) Act 1987*, or

(ii) in the case of a person who is of or above the age of 21 years, to the control of the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

(1A) …

(1B) If the Children's Court deals with a person under subsection (1) (g), it may make an order:

(a) suspending the execution of its order under subsection (1) (g) for a specified period (not exceeding the term of that order), and

(b) releasing the person on condition that the person enters into a good behaviour bond under subsection (1) (b) for such a specified period,

but only if the person is not subject to any other order under subsection (1) (g) or to any sentence of imprisonment. Part 4 of the*Crimes (Sentencing Procedure) Act 1999* does not apply to an order under subsection (1) (g) whose execution is suspended under this subsection.

41A Provisions applicable where control order suspended subject to good behaviour bond

(1) This section applies where the Children's Court has, under section 33 (1B), suspended the execution of an order under section 33 (1) (g) and the person concerned has entered into a good behaviour bond.

(2) Action with respect to a failure to comply with any such good behaviour bond may be taken under section 41. The good behaviour bond is to be terminated unless the court is satisfied that:

(a) the person's failure to comply with the conditions of the bond was trivial in nature, or

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

(3) If any such good behaviour bond is terminated:

(a) the suspension of the execution of the order under section 33 (1) (g) ceases to have effect, and

(b) Part 4 of the *Crimes (Sentencing Procedure) Act 1999* applies to the order under section 33 (1) (g), as if the order were a sentence of imprisonment being imposed following the revocation of the good behaviour bond, and section 24 of that Act applies in relation to the setting of a non-parole period under that Part.
(c) (Repealed)

(4) The conditions of any such good behaviour bond may be varied under section 40 or in proceedings taken under section 41.

42 Action may be taken after good behaviour bond has expired

Action may be taken under this Part in relation to a good behaviour bond even if the term of the bond has expired, but in respect only of matters arising during the term of the bond.

Bail Act 1978

8 Right to release on bail for minor offences

(1) This section applies to:
(a) all offences not punishable by a sentence of imprisonment (except in default of payment of a fine),
(a1) offences under the *Summary Offences Act 1988* that are punishable by a sentence of imprisonment, and
(b) all offences punishable summarily that are of a class or description prescribed by the regulations for the purposes of this section, and
(c) all offences (whether or not of a kind referred to in paragraph (a) or (b)) in respect of which a person is an accused person by virtue of section 4 (2) (e) or (f),
except offences against section 51.
(2) A person accused of an offence to which this section applies:
(a) is entitled to be granted bail in accordance with this Act unless:
(i) the person has previously failed to comply with a bail undertaking given or bail condition imposed in respect of the offence,
(ii) the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,
(iii) the person stands convicted of the offence or the person's conviction for the offence is stayed, or
(iv) the requirement for bail is dispensed with, as referred to in section 10, and
(b) is entitled to be so granted bail either:
(i) unconditionally, or
(ii) subject to such bail condition or bail conditions imposed on the grant of bail to the person as, in the opinion of the authorised officer or court, is or are reasonably and readily able to be entered into,
to the intent that the person shall be, subject to section 7, released (if in custody) as soon as possible after the person gives the bail undertaking.
(3) Subject to subsection (4), a person is entitled under this section to be granted bail in respect of an offence to which this section applies, notwithstanding that the person is in custody also for some other offence or reason, in respect of which the person is not entitled to be granted bail.
(4) A person is not entitled under this section to be granted bail in respect of an offence to which this section applies, if:
(a) the person is in custody serving a sentence of imprisonment in connection with some other offence, and

(b) the authorised officer or court is satisfied that the person is likely to remain in custody in connection with that other offence for a longer period than that for which bail in connection with the firstmentioned offence would be granted.

Appendix B – Case Notes

***DPP v Nouata & Ors* [2009] NSWSC 72**

Mr Nouata received a 12 month suspended sentence for, *inter alia*, AOABH. He breached the bond by the commission of a further AOABH, for which he was charged only two weeks before the expiration of the s12.

It took nearly another year for his conviction to be entered, by which time of course the original s12 had long since expired. The Magistrate in dealing with him imposed a new 18 month s12 bond and purported to 'take no action' on the breach.

The Magistrate reasoned as follows;

> "I do have regard to the fact that this s12 bond was very close to its finality and I find that there are special circumstances and I will take no action in relation to that bond, the bond having very nearly expired at the time of the commission of this offence and has currently expired".

Observing that the relevant law is s98(3), and the Magistrate had apparently not considered triviality or good reasons, His Honour Mr Justice Grove upheld the DPP appeal against the Magistrate's decision.

***Regina v Zamagias* [2002] NSWCCA 17**

Mr Zamagias was at the pub when a running blue between his wife and her aunt came to blows. As once before, Mr Zamagias thereby came into conflict with the aunt's boyfriend. The boyfriend intervened this time, coming between the women and Mr Zamagias. The jury convicted him of MIGBHw/i, apparently accepting that Mr Zamagias broke a glass and slashed it across the neck of his victim. Injuries included a 15cm scar, the complete division of a muscle in the neck and permanent loss of sensation near one ear. Mr Zamagias had to be pulled off his victim.

Though unrepresented on his plea, the court received evidence that he had no priors of any kind; had been long in continuous employment and was a trained tradesman; he was supporting the three children his wife brought to their marriage; was active in the community and had engaged in a sustained act of bravery in saving the life of another while employed as a volunteer fireman. At first instance Her Honour characterized his offence as, "one breach in an otherwise exemplary life".

His Honour Mr Justice Howie delivered the unanimous judgment of the CCA, accepting Her Honour's findings about the very strong subjective case and allowing considerations of double jeopardy to loom large. The original two year suspender was quashed and in lieu a three year order for periodic detention was imposed. While no special circumstances were found, interestingly His Honour

reduced the sentence day for day, taking into account the six months during which Mr Zamagias was subject to and compliant with his s12 bond.

The case is most often cited as authority for the process to be engaged in when imposing a s12. See paragraphs 23 to 29 per Howie J, which basically boil down to:

1. Determine – per s5 of the act – that no alternative to a full time sentence is appropriate to the circumstances of the case, considering the objective gravity of the offence and the subjective features of the offender, but giving more weight to the former. (Quaintly, at this stage the court should not consider s12, HD or PD as alternatives, nor should it allow a desire to impose one such alternative to interfere. It seems to me that during step one the court pretends that such alternatives do not exist.)
2. Fix a head sentence proportionate to the objective seriousness of the offence, again considering the objective case and the subjective, but with greater weight in the former.
3. Determine how the sentence is to be served, s12, HD or PD.

***R v Marston* (1993) 60 SASR 320**

Ms Marsden was sentenced to three years with a NPP of two for an offence of robbery with violence. Three months into that term she committed a minor offence of larceny: After a night of drinking she called on a friend staying in a hotel and, seeing some muffins laid out for breakfast, she stole two of them and a butter knife to spread butter on them.

The matter came back before the Supreme Court which had imposed the suspender and the Justice revoked the bond. On appeal Chief Justice King read a unanimous decision of a three Justice bench of the Supreme Court upholding the appeal and finding good reasons to excuse the breach.

The case is usually cited as authority for the proposition that the disproportion between the minor nature of the breach and the significant custodial penalty that will be activated is a good reason to excuse the breach.

That said it is not often remembered that the Supreme Court had, at first instance, received evidence orally and in writing from a psychologist, to the effect that Ms Marsden lacked forward planning capacity, was impulsive, was readily frustrated by failure and was capable of low average intellectual function.

While these particular features of Ms Marsden's case might distinguish it, they also point to the ratio. Chief Justice King suggests that the essential compact in a suspended sentence bond is for the offender to avoid a non-law abiding life. Taking the subjective features together with the nature of the offence he

concludes that, “The nature of the offence does not suggest that she has fallen into a non-law-abiding way of life.”

***Rickard v R* [2007] NSWCCA 332**

In February 2006 Ms Rickard received in the District Court a two year suspender with a set NPP of 12 months. The legislation as it then stood required that the NPP be set upon imposition of the bond.

On 29 November 2006 amendments to s12 and related parts of the sentencing Act came into effect, requiring a sentencing court to set no NPP in imposition of a s12, but rather allowing the breaching court to deal with that issue, taking s24 into account as it did so.

While Ms Rickard came before the court for revocation proceedings after 29 November 2006, her NPP had been validly imposed before the amendments and the transitional provisions did not assist her.

There is a bit of funky common law and some stuff about *res judicata*, but basically the ratio is that if the NPP was set before 29 November 2006 then it was so set validly and the revocating court cannot interfere with it.

***DPP v Burrow & Anor* [2004] NSWSC 433**

David Burrow was placed on two concurrent s12 bonds on 6 November 2002 for offences of indecency. On 29 May and 3 June 3002 he twice impersonated a police officer using a badge obtained from the academy. In the first instance he used the ID to warn off a man apparently casing cars outside Penrith railway station. His Honour Mr Justice Hidden hearing the case in the Common Law division as a DPP appeal characterized these offences as odd. On 12 June 2003 the matters, including the breach, came before the Local Court where the Magistrate against whose decision the DPP appealed, “took no action”.

No reference was made to section 98(3) in the proceedings before the Magistrate and it fell to the appeal court to look to possible constructions of the facts that might bring the Magistrate’s decision within that section. In the end the DPP appeal was upheld and the matter remitted to the Local Court to be dealt with according to law, the court relying on the Magistrate’s apparent failure to properly exercise the jurisdiction.

This result is often overlooked. The matter is usually cited as authority for a proposition expressed at paragraph 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. One of the matters to which King CJ had regard in *Marston* (at 322) was the “marked disproportion between the seriousness of the breaching offence and the length of the sentence which is activated by the revocation of the suspension”. (Of course, I am not

> speaking here of offences which are trivial in their nature, for which separate provision is made in par (a).)

Another way of viewing the decision is as specific approval by a superior NSW court of the line of authority in *Marston*.

R v Tolley [2004] NSWCCA 165

Stuart Tolley pleaded to being knowingly concerned in manufacture. The offences related to a meth lab, a similar offence and a firearms offence being taken into account on a form. He received a two year s12 and the CCA dealt with it as a Crown inadequacy appeal. Howie J delivered the unanimous decision of the three judge bench upholding the appeal and returning Mr Tolley to custody.

The case is relevant to s12 because of extensive *obiter* remarks by His Honour in paragraphs 22 to 44.

As the law stood in 2003 the court was to fix the non-parole period upon imposing the suspended sentence but to allow the revoking court to otherwise apply part 4 of the sentencing act. Part 4 included s47 which, on a literal reading, seemed to His Honour to produce an absurd result: If the revocation proceedings took place after the conclusion of the bond, and the revoked sentence must commence on the date of imposition then the entirety of the term of imprisonment would have elapsed before the revocation date.

> 43 I am prepared to admit that, in the absence of full argument by the parties on these matters, I may be overlooking some provision or policy that makes the operation of suspended sentences rational, consistent and comprehensible. But I am also prepared to admit defeat and move on. I would simply pause to express my exasperation that it appears to be so difficult to find in the legislation the answer to what is a fundamental question and one that should be capable of an immediate and simple answer by reference to a single provision of the Act. Does the revocation of a bond under s 12 reactivate the whole of the suspended sentence so that, subject to s 47(2), it commences from the date of revocation or does it merely reactivate that part of the sentence that is the equivalent to the unexpired period of the bond? The answer to that question will reveal whether a suspended sentence in this State is a sword or a butter knife.

This is all very confusing, but Tolley does seem clearly to be authority that upon revocation, the court can backdate commencement to take into account any time served prior to the imposition of the bond.

> 27 Insofar as Judge O'Reilly was of the view that, if "the worst" happened and the bond was revoked, the period served in custody could be taken into account at that time, his Honour was, with respect, appears to be *(sic)*correct.

***DPP v Cooke & Anor* [2007] NSWCA 2**

On 5 September 2005 Mr Cooke was placed on 5 s12 bonds by the Liverpool Local Court. In February 2006 he was charged with mal wound in company, subsequently pleaded guilty and came for sentence before the DC. The s12 breaches were brought before the same court pursuant to s98(1)(c). ADCJ Mahoney purported to take no action in relation to the breaches of the s12 bonds and sentenced Mr Cooke to a further 18 month suspended sentence for the mal wound.

The DPP appealed the decision not to revoke, as well as simultaneously lodging an inadequacy appeal to the CCA for the new sentence. The Court of Appeal's decision was unanimously delivered by Howie J.

The Judge at first instance recounted some features of the breaching offence itself and of Mr Cooke's subjective case before determining to take no action. At paragraph 15 HH Howie J draws the distinction between finding good reasons not to breach the bond, and good reasons to excuse the conduct constituting the breach. This is a chief principle established by the case; that the revoking court should look to the conduct constituting the breach and not weigh issues limited to the offender's subjective case at the time of the revocation hearing.

Howie J goes on to consider *Burrow*, and the potential that in limited circumstances the subjective features of the offender might be relevant to a determination under s98(3). *Burrow* in turn was based on the South Australian case of *Marston*. In that case the SA Supreme Court upheld an appeal against revocation of a three year suspender for robbery where the breach was a further offence of larceny of two muffins and a butter knife. That court in part relied on the, *"marked disproportion between the seriousness of the breaching offence and the length of the sentence which is activated if the suspension is revoked."*

Following a précis of the decision in *Marston* HH Howie observes, *"It is unnecessary in order to determine the present matter to form a decided view on whether the approach taken in* ***Marston*** *should be followed in this State in applying s 98(3)(b).* This is significant. Given a clear opportunity to distinguish or overrule *Marston* for the purposes of the NSW act, a three judge bench of the CA delivered a unanimous decision declining to do so.

Continuing in paragraph 20 HH Howie J observes that it would be a rare case indeed in NSW where the reasoning in *Marston* were followed, because of differences in the statutory regimes in the two states. In NSW – unlike SA – the maximum s12 is two rather than three years and – importantly – on revocation the NSW court can ameliorate the impact of revocation by ordering that the sentence be served by HD or PD, and adjusting the NPP.

This first decision in *Cooke* is the most frequently cited authority on the revocation of s12 bonds. It is often used to argue that the court look only to the

conduct constituting breach and not to subjective circumstances; that breach must be taken seriously and usually result in revocation and that the reasoning in *Marston* would seldom apply.

However, the case specifically leaves the door open to *Marston* reasoning and, particularly in rural and regional NSW – and for children – the points raised by HH Howie J in distinguishing *Marston* do not apply. Ask; is PD available for your client? Is HD available? Can the sentence have a NPP set on revocation? (The answer will be no if the sentence is less that 6 months, was set before 29 November 2006 or involves a child sentenced before the parallel amendments effective 3 November 2008.) If any of these features apply then Cooke can be distinguished and the scope for applying *Marston* is at least wider than, the "very rare case indeed".

It is the *Marston* discussion that is often argued in s12 revocation matters, but the decision of the Court of Appeal was based more on a finding that the primary judge's decision could not be founded in law and accordingly the matter was remitted to him to be dealt with according to law. Which brings us to the CCA *Cooke* decision.

***R v COOKE; COOKE v R* [2007] NSWCCA 184**

This appeal to the CCA was by the Crown – at first – and is referred to in the case note above. It was against the inadequacy of the suspender imposed for the breaching offence. However, matters were complicated by Mr Cooke's cross appeal.

On the matter remitting to the DC following the first appeal HH ADCJ Mahoney proceeded on the basis that the Court of Appeal had effectively ordered him to revoke the bonds. Without making any such order clearly he ordered that the revoked s12 be served by PD and did not interfere with the suspended sentence he had originally ordered with respect to the new offence.

In the result, Mr Cooke's cross appeal, together with asserted error by the Judge in failing to order revocation formally, provided some basis for counsel to again litigate the 'good reasons' issue before the CCA. Counsel relied on a combination of reasons arising form objective features of the case and subjective issues. Counsel did not suggest that the facts were analogous to *Burrow*. The CCA ruled that the principles espoused by Howie J in the earlier decision applied; that subjective features were irrelevant as to the question whether to revoke and that such inquiry be limited to an analysis of the conduct giving rise to the breach.

The Court went on to observe, "In *DPP v Cooke and Anor*, Howie J did not consider it necessary to form a settled view on whether the approach taken in *Marston* should be followed when applying s 98(3)(b). We are of the same

view."[14] Many are inclined to be discouraged by the CCA's failure to endorse *Burrow* or *Marston*, but there is another view: Considering directly the approach in *Marston*, both the Court of Appeal and the CCA explicitly declined to rule it out. The door is barely open, but the CCA and Court of Appeal deliberately left it so.

Pulitano v R [2010] NSWCCA 45

Mr Pulitano served about six months on remand before being granted bail and then absconding. Nearly ten years later he handed himself in, was sentenced, and received a couple of 18 month s12 bonds. He did not maintain contact with the PPS and was breached.

In dealing with him in the subsequent revocation hearing HH Berman DCJ backdated the revoked s12 to commence from his recent entry into custody, but not to allow for the six odd months served some ten years earlier when initially on remand.

After noting the s47 mandate to account for pre-sentence custody, the court observed at paragraph 8 (emphasis added):

> 8 The statutory mandate can be fulfilled by backdating the date on which the sentence is to commence, as provided for in s 47(2)(a), or by reducing the sentence imposed. **The former course is generally to be preferred,** see *R v McHugh* [1985] 1 NSWLR 588; *R v Deeble* (CCA, 19 December 1991, unreported); and *R v Newman and Simpson* [2004] NSWCCA 102, (2004) 145 ACrimR 361 particularly at [22]-[23]. The latter course can be followed for good reason, see *R v Deeble* and *R v Leete* [2001] NSWCCA 337, (2001) 25 ACrimR 37.

Noting that a s12 cannot be backdated on imposition, the court observed that the s47 mandate can be fulfilled therefore by either adjusting the period of gaol ordered on imposition, or backdating upon any revocation. The question for the appeal is therefore one of fact as to what occurred in the instant case.

The court then turned to an analysis of the remarks on sentence concluding that while it was not explicit in those remarks, the sentencing judge did take the pre-sentence custody into account.

This case makes it clear that where there is ambiguity as to the imposing court accounting for time served, the Crown might well succeed in arguing that it was considered in imposing the s12. All the more reason to consider that clearly in submissions, and ensure something equally clear is said on the record by the sentencing judge.

[14] See paragraph 28.

Appendix C – Hypotheticals

1. **Ms Winehouse**
   a. Ms Winehouse was charged with a serious assault.
   b. Originally remanded in custody for two weeks pending a MERIT assessment , Ms Winehouse declared some problems with alcohol, amphetamines and pot. Accepted onto the MERIT programme she spent three months living at the Buttery subject to MERIT supervision and bail, before leaving without MERIT support citing differences with her counselors.
   c. Notwithstanding this failure, MERIT provided a positive final report confirming she had made real progress in her rehabilitation.
   d. Ms Winehouse was sentenced to a 12 month section 12 bond.
   e. Six months after the imposition of the s12, Ms Winehouse was arrested in Nimbin in possession of two grams of pot.
   f. She enters a plea of guilty to the possession matter and the case is stood over for sentence, the s12 to be called up and an updated PSR ordered.

      i. Would you make any s98 submissions? What would they be?
      ii. What could you argue about the back-dating of the sentence and fixing of a NPP?

2. **Master Megs**
   a. Young master Megs, aged 15, is in the Police cells on a warrant issued for alleged breach of a s33(1B) suspended sentence imposed 1 December 2008.
   b. Back at court you gain access to the bench papers for the original offence and see that the sentencing court fixed a non-parole period of eight months and a head sentence of 12.
   c. The old cover sheets do not reflect any order for a JJR, nor is there one on the old papers. There is a breach report alleging that despite warnings, letters and telephone calls Master Megs completely failed to have any contact at all with DJJ following the imposition of the suspender.

      i. What advice will you give Master Megs on admitting the breach?
      ii. What can you say in support of a bail application?
      iii. Is there another application you would make? What ramifications would it have for the suspender?

3. **Mr Hinze**
   a. Was placed on a 2 year section 12 with a fixed 18 month non-parole period in October 2006 for an indecent assault. From the PSR, AOD was an issue.
   b. In September 2008 he was charged with drug supply. The facts allege that he provided a small joint to a friend at a party for no financial reward.
   c. In December 2008 he was convicted in his absence of the drug supply matter and a warrant issued for his arrest.
   d. You meet Mr Hinze in custody in 2010. He has been arrested in NSW on the warrant and instructs that during the last two years he has lived in Qld, including a 6 month stint at Moonyah, the Salvation Army rehabilitation centre in Ashgrove Brisbane.
   e. The case is adjourned for a PSR which finds Mr Hinze unsuitable for PD or HD.
   f. There are no new entries on Mr Hinze's records since the drug supply matter.

      i. What can you say in support of a s98 argument?