

# THE IMPOSITION AND REVOCATION OF SUSPENDED SENTENCES IN THE CHILDREN'S COURT OF NEW SOUTH WALES

A paper prepared for the Children's Legal Service  
Annual Conference 2012

Slade Howell

*Lawyer: Okay, so you've been sentenced to a control order, but the court has suspended that order on condition that you enter into a good behaviour bond to be of good behaviour and accept the supervision of Juvenile Justice –*

*Child: Yep.*

*Lawyer: Do you have any questions about that?*

*Child: Yeah, just one: am I still on curfew?*

This paper will discuss the imposition and revocation of suspended control orders in the Children's Court.

It is often assumed that the law of suspended sentences as it applies to adults applies equally to children.

What this paper aims to do is equip lawyers with a better understanding of the law of suspended sentences as it applies to children, and the types of issues to consider when the question of the revocation of a suspended sentence arises in the Children's Court.

The paper will also provide some procedural tips for practitioners to refer to in an appendix (**Appendix A**).

By way of further reading, the NSW Sentencing Council recently published a background report on suspended sentences. This is an area of sentencing law currently in the spotlight, not just in New South Wales but in Victoria as well. A copy of their full report is available via the NSW Sentencing Council's website.<sup>1</sup>

## 1. Imposition

If dealt with under the *Children (Criminal Proceedings) Act 1987 (CCPA)*, children are not sentenced to imprisonment; they are sentenced to a control order: s.33(1)(g) CCPA.

Before sentencing a young person to a control order, a magistrate must determine that all other less restrictive sentencing alternatives would be "*wholly inappropriate*" in the circumstances of the case: see s.33(2) CCPA.

---

<sup>1</sup> Internet address: <http://www.sentencingcouncil.lawlink.nsw.gov.au>

If a magistrate decides that a control order is to be imposed upon a child, they must consider whether the execution of that control order should be suspended on condition the child enters into a good behaviour bond: s.33(1B) CCPA (**a suspended control order**).<sup>2</sup>

In practice, suspended control orders are imposed sparingly by most specialist children's magistrates. Statistics maintained by the Judicial Commission of NSW of the types of sentences imposed on young offenders in the Children's Court for common offences support this observation.<sup>3</sup>

## 2. Revocation

If the Children's Court is notified that a child has failed to comply with a condition of a suspended control order, a magistrate can order that child appear before the Children's Court: s.41(1) CCPA.

The proceedings for the offence for which the suspended control order was imposed are re-instituted against the child. If a breach of the suspended control order is established, the good behaviour bond underpinning the order is terminated, and the child is re-sentenced. The suspended control order becomes a full-time control order. The court is obliged to fix a non-parole period for sentences longer than 6 months: s.44 *Crimes (Sentencing Procedure) Act 1999 (CSPA)*. They are not empowered to fix a non-parole period for sentences of 6 months or less: s.46 CSPA.

In practice, suspended control orders are terminated for one (or both) of the following reasons:

- The child pleads guilty to an offence committed during the term of the suspended control order (in which case there are two related proceedings: i) the re-instituted proceedings in relation to the suspended control order and ii) sentence proceedings for the new offence).
- The child is breached by Juvenile Justice for failing to comply with the requirement for their supervision by that service during the term of the suspended control order.<sup>4</sup>

The first step in the re-instituted proceedings for an alleged breach of a suspended control order is for the court to determine whether the child has

---

<sup>2</sup> Note: pursuant to s.5 *Children (Community Service Orders) Act 1987* a community service order is the only other direct alternative to the imposition of a full-time control order.

<sup>3</sup> For example, in the period January 2008 to December 2011, the percentage of young offenders sentenced in the Children's Court by way of suspended control orders for robbery in company was 10%; for aggravated break, enter and steal – in company it was also 10%; and for assault occasioning actual bodily harm it was 5%.

<sup>4</sup> The second of these two scenarios is a matter for instructions. Magistrates will often ask whether the breach in relation to supervision is admitted in light of the material provided to the court by the child's supervising Juvenile Justice Officer. It is not always the case that this material is accurate.

breached the terms of that order. This is a question of fact. In the event of a plea of guilty to an offence committed during the term of the suspended control order the question can be answered without the need for instructions to be taken from the child beyond those on the plea.

If satisfied there has been a failure to comply with the suspended control order the court applies the provisions s.41A CCPA. That section provides:

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

Section 41A(2) guides the court's approach to the question of whether to terminate a suspended control order once a breach of that order has been established.

## **2.1 General principles of revocation**

If it is found that a child has failed to comply with their suspended control order, the *"ordinary consequence"* of that failure is that the execution of the control order is no longer suspended. There are clear policy reasons underlying this approach.

In *R v Buckman* (1988) 47 SASR 303 at 304, the then Chief Justice of South Australia, King CJ, said:

*"There is a clear legislative policy that in general a breach of a condition of a recognisance upon which a sentence has been suspended, should result in the offender serving the sentence which was suspended. A sentence of imprisonment is imposed and suspended only where imprisonment is fully merited but the court considers it appropriate to give the offender a last chance to avoid imprisonment by leading a law-abiding life. It is intended to be a sanction suspended over the head of the offender*

which is to be activated if there is a lapse into non-law-abiding ways. The court will not lightly interfere with the ordinary consequence of a breach of the recognisance.<sup>5</sup>

In *DPP v Cooke & Anor* [2007] NSWCA 2 at [23] (**Cooke**) Howie J (as his Honour then was) said:

*"There is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison. Notwithstanding what has been stated about the reality of the punishment involved in a suspended sentence, if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved."*

## 2.2 Two categories of exception

The "ordinary consequence" must flow unless the court is satisfied that either:

- the child's failure to comply with the suspended control order was trivial; or
- good reasons exist for excusing the child's failure to comply.

If satisfied of either of these two states of affairs, a magistrate is not required to terminate the suspended control order and may allow the bond that underpins it to continue in force despite the child's failure to comply.

## 2.3 The two categories of exception in more detail

The first category of exception: "*triviality*", is comparatively non-controversial in its application. The court must be satisfied that the relevant failure to comply with the suspended control order is "*of small value or importance; trifling*".<sup>6</sup>

Minor or technical failures to comply would likely qualify. Arguably, a plea of guilty to a new offence carrying a maximum penalty of a fine only may also qualify in particular cases, the facts of which support a conclusion the new offence is trivial in substance.

The second category of exception: "*good reasons*", is where there exists some room for controversy.

The leading authority in this State on the operation of the equivalent provision to s.41A(2) for adults in relation to the good reasons exception, is the decision of Howie J in *Cooke*.<sup>7</sup>

---

<sup>5</sup> This statement of principle was cited with approval in *R v Marston* (1993) 60 SASR 320 at 322; *DPP v Burrow & Anor* [2004] NSWSC 433 at [22]; and *DPP v Cooke & Anor* [2007] NSWCA 2 at [21].

<sup>6</sup> The Australian Concise Oxford Dictionary.

<sup>7</sup> See s.98(3) CSPA.

Cooke was an appeal by the Director of Public Prosecutions from a decision of the District Court to take no action in respect of five suspended sentences which had been breached by the commission of a further serious offence by the offender. The sentencing judge imposed an 18 month suspended sentence for the new offence and declined to revoke the existing five suspended sentences. He found there to be "*very good reasons for not taking any action on the breach of the bond(s)*."<sup>8</sup>

In allowing the Director's appeal, Howie J said at [14] (my emphasis):

*"...the focus [in determining whether good reasons exist to excuse the breach] must principally be upon the behaviour giving rise to the failure to comply with the conditions of the bond and whether that behaviour should be excused."*

Howie J considered previous decisions in *DPP v Burrows* [2004] NSWSC 433 (**Burrows**) and *R v Marston* (1993) 60 SASR 320 (**Marston**). He observed at [17] (my emphasis):

*"There is a live issue as to the extent, if any, to which a court can have regard to matters other than the behaviour giving rise to the breach in determining whether to excuse the breach, such as the impact upon the offender of the consequences of the breach."*

His Honour ultimately considered it unnecessary to decide whether a broader approach (which would take into account, among other things, the consequences of revocation), similar to that adopted by the South Australian Supreme Court in *Marston*, should be followed in this State or not. One of the reasons Howie J felt this question unnecessary to resolve was that, unlike South Australia:

*"...more significantly, the impact of the revocation of the bond can be ameliorated in this State by ordering that the sentence that is enlivened by the breach be served by periodic detention or home detention."<sup>9</sup>*

In considering this difference (and others which are not relevant for present purposes) he concluded at [20]:

*"These differences indicate to me that, assuming that a court could take into account the impact of the revocation of the bond, it would be a rare case indeed in which it would be appropriate to do so in this State."*

The appeal in Cooke's case was ultimately upheld conclusively in relation to a separate "*more obvious error of law*".<sup>10</sup>

In *Marston*, of particular importance to the South Australia Supreme Court's decision to take no action on the breach of that appellant's suspended sentence was:

---

<sup>8</sup> Cooke at [15].

<sup>9</sup> Cooke at [20].

<sup>10</sup> Cooke at [26].

- The "*marked disproportion*" between the seriousness of the breaching offence (stealing a couple of muffins and a knife to spread butter on them from a hotel breakfast buffet) and the length of the sentence activated by breaching the bond (a three year term of imprisonment for robbery with violence).
- Evidence of the appellant's intellectual and psychological presentation.

The relevance of such matters to the good reasons exception in this State was left open by Cooke, but their relevance appears to have been restricted to "*rare cases indeed*".

### **3. Application of these principles in the Children's Court**

There is, in my view, no material difference between the wording of s.98(3) CSPA and s.41A(2) CCPA.

A suspended control order must be terminated unless the court is satisfied of one of the two categories of exception.

But there are issues in relation to how, in particular the good reasons exception, should be approached by the court when dealing with a child. Remember none of the authorities dealing with revocation of suspended sentences were considering the application of the principles to the case of a child.

In this context, it is helpful to keep firmly in mind some of the general principles of law that inform the approach to sentencing children:

- General deterrence and retribution are, in most cases, less significant than they would be when sentencing an adult for the same offence: *KT v R* [2008] NSWCCA 51 at [22] (KT).
- Considerable emphasis must be placed upon a young person's rehabilitation in considering an appropriate penalty for an offence: *KT* at [22]; *R v GDP* (1991) 53 A Crim R 112 at 115.
- Cognitive, emotional and psychological immaturity of young people (often) contributes to their breach of the law: *KT* at [23].
- It is misguided to equate the failings of a young person with those of an adult for a greater possibility exists that the young person's character deficiencies will be reformed: see *Roper v Simmons* (2005) 125 S Ct 1183 (US Supreme Court).

In *The Queen v Slade* [2005] NZCA 19 at [43]-[44] the New Zealand Court of Appeal quoted with approval from a psychological report relied upon by the defence as follows (my emphasis):

*"[43]...Judges are only too familiar with the statistics and the reality of cases which show the high degree of violent offending amongst youths. The statistics are also fairly graphic that, after their early 20s, such offending, generally speaking, tails away. The*

reasons for this were enlarged upon by Dr Ian Lambie, a registered consultant psychologist, in a report for the defence, in the following terms:

*It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.*

*[44] The policy implications in the criminal justice sphere are relatively obvious. The first concern is to actually prevent the problem of delinquency manifesting itself as violent criminal activity in the decidedly "at risk" period; then to address the root causes of that offending in an individual."*

Many children simply fail to understand the nature of a suspended control order. In this way, anecdotally at least, they appear to be no more effective as a specific deterrent than other less restrictive orders available to the Children's Court.

Inherent in the deterrent effect of a suspended control order is appreciation of the implicit threat that an order of that nature carries. For many children there is no difference in their mind between a suspended control order, a good behaviour bond or a probation order: in each case, the child leaves court, their liberty intact, and is mandated to be supervised by Juvenile Justice.

Many children only come to appreciate the sting of a suspended control order when placed back into custody for a breach and they are confronted with the immediacy of being refused bail. It is sometimes then that a child will apply themselves, for example, to the task of complying with supervision from Juvenile Justice, or agreeing to participate in an intervention program.

Whenever a magistrate makes orders in relation to a child in criminal proceedings they are obliged to have regard to the principles of s.6 CCPA which provide most relevantly for present purposes:

*"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:*

...

*(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,*
- ..."

### **3.1 The good reasons exception in the Children’s Court**

If one were to apply the reasoning in Cooke to the question of whether good reasons exist to excuse a breach of a suspended control order, this may often be a difficult task. Cooke’s case would have a children’s magistrate focus principally on the conduct giving rise to the breach, and exclude from consideration post-breach conduct and matters subjective to the child.

But there is, in my view, a fundamental problem with the application of the reasoning in Cooke to cases in the Children’s Court. As discussed above, Cooke was ultimately decided on a different point. Howie J did not resolve the tension between the decision in Marston and his approach in Cooke. But one of the crucial differences he identified in favouring a stricter approach when assessing the good reasons exception was that, for adults, the effect of revocation in this State can be ameliorated by the imposition of other penalties apart from full-time imprisonment. In the Children’s Court this is not the case.

Children who breach their suspended control order can only have their sentence converted to a sentence of full-time control. If the court applies the reasoning in Cooke and finds no good reason why a child breached their suspended control order, they are bound to sentence that child to custody. Without the ability to ameliorate that outcome, the court deals with the child more harshly than they might have an adult in the same situation. The principle that a child is not to be treated more harshly than an adult (stated in s.6(e) CCPA) would have the court be guided against such a course.

In a post-Cooke decision of the District Court, Cogswell SC DCJ accepted a submission put on behalf of an adult offender from a regional area, that the unavailability of periodic detention or home detention to ameliorate the effect of revoking the suspended sentence placed the particular case into the category described by Howie J in Cooke as a "*rare case indeed*". In that case, the court permitted itself to look at the impact of the revocation of the suspended sentence before deciding whether to revoke it or not.<sup>11</sup>

It follows that in the Children’s Court, a submission is available that because of the inability of the court to ameliorate the effect of the revocation of a suspended control order, the court should treat each case as a "*rare case indeed*". The court should permit itself, in these circumstances, to consider a

---

<sup>11</sup> *Regina v Jonathon Michelin* [2008] NSWDC 204 at [6]-[7].



child's post-breach conduct and the effect of revocation upon that child, as well as other subjective matters, before deciding whether to revoke the suspended control order. This approach also ensures the court does not offend the principle of s.6(e) CCPA.

Magistrate David Heilpern in a decision of the Local Court considering the temporal aspect of the good reasons exception and whether it is permissible for a court to have regard to the impact of revocation and other subjective matters in deciding whether to revoke, said this:

*"To do otherwise invites the court to enter into an unrealistic exercise of factual delineation, which amounts to intellectual dishonesty. Whilst professional judicial officers become expert at creating Chinese Walls, it is simply illogical to seek to consider if there has been a "good reason" for a breach without being able to look at the conduct in the light of the current situation of the offender. More than that, it becomes a Herculean task to look at the breach without giving any consideration to the consequences of being incarcerated should good reasons not be found."<sup>12</sup>*

There is certainly an argument to be made in many children's matters along these lines.

There is a further argument that can be advanced as to why the court should permit itself to look at a child's post-breach conduct and other subjective matters. What s.41A(2) requires a child to establish is that there are good reasons for *excusing* their failure to comply with their suspended control order. Put another way: does there exist a good reason to excuse a child's failure to comply? There is, in my view, nothing in the wording of s.41A(2) that compels a temporally restrictive reading of its intent.

In practice, when determining whether to revoke a suspended control order or not, the court frequently has available to it update reports from Juvenile Justice. It also has the inherent power to adjourn proceedings and grant bail pending the preparation of up to date material on a child's circumstances. Contained within such reports may be material that bears upon the question of whether good reasons exist to excuse a breach of a suspended control order. But that material goes to post-breach conduct. If the court were to apply the reasoning of Cooke and not look at post-breach conduct in deciding whether to terminate the suspended control order, it would not be able to have regard to that material.

Why couldn't good reasons in a particular case be for example:

1. Ongoing compliance with bail for a period of a couple of months following the breach, and an updated Juvenile Justice report outlining various improvements made by the child whilst subject to continued supervision pending re-sentence?
2. The suspended control order is 6 months in length (meaning a non-parole period cannot be set if the suspended control order is terminated); the order had only been in place for 3 weeks, the child is young, the new offences are unlikely to attract a custodial

---

<sup>12</sup> *Re Christopher Arthur O'Connor* (unreported, Local Court of NSW, 4 August 2009).

penalty; and a further 14 days have already been accumulated on remand?

In the latter of these two examples, why couldn't the reasoning in Marston (in relation to consideration of the disproportion between the seriousness of the breaching offences and the length of the suspended control order) be a good reason for not revoking the suspended control order? In my view, this argument is not without merit, particularly where the point was not finally decided in Cooke.

Of course, none of this means that principal consideration should not be given to the circumstances surrounding the breach itself in determining whether good reasons exist. The extent of the argument in this paper is that the decision in Cooke and the wording of s.41A(2) do not necessarily compel a restrictive approach to relevant considerations when dealing with a child.

It is trite to say that not all magistrates will be sympathetic to some of the arguments set out in this paper. It is also trite to say that there is sometimes no persuasive argument to be had as to why a suspended control order should not be terminated. The governing principle of the "ordinary consequence" can sometimes loom large over your client.

But the preparation and presentation of well thought through submissions in relation to why a magistrate might exercise discretion to not terminate a suspended control order can be a meaningful and worthwhile exercise for your client.

Procedurally, when dealing with a breach of a suspended control order and a new offence for sentence, the court is required to consider the question of revocation of the suspended control order first: see Cooke at [28].<sup>13</sup> If an advocate can persuade the court that in light of new material, or by reference to principle, or by the calling of oral evidence or otherwise, that the court might not revoke the suspended control order, the door is then open for submissions to be made that a non-custodial penalty be imposed for the new offence.

By properly ventilating arguments on behalf of your client on the question of revocation, you are likely to raise a number of relevant matters for sentence in relation to the new offence anyway. It may be that you lose the argument about revocation, but are successful in establishing persuasive grounds for concurrency and special circumstances in relation to the fixing of the resultant non-parole periods.

A range of different policy considerations apply when courts are dealing with children. These are not the same types of policy considerations that Howie J was thinking of and applying in Cooke's case. A Children's Court must always

---

<sup>13</sup> Per Howie J:

*"But it is of crucial importance that the breach proceedings be resolved before the sentence is imposed for the offence. This is because, as I have indicated, the result of the breach proceedings can affect the sentence to be imposed for the offence but the sentence for the offence is irrelevant to a determination of whether there are good reasons to excuse the breach."*

be mindful of the principles to be found in s.6 CCPA. These are not easily reconciled with a strict approach to the termination of suspended control orders.

In closing, it is noteworthy that the former President of the Children's Court, Marien SC DCJ, appears to favour a less restrictive approach to the revocation of suspended control orders. The Sentencing Council in paraphrasing his Honour's submission said:

*"with respect to juveniles, wider considerations should be able to be taken into account by the court when determining whether there are 'good reasons' for excusing the person's failure to comply with the condition of a bond under s.41A(2)(b), than those identified in DPP v Cooke...In particular, he submitted that, a court should be able to have regard to considerations in relation to the subjective circumstances of the offender at the time of the breach proceedings, and to the consequences of revoking the bond."*<sup>14</sup>

And again, in his submission on behalf of the Children's Court to the Criminal Law Review Division in relation to their ongoing review of the CCPA and *Young Offenders Act 1997* his Honour argues:

*"...the provisions regarding breach of suspended sentences operate unfairly and harshly on young people. The circumstances in which a breach of a suspended sentence can be excused are very limited; see DPP v Cooke [2007] NSWCCA 184. Although suspended sentences are rare in the Children's Court there are occasions where a relatively minor offence, e.g. shoplifting, breaches a suspended sentence for a more serious offence such as robbery, and the court is faced with imposing a custodial sentence when that sentencing option may be inappropriate. The first consideration is that courts should not impose such sentences if there is a risk that breach proceedings may result in a custodial penalty when that would be inappropriate. However, it is also worth noting that for adults the options of home detention and intensive correction orders are available as further alternatives when a suspended sentence is breached. No alternative short of full time custody is available for young people. Consideration should be given to a broader discretion to deal with breaches short of a full time custodial penalty."*<sup>15</sup>

---

<sup>14</sup> NSW Sentencing Council, *Suspended Sentences – A Background Report by the NSW Sentencing Council* (2011) at 55.

<sup>15</sup> Submission by the Children's Court of NSW to the Criminal Law Review Division's Review of the Young Offenders Act 1997 and Children (Criminal Proceedings) Act 1987 accessed via <http://www.lpcld.lawlink.nsw.gov.au>

## Appendix A

### Procedural tips for practitioners when dealing with the imposition and revocation of suspended control orders

#### 1. Imposition

- As the statistics indicate, many children's magistrates are reticent about imposing suspended control orders. Many are all too familiar with the difficulties they often cause for young people. Remember that in the Children's Court, the other direct alternative to a full-time control order is a community service order: see s.5(1) *Children (Community Service Orders) Act 1987 (CCSOA)*.
- The CCSOA provides for flexibility in how community service order hours are completed. Some of the hours can be completed by way of therapeutic programs if recommended by the court: see s.5(1B) CCSOA. As a further measure, the court can impose a community service order together with a probation order for the same offence: s.33(1)(f1) CCPA.
- If the court does propose to sentence your client by way of a suspended control order be sure to make a submission as to the length of the order. An order 6 months or less is no good if the child breaches because on re-sentence the court cannot set a non-parole period. Where the court indicates a length of 6 months, a submission for a sentence of 6 months and 1 day should be made.

#### 2. Revocation

- Remember the important question is whether there is an argument as to why the court would not revoke the suspended control order.
- If the breach alleged is one of failure to comply with Juvenile Justice supervision there will be a breach report from Juvenile Justice. Get instructions from the young person on the content of that report. If there are aspects of that report that raise material questions as to whether a breach is established or not, adjourn the matter and consider whether it is worth subpoenaing Juvenile Justice's case file.
- You will be expected on the first mention of the breach to indicate on behalf of your client whether the breach is admitted or not. If the breach is not admitted, the court will need to determine whether a breach has in fact occurred: that is a question of evidence to be determined at a hearing.
- Once a breach is established, the next step is the question of revocation. It is not inappropriate to ask the magistrate to adjourn the proceedings and order an update report from Juvenile Justice addressing the circumstances surrounding the breach of the suspended control order (where appropriate) and your client's current circumstances generally.

- The question of revocation is where the arguments as to whether the breach can be characterised as trivial or whether there are good reasons for excusing the child's failure to comply are to be ventilated.
- It is important that when a breach of a suspended control order is admitted by a child, detailed instructions are taken about the circumstances present in their life at the time that they breached their order. It is not uncommon for children who appear in the Children's Court to experience periods of acute instability, often because of factors not within their control. There may be, within your instructions, good reasons as Cooke would have the court understand that exception.
- If there are no good reasons for excusing the breach of the suspended control order on the basis of the circumstances surrounding the breach, then urge the court to take a broader view in accordance with what has been argued in this paper.

### **3. Re-Sentence**

- The court must take into account anything done by the child in compliance with the suspended control order in fixing an appropriate non-parole period. This can be an important consideration in particular when a child breaches a suspended control order after a lengthy (or moderately lengthy) period of compliance with its conditions: see s24(c) CSPA.
- Pre-sentence custody may be used to back-date the commencement of the non-parole period on re-sentence: see *Pulitano v R* [2010] NSWCCA 45 at [9].<sup>16</sup> This may be particularly important if before the original suspended control order was imposed, the child served a period on remand referable to the offence. This pre-sentence custody may be able to be added to time spent in custody after the breach. All can contribute to the back-dating of the commencement of the non-parole period.

### **4. Appeal**

- Advise and encourage children to appeal the imposition of suspended control orders. In particular where the sentence is 6 months or less, or 15 months or more, or where the child's background report found them suitable for community service.

---

<sup>16</sup> "9. However, the former course, that is, backdating at the time of sentence, is not available when a sentence is suspended pursuant to s 12(1) of the Crimes (Sentencing Procedure) Act, and by s 12(3) Part 4 of the Act (within which is s 47, which would otherwise dictate a day of commencement of the sentence and allow for backdating) does not apply to a sentence the subject of an order suspending its execution. Thus any pre-sentence custody must either be taken into account by reducing the sentence imposed, in which I include in prescribing the manner in which the sentence is to be served, or by backdating at the time there is revocation of the bond and the sentence descends."

- Advise children, if not out of time, to consider appealing the imposition of a suspended control order where it has been breached.
- Advise children that, following re-sentence, they have a right to appeal both the decision of the magistrate to revoke the suspended control order<sup>17</sup> and the length of the non-parole period.

---

<sup>17</sup> See the definition of "sentence" in s.3 *Crimes (Appeal and Review) Act 2001*.