sentencing
ADVISORY
COUNCIL

SEX OFFENCE SENTENCING

CONSULTATION PAPER

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Tasmanian
Government

Introduction

In May 2012 the Attorney-General, Brian Wightman sought advice from the Sentencing Advisory Council into sentencing of sex offences in Tasmania. The terms of reference for this project were agreed between the Council and the Attorney-General in July 2012:

1. A report of the type and length of sentences for sex offences by reference to sentences imposed by the Tasmanian Supreme Court in the period 1978-2011
2. A comparison with sentencing in other jurisdictions building on the analysis in the Tasmanian Law Reform Institute's Report on Sentencing (June 2008) for the offence of rape against a comparator offence such as armed robbery or grievous bodily harm.
3. Analysis of and commentary on any published statistics on sentences for sex offences in Tasmania compared with other Australian jurisdictions.
4. Preliminary advice on whether current sentence type and length for sex offences are appropriate based on:
   - Selected key Tasmanian stakeholder opinion on sentencing for sex offences;
   - Further analysis of the data collected for the Tasmanian Jury Sentencing Study;
   - Further analysis of the interviews with jurors in sex offence trials conducted as part of that study; and
   - Review of national and international research on public opinion in relation to sentencing for sex offences.
5. A proposal for a second stage of the project to include but not necessarily be limited to:
   - Gauging public opinion on sentencing for sex offences;
   - Extending previous research to include more sex offence trials to increase the reliability of findings;
   - Exploring alternative ways of gauging public opinion on sentencing for sex offences;
   - Opportunities for partnering with other funders to pursue this research; and
   - If current sentence type and length for sex offences are not considered appropriate, advice on how this should be addressed.

The Research Paper for this reference is attached to this questionnaire and provides information about sentencing practices for sex offences in Tasmania. It compares the sentencing practices for these offences with other serious offences in Tasmania and the sentencing practices for similar offences in other Australian jurisdictions. It also reviews research on public opinion and public attitudes on the sentencing for sex offences. The paper provides the background for the consultation with key stakeholders and the public as required by the terms of reference.

Questions

NOTE: in responding to the question of the adequacy or otherwise of sentences for these offences, please be aware that in many cases, an offender may be convicted of more than one offence, either of the particular offence identified below or of other offences, and the total sentence will then be more severe than the sentence for the single offence.

Questions are asked in relation to specific offences. Each of these offences contains at least one example. This gives the reader a factual example of a particular case and the sentence it attracted. Readers should also refer to the sex offence cases from the Tasmanian Jury Study which is mentioned in the Research Paper (these will be referenced where appropriate in the question). It must be emphasised that the facts of any given offence can vary extensively: the examples given are indicators only. Some examples are indicative of more serious cases that have attracted a penalty at the higher end of the range for that offence. Other examples are mid-range or at the lower sentences. Please note the number of offences in the example, as some of the cases have multiple offences. The minimum, maximum and mean described for each offence below is generally for a single offence only (with the exception of rape where the discussion paper included data for multiple offences). This must be taken into consideration when indicating your opinion on the sentencing data applicable to each question.

GENERAL OFFENCES

Question 1 – Armed robbery

Between 2001 and 2011, 85% of sentences for a single offence of armed robbery involved an immediate custodial sentence. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for a **single offence of armed robbery** was 2 years, the minimum was 2 months 3 weeks and the maximum 6 years (see Table 17 at page 23).

> Example: The CCA upheld a sentence of imprisonment of 4 years with a non-parole period of 2 years and ordered the offender pay $8,500 compensation for **stealing, aggravated armed robbery, and unlawfully setting fire to property**. The offender was in company when he stole a car, entered a hotel armed with a shotgun and robbed a bar attendant of the money in the till. He also robbed the bar attendant and a customer of their personal possessions. He then drove away and set fire to the stolen car. The offender was 19 years old at the time of the offence. The offence was well planned, the offender had 26 prior driving offences but no serious convictions, he cared for is disabled mother, had a good employment history and prospects of rehabilitation.

Having regard to all of the above information would you say that current sentencing practices for armed robbery in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	□

(4) A little too lenient	X
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind?

CLC Tas is concerned that similar median sentences are imposed for both armed robbery and aggravated armed robbery. We concur with Justice Zeeman's statement in *McFarlane*[1] that aggravated armed robbery "ought to be regarded as a more serious crime than armed robbery".[2] In Kate Warner's *Sentencing in Tasmania* it is noted that between 1990-2000 single-count custodial sentences ranged from 3 months to 8 years for armed robbery and from 3 months to 5 years for aggravated armed robbery and the median in each case was 18 months.[3] Global sentences were also similar between armed robbery (3 months to 9 years, with a median of 3 years) and for aggravated armed robbery (3 months to 13 years, with a median of 3 years).[4] It is strongly recommended that aggravated armed robbery be considered a more serious offence and that this be reflected in sentencing.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

CLC Tas agrees that the offender's age should play a role in the sentence imposed. In *Sentencing in Tasmania* it is noted that the court was usually more lenient on younger offenders,[5] possibly because of the offender's likelihood of rehabilitation.

Question 2– Causing grievous bodily harm

Between 2001 and 2011, 80% of sentences for a single offence of causing grievous bodily harm were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences for a **single offence of causing grievous bodily harm** was 2 years, the minimum was 3 months and the maximum 5 years (see Table 17 at page 23).

> Example: The CCA upheld a sentence of imprisonment of 5 years with a non-parole period of 2 years and 9 months for **one count** of GBH. The offender was a trained boxer who attacked his friend for a period of forty minutes. The victim had multiple fractures, a punctured lung, and could have died if the ambulance had not arrived. The offender was 42 years of age, had a significant record which included robbery with violence, violent assaults and rape, he had served many prison sentences.

Having regard to all of the above information would you say that current sentencing practices for causing grievous bodily harm in Tasmania are:

(1) Much too tough	□

[1] (1993) 2 Tas R 201.
[2] (1993) 2 Tas R 201 at 222.
[3] K Warner, *Sentencing in Tasmania* (Federation Press: 2002) at 332.
[4] K Warner, *Sentencing in Tasmania* (Federation Press: 2002) at 332-333.
[5] K Warner, *Sentencing in Tasmania* (Federation Press: 2002) at 333.

(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind?

CLC Tasmania believes that the sentences imposed for grievous bodily harm should be a similar range to those imposed in cases of serious sexual assault. We endorse Justice Wright's comments in the case of *Allen*:[6]

> Sentences for rape commonly fall within a similar range and there appears to me to be no sound basis for suggesting that a deliberate crime of violence which inflicts severe trauma with long term disability upon another human being is any less serious than a case of serious sexual assault.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

CLC Tas finds it problematic comparing sentences for grievous bodily harm in Tasmania with similar offences in Victoria and New South Wales given that the offences are not precisely equivalent.

Whilst a sentence of imprisonment is appropriate in some circumstances it is important that offenders are provided with appropriate rehabilitation and reintegration programs during their sentence. This will in turn reduce re-offending.[7]

Question 3 – Causing death by dangerous driving

Between 2001 and 2011, 100% of sentences for causing death by dangerous driving were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for a **single offence of causing death by dangerous driving**, was 12 months, the minimum was 8 months and the maximum 4 years (see Table 17 at page 23).

> Example: On appeal a sentence of imprisonment was reduced to 3 years and 3 months with a non-parole period of 2 years and disqualified from driving for 3 years commencing on release from prison for **causing death by dangerous driving, driving while not the holder of a drivers licence, driving a motor vehicle while exceeding the prescribed alcohol limit, driving a motor vehicle whilst a prescribed illicit drug was present in his blood**. The offender drank a large amount of alcohol, consumed cannabis and methyl amphetamine, he then drove his vehicle. The offender failed to remain on the correct side of the road and collided head on with a car driven by a young woman

[6] [1999] TASSC 112.

[7] In a recent strategic plan of Tasmania's Prison System it was noted that increasing the number and diversity of therapeutic group programs would assist in the reduction of re-offending: Department of Justice, Breaking the Cycle, A Strategic Plan for Tasmanian Corrections 2011-2020 at 1.1.1.

who died at the scene. The offender was 37 years of age and had a significant history of drink-driving and driving offences.

Having regard to all of the above information would you say that current sentencing practices for causing death by dangerous driving in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind?

It would appear that sentences for causing death by dangerous driving have become more severe over time with 94 per cent of sentences imposed between 1978-1989 being custodial sentences[8] whereas between 2001-2011 the figure was 100%.[9] This may be the result of the community's views hardening towards offenders found guilty of causing death by dangerous driving. In the example listed above the sentence imposed is 'about right' given that the offender was driving without a licence, was driving whilst over the prescribed alcohol limit, had prescribed illicit drugs in his system, was driving negligently and had a relevant prior criminal record.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

The ability to impose a sentence of licence disqualification under section 55(2) of the *Sentencing Act 1997* (Tas) is supported. Whilst we have been unable to find any corroborating evidence it is hoped that along with an increase in custodial sentences over the last 30 years that there has also been a concomitant increase in licence disqualification for offenders found guilty of causing death by dangerous driving.[10]

SEXUAL OFFENCES

[8] K Warner, *Sentencing in Tasmania* (Federation Press: 2002) at 281.
[9] Sentencing Advisory Council, *Sex Offence Sentencing Research Paper* (April 2013) at 24.
[10] In *Sentencing in Tasmania*, the rate of licence disqualification between 1978-89 was 80%: K Warner, *Sentencing in Tasmania* (Federation Press: 2002) at 282.

Question 4 – Rape

Between 2001 and 2011, 92% of sentences for a single count of rape were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for a **single offence of rape**, was 3 years 3 months, the minimum was 12 months and the maximum was 5 years (see Table 1 at page 4).

Between 2001 and 2011, 97% of **single and global combined** sentences for rape were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for single and multiple offences where rape was the principal offence was 3 years 10.5 months, the minimum was 6 months and the maximum was 9 years (see Table 2 at page 4).

> The CCA upheld a global sentence of imprisonment for 5 1/2 years' imprisonment with a non-parole period of 3 years and placed the offender on the sex offenders register for a period of 10 years. The offender was charged with **one count of rape, five counts of aggravated sexual assault, one count of assault and one count of indecent assault**. The victim and the offender were separated but maintained a relationship for the sake of the children. The offender planned the rape and tricked the victim into being alone with him in her home. The offender dragged the victim to the bedroom by the hair where he gagged, assaulted and raped her for a continuous period. The offender was 38 years of age had no prior convictions and a good work record.

Having regard to all of the above information and the two cases of rape from the Tasmanian Jury Study which is outlined in the Research Paper (see page 35) would you say that current sentences rape in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind (for example stranger rape or date rape)?

Whilst it is acknowledged that rape and other sexual assaults are generally carried out by offenders known to the victim we do not support any legislative or judicial distinction between the seriousness of rape of a stranger compared with the rape of a non-stranger. We endorse Slicer J's observations in *S* where he noted that the existence of a prior sexual relationship should not be considered a mitigating factor: [11]

[11] Serial No 75/1991. Slicer J's views have received endorsement in other Tasmanian cases including *Radcliffe* Underwood J 10/7/1997; *Armstrong* Wright J 18/6/1996; *Bryan* Underwood J 25/11/1992.

> It may be that because of a prior relationship there was, in fact, less harm caused to the victim, but the test is to determine the effect of the rape on the victim, and the effect is to be determined by the degree of harm suffered irrespective of its reason. Indeed a rape victim who has been involved in a previous sexual relationship, may suffer greater harm because of the betrayal of trust or the humiliation of the abuse of physical power. She may just have commenced the process of living a new life, such process being destroyed by the act of betrayal and violence.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

CLC Tas concurs with Slicer J's comments that when sentencing offenders convicted of rape "a custodial sentence is warranted in all but the most exceptional circumstances".[12] Further, we endorse the list of aggravating factors listed in *Billam*[13] that courts should take into account when considering sentences for rape. In that case the court held that as well as there being aggravating factors where two or more men act together, where a person has broken into or otherwise gained access to a place where the victim is living, is committed by a person who is in a position of trust in relation to the victim or a person who abducts and holds the victim captive, eight other factors would amount to aggravating factors:[14]

> (1) violence… over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned: (5) the offender has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is either very old or very young; (8) the effect on the victim, whether physical or mental, is of special seriousness.

Question 5 – Maintaining a sexual relationship with a young person

Between 2001 and 2011, 77% of sentences for a single offence of maintaining a sexual relationship with a young person were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences for a **single offence of maintaining a sexual relationship** with a young person was 2 years 6 months, the minimum was 4 months and the maximum was 8 years (see Table 8 at page 10).

> Example 1: On appeal a sentence of imprisonment was increased to 8 years with a non-parole period of 5 years and 6 months for the conviction of **one count** of maintaining a sexual relationship with a person under the age of 17 years. The sexual relationship was maintained for a period almost five years and started when the victim was 12 years of age and the offender was 33. The offender was the stepfather of the victim; he committed oral sex and ejaculated into the victim's mouth on an almost daily basis. The offender had no prior convictions and a good employment history.

[12] S Serial No 75/1991 at 7.
[13] [1986] 1 All ER 985.
[14] [1986] 1 All ER 985 at 988. Most of these factors have been applied in Tasmania decisions: *Brown* Serial No 69/1987 per Wright J at 6; *Woore* Serial No 30/1997 per Wright J at 2; *Jones* [1999] TASSC 30 per Wright J at 8.

> Example 2: On appeal a sentence of imprisonment was decreased to 2 years a with a non-parole period of 12 months for the conviction of **one count** of maintaining a sexual relationship with a person under the age of 17 years. The sexual relationship was maintained for a period of ten months and started when the victim was 15 years of age and the offender was 46. The offender was an organist and the victim was a member of the choir, the offender eventually employed the victim at his business. Although the victim was a willing participant in the relationship she had considerable personal issues and considered the offender a father figure. It was the offender who terminated the relationship. The offender was 76 years of age at the time of sentencing, had significant heath issues and no criminal record.

Having regard to all of the above information provided and the case from the Tasmanian Jury Study which is outlined in the research paper (see page 36) would you say that current sentences for maintaining a sexual relationship with a young person in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind (for example a relationship between a 15 year old girl and a man over the age of 18 or the continued rape of a young child)?

The age of the victim should remain an important factor, with relationships involving young children more seriously regarded than a relationship with a 15 or 16 year old. In the examples listed above the first case study requires a harsher sentence given the age gap between the victim and offender, the breach of trust between a stepfather and his stepdaughter and the length of the assault.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

We endorse the findings of the *Tasmanian Jury Study* that sentences imposed for consensual sex with teenagers are about right.[15] That is, that mitigation should be applied in a consensual relationship between a 15-year-old girl and a man over the age of 18 or vice versa, whereas age should be an aggravating factor where it involves an adult and a young child.

Question 6 – Sexual intercourse with a young person

Between 2001 and 2011, 24% of sentences for a single count of sexual intercourse with a young person were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for a **single offence of sexual**

[15] Sentencing Advisory Council, *Sex Offence Sentencing Research Paper* (April 2013) at 34-35.

intercourse with a young person, was 5 months, the minimum was 2 months and the maximum was 9 months (see Table 8 at page 10).

> Example: On appeal a sentence of imprisonment was decreased to a period of 9 months for **three counts of indecent assault and two counts of unlawful sexual intercourse with a young person.** The offender was a 46 year old police officer and the victim was 15 years of age. The offender was having an affair with the mother of the victim at the time. The offender fondled the victim's breasts and sucked her nipples on all occasions, the final two occasions he had sexual intercourse with her. The offender bragged about the incident and showed no remorse, and had no criminal record.

Having regard to all of the above information and the cases of consensual sex with a teenager from the Tasmanian Jury Study which is outlined in the Research Paper (see page 36) would you say that the current sentencing practices for sexual intercourse with a young person in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind (for example where the young person was under 13 and the defendant an adult in a position of trust)?
CLC Tas believes that the offence of sexual intercourse with a young person should attract a custodial sentence in circumstances in which the offender was in a position of trust. That is, cases in which the offender has abused their position of authority or trust, by exploiting the age, vulnerability and/or experience of the victim to commit the offence. In the case study above the custodial sentence is warranted given his lack of remorse and the breach of trust.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?
Whilst sentence lengths are stable it is clear that the proportion of custodial sentences has increased[16] possibly suggesting a hardening in the community's views of offenders found guilty of sexual intercourse with a young person.

CLC Tas supports the current defence to section 124 of the *Criminal Code Act 1924* (Tas). That is, that whilst sexual intercourse with a young person under the age of 17 years is a crime, consent will be a defence where the young person was of or above the age of 15 and the accused was not more than 5 years older or the young person was of or above the age of 12 years and the accused person was not more than 3 years older.

[16] Sentencing Advisory Council, *Sex Offence Sentencing Research Paper* (April 2013) at 6.

Question 7 – Aggravated Sexual Assault

Between 2001 and 2011, 60% of sentences for a single offence of aggravated sexual assault were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for a **single offence of aggravated sexual assault**, was 7.5 months, the minimum was 6 months and the maximum was 15 months (see Table 8 at page 10).

> Example: The offender was sentenced in the Supreme Court to imprisonment of 4 months and placed the on the sex offender list for a further 12 months for **one count of aggravated sexual assault.** The offender was 40 years of age and the victim was 10. The offender was in a parental role and in a position of trust (he was living with the victim's mother) when he inserted his finger into the victim's vagina. When sentenced the offender was already serving a term of imprisonment for 8 months for having sexual intercourse with the victim's sister who was 13 at the time of the offence. The offender was generally of good character and had a good work record.

Having regard to all of the above information would you say that the current sentencing practices for aggravated sexual assault in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind?

The custodial sentence imposed in the case study is warranted given the offender's relevant prior criminal record, breach of trust and degree of harm as well as the victim's age and vulnerability.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

Whilst it appears that sentences for aggravated sexual assault have become more lenient between 1987-2000 and 2011-2011 no conclusions can be drawn with confidence because of the small number of cases. Nevertheless, custodial sentences should remain the norm. In determining whether a custodial sentence is warranted the courts should assess the age and vulnerability of the victim as well as the degree of harm.

CLC Tas supports the continued use of the important sentencing principle of proportionality. That is, when sentencing offenders for the crime of aggravated sexual assault the seriousness of the crime should be assessed by the degree of harm done to the victim.

Question 8 – Indecent Assault

Between 2001 and 2011, 50% of sentences for a single offence of indecent assault were immediate custodial sentences. The median sentence of imprisonment, that is, the sentence which falls in the middle of the range of sentences, for a **single offence of indecent assault** was 5.5 months; the minimum was 2 months and the maximum was 15 months (see Table 8 at page 10).

> Example 1: The CCA upheld a sentence of imprisonment of 18 months for **five counts of indecent assault.** The offender was a relative and in a position of trust. The first count was when the offender was 40 and the victim was 9 the other offences occurred when the victim was 13. The offender fondled the victim's testicles and penis and on the last occasion the offender rubbed his penis between the boy's buttocks for the purpose of anal intercourse. When sentenced the offender was 65 years of age, showed no remorse and had no prior convictions.
>
> Example 2: The offender was sentenced to 6 months imprisonment, wholly suspended (on condition that he not commit an offence punishable by imprisonment for a period of two years). The offender was 31 years of age and his victim 17 years of age. Pretending to be a photographer, he organised to do a shoot of erotic poses including nude shots of them both, After the shoot he asked her to 'play around' but she refused and refused his offer of money to do so. He then performed oral sex on her and penetrated her vagina with his fingers. In a police interview the offender admitted he realised she was not consenting. He had no serious prior convictions and was in regular employment.

Having regard to all of the above information would you say that current sentencing practices for indecent assault in Tasmania are:

(1) Much too tough	□
(2) A little too tough	□
(3) About right	X
(4) A little too lenient	□
(5) Much too lenient	□
(6) Don't know	□

When answering this question what type of offence did you have in mind?

CLC Tas believes that the offence of indecent assault should generally attract a custodial sentence, particularly in those circumstances in which the offender was in a position of trust. Of the case studies above, the sentence imposed in the first example is a good example of a sentence warranting imprisonment given the offender's age, vulnerability and the offender's betrayal of trust.

Do you have any further views you would like to express to the Council in relation to the sentences for this offence?

Although it appears that sentences for indecent assault have become more lenient over the last 30 years this is probably because of changed definitions. For example, more invasive forms of indecent assault (such as digital penetration) are now covered by the aggravated sexual assault provision.

CLC Tas supports the court's 'increased tendency to wholly suspend sentences in cases of indecent assault'[17] particularly where the assault is relatively minor and the prospects of re-offending are slight.[18]

Question 9 – Your views

If you think that the current sentencing practices for sex offences are not considered appropriate then how you do suggest this should be addressed? For example:

- introduce separate maximum penalties for each offence;
- mandatory minimum sentences for each offence,
- sentencing guidelines; or
- presumptive minimum or baseline sentences.

These sentencing options are described below.

Maximum Penalty: Maximum penalties are set by Parliament and are found in the Act creating a particular offence. Judges or magistrates may impose a sentence less than the prescribed maximum penalty. Maximum penalties provide a legislative view of the severity of a particular offence and are intended to reflect the relative severity with which the community perceives a particular offence.

Presently the Code does not specify maximum or minimum penalties for individual offences. In Tasmania all offences in the Code have the same maximum penalty of 21 years. Individual maximum penalties are found in the *Police Offences Act 1997* (Tas) for summary offences. In all other jurisdictions, individual and graduated maxima are specified for all offences whether indictable or summary.

Mandatory Minimum Sentences of Imprisonment: A mandatory minimum term of imprisonment is one where Parliament sets a fixed minimum term of imprisonment but leaves a court with the discretion to impose a more severe sentence where it considers it appropriate.

Presumptive Minimum Sentencing: Presumptive minimum sentences are similar to mandatory minimum sentences except there is discretion to impose a sentence below the minimum amount prescribed for the offence. Under this model a presumptive range for imprisonment is established in respect of specific offences. The court has the power to depart from the presumptive range if there is sufficient reason to do so having regard to the subjective circumstances of the offender and any other discounting factors that may come into play.

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[17] K Warner, Sentencing in Tasmania (Federation Press: 2002) at 322. Also found in Sentencing Advisory Council, Sex Offence Sentencing Research Paper (April 2013) at 10.

[18] In *Sentencing in Tasmania* the author observes that wholly suspended sentences having increased from 19% in the period 1978-89 to 41% between 1990-2000 for single-count sentences and from 12% in 1978-89 to 37% in 1990-2000 for global sentences: K Warner, *Sentencing in Tasmania* (Federation Press: 2002) at 322.

Baseline Sentencing: This model involves the legislative prescription of a 'baseline sentence' that operates as a starting point for specific offences. There are several factors that determine a recommended baseline level which include such matters as the maximum penalty, the objective seriousness of the offence, past sentencing practices and comments of the Court of Appeal. The 'objective seriousness' of an offence is assessed by factors that relate to the offence rather than the offender to justify a term of imprisonment above or below the baseline.

Sentencing guidelines: There are two forms of guidelines:

1) A guideline judgment is a judgment of a court of appeal which goes beyond the facts of the particular case before the court and suggests a starting point or range for dealing with certain types of offences. Guideline judgments can cover a variety of methods adopted by the court for the purpose of giving guidance to judges when exercising their discretion. These can include factors that can be taken into account when sentencing an offender or factors relevant when imposing a particular sanction. Guideline judgments are generally not binding in a formal sense but when a sentencing judge does not apply a guideline it is expected that reasons for the decision be articulated.

2) Guidelines can also be produced by, or with the aid of sentencing panels and councils. Since 2010 the Sentencing Council for England and Wales has been placed under legislative duty to create sentencing guidelines. The guidelines specify the range of sentences that the Council considers appropriate for a court to impose on an offender convicted of certain offences. The guidelines are also required to list aggravating and mitigating factors that the court is required to take into account and the weight that should be given to previous convictions. Draft guidelines are subject to consultation and the definitive guidelines are then published and can be subject to review and revision by the Council. In sentencing an offender the court must follow (rather than have regard to) the definitive guidelines which are relevant to the offenders case unless the court is satisfied that it would be contrary in the interests of justice to do so.

In Australia, the High Court has ruled that sentencing guidelines are generally inconsistent with the preferred methodology of sentencing which requires that a judge intuitively synthesises all of the relevant facts rather than approaching sentencing as an arithmetic or mathematical exercise. However, the Tasmanian Government could legislate for sentencing guidelines.

CLC Tas Response

CLC Tas believes that caution is warranted when comparing Tasmanian sentencing data with data from other Australian jurisdictions. As the *Sex Offence Sentencing Research Paper* makes clear there are a number of difficulties with this approach including that offence and sentencing laws are not uniform and prosecution differences between jurisdictions mean that some jurisdictions may be more likely to prosecute 'less serious' sex offences resulting in the imposition of less severe sentences. Nevertheless, we do not believe that sex offence sentences imposed in Tasmania are less

severe with Australian Bureau of Statistics data demonstrating that 100% of those Tasmanians convicted for sexual assault offences[19] being sentenced to 'custodial orders'.[20] It should also be noted that additional Australian Bureau of Statistics data emphasises that whilst Tasmanians are generally sentenced to shorter periods of imprisonment than offenders sentenced to similar offences in other Australian jurisdictions, they tend to serve most of their sentence before being released.[21]

CLC Tas does not support the introduction of mandatory minimum periods for rape or any other form of sexual assault. In our view mandatory minimum sentences may lead to harsh and unfair outcomes with the courts hamstrung in their ability to determine the most appropriate sentence for the particular circumstances of the case. Importantly, there is little evidence to suggest that the introduction of a mandatory minimum sentence will deter with the Tasmanian Law Reform Institute finding that "there is little basis for believing that [mandatory minimum penalties] have any deterrent effect on rates of serious crime".[22]

Further, CLC Tas does not support the introduction of statutory maximum penalties for offences. Whilst the introduction of such penalties will allow the community and legislature an opportunity to articulate the severity with which they view particular crimes, statutory maximum penalties are unlikely to assist the sentencing process. This is because such penalties will be set very high to ensure that the gravest offences are captured by the sentence and will therefore continue to be disproportionate to most sentences imposed for that crime. CLC Tas prefers the continued adoption of the current model with Tasmania's *Criminal Code Act 1924* (Tas) providing an overall maximum term of 21 years for offences dealt with in the Supreme Court and allowing the courts to determine the level of gravity.

In our view a better solution to the introduction of mandatory minimum periods and statutory maximum penalties is the establishment of a sentencing database. In our view a publicly available sentencing database will assist in research and policy making, will support both the judiciary and the community in determining just and fair sentences, and ensure that the sentence is both appropriate and consistent when judged against similar offences and the sentences imposed.

Finally, CLC Tas is concerned that there may continue to be a lack of resourcing for sex offender treatment programs.[23] With research demonstrating that some forms of treatment are effective for

[19] Defined as 'acts, or intent of acts, of a sexual nature against another person which are non-consensual or consent is proscribed. As found at Australian Bureau of Statistics 2012, Criminal Courts, Australia, 2010-11 and republished in Sentencing Advisory Council, *Sex Offence Sentencing Research Paper* (April 2013) at 14.
[20] Defined as including fully suspended sentences and 'custody in the community' such as home detention and intensive correction orders. As found at Australian Bureau of Statistics 2012, Criminal Courts, Australia, 2010-11 and republished in Sentencing Advisory Council, *Sex Offence Sentencing Research Paper* (April 2013) at 13.
[21] As found at Australian Bureau of Statistics 2012, Prisoners in Australia 2011 and republished in Sentencing Advisory Council, *Sex Offence Sentencing Research Paper* (April 2013) at 15.
[22] Tasmanian Law Reform Institute, *Sentencing* (Final Report No 11) at 41.
[23] For example the Chairman of the Parole Board noted in her most recent Annual Report that a program to monitor and rehabilitate offenders has still not been fully implemented: Parole Board of Tasmania, 2011 Annual Report at 4.

sex offenders and the Parole Board finding "that the sex offender's treatment programme plays an integral part in the rehabilitation of prisoners convicted of sexual based offences"[24] it is crucial that programs such as *New Directions* are appropriately resourced.

NAME Benedict Bartl, Policy Officer

ORGANISATION Community Legal Centres Tasmania

As stated earlier, your responses may be referred to or quoted in the Council's reports to the Attorney-General. If anonymity is preferred then please mark this Consultation Paper 'CONFIDENTIAL'

THANK YOU FOR YOUR CO-OPERATION

http://www.justice.tas.gov.au/__data/assets/pdf_file/0008/193670/Parole_Board_Annual_Report_2010-2011_accessible.pdf (Accessed 19 June 2013).

[24] Parole Board of Tasmania, 2011 Annual Report at 20. As found at http://www.justice.tas.gov.au/__data/assets/pdf_file/0008/193670/Parole_Board_Annual_Report_2010-2011_accessible.pdf (Accessed 19 June 2013).