COMMUNITY
LEGAL CENTRES
TASMANIA

16 October 2015

Sentencing Advisory Council
GPO Box 825
Hobart TAS 7001

via email: sac@justice.tas.gov.au

To the Sentencing Advisory Council,
Re: *Phasing out of Suspended Sentences Consultation Paper*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Phasing out of Suspended Sentences Consultation Paper*.[1]

CLC Tas is the peak body representing the interests of eight community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We do not believe that suspended sentences should be phased out. They remain a viable sentence particularly for offenders who are unlikely to re-offend but where the seriousness of the offence or the offender's conduct must be acknowledged.

However, it is acknowledged that there are offenders, particularly offenders with a history of alcohol and/or illicit drug abuse who are being sentenced to suspended sentences with no action being taken to resolve the underlying offending behavior. We strongly believe that the courts do have an important role in addressing offender behaviour, particularly in circumstances where the offender is motivated to reform. We therefore welcome the proposed introduction of an alcohol and other drug treatment order.

Alcohol and Other Drug Treatment Order

We strongly support the Sentencing Advisory Council's recommendation of expanding Tasmania's Court Mandated Diversion program to both include alcohol and be a sentencing option available in all courts. Court Mandated Diversion is currently

[1] CLC Tas would like to acknowledge the assistance of Rebekah Fleming, Amelia Hickman, Genevieve James, Olivia Jarvis, Erin Lim, Hannah Moore and Alice Wanders who undertook the research that underpins this response.

available to adult offenders with a demonstrable history of drug use who plead guilty to committing non-violent offences. The Court Mandated Diversion program allows judicial officers to sentence offenders to a drug treatment order that includes treatment for illicit drug use and may require attendance at a 'vocational, educational, employment, rehabilitation or other programs specified in the order'.[2]

Importantly, participation in Court Mandated Diversion allows judicial officers to be actively involved in the treatment and monitoring of the offender in an attempt to address the factors underpinning the offending behaviour, thereby increasing the likelihood of rehabilitation. Despite the initial costs, participation in the Court Mandated Diversion program is likely to result in a saving to the community through decreased recidivism,[3] with flow on effects for both the court and prison systems.

Many of these conclusions were found in a review for the Department of Justice in November 2008. The review entitled *Tasmania's Court Mandated Drug Diversion Program, Evaluation Report* found less than half of the 157 offenders who had commenced the program had undertaken any previous drug treatment, leading the authors to conclude that "…Court Mandated Diversion has been their first ever opportunity to confront their need for treatment and to gain support to deal with their addiction related issues… and this, in itself, is a significant achievement".[4] The review also found that 56.7 per cent of participants had not reappeared in court after their involvement in the program, a figure commensurate with other court-based drug diversion programs.

We strongly support the availability of Court Mandated Diversion to all offenders with a history of alcohol or other illicit drug abuse. Court Mandated Diversion should also be available in the Supreme Court as well as the Magistrates Court. Currently, there is considerable frustration in both the legal and community sectors about the inability of offenders to be sentenced to the Court Mandated Diversion program in cases heard solely in the Supreme Court or where an offender has matters that will be heard in both the Magistrates and Supreme Courts.

However, the expansion of Court Mandated Diversion to Supreme Court matters will require a significant injection of funds and resources. We concur wholeheartedly with

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[2] Sections 7, 27G and 27H of the *Sentencing Act 1997* (Tas).

[3] For example, a review of the NSW Drug Court compared reconviction rates amongst participants in the Drug Court program with reconviction rates amongst a comparison group deemed eligible for the Drug Court Program but excluded either because they reside out of area or because they had been convicted of a violent offence. The study found that participants in the NSW Drug Court were less likely to be reconvicted than offenders given conventional sanctions: see Don Weatherburn, Craig Jones, Lucy Snowball and Jiuzhao Hua, 'The NSW Drug Court: A re-evaluation of its effectiveness' (Crime and Justice Bulletin No 121, NSW Bureau of Crime Statistics and Research, September 2008).

[4] Tasmania's Court Mandated Drug Diversion Program, Evaluation Report (November 2008) at 68. As found at http://www.justice.tas.gov.au/__data/assets/pdf_file/0020/115463/CMD_Eval_Final_Report_Jan_09.pdf (Accessed 29th April 2015).

the Sentencing Advisory Council that “considerable resources will need to be allocated to support the order”.[5]

Whilst there are a number of studies demonstrating that many offenders are intoxicated at the time of their offending,[6] this does not necessarily point to a history of drug abuse. These studies are also subject to a number of limitations, including most importantly that many offenders intoxicated at the time of their offending do not have a history of drug abuse. Other limitations include that the findings may be an attempt by those self-reporting to attribute their offending behaviour to their use of drugs. Alternatively, self-reporting may be underreported, with offenders concerned that their admission may see them charged with additional offences. Finally, it is important to note that many offenders do not attribute their offending behaviour to their intoxication.

As well, the data provided in the Sentencing Advisory Council’s *Phasing out of Suspended Sentences Background Paper* only present information on the numbers and percentages of offenders being sentenced for *drug* offences in the Magistrates and Supreme Courts. Whilst useful in demonstrating the likely sentence for offenders who receive a suspended sentence, the data is unable to quantify the numbers of offenders who may be suitable for assessment for the Court Mandated Diversion program.

In our opinion, the number of offenders sentenced with a history of alcohol and/or illicit drug abuse provides a more reliable estimate of offenders in Tasmania who require access to treatment and other rehabilitation programs. Whilst we have been unable to review cases from the Magistrates Court, we have reviewed all sentencing decisions made available through the *Sentencing Database* and handed down in the Supreme Court of Tasmania between 2008-14.[7] The Remarks on Sentence, as they are sometimes called, are delivered by the sentencing judge in open court when passing sentence and generally state the offence/s for which the offender has been convicted, the objective circumstances of the offence and the subjective circumstances of the offender.[8] The documentary evidence made available to the Supreme Court by both prosecution and defence counsel, including pre-sentence reports, psychological assessments, criminal records and testimony is capable of being tested as well as

[5] Sentencing Advisory Council, *Phasing out Suspended Sentences Consultation Paper* (August 2015) at 52. As found at http://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0016/324106/Phasing_Out_of_Suspended_Sentences_-_Consultation_Paper.pdf (Accessed 12 October 2015).

[6] See, for example, Jason Payne and Antonette Gaffney, ‘How much crime is drug or alcohol related? Self-reported attributions of police detainees’ (Trends and Issues in crime and criminal justice No 439, Australian Institute of Criminology, May 2012); Toni Makkai and Jason Payne, ‘Drugs and Crime: A Study of Incarcerated Male Offenders’ (Research and Public Policy Series No 52, Australian Institute of Criminology, 2003); Holly Johnson, ‘Drugs and Crime: A Study of Incarcerated Female Offenders’ (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004).

[7] This research was made possible through the grant of research monies made available through the Solicitors’ Guarantee Fund in 2013. The research forms part of a much larger project investigating the economic and social impacts of drug use in Tasmania.

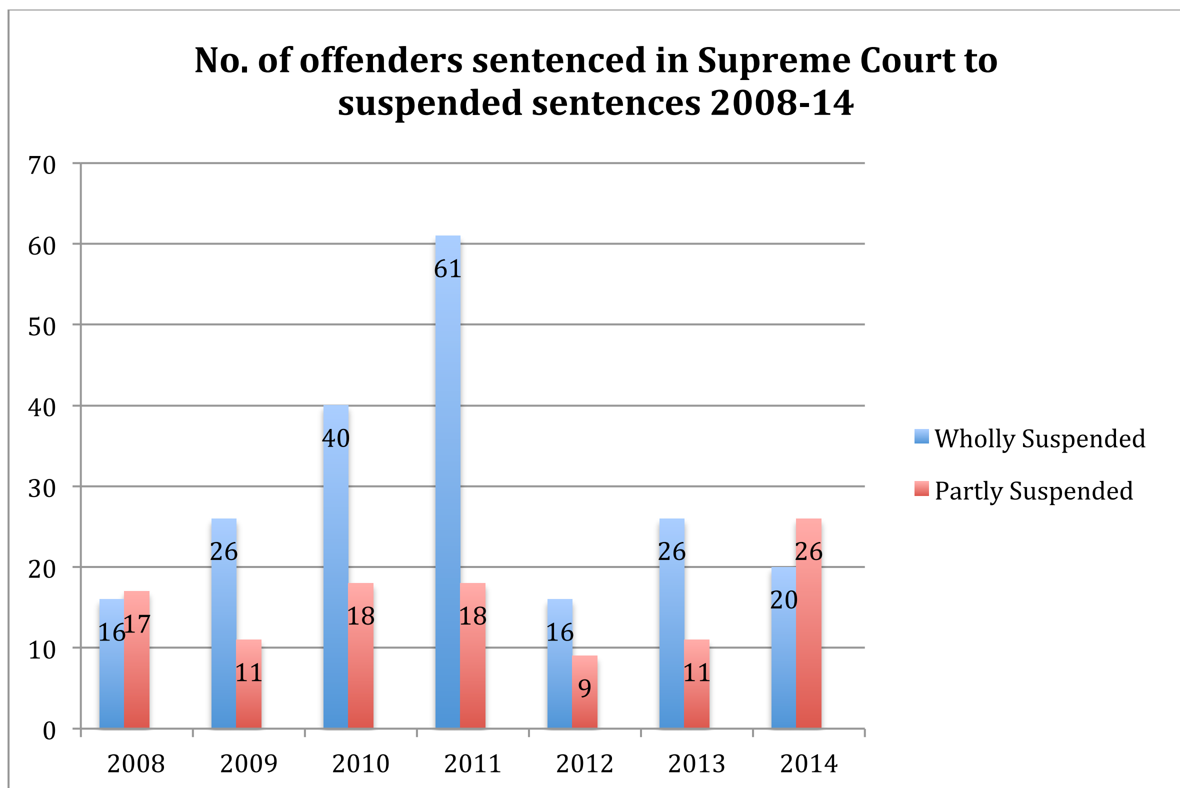
[8] An electronic database of the sentencing comments is available at http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm (Accessed 10 July 2015).

corroborated and therefore provides Tasmania's Supreme Court with a more complete picture of the offender's drug use or abuse.

As set out in the table below, our analysis of the *Sentencing Database* from 2008-2014 demonstrates that there are around 85 offenders each year who have a recognised history of alcohol and/or illicit drug abuse at the time of their offending in the Supreme Court of Tasmania.

Supreme Court	2008	2009	2010	2011	2012	2013	2014	TOTAL
No. of offenders sentenced with history of alcohol and/or other drug abuse	72	99	112	144	42	64	77	610
% sentenced to suspended sentences	46% (n=33)	37% (n=37)	52% (n=58)	55% (n=79)	60% (n=25)	58% (n=37)	60% (n=46)	52.5% (315)

It is also worth noting that the data highlights the high proportion of offenders with a history of alcohol and/or illicit drug abuse that have received suspended sentences and that this figure has increased to 55-60 per cent over the last four years. Furthermore, of those offenders with a history of alcohol and/or illicit drug abuse who were sentenced to suspended sentences, the overwhelming majority were sentenced to wholly suspended sentences, as set out in the figure below.



Our analysis of the *Sentencing Database* also found that a large number of offenders with a history of alcohol and/or illicit drug abuse are subject to both a suspended sentence and a probation order.[9] We are concerned about the lack of judicial oversight that accompanies the making of probation orders. In discussions with both the legal and community sectors, we have become aware that drug testing is not regularly required and the failure to undertake urinalysis or other forms of drug testing, or unattended appointments with counselling services, treatment programs or probation officers, is not necessarily likely to warrant a review of the probation order, as is currently required under section 41 of the *Sentencing Act 1997* (Tas). Anecdotally, we are also aware of cases in which a judicial officer imposes a probation order on an offender who has expressed no motivation to rehabilitate, resulting in a likely breach and bringing disrepute to the sentencing process.

The lack of judicial oversight with probation orders can be starkly contrasted with Court Mandated Diversion, where the offender is intensely and actively managed for two years, is regularly subject to urinalysis and other forms of drug testing, and is required to attend court fortnightly. Overseeing these efforts is a judicial officer who forms a close working relationship with defence, prosecutorial and departmental staff to ensure that the offender is given every opportunity to rehabilitate.

The expansion of the Court Mandated Diversion program to the Supreme Court is likely to be a win-win-win that reduces recidivism as offenders undergo treatment for their drug abuse, increases confidence in the Judiciary by ensuring that orders are complied with and provides a level of accountability that is currently lacking for many offenders sentenced to a suspended sentence in the Supreme Court of Tasmania.

Nomenclature

Finally, we would strongly recommend that the nomenclature around the drug treatment order be amended. In our opinion, the 'drug and alcohol treatment order' is suggestive of alcohol not being a drug or not being a drug that is as dangerous as illicit drugs. Nothing could be further from the truth. According to a report cited in the *National Drug Strategy Household Survey 2013* deaths attributable to alcohol are more than double the deaths attributable to illicit drugs.[10] It is therefore important that the order highlight that alcohol is capable of being a harmful drug and that alcohol abuse is taken as seriously as illicit drug abuse. We therefore recommend that the proposed order be referred to either as the 'Alcohol and Other Drug Treatment Order' or simply a 'Drug Treatment Order' that includes reference to alcohol abuse.

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[9] See section 37(2) of the *Sentencing Act 1997* (Tas). Most commonly, offenders were required to undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer; and/or submit to testing for alcohol or drug use as directed by a probation officer and/or submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer

[10] The report cited found that in 2003 alcohol was attributable for 3,430 deaths whilst 1,705 deaths were attributable to illicit drugs: see Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report* (2013) at 106. As found at http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549848 (Accessed 13 October 2015).

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,

Benedict Bartl
Policy Officer
Community Legal Centres Tasmania