

COMMUNITY LEGAL CENTRES TASMANIA

2 September 2016

Department of Justice
Office of Strategic Legislation and Policy
GPO Box 825
Hobart TAS 7001
Attn: Bradley Wagg

via email: bradley.wagg@justice.tas.gov.au

To the Office of Strategic Legislation and Policy,
Re: *Sentencing Legislation Amendment Bill 2016*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Sentencing Legislation Amendment Bill 2016*.

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 commend the State Government's decision to allow the Supreme Court to make drug treatment orders and to allow all judicial officers to defer sentences through the proposed amendments to the *Sentencing Legislation Amendment Bill 2016*. The proposed reforms are crucial in seeking to address offender behavior, providing the courts and professional staff in the government and non-government sectors with an opportunity to be actively involved in addressing the factors underpinning the offending behaviour, thereby increasing the likelihood of rehabilitation.

However, the proposed reforms will only be an effective replacement for suspended sentences if properly funded, a point that we have repeatedly made and which has also been made by a number of government departments and non-government organisations.¹ With the Court Mandated Diversion program currently operating in the Magistrates Court already running at capacity or very close to capacity it is imperative

¹ Organisations that have called for appropriate resourcing include the Director of Public Prosecutions, the Department of Police and Emergency Management, the Alcohol, Tobacco and other Drugs Council of Tasmania Inc, the Probation and Community Corrections Officers Association and the Law Society of Tasmania. As found in Sentencing Advisory Council, *Phasing out of Suspended Sentences* (Final Report No. 6) March 2016) at 3-4.

that an appropriate level of additional funding is provided to allow those offenders assessed as both eligible and suitable to be sentenced to a drug treatment order in the Supreme Court.

It is also important to note that the introduction of drug treatment orders and deferred sentencing will not solely be a substitute for suspended sentences, with many offenders currently sentenced to imprisonment also likely to be eligible for the reform. With specific reference to drug treatment orders, the following research demonstrates that there is a large number of offenders sentenced in the Tasmanian Supreme Court who may be both eligible and suitable for the drug treatment orders.

How many offenders sentenced in the Supreme Court may be eligible for a drug treatment order?

According to Tasmania's *Sentencing Database* there are approximately 68 Tasmanians sentenced each year in the Supreme Court for drug-related offences with a peak of 89 in 2009 and 2011 and a gradual decline thereafter (see Table 1). However, this figure is of limited use given that some of these offenders will not satisfy the eligibility criteria for a drug treatment order.²

Table 1

Supreme Court of Tasmania	
Year	No. of offenders sentenced for drug-related offences
2008	84
2009	89
2010	72
2011	89
2012	58
2013	52
2014	52
2015	49
Total	545

A more complete analysis of problematic drug use in the Supreme Court is provided by reviewing the underlying causes of the offender's behavior rather than focusing narrowly on the type of offence, a review that we were able to undertake as part of a much larger project on the social and economic impacts of laws relating to drug use and possession in Tasmania.³

Our review of all sentences handed down in the Supreme Court between 2008-15 found that approximately 120 offenders are sentenced in the Supreme Court each year for offences directly attributable to their problematic drug use (see Table 2).⁴ Taking into account the eligibility criteria for drug treatment orders set out in Part 3A of the

² Section 27B of the *Sentencing Act 1997* (Tas) sets out the eligibility criteria including that offenders must have a demonstrable history of illicit drug use. This criterion would exclude drug traffickers motivated by greed.

³ In 2014 CLC Tas were successfully awarded a grant from the Solicitors' Guarantee Fund to review the social and economic impacts of drug use on the Tasmanian community. The paper is likely to be published later this year.

⁴ 'Drug use' is defined to include both alcohol and illicit drugs.

Sentencing Act 1997 (Tas) we have further narrowed this sub-set of offenders, excluding those offenders convicted of sexual offences and all offenders convicted on charges involving the infliction of actual bodily harm.⁵ Finally, we have excluded youth offenders, offenders with an alcohol problem and offenders who received a sentence other than a term of imprisonment or a suspended sentence.⁶ As Table 2 highlights, even after applying a narrow reading of eligibility criteria there remain approximately 72 offenders each year sentenced in the Supreme Court who may be eligible for a drug treatment order if the reforms set out in the *Sentencing Legislation Amendment Bill 2016* are to be introduced.

Table 2

Supreme Court of Tasmania			
Year	No. of offenders sentenced with an acknowledged drug-problem	No. of offenders excluding ineligible offences	No. of offenders excluding ineligible offences + alcohol, youth and other sentences*
2008	105	74	57
2009	127	87	68
2010	120	80	69
2011	153	108	86
2012	122	88	72
2013	127	92	65
2014	133	98	82
2015	120	92	79
Total	1007	719	578

*Other sentences include fines, community service orders and probation

If the reform is to be an effective replacement for suspended sentences it is essential that it be properly funded. The required funding will be necessary for a number of services and programs including assessment, drug treatment programs, other programs and services that address the criminogenic needs of the offender as well as the monitoring of compliance with conditions imposed, such as drug testing.

⁵ It is likely that some of these excluded offenders remain eligible given that section 27B(1)(a)(ii) of the *Sentencing Act 1997* (Tas) provides that offenders are excluded for offences involving the infliction of actual bodily harm *that, in the court's opinion, was not minor harm* [emphasis added]. To avoid putting ourselves in the role of a judicial officer we have excluded all offenders convicted of offences involving the infliction of bodily harm.

⁶ Drug treatment orders are not listed in the sentencing options available to judicial officers when sentencing youth: section 47(1) of the *Youth Justice Act 1997* (Tas). Further, drug treatment orders are only available where the offender would otherwise have been sentenced to a term of imprisonment: section 27B(1)(c)(i) of the *Sentencing Act 1997* (Tas). Nevertheless, we have included offenders sentenced to a suspended sentence given the Government's intention to "phase out suspended sentences and replace them with a wider range of alternative sentencing options": Attorney-General Vanessa Goodwin, Legislation to implement new sentencing options, Media Release 23 August 2016. As found at http://www.premier.tas.gov.au/releases/legislation_to_implement_new_sentencing_options (Accessed 29 August 2016).

According to data provided in the report *Exploring the Costs of Alternatives to Suspended Sentences* drug treatment orders cost \$26,000.00 per participant per annum meaning that an additional \$1,872,000.00 will need to be made available annually.⁷ It should also be noted that if drug treatment orders were extended to all persons wanting to access the program in the Magistrates Court, the numbers would be much higher, particularly given the program's current restriction to 80 participants and its inaccessibility to persons who solely misuse pharmaceuticals or alcohol.⁸

In light of these figures it is vitally important that the State Government at the very least matches the funding made available through the Federal Government's Illicit Drug Diversion Initiative to ensure that all offenders sentenced in the Supreme Court assessed as both eligible and suitable are able to access the treatment they require to address their underlying drug problem.⁹

- Deferred Sentences

With regard to deferred sentences it is essential that offenders have both the opportunity to be assessed and if eligible be able to access an appropriate reintegration program. As the Bill currently stands, the court is able to defer a sentence so that an offender's capacity and prospects for rehabilitation can be assessed or to allow an offender to participate in a reintegration program. However, there appears to be no scope for the court to have the offender assessed and if considered capable to be referred to a reintegration program. A simple reform that would address this difficulty would be to add the following:

When sentence may be deferred under section 7(eb)

(1) The Court may adjourn proceedings in relation to an offender under section 7(eb) so as to defer, in accordance with this division, sentencing the offender.

(2) The Court may defer, in accordance with this Division, sentencing an offender –

(a) so as to allow for the assessment of the offender's capacity, and prospects for rehabilitation; and/or

(b) to allow the offender to demonstrate that the offender is being, or has been, rehabilitated; and/or

(c) to allow the offender to participate in a reintegration program.

⁷ The figure of \$26,000 per participant per annum is outlined in a report prepared for the Sentencing Advisory Council as part of their paper on phasing out suspended sentences: John Walker and Lorana Bartels, *Exploring the Costs of Alternatives to Suspended Sentences* (November 2015). The report is available at <http://www.sentencingcouncil.tas.gov.au> (Accessed 29 August 2016).

⁸ Section 27B(1)(b)(i) of the *Sentencing Act 1997* (Tas) provides that the court may only make a drug treatment order if "satisfied on the balance of probabilities that the offender has a demonstrable history of *illicit drug use*" [emphasis added].

⁹ According to the most recent data, in 2014-15 the Court Mandated Diversion received approximately \$1,540,000 for 80 participants including both offenders on a CMD order and those being assessed for suitability for the order. As found in Sentencing Advisory Council, *Phasing out of Suspended Sentences* (Final Report) at paragraph 6.1.5.

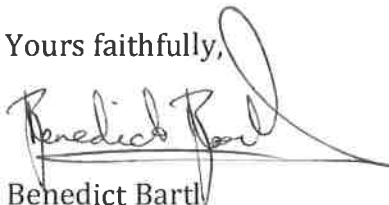
It must also be noted that if the principle of equality before the law is to be upheld there must be appropriate funding provided for deferred sentences and in particular the provision of assessment and participation in a reintegration program. It is essential that these services are available to all offenders and not just those with financial means. It would be extremely concerning if a paucity of funding resulted in the wealthy having the means to access assessment or participation in a reintegration program and thereby avoid imprisonment while the financially disadvantaged were sentenced to imprisonment due to their impecuniosity.

We are very concerned that a failure to provide the necessary resourcing for both drug treatment orders and deferred sentences will almost certainly result in increased prison numbers. This is because the inability of the courts to impose a suspended sentence at the same time as the drug treatment order program is operating at capacity or because a lack of funding to assess offenders and/or allow the offender to participate in a reintegration program as part of a deferred sentence will mean that judicial officers will have little choice but to sentence offenders to terms of imprisonment.

In summary, whilst we strongly support the intention of the Bill and commend the Government for introducing such an important reform, the passing of the Bill has the potential to be counter-productive if not properly funded. In the strongest possible terms we call on the Government to pass this Bill but only have it proclaimed and thereby operational when the relevant legal, judicial, government and non-government sectors are appropriately resourced.

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

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Benedict Bartl', with a long horizontal flourish extending to the right.

Benedict Bartl
Policy Officer
Community Legal Centres Tasmania
