

17 September 2021

Sentencing Advisory Council

GPO Box 825

Hobart TAS 7000

attn: Rebecca Bradfield *via email:* *sentencingadvisory.council@justice.tas.gov.au*

Dear Rebecca Bradfield,

**Re: Review of the *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017***

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to respond to the Sentencing Advisory Council’s review of the *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017*. Our response focuses on drug treatment orders and reforms that would make the order more accessible. We also call for an extension of the period of review so that more significant data sets can be collected, analysed and a better-informed assessment made of alternative sentencing options and their suitability as a replacement for suspended sentences.

CLC Tas is the peak body representing the interests of nine 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.

***Drug Treatment Orders***

In an article to be published in the upcoming *Law Letter*, the Law Society of Tasmania member journal, we review drug treatment orders made in the Supreme Court and consider whether reforms are necessary (see attached). Our research found that over the last three years (2017/18 – 2019/20) the Supreme Court has made around 13 referrals each year[[1]](#footnote-1) with eligible persons required to be assessed as suitable for a drug treatment order.[[2]](#footnote-2) Of those persons referred from the Supreme Court for assessment, 60 per cent were assessed as eligible and suitable and the drug treatment order was made.[[3]](#footnote-3)

Notwithstanding that persons may be both eligible and suitable for a drug treatment order, the Supreme Court is still required to be “satisfied in all the circumstances that it is appropriate”.[[4]](#footnote-4) In *Tasmania v Joseph*[[5]](#footnote-5)  the appropriateness of a drug treatment order was considered by Brett J in circumstances where the 23-year-old offender had “had an illicit drug problem for some years” and had committed armed robbery “as an act of desperation in order to obtain illicit drugs”.[[6]](#footnote-6) Importantly, after reviewing the relevant provisions of the *Sentencing Act 1997* (Tas) his Honour concluded that as a matter of statutory construction “it would, in most circumstances, be inappropriate to make a drug treatment order if the custodial component will exceed two years”.[[7]](#footnote-7)

On the facts before him, Brett J acknowledged Joseph’s history of substance use and that the armed robbery was committed in order to obtain illicit drugs, but was nevertheless “satisfied that the only appropriate sentence in this case is a significant term of imprisonment”.[[8]](#footnote-8) Joseph was thereafter sentenced to three years imprisonment.

Brett J’s finding that a drug treatment order would be inappropriate for sentences of more than two years was affirmed in the Court of Criminal Appeal decision of *Bell v Tasmania*[[9]](#footnote-9)and has subsequently been applied in a number of Supreme Court cases.[[10]](#footnote-10)

The two-year limitation currently in place in Tasmania can be contrasted with the Australian Capital Territory Supreme Court and the Victorian County Court where drug treatment orders are able to be imposed on persons who would otherwise be imprisoned for up to four years imprisonment.[[11]](#footnote-11)

In the Australian Capital Territory where the model has been in place since 2019, the drug and alcohol treatment order is available to persons with alcohol or illicit drug dependency and where eligibility is available to those who plead guilty to an offence other than a sexual offence or a serious violence offence.[[12]](#footnote-12) Successful completion of the drug and alcohol treatment order means that the remainder of the offender’s custodial sentence is replaced with a good behaviour bond.[[13]](#footnote-13) A review of the case law demonstrates that aggravated robbery, aggravated burglary and aggravated dangerous driving are all offences for which the ACT Supreme Court has been prepared to grant a drug and alcohol treatment order.[[14]](#footnote-14)

In Victoria, the Magistrates Court has been able to sentence persons to drug and alcohol treatment orders since 2002. However, the program was recently expanded to the County Court with the establishment of a pilot program, meaning that persons who are liable for a maximum sentence of up to four years are also eligible. Persons convicted of sexual offences and offences involving the infliction of actual bodily harm will remain ineligible and in the County Court a number of other offences including aggravated home invasion and aggravated carjacking also result in exclusion.[[15]](#footnote-15) Similar to the Australian Capital Territory model, completion of the drug and alcohol treatment order means that the person is able to remain in the community until the inactive custodial sentence ends.

It is also worth noting that in Queensland magistrates are able to refer offenders to the Drug and Alcohol Court. In order to be eligible, offenders must reside within the district of the Brisbane Magistrates Court and be sentenced to imprisonment of up to four years i.e. a summary offence or an indictable offence dealt with summarily.[[16]](#footnote-16)

We strongly believe that the *Sentencing Act 1997* (Tas) should be broadened to allow for the imposition of drug treatment orders for persons who would otherwise be imprisoned for up to four years imprisonment. This reform would bring Tasmania into line with the Australian Capital Territory, Queensland and Victoria. Importantly, the reform is likely to broaden the range of offending behaviour subject to the order whilst also reducing recidivism with the cause of the offending more likely to be addressed.

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| **Recommendation:** That the *Sentencing Act 1997* (Tas) is amended to expressly provide that the statutory limit for imposing a drug treatment order is four years.  |

As well, any offender who can demonstrate that they have a history of drug use which contributed to their offending should be considered for a drug treatment order. In the Australian Capital Territory, Queensland and Victoria[[17]](#footnote-17) drug treatment orders are able to be made where either alcohol and/or illicit drugs contributed to their offending. At the very least, drug treatment orders should be broadened to include alcohol. However, given Tasmania’s high rate of pharmaceutical oxycodone and fentanyl abuse[[18]](#footnote-18) we strongly believe that drug treatment orders should be a sentencing option for all drug abuse including alcohol, pharmaceutical and illicit drugs.

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| **Recommendation:** That the *Sentencing Act 1997* (Tas) is amended to expressly provide that drug treatment orders are a sentencing option available to any offender who has a history of alcohol and/or pharmaceutical and/or illicit drug use which contributed to their offending.  |

**Extension of Transition Period**

The inability to impose some alternative sentencing options due to COVID-19, the small number of offenders captured in each offence category and the resultant lack of meaningful data able to be collected by the Sentencing Advisory Council are all reasons to extend the period of review. In our opinion, a further three years should provide a more robust set of data that can then be analysed to assess the uptake of the new orders and their suitability as a replacement for suspended sentences.

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| **Recommendation:** That the review of the *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017*  be extended for a further three years.  |

**National Agreement on Closing the Gap**

Finally, we reiterate the concerns of the Tasmanian Aboriginal Legal Service who observed in its response, that the Terms of Reference for this review fail to address the *National Agreement on Closing the Gap.*[[19]](#footnote-19) According to a 2018 Australian Law Reform Commission report, the Aboriginal and Torres Strait Islander population constitutes just 2 per cent of the Australian adult population but comprises 27 per cent of the national adult prison population.[[20]](#footnote-20) The overrepresentation of Aboriginal and Torres Strait Islander people in Tasmania’s prison system and the impact phasing out suspended sentences may have, is an issue that should be considered, particularly given the Closing the Gap target of reducing the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent by 2031.

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| **Recommendation:** That any future review of the *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* consider the impact on Aboriginal and Torres Strait Islander people.  |

If you have any queries, or would like to discuss our submission further, please do not hesitate to contact us.

Yours faithfully,

Benedict Bartl

Policy Officer

**Community Legal Centres Tasmania**

enc: *A Review of Drug Treatment Orders in the Supreme Court* - Article for *Law Letter*

1. There were 13 referrals in 2017/18, 9 referrals in 2018/19 and 18 in 2019/20. [↑](#footnote-ref-1)
2. Sections 27B and 27D of the *Sentencing Act 1997* (Tas). [↑](#footnote-ref-2)
3. 24 out of 40 referrals were assessed as both eligible and suitable. Persons whose referral resulted in a different community-based order (including a deferred sentence) or a sentence in the Magistrates Court have been excluded. Interestingly, 75 per cent of women (6 out of 8) who were assessed were found eligible and suitable and the drug treatment order was made. This can be contrasted with a 56 per cent success rate for men (18 out of 32). [↑](#footnote-ref-3)
4. Section 27B(3)(a) of the *Sentencing Act 1997* (Tas). [↑](#footnote-ref-4)
5. [2017] TASSC 23. [↑](#footnote-ref-5)
6. *State of Tasmania v Benjamin Joseph* (comments on passing judgment) 27 April 2017 per Brett J. [↑](#footnote-ref-6)
7. [2017] TASSC 23 at para. 34. [↑](#footnote-ref-7)
8. [2017] TASSC 23 at para. 35. [↑](#footnote-ref-8)
9. [2021] TASCCA 3 at para 32 per Martin AJ; Marshall AJ and Porter AJ in agreement. See also *State of Tasmania v Cameron Clark*(comments on passing sentence) 6November 2018 per Estcourt J.   [↑](#footnote-ref-9)
10. *State of Tasmania v Adam Halbwirth* (comments on passing sentence) 6 December 2018; *State of Tasmania v Brook Targett* (comments on passing sentence) 12 February 2019 per Brett J. [↑](#footnote-ref-10)
11. See section 12A(1)(b) of the *Crimes (Sentencing) Act 2005* (ACT); section 18Z(1)(d)(ii) of the *Sentencing Act 1991* (Vic). [↑](#footnote-ref-11)
12. See subsections 12A(1)(a) and 12A(1)(9) of the *Crimes (Sentencing) Act 2005* (ACT). [↑](#footnote-ref-12)
13. Section 80ZA of the *Crimes (Sentencing) Act 2005* (ACT). [↑](#footnote-ref-13)
14. For example, *R v Jake Blackburn* [2020] ACTSC in which the offender was sentenced to three years and six months imprisonment for a range of offences including aggravated burglary, theft, assault and aggravated dangerous driving; *R v Patrik Pelecky* (No 2) [2020] ACTSC 370 in which the offender was sentenced to four years imprisonment for 27 offences including aggravated dangerous driving and burglary; *R v Crystal Parker* [2020] ACTSC 38 in which the offender was sentenced to three years imprisonment for aggravated robbery; *R v Charles* [2020] ACTSC 39 in which the offender was sentenced to two year and one month imprisonment for offences including aggravated burglary with intent to cause harm. [↑](#footnote-ref-14)
15. Section 18Z(2B) of the *Sentencing Act 1991* (Vic). These offences include aggravated home invasion and aggravated carjacking as well as certain offences against emergency workers, custodial officers and youth justice custodial workers on duty. [↑](#footnote-ref-15)
16. Section 15E of the *Penalties and Sentences Act 1992* (Qld). [↑](#footnote-ref-16)
17. Section 12A of the *Crimes (Sentencing) Act 2005* (ACT); Part 8A of the *Penalties and Sentences Act 1992* (Qld); Division 2, Subdivision (1C) of the *Sentencing Act 1991* (Vic). [↑](#footnote-ref-17)
18. Australian Crime Intelligence Commission, *National Wastewater Drug Monitoring Program* (Report No. 13: 2021) at 14. [↑](#footnote-ref-18)
19. Australian Government, *National Agreement on Closing the Gap* (July 2020). As found at <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap> (Accessed 16 September 2021). [↑](#footnote-ref-19)
20. In Tasmania, Aboriginal and Torres Strait Islander persons comprise 5 per cent of the adult population but 16 per cent of the adult prison population: Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133). Figure 3.1. As found at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/> (Accessed 16 September 2021). [↑](#footnote-ref-20)