

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Sentencing**

FINAL REPORT NO 11

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## Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), and Mr Mathew Wilkins (nominated by the Tasmanian Bar Association).

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The final report is also available on the Institute's web site at: [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform) or can be sent to you by mail or email.

## Acknowledgments

This report was prepared for the Board by Professor Kate Warner. Considerable assistance in preparation of the report was obtained from a wide range of people and much is owed to their assistance. Jenny Rudolf provided research assistance for the Issues Paper and in preparing the final report research assistance has been obtained from Rohan Foon, Adam Purton, Lucinda Wilson, Susannah Ball, Pauline Van Adrichem, Warwick Marshall and Lucy De Vreeze. Jonathon Rees, Principal Consultant at the Justice Department, provided statistics for Part 1 and Part 2 and Mr Hugh Donnolly, Director, Sentencing and Research, Judicial Commission of New South Wales provided New South Wales sentencing data for Part 6. Others provided comment and advice on drafts of various sections of the report including Dr Marja Elizabeth, Director of Community Corrections and Graeme Barber, Director of Prisons and his staff (Part 3), Debra Raabe, Manager, Victims Support Services (Part 4), and Pip Shirley (Part 5). Statistical assistance with the data was obtained from University staff including Dr John Davidson, Phillip Patman and Dr Maggie Walter.

The Institute benefited greatly by the work of two law students in particular. Rohan Foon completed a Supervised Research project on parole and this provided valuable background material for assessing the impact of changes to the parole legislation on sentence length. Rohan also created a sentencing database of all Supreme Court sentences from 2001 to 2006 – a task that was necessary to provide the sentencing data for Part 1. Lorana Bartels undertook, as her PhD project, an evaluation of suspended sentences in Tasmania. The section on suspended sentences in this report owes much to her work. Lorana's thesis included the first reconviction study of offenders in Tasmania to explore the different outcomes for different sentencing options. This has also been drawn on in Part 3. Dr Rebecca

Bradfield provided considerable assistance with many aspects of the report and finally, Bruce Newey patiently and painstakingly edited and formatted the final version for publication.

## Background to this report

On 10 October 2001 the Board of the Law Reform Institute considered a request by the Attorney-General to undertake a project on sentencing and recommended that the project be undertaken. A formal letter containing terms of reference was sent to the Institute on 20 November 2001. The terms of reference included issues on bail as well as sentencing. The background for the request was community concern about the adequacy of sentences for violent and property crimes, and criticism of bail decisions. The Institute resolved to separate the topics of bail and sentencing.

The agreed terms of reference were:

**1. Sentencing Trends**

*Examine whether there has been a change in sentencing patterns in Tasmania for major crimes and summary offences.*

**2. Crime reduction**

*(a) Examine whether there is a relationship between crime levels and sentencing in Tasmania.*

*(b) What role can sentencing legislation and sentencing measures have in achieving the Tasmania Together Goals in relation to perceptions of safety and achieving safe environments?*

**3. Sentencing options**

*Examine the suitability of present sentencing options (including options provided in the Youth Justice Act 1997) and to consider whether any changes should be made to existing options and whether new sentencing options should be introduced.*

**4. Role of victims**

*Consider whether the interests of victims are adequately dealt with in the sentencing process and to what extent the objective of section 3(h) [that of recognising the interests of victims] has been met. In particular to consider the efficacy of compensation orders and the victims' levy.*

**5. Role of the community**

*(a) Consider the level to which the objective in section 3(f) of the Sentencing Act [of promoting public understanding of sentencing practices and procedures] has been met and make recommendations as to how the public can be informed of the sentencing process.*

*(b) Consider how community attitudes towards sentencing should be ascertained.*

*(c) Examine whether any mechanism could be adopted to more adequately incorporate community views into the sentencing process.*

Point 3 on Sentencing Options includes sentencing options provided in the *Youth Justice Act*. However, it was decided to exclude issues relating to young offenders with a view to picking this up at a later stage.

On 24 April 2002, the Institute was requested by the Attorney-General to extend the terms of reference by incorporating the issue of parole into the project. The letter outlined a proposed amendment to the *Sentencing Act* to require the courts to impose a non-parole period for every sentence which exceeds 12 months. Two amendments to the *Corrections Act* were also foreshadowed: first, a requirement that the Parole Board publish reasons for its decisions and secondly, requiring the Parole Board to take into account victim impact statements in its decision-making. The letter requested the Institute to make

recommendations in relation to other issues relating to parole if appropriate. This extension of the project was accepted by the Institute and the following terms of reference were agreed:

**6. Parole**

- (a) *Consider and comment upon the legislative requirement that judges and magistrates state the non-parole period.*
- (b) *Consider whether the minimum non-parole period should be extended.*
- (c) *Consider and comment upon the legislative requirement that the Parole Board publish its decisions.*
- (d) *Consider and comment upon the legislative requirement that the Board take into account a Victim Impact Statement (VIS) provided to it and not to make a decision until a victim whose name has been entered on the Victims' Register has been given an opportunity to make a VIS.*

At the request of the Attorney-General, in December 2006, the terms of reference of the sentencing project were amended to include consideration of whether the protection of society requires legislative change to *Sentencing Act 1997* (Tas) and the *Youth Justice Act 1997* (Tas) in relation to sentencing sexual offenders.

The publication of this final report is made following consultation with the public and participants in the Criminal Justice System. The consultation was performed by the release of an Issues Paper on this topic in August 2002. Professor Warner also conducted consultations with Community corrections officers, the Department of Justice and the Legal Aid Commission of Tasmania.

The following people responded to the Issues Paper (titles/positions as at date of submission):

1. Hon Justice Cox, Chief Justice.
2. Ms Kim Baumeler, Chair, Criminal Law Sub-committee of the Law Society of Tasmania
3. Mr Warwick Dunstan
4. Mr Tim Ellis, SC, Director of Public Prosecutions
5. Ms Kay Fisher, member of the Parole Board
6. Mr Bob Hamilton, Launceston Community Legal Centre
7. Hon Michael Hodgman, QC, Shadow Attorney-General
8. Mr John Heathcote, probation officer
9. Ms Maureen Holloway, Tasmanian Catholic Justice and Peace Commission
10. Mr & Mrs Pat Holloway
11. Ms Jane Hutchinson and Olivia Montgomery, Hobart Community Legal Service
12. Ms Dianne Jackson
13. Mr Mark Kadziolka, Police Association of Tasmania
14. Mr Norm Laurence
15. Mr Craig Mackie, Legal Aid Commission
16. Mr Benjamin Nahmani
17. Dr Bryan Walpole, medical officer
18. Mr Chris Smith, solicitor
19. Hon Justice Underwood

20. Hon Don Wing, President, Legislative Council
21. Legal Aid Commission of Tasmania
22. Ms Liz Tanton-Buchanan, the Victims of Crime Service, Launceston.
23. Hon Alison Ritchie, MLC.
24. Mr Richard McCreadie, Commissioner of Police
25. Department of Justice and Industrial Relations
26. Department of Police and Public Safety
27. Ms Jocelyn Freedman, Victims of Crime Service
28. Confidential, victim

In the preparation of this report detailed consideration has been given to all responses. We thank these people for taking the time and effort to respond.

The completion of this project has taken six years. In this time there have been four Attorneys-General and now three Chief Justices. While this is far longer than ever anticipated by the Institute, the project was an ambitious one and many hundreds of hours of background research was required to complete it. Data difficulties proved an obstacle to timely completion together with Director's work commitments that made it difficult to devote the blocks of time necessary to complete the project earlier.



# Summary of recommendations

## **Recommendation 1**

That short sentences of imprisonment should continue to be a sentencing option for the reasons given in para 3.2.14.

## **Recommendation 2**

The principle of restraint in the use of imprisonment should be enacted by inserting an amendment into the *Sentencing Act 1997* (Tas) s 13A, providing:

- (1) that a court must not sentence an offender to imprisonment unless the offence, or a combination of the offence and one or more offences associated with it, was so serious that neither a fine nor a community sentence can be justified for the offence.
- (2) if a sentence of imprisonment is justified under subsection (1) the sentence must be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence. (3.2.18)

## **Recommendation 3**

The Tasmanian Law Reform Institute does not recommend enacting a legislative provision requiring courts to give reasons for short sentences of imprisonment. (3.2.21)

## **Recommendation 4**

That post release interventions be made available for short-term prisoners in appropriate cases and particularly for prisoners with partly suspended sentences with supervision. (3.2.23)

## **Recommendation 5**

Advantage should be taken of the opportunity imprisonment presents by continuing to direct resources to evidence-based rehabilitative programs for prisoners in the areas of cognitive behavioural therapy, sex offender treatment and drug treatment programs.

## **Recommendation 6**

In addition, education and work programs should be introduced.

## **Recommendation 7**

Program participants should be supported after release with appropriate social support and after-care to ensure that any program gains are not lost.

## **Recommendation 8**

The Institute does not recommend that courts be given the power to defer sentence for the reasons given in para 3.2.44.

## **Recommendation 9**

Notwithstanding criticisms of the suspended sentence, the Institute is of the view that the suspended sentence is a useful sentencing option that should be retained (see para 3.3.26).

**Recommendation 10**

The Institute found no evidence that suspended sentences are overused or used inappropriately. Therefore it does not recommend that length-based or offence-based restrictions be imposed on the power to order suspended sentences (3.3.27 – 3.3.30).

**Recommendation 11**

The Institute recommends that to remove confusion about the nature of the suspended sentence, legislative guidance be given in the *Sentencing Act 1997* (Tas) about the imposition of suspended sentences that does not interfere with judicial discretion (3.3.31- 3.3.32). The proposed s 23A is as follows:

A court must not impose and suspend a term of imprisonment (wholly or partly) unless, having regard to the provisions of this Act (and in particular s 13A), it has first determined that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed.

**Recommendation 12**

To give suspended sentences some punitive bite, the Institute recommends that instead of permitting combined orders, the *Sentencing Act 1997* (Tas) s 24 be amended so that it lists a range of additional conditions that may be attached to a suspended sentence (3.3.36). The new provision should be modelled on the following:

- (1) An order of a court suspending the whole or part of a sentence of imprisonment is subject to the condition that the offender must not commit another offence punishable by imprisonment during the specified period.<sup>1</sup>
- (2) Such an order may be made subject to such additional conditions as the court considers necessary and expedient including the following conditions:
  - that the offender be subject to the supervision of a probation officer;
  - that the offender be required to perform community service;
  - that the offender be required to undertake a rehabilitation program;
  - that the offender undergo specified medical or psychiatric treatment;
  - a restorative requirement.

**Recommendation 13**

The Institute recommends that to avoid the offender being punished more than once for breaching the same sentence that the *Sentencing Act 1997* (Tas) s 8(1) be amended so that a suspended sentence cannot be combined with a community service order, a probation order or a rehabilitation program order (see 3.3.38).

**Recommendation 14**

To ensure that the needs of the offender are addressed and to enhance the opportunities that a suspended sentence presents to address those needs, it is recommended that where there is reason to think that an offender may benefit from any ‘additional conditions’, the court should require a pre-sentence report addressing the issue of ‘additional conditions’ that should be included in the order. This recommendation would require an amendment to s 24 (see 3.3.39).

**Recommendation 15**

The Institute recommends that a review be conducted to see if improvements introduced to address the neglect in instituting breach proceedings have been successful. (3.3.41)

<sup>1</sup> This merely makes explicit the current position: see s 27(1).

### **Recommendation 16**

If breach proceedings still appear to be lax, the Institute recommends discussions between the Director of Public Prosecutions, Police Prosecutions, Department of Justice, Community Corrections, Supreme and Magistrates Courts to develop protocols for dealing with breaches and the introduction of computer software to automatically notify apparent breaches. (3.3.41)

### **Recommendation 17**

The Institute recommends that s 27 of the *Sentencing Act* be amended to empower the prosecution to make an oral application to have a breach of a suspended sentence dealt with when a court is sentencing an offender for an offence the conviction for which constitutes a breach of the condition of a suspended sentence that an offender not commit an imprisonable offence. (3.3.42)

### **Recommendation 18**

To promote the deterrent value of the sanction and to enhance the integrity of the sanction in the eyes of the community, the Institute recommends that in dealing with breach cases there be a statutory presumption in favour of activation. (3.3.43)

### **Recommendation 19**

The Institute recommends that ‘front-end’ home detention be introduced as a sentencing option and that it be called ‘home detention’. (3.4.11, 3.4.13)

### **Recommendation 20**

That it should not be a condition of a suspended sentence but a custodial sentence located in the sentencing hierarchy between an immediate sentence of imprisonment and a wholly suspended sentence of imprisonment. (3.4.12)

### **Recommendation 21**

That home/residential confinement be a core condition of the order but courts should have the discretion to impose additional orders to reflect the needs of the offender or the restorative aims of the sentence. (3.4.14)

### **Recommendation 22**

That a home detention assessment report be a prerequisite of a home detention order. (3.4.15)

### **Recommendation 23**

That a court must not make a home detention order unless the offender consents and signs an undertaking to comply with their obligations under the order. (3.4.15)

### **Recommendation 24**

That consent of co-residents be a prerequisite of the order and consent should be able to be withdrawn at any time. (3.4.15)

### **Recommendation 25**

That offenders sentenced to home detention not be eligible for remissions or parole. (3.4.16)

**Recommendation 26**

That there be no limits on the length of the order but that judicial officers be required to review orders in excess of six months. (3.4.17)

**Recommendation 27**

That there should be no offence-based exclusion criteria, however, an offender who poses a significant risk in terms of committing a further violent offence should not be eligible for a community custody order. (3.4.18)

**Recommendation 28**

That the courts should have a discretion to order home detention be served in a place other than the offender's home in appropriate cases (e.g. in cases of domestic violence offences and homeless offenders). (3.4.15, 3.4.19)

**Recommendation 29**

That additional resources be allocated to Community Corrections for preparation of assessment reports, supervision of home detainees and provision of home detention programs. (3.4.20)

**Recommendation 30**

The Institute does not recommend that periodic detention be introduced as a sentencing option at this time (for the reasons outlined in para 3.5.9).

**Recommendation 31**

For the reasons outlined in paras 3.6.7 – 3.6.8, the Institute does not recommend the introduction of the intensive correction order in Tasmania, either as a means of serving a sentence of imprisonment or as a sentencing option in its own right.

**Recommendation 32**

The Institute does not recommend that a generic community sentence should replace community service orders and probation orders, (3.7.13) however, it does recommend that s 28 of the *Sentencing Act 1997* (Tas) be amended so that supervision or attendance at a 'rehabilitation program' for domestic violence offenders is made available as an optional condition of a community service order. (3.7.13)

**Recommendation 33**

The Institute recommends that s 8(2)(a) and (b) (which allow a CSO to be combined with a probation order or a rehabilitation order) be omitted. (3.7.13). This conforms with the Institute's view that sanction stacking is undesirable, but there should be flexibility in relation to conditions of sentencing orders (see above para 3.3.36).

### **Recommendation 34**

The Institute recommends that community service order assessments assess an offender's need for supervision and programs, suitability for work and availability of programs. (3.7.13)

### **Recommendation 35**

The Institute recommends that the Part 6 (Fines) of the *Sentencing Act 1997* (Tas) be amended to include the power to impose a community service order where the penalty prescribed is a mandatory minimum fine or imprisonment. (3.7.14)

### **Recommendation 36**

The Institute does not recommend that the power to impose a community service order be broadened so it is available for offences that are not punishable by imprisonment. If an offender cannot pay a fine, the judicial officer should impose a conditional release order. (3.7.14)

### **Recommendation 37**

The Institute also recommends that the New Zealand practice of remitting up to 10 per cent of the aggregate of the total of community service hours be further explored by the Justice Department. (3.7.15)

### **Recommendation 38**

The Institute recommends that the Justice Department conduct a review of the community service order scheme<sup>2</sup> to ensure the availability of adequate resources to provide projects in country areas, a diversity of projects so that women and others with dependants, those with health problems and disabilities have suitable work and that promising findings from projects such as the UK's Pathfinder project can be implemented in this state. (3.7.16)

### **Recommendation 39**

The Institute does not recommend a generic community sentencing order for the reasons outlined in para 3.8.13. (and see 3.7.13)

### **Recommendation 40**

The Institute does not recommend altering the place of probation orders in the hierarchy of sanctions to indicate that it is a more serious sanction than a community service order for the reasons given in para 3.8.20.

### **Recommendation 41**

In the Institute's view there are two basic problems with probation orders that need to be addressed. First, there is a need to restore confidence in probation orders as an *independent* sentencing option (as evidenced by the fact that 90 per cent of probation orders in the Supreme Court and more than 50 per cent of orders in the Magistrates Court are combined with a more serious penalty) and secondly, there is the lack of resources devoted to community corrections. To help restore the reputation of probation orders as a credible independent sentencing option, the Institute recommends:

- that the Justice Department conduct a breach study of probation orders to inform guidance for probation and judicial officers in relation to breach proceedings.

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<sup>2</sup> The Institute understands that such a review is now underway.

- that a review be conducted to determine a range of evidence-based programs for introduction in Tasmania to enhance the potential of probation to reduce recidivism and encourage desistance and that resources be made available to offer these programs to appropriately targeted offenders.
- that such programs be supported by proper assessment, motivation, case-management and reinforcement of learning to follow-up and support program effects.
- that the possibility of ongoing supervision by the court be considered for certain categories of offenders on probation orders.

### **Recommendation 42**

The Institute recommends that the *Sentencing Act 1997* (Tas) s 7(e) be amended to empower courts to fine an offender without recording a conviction. (3.9.6)

### **Recommendation 43**

The Institute recommends that *Monetary Penalties Enforcement Act 2005* (Tas) be amended to omit the power of the Director of the Monetary Penalties Enforcement System to order suspension of an offender's driver's licence or vehicle registration for failure to comply with an enforcement order issued for fine default. (3.9.13)

### **Recommendation 44**

The Institute recommends that the government establish a feasibility study to investigate how a day fine scheme could be introduced into Tasmania. (3.9.19)

### **Recommendation 45**

Pending the introduction of unit fines, the Institute recommends that the *Sentencing Act 1997* (Tas), Part 6 be amended to insert a new provision:

- (a) requiring a court to inquire into an offender's financial circumstances before fixing the amount of a fine;
- (b) providing the amount of the fine should reflect the seriousness of the offence;
- (c) that in fixing the fine a court should take into account the offender's financial circumstances;
- (d) empowering the court to make a financial circumstances order, requiring the offender to provide the court with such financial details as it requests. (3.9.20)

### **Recommendation 46**

The Institute recommends:

- that the Justice Department follow-up conditional release orders and report on breach rates annually;
- that a reconviction study be done to ascertain the outcomes of conditional release orders. (3.10.4)

### **Recommendation 47**

The Institute recommends that if the evaluation of the Court Mandated Diversion of Drug Offenders program proves promising:

- each of the three levels of the program should continue; and
- the *Sentencing Act 1997* (Tas) should be amended to enable offenders convicted in the Supreme Court to be made subject to drug treatment orders. (3.11.7)

### **Recommendation 48**

The Institute recommends that:

- the offences of breach of a community service order, breach of a probation order and breach of a rehabilitation program order be abolished and replaced with breach provisions similar to those in s 27 of the *Sentencing Act 1997* (Tas);
- the procedures for follow-up and actioning breaches of community orders be radically overhauled.(3.12.3)

### **Recommendation 49**

The Institute supports the use of victim impact statements. They are a valuable tool in the sentencing process which assist the court in assessing the effects of the crime on the victim, and provide the victim with a voice in the sentencing process. The courts' use of VIS can be therapeutic and empowering for victims. To ensure that provision of a VIS provides a positive experience for victims, the Institute recommends that the advice given by the Victims Assistance Unit and other victim services assisting with VIS continue to ensure the focus is on the symbolic and communicative function of VIS rather than its impact on the sentencing outcome. It recommends that this be explained in the Victims Support Service's brochure. (4.2.9 – 4.2.12)

### **Recommendation 50**

The Institute recommends retaining the right of the family victims in homicide cases to make a VIS. However, as in the previous recommendation, it recommends that advice to victim should make it clear that this is but one factor the court will consider in imposing sentence and that it cannot lead to the court putting a greater value on one life rather than another. (4.2.13)

### **Recommendation 51**

The Institute recommends that research be conducted in this jurisdiction to examine the value of VIS to the courts and victims. (4.2.14)

### **Recommendation 52**

The Institute recommends a pilot community conferencing program for young adults modelled on both the New South Wales pilot and on Tasmania's youth justice experience with conferencing. (4.3.5)

### **Recommendation 53**

The Institute is of the view that the interests of victims would be better served by making some fundamental changes to compensation orders including making a compensation order a sentencing option in its own right.

**Recommendation 54**

The Institute recommends that the *Sentencing Act 1997* (Tas) s 68(1) be amended omitting the requirement that compensation orders *must be made* for injury loss, destruction or damage if the offence is burglary, stealing, robbery, arson or injury to property. Instead courts should be required *to consider* making a compensation order in cases where injury, loss, destruction or damage has been caused by the offence and where such an order is not made, give reasons for not doing so. This requirement should be inserted in s 8A of the Act. (4.4.16)

**Recommendation 55**

The Institute recommends that the option of making a compensation order should be included in the list of sentencing orders in s 7 of the *Sentencing Act 1997* (Tas) rather than as an ancillary order in Part 9. The provision should state [a court may] ‘with or without recording a conviction make a compensation order for injury, loss, destruction or damage suffered by a person as a result of the offence’. (The provisions relating to compensation orders in Part 9 will have to be relocated). (4.4.17)

**Recommendation 56**

The Institute recommends that the *Sentencing Act 1997* (Tas) be amended to provide that in determining the amount of a compensation order the court may take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.<sup>3</sup> (4.4.18 - 4.4.19)

**Recommendation 57**

The Institute recommends a review of the administrative procedures and resources associated with the making of compensation orders to enable them to be ‘adequately attended to’.<sup>4</sup> (4.4.20)

**Recommendation 58**

The Institute recommends that courts be empowered to make a compensation order in addition to imprisonment, community service order or a fine (this will require amendments to s 8 of the Act). It also recommends that courts be given the discretion to make compensation a condition of a suspended sentence, a home detention order, a community service order or a probation order. (4.4.16)

**Recommendation 59**

The Institute recommends that payment of compensation orders be enforced in the same manner as fines. It therefore recommends that:

- This be clarified in (the relocated) s 69 of the *Sentencing Act 1997* (Tas) (enforcement as a judgment debt) by adding a provision that enforcing the fine in this way does not preclude action being taken under s 47 of the *Sentencing Act 1997* (Tas) for fine default;
  - That the definition of ‘fine’ in s 3 of the *Monetary Penalties Enforcement Act 2005* (Tas) be amended to include ‘or the Supreme Court’ after the words ‘Magistrates Court’.
- (4.4.1)

<sup>3</sup> For a similar provision see *Sentencing Act 1991* (Vic) s 86(2). See also *Criminal Law (Sentencing) Act 1988* (SA) s 53(3).

<sup>4</sup> Director of Public Prosecutions, submission, 2.

**Recommendation 60**

To increase the amount that compensation levies contribute to the criminal injuries compensation fund that the *Victims of Crime Compensation Act 1994* (Tas) be amended to adopt a scale which increases the amount payable and better reflects the seriousness of the offence. (4.5.6)

**Recommendation 61**

That a levy be imposed on infringement notices as well as on court imposed sentences as is done in South Australia. (4.5.6)

**Recommendation 62**

That the time for payment for levies be a standard 14 days from conviction or release from prison with a discretion for the court to otherwise order. (4.5.7)

**Recommendation 63**

That the nature of the compensation levy be explained in the Victims Support Services brochure for victims to counter any misperception that the levy represents compensation for their injury or loss. (4.5.8)

**Recommendation 64**

The Institute supports the current parole model in which parliament sets the minimum non-parole period, the court determines the parole eligibility date and the Parole Board determines the date of release for parole eligible offenders. (5.1.11)

**Recommendation 65**

In the light of the inconsistencies that have emerged between judges in sentencing practices relating to the extension of non-parole periods and the denial of parole eligibility, the Institute recommends that s 17 be amended to include a requirement that the court state a period that is equal to the statutory non-parole period unless it is satisfied having regard to the circumstances that it is required to consider in s 17(4) that an extension of that period is necessary or parole should be denied. (5.2.17)

**Recommendation 66**

It is recommended that s 17(7) be amended so that when a sentence of more than 12 months imprisonment is imposed and an order is made under s 17(2)(a) that an offender is not eligible for parole or an order is made under s 17(2)(b) setting a non-parole period, reasons for such an order are given. (5.2.18)

**Recommendation 67**

It is recommended that a court be required to state that an offender is not eligible for parole when parole eligibility is denied by requiring a court to make an order under s 17(2)(a) or (b). (5.2.18)

**Recommendation 68**

The Institute does not recommend increasing the statutory non-parole period in the *Corrections Act 1997* (Tas) s 68(1) and the *Sentencing Act 1997* (Tas) s 17(3) beyond half of the period of the operative sentence.<sup>5</sup> (5.3.10 – 5.3.12)

**Recommendation 69**

The Institute recommends that the *Corrections Act 1997*(Tas) s 72(2B)(b) be amended to better reflect the role of the victim statement in a Board's deliberations by adding an additional sub-paragraph referring to the 'matters relevant to the risk of the offender re-offending and the sorts of conditions which should be imposed on any parole order in relation to contact with the prisoner.' (5.4.7- 5.4.9)

**Recommendation 70**

The Institute recommends that Parole Board decisions should be published on the Parole Board's website. (5.5.3)

**Recommendation 71**

It does not recommend that Parole Board hearings should be open to the public for the reasons given in para 5.5.5.

**Recommendation 72**

The Institute recommends that the issue of whether current sentencing practices for sexual offences are appropriate should be further investigated by using a range of methods including specially designed focus groups and deliberative polls to build upon current research studies that are investigating this issue. (6.2.12)

**Recommendation 73**

The Institute recommends retaining the common law principles in relation to the sentencing of juvenile offenders and does not recommend altering the current position which allows the Director of Corrective Services to transfer juvenile offenders to Ashley Detention Centre. (6.2.13 – 6.2.14)

**Recommendation 74**

The Institute opposes the use of mandatory minimum penalties for sex offenders. (6.4.5)

**Recommendation 75**

The Institute does not recommend the introduction of standard non-parole periods for sex offences. (6.4.8)

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<sup>5</sup> Operative sentence is the term used in the *Corrections Act 1997* (see definition in s 3) – it means the period of imprisonment that is not suspended.

### **Recommendation 76**

The Institute does not recommend the introduction of provisions for post-sentence detention and supervision orders on the grounds that existing provisions for preventive detention and monitoring of released sexual offenders are adequate. The *Sentencing Act 1997* (Tas) s 19 already provides for dangerous criminal declarations, which can be made at any time during a sentence of imprisonment of an offender who is eligible for such an order. To add a new and separate set of provisions for post sentence detention would be unnecessary duplication and confusing. (6.4.25)

### **Recommendation 77**

The Institute does not recommend that the trigger conditions for a dangerous offender declaration should be extended. However, it does suggest that consideration be given to amending s 19 so that courts have the option of making a supervision order after the end of the offender's sentence of imprisonment as an alternative. (6.4.26)

### **Recommendation 78**

To ensure that an application for a dangerous criminal declaration can be heard when the sentencing judge is not available, it is recommended that sub-section (1A) be inserted into s 19 to provide that if the sentencing judge has ceased to hold office or in other special circumstances, another judge may hear an application for a dangerous criminal declaration. (6.4.27)

### **Recommendation 79**

The Institute does not recommend the introduction of civil commitment procedures to detain sex offenders beyond the expiry of an offender's sentence for the reasons given in para 6.4.29.

### **Recommendation 80**

The Institute recommends that for the protection of the public the best possible evidence-based sex offender treatment programs should be made available in the prison system and in the community and that prisoners on sex offender treatment programs should be receive follow-up treatment and support after their release. (6.4.30)

### **Recommendation 81**

The Institute does not recommend that chemical castration should be a sentencing option or a condition of a sentencing order but when appropriate it be made available to offenders who consent as part of their treatment program. (6.4.32)

### **Recommendation 82**

The Institute recommends that the issue of the appropriateness of sentencing patterns for sexual offenders be referred to the proposed Sentencing Advisory Council. (6.5.2)

### **Recommendation 83**

The Institute recommends that the government allocate funding for the publication of easily accessible and digestible general crime and sentencing information including annual sentencing statistics to promote public understanding of crime and sentencing matters. This would also remedy the information deficit in relation to sentencing practices in magistrates' courts and promote consistency. (7.1.18)

**Recommendation 84**

The Institute recommends that a number of strategies are necessary to improve public education about crime and sentencing including:

- continuation of sentencing workshops and making them available on a more regular basis by calling on more judges and magistrates to assist with them; (7.1.25)
- updating and expanding the materials for the You be the Judge multi-media package to ensure that it is useful and relevant for school and community groups; (7.1.25)
- ensuring that the ‘Judge for Yourself’ booklet is widely available or a booklet that includes data about crime trends as well as sentencing information; (7.1.26)
- reviewing the outcome of the Jury Sentencing Study to see if it supports supplying COPS and an information booklet to jurors as a regular and ongoing procedure. (7.1.27)

**Recommendation 85**

The Institute recommends that the *Sentencing Act 1997* (Tas) include separate sections for the purposes of the Act and the purposes of sentencing.

**Recommendation 86**

In the *Sentencing Act 1997* (Tas) s 3, para (b) and (e) should be replaced with the following:

- (b) to provide the courts with the purposes of punishment;
- (e) to preserve the authority of the law and to promote respect for the law.

**Recommendation 87**

It recommends that to better promote the interests of victims and to complement the recommendations in Part 4, that the purposes of sentencing include restoration (reparing the harm caused by the offence and restoring the relations between the offender, the victim and the community).

**Recommendation 88**

The purposes of sentencing should provide:

A court can impose a sentence on an offender for one or more of the following purposes only:

- (a) to ensure that the offender is punished justly for the offence;
- (b) to deter the offender and others from committing the same or similar offences;
- (c) to promote the rehabilitation of the offender;
- (d) to protect the community by limiting the capacity of the offender to re-offend;
- (e) to denounce the conduct of the offenders; and
- (f) to promote the restoration of relations between the community, the offender and the victim. (7.1.35 - 7.1.36)

**Recommendation 89**

The Institute does not recommend a legislative listing of common law sentencing principles or the relevant factors that should be taken into account in imposing sentence on the grounds that such legislative listing is unnecessary, complex and has dangers. (7.1.44)

### **Recommendation 90**

The Institute emphasises the importance of research which aims to ascertain informed public opinion. It therefore recommends that priority be given to allocating resources to public opinion sentencing research in Tasmania. In particular it is recommended that the ARC research team on the Sentencing and Public Confidence project be invited to conduct focus groups in Tasmania with appropriate financial support. (7.2.12)

### **Recommendation 91**

For the reasons outlined in para 7.3.10, the Institute does not recommend introducing a statutory maximum penalty for each crime in the *Criminal Code* to replace the general maximum in s 389 of 21 years.

### **Recommendation 92**

The Institute recommends the creation of an independent statutory sentencing advisory council (the Sentencing Advisory Council) with a broad membership (of approximately 10 persons) drawn from persons with experience in community issues affecting courts, victim support or advocacy groups, judges and magistrates, academics in relevant disciplines, experienced defence and prosecution lawyers and those with experience in the operation of the criminal justice system. (7.3.36)

### **Recommendation 93**

The primary role of the Sentencing Advisory Council should be to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. More specifically it should have the following functions:

- the provision of accessible sentencing data;
- the provision of accessible data on crime trends;
- gauging public opinion on sentencing matters;
- coordinating strategies to educate the public on crime and sentencing issues;
- conducting research on sentencing matters;
- consulting with government bodies, stakeholders and members of the public on sentencing matters; and
- advising the Attorney-General on sentencing matters. (7.3.36)

### **Recommendation 94**

The Institute recommends that the proposed Council be supported by a full-time secretariat and a budget that can fund this and the outsourcing of some of its tasks and functions. (7.3.41)

### **Recommendation 95**

That guideline judgments should not be introduced at this stage in the absence of broad judicial and professional support for them from the legal profession. (7.3.46)

### **Recommendation 96**

That, if a sentencing advisory council is established, after it has had the opportunity to consolidate its operations, it be requested to review the introduction of guideline judgments for magistrates and judges. (7.3.47)

# Executive Summary and Recommendations

## Part 1: Sentencing trends

Examine whether there has been a change in sentencing trends in Tasmania for major crimes and summary offences.

Sentencing is the process by which people who have been found guilty of offending against the criminal law have sanctions imposed upon them in accordance with that law.<sup>1</sup> The sentence of the court is the most visible aspect of the criminal justice system's response to a guilty offender. Public dissatisfaction with sentencing is endemic. Public opinion polls suggest that sentences are too lenient. There appears to be a perception that sentences are becoming more lenient. And sentences attract the criticism that there are inconsistencies between judicial officers. Sentencing trends and prison statistics were examined to explore the issue of changes in sentencing patterns for major crimes and summary offences. The issue of consistency between judicial officers was investigated and sentencing data was examined to demonstrate what courts see as the appropriate sentencing range for particular offences.

### *For most offences Supreme Court sentences have not decreased*

Sentencing patterns in the Supreme Court over the three periods examined in the report (1978-1989, 1990-2000 and 2001-2006) are remarkably consistent. Analysing changes in the median sentence for each crime showed no change to be the most likely outcome with decreases and increases about equal. For many crimes the proportion of custodial sentences are the same or similar. Reductions in the use of imprisonment are rare and for no crime was the reduction significant.

For a small number of crimes there have been increases in the percentage of custodial sentences and the median sentence which are statistically significant. For more than ten counts of burglary the increase in the percentage of custodial sentences is significant and there is also an increase in the median sentence. For one count of stealing the increased use of custodial sentences is significant and there are significant increases in the use of custodial sentences for both drug trafficking and robbery. It also appears prison sentences have become longer for serious assaults and for sexual offences involving young people. Sentences for one or two counts of rape and sentences for indecent assault are the only sentences where the median custodial sentence has become shorter. This is further explored in Part 6. Overall, the percentage of custodial sentences was 79 per cent in the earlier period, 83 per cent in the second period and 87 per cent in the third period. If there is a perception that sentencing is becoming more lenient this is not borne out by the evidence of Supreme Court sentencing patterns. If anything sentencing has become more severe.

In relation to the consistency of sentences, a comparison between the sentences imposed by judges for the most frequent offences of robbery and assault failed to reveal any statistically significant differences.

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<sup>1</sup> A Freiberg (2002) *Pathways to Justice*, at 30 citing Victorian Sentencing Committee (1988) *Report: Sentencing*, at 15.

### ***Magistrates Court sentencing patterns***

As the Report observes, tracking sentencing trends in the Magistrates Court is limited by data collection issues. Until 1 July 2003, there was no state-wide database for the Magistrates Court. Due to significant differences in the data collection periods used in the Report, the data can only be a rough indicator of sentencing trends. Comparisons of the percentage custodial sentences for assault and motor vehicle stealing suggest a stable custodial sentencing pattern with an increased median sentence for assault and a decreased median for motor vehicle stealing. For stealing, the median is the same but there appears to be less use of custodial sentences. Overall the rate of custodial sentences appears to have increased.

### ***Inconsistency in use of custodial sentences in the Magistrates Court***

Sentencing in the Magistrates Court was also examined for consistency between magistrates and consistency between regions (south, north and north-west) in terms of the number of offenders sentenced to custody and the median sentences. An examination of all sentences imposed since 1 July 2003 for four common offences (assault, motor vehicle stealing, stealing and burglary) revealed inconsistency in the use of a custodial sentences between magistrates. There were inconsistencies between magistrates for sentences for assault in particular, but also for motor vehicle stealing, stealing and burglary. Some magistrates had custodial sentencing rates for some offences which were statistically significantly more than the mean and some had rates which were significantly less than the mean. Comparing the regions also showed some differences.

### ***Prison statistics do not support perception of increased leniency***

Prison statistics on average time served by released prisoners fail to support the perception of increased leniency. This data shows quite consistent patterns with a trend for slightly longer terms of imprisonment.

## **Part 2: Crime levels**

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|---|
| <ul style="list-style-type: none"><li>(a) Examine whether there is a relationship between crime levels and sentencing in Tasmania.</li><li>(b) What role can sentencing legislation and sentencing measures have in achieving the Tasmania Together Goals in relation to perceptions of safety and achieving safe environments?</li></ul> |
|---|

There are two main sources of crime data available in Australia that seek to measure crime levels. These are (1) administrative records obtained from police agencies and (2) crime victim surveys.

### ***Crime rate lower than 10 years ago***

Recorded crime statistics in Tasmania for the last 25 years suggest a general increase in crime until 1997-98 followed by a decrease until 2005, with the crime rate increasing slightly in 2005-06. The crime rate is now lower than it was 10 years ago but higher than it was 20 years ago. In the last five years, there has been a general downward trend for offences against property. In contrast, there has been an increase in the rate for offences against the person. However, it is possible that offence rates for rape and robbery may have stabilised. In general terms, the Tasmanian trend is in accord with national trends.

### ***Below Australian average for recorded crime***

In the Australian context, Tasmania is below the national average of recorded crimes for the crimes of robbery, burglary and motor vehicle theft. National recorded crime rate data is no longer available for assault and sexual assault, so comparisons with other states and territories cannot be made. However, victim surveys suggest that Tasmania has the lowest rate after Victoria for personal crimes (robbery, assault and sexual assault).

### ***No empirical evidence of relationship between crime levels and sentencing***

It is commonly assumed that the way to tackle rising crime and unacceptable levels of crime is by tougher sentencing. While on the face of it a plausible explanation for the decrease in crime after 1998 might be the increased imprisonment rates, experts caution against such reasoning. While this may be a ‘common sense’ assumption, a clear causal link between crime levels and harsher sentencing practices is not supported by empirical evidence. The belief that sentencing can reduce crime is based on the assumption that this can be achieved through general deterrence, incapacitation, specific deterrence or rehabilitation.

The evidence of the general deterrent effect of harsher penalties is limited and provides no basis for expecting that general penalty increases, which do not involve an unacceptably harsh punishment, will reduce the crime rate. The availability of punishment clearly contributes to general deterrence but it is the prospect of getting caught that has deterrent value rather than alterations in the severity of sentences. Excluding offenders from society by imprisoning them does prevent them committing crimes while they are in prison. But estimates of the incapacitative effect of increasing the prison population have proved elusive and it has been suggested not only that drastic increases in imprisonment are necessary to achieve an impact on crime levels but also that crime reduction effects are likely to be temporary. The other basis for assuming sentencing can impact on crime is by the penalty acting as a deterrent to the offender (specific deterrence) or by it having a rehabilitative effect. The fact that so many sentenced prisoners re-offend (between one-half and two-thirds) casts doubt upon imprisonment as a deterrent. The evidence is that there is no discernible difference between reconviction rates for prison and for community penalties. This also suggests that imprisonment itself is not effective in reforming offenders. While long-standing scepticism surrounding the effectiveness of rehabilitation programs inside and outside the prison embodied in the mantra ‘Nothing Works’ is now rejected as unscientific overstatement, renewed optimism about rehabilitation cannot justify advocating an increase in imprisonment.

If criminal justice and sentencing policy is to be evidence-based, then increased sentence severity with the aim of reducing crime is not the appropriate response.

### ***The role of sentencing in achieving the Tasmania together goals***

Tasmania Together has goals that were formulated in 2001 and revised in 2006 in relation to safe environments and perceptions of safety. The identified challenges include halving the crime rate by 2020 and ensuring at 92 per cent of people feel safe in their homes at night and 97 per cent of people feel safe in their homes by day by 2020. Fear of crime is undoubtedly a problem and dissatisfaction with the criminal justice system appears widespread. Dissatisfaction with sentencing clearly damages public confidence in the criminal justice system and fuels fear. Dissatisfaction is caused by the perception that sentences are too lenient, that sentences are inconsistent, that judges and magistrates lack accountability and that the current system is inaccessible and that judges and magistrates are not sufficiently responsive to public concerns. Given that crime levels are largely unaffected by sentencing levels, it is wrong to attempt to appease public concern by law and order rhetoric that includes increasing sentencing severity. Instead, public confidence in the criminal justice system could be addressed in three ways:

### **Promote understanding of sentencing practice**

Studies have shown that in general, the public lacks knowledge of sentencing practice and that those most dissatisfied with the criminal justice system are those whose perceptions are particularly inaccurate. Improving understanding of sentencing practice should lead to an improvement in public confidence and a reduction of fear of crime.

### **Review aspects of the system that undermine public confidence**

An examination of sentencing options may indicate that the available options are inadequate. Some existing options may be misunderstood and contribute to criticism of the system. Part 3 of this paper undertakes a review of sentencing options. Parole is another aspect of the criminal justice system that has attracted public criticism. Parole will be considered in Part 6

### **Taking public opinion into account**

Ways of taking public opinion into account in sentencing are examined in Part 7.

These three ways of improving public confidence relate to perceptions of public safety and fear of crime rather than actual community safety and crime reduction. Crime levels are largely unaffected by sentencing levels so sentencing reforms cannot *significantly* impact on crime level. It has been shown that the intuitive appeal of the assumption that crime levels are easily controlled by sentencing measures collapses in the face of the empirical evidence and normative arguments to the contrary. Given the limited impact sentencing can have on crime levels, the public should not be encouraged to think that crime can be solved by punishment. This is not to say there is no room for improvement and that resources could not be used more effectively and imaginatively. We should endeavour to sentence smarter.

## **Part 3: Sentencing options**

Examine the suitability of present sentencing options (including options provided in the *Youth Justice Act 1997* (Tas) and consider whether any changes should be made to existing options and whether new sentencing options should be introduced.

This part reviews existing sentencing options and considers whether any additional sentencing options should be adopted.

### ***Imprisonment***

There are strong arguments in favour of a low imprisonment rate. Imprisonment is the most expensive sentencing option. It may incapacitate offenders while they are in prison, but it achieves little else in terms of crime reduction. A reconviction study in Tasmania shows that 62 per cent of offenders given unsuspended sentences of imprisonment re-offended within a two year period. Ways of encouraging restraint in the use of imprisonment should be considered.

### **Retention of short sentences**

Short prison terms are common. In Magistrates' Court in 2003-04, 67 per cent of prison sentences were three months or under and 89 per cent six months or less and in the Supreme Court from 2001-2006, 18 per cent were three months or under and 47 per cent six months or less. While commonly used, it seems short prison sentences are particularly ineffective for most

offenders. While short periods of imprisonment have all of the adverse effects of imprisonment (loss of the deterrent effect of imprisonment on a first offender, exposing minor offenders to more serious offenders, and negative effects on family, housing and employment) without any benefits (too short to deploy therapeutic programs) and minimum incapacitative effects, the Institute's view is that Tasmania should not follow jurisdictions that have abolished short sentences of imprisonment. The Institute's view is that their abolition would leave an undesirable gap in the sentencing continuum.

**Recommendation**

1. That short sentences of imprisonment should continue to be a sentencing option for the reasons given in para 3.2.14.

**Statutory recognition of the principle of restraint in the use of custody**

Tasmania is the only State that does not give statutory recognition to the principle of restraint in the use of imprisonment. The Institute considers that a statutory statement of restraint in the use of custody does service as a salutary reminder of the principle of parsimony and is an encouragement of such restraint. The data on magistrates' sentencing practice that reveals disparities in magistrates' views of the custody threshold demonstrates the need for more guidance as to when a custodial sentence is appropriate. The purpose of the statutory provision is to encourage non-custodial sentences rather than short custodial sentences, and when only a custodial sentence is appropriate to urge that it is as short as possible.

**Recommendation**

2. The principle of restraint in the use of imprisonment should be enacted by inserting an amendment into the *Sentencing Act 1997* (Tas) s 13A, providing:

- (1) that a court must not sentence an offender to imprisonment unless the offence, or a combination of the offence and one or more offences associated with it, was so serious that neither a fine nor a community sentence can be justified for the offence.
- (2) if a sentence of imprisonment is justified under subsection (1) the sentence must be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence. (3.2.18)

**No legislative requirement for reasons justifying short sentences**

The Institute considered whether there should be a statutory requirement in Tasmania for courts to give reasons for imposing a custodial sentence. The Institute's view is that enacting the principle of restraint in the use of imprisonment (Recommendation 2) is sufficient to discourage the use of short prison sentences in inappropriate circumstances and that requiring reasons for short sentences could well become an empty incantation.

**Recommendation**

3. The Tasmanian Law Reform Institute does not recommend enacting a legislative provision requiring courts to give reasons for short sentences of imprisonment. (3.2.21)

### **More post-release support for short term prisoners and partially suspended sentences**

The Institute explored the English idea of “Custody Plus” as a means of attempting to reduce the reconviction rate of offenders. Custody Plus refers to a short period of imprisonment (up to 13 weeks) followed by supervision in the community of at least 52 weeks. The Institute’s view is that the same goals could be achieved by providing post-release support for short term prisoners and those given partly suspended sentences.

#### **Recommendation**

4. That post release interventions be made available for short-term prisoners in appropriate cases and particularly for prisoners with partly suspended sentences with supervision. (3.2.23)

### **Improving the rehabilitative potential of custody**

The Institute also examined ways of improving the rehabilitative potential of custody. Whilst imprisonment cannot be justified on the basis of either its rehabilitative or deterrent effects on those sentenced to it, there is scope for improving the reconviction rates of prisoners by some selected and properly targeted programs. On the basis of international evidence-based reviews of rehabilitative programs for prisoners the following are cost effective programs:

- cognitive behavioural therapy;
- sex offender treatment;
- drug treatment programs;
- education and work programs.

These programs need to target the dynamic risk factors of individual offenders with appropriate programs, and in addition, appropriate social support and after-care must be provided to ensure program gains are not quickly lost on release.

#### **Recommendations**

5. Advantage should be taken of the opportunity imprisonment presents by continuing to direct resources to evidence-based rehabilitative programs for prisoners in the areas of cognitive behavioural therapy, sex offender treatment and drug treatment programs.

6. In addition, education and work programs should be introduced.

7. Program participants should be supported after release with appropriate social support and after-care to ensure that any program gains are not lost.

### **No need to defer the commencement of sentence**

It has been suggested that courts should be given greater flexibility in relation to sentences of imprisonment by deferring the commencement date or ordering that it be served over separate periods. However, the Institute is not persuaded of the need to defer sentences of imprisonment.

#### **Recommendation**

8. The Institute does not recommend that courts be given the power to defer sentence for the reasons given in para 3.2.44.

### ***Suspended sentences of imprisonment***

A suspended sentence is one, which although imposed is not activated or not wholly activated but suspended on conditions similar to probation and parole. Suspended sentences are a popular sentencing measure in Tasmania. In Tasmania more than half of all sentences of imprisonment are wholly suspended. Suspended sentences have been criticised on many grounds:

- (1) The disjuncture between the legal view and the public view of suspended sentences. From the legal point of view they are the penultimate sanction but the public regards them as less severe than probation or a small fine. Offenders given a suspended sentence are regarded as ‘walking free’.
- (2) The reasoning process for imposing suspended sentences is said to be illogical, as the court takes into account the same factors in deciding to suspend a sentence of imprisonment as it takes into account in determining whether a sentence of imprisonment is warranted at all.
- (3) It is further argued that suspended sentences are ineffective as a deterrent and do not result in a reduction of the prison population.
- (4) Suspended sentences are seen to have the potential for net-widening and sentence inflation.
- (5) It has also been argued that suspended sentences violate the principle that sentences should be proportional.
- (6) A concern raised in relation to suspended sentences is that many offenders breach the conditions without consequences.

The Issues Paper asked whether changes were needed to make the suspended sentence a more logical, credible and effective sentencing option. Several options for change have been considered to address the criticisms of suspended sentences.

### **No abolition of suspended sentences**

The Institute acknowledges the criticisms of suspended sentences but considers that to abolish the suspended sentence would be to remove a valuable tool, one which enables courts to mark the seriousness of the offence by imposing a sentence of imprisonment while showing mercy in the particular case by suspending it. There is also the fear that removing it will have a significant impact on the imprisonment rate – a very real fear in this jurisdiction where more than half of the sentences of imprisonment imposed are wholly suspended.

### **No restriction on the availability of suspended sentences**

The Institute considered whether legislative limits should be placed on the length of suspended sentences. After analysing the sentence length of suspended sentences, the Institute’s view is that it is unnecessary to restrict the length of suspended sentences. Another method of restricting the availability of suspended sentences would be to place offence based restrictions, limiting the availability of wholly suspended sentences for serious offences to exceptional circumstances. The Institute found no evidence that wholly suspended sentences are being used inappropriately for serious crimes in Tasmania. The Institute also found no conclusive evidence of net-widening for less serious offences. The Institute does not recommend that length-based or offence-based restrictions be imposed on the power to order suspended sentences.

### **Need for guidance as to the use of suspended sentences**

The Institute's view is that the confusion about the way suspended sentences are supposed to operate, the uncertainty of the current law and the impact of the decision in *Dinsdale v The Queen*,<sup>2</sup> means that it is desirable for guidance to be given about the imposition of the suspended sentence. It is recommended that the legislative guidance not interfere with judicial discretion.

### **Need to increase the punitive and rehabilitative elements**

The Institute acknowledges that one of the most compelling criticisms of the suspended sentence is its confusing nature. It is difficult for the public to accept that it is indeed the penultimate sanction (the ultimate sanction being actual imprisonment). The Institute considers that the idea of adding supervision, program or community service requirements to bolster the credibility of the suspended sentence as a serious penalty is an attractive one. However, the Institute does not recommend that courts be required to impose additional conditions. However, it does recommend that the *Sentencing Act 1997* s 24 be amended to make explicit the kinds of conditions that can be attached to a wholly or partly suspended sentence. The Institute also recommends that a new provision (s 24A) be inserted into the *Sentencing Act 1997*, providing that where there is reason to think that an offender may benefit from 'additional conditions' the court should order a pre-sentence report addressing these issues. There would be no requirement to order a pre-sentence report in cases where there was no need for special conditions.

### **Need to reform breach proceedings**

Only five per cent of breached suspended sentences result in proceedings. The Institute's view is that this is unacceptable. The Institute commends the efforts of the Director of Public Prosecutions and Tasmania Police to ensure that proceedings for breach are initiated in all cases but acknowledges the obstacles that currently exist to achieving improvements in actioning breach. The Institute considers that a review should be undertaken to explore whether the administrative changes put in place have produced improvements. This review should investigate breaches of all conditions of the sentence and not merely the requirement not to commit an imprisonable offence. If breach proceedings still appear to be lax, the Institute recommends discussions between the DPP, Police Prosecutions, Department of Justice, Community Corrections, Supreme and Magistrates Courts to develop protocols for dealing with breaches and the introduction of computer software to automatically notify apparent breaches.

To facilitate enforcement of breaches of suspended sentences, the Institute also recommends that the prosecution be given power to make application at the time of sentence for the breaching offence for the breach to be dealt with simultaneously.

The Institute's view is that there is merit in tightening the consequences of breach by enacting a presumption in favour of activation of the sentence on proof of breach. This would mean that the sentence of imprisonment would be activated on proof of breach, either in whole or in part, unless the Court concludes that it would be unjust to do so.

### **Recommendations**

9. Notwithstanding criticisms of the suspended sentence, the Institute is of the view that the suspended sentence is a useful sentencing option that should be retained (see para 3.3.26).

10. The Institute found no evidence that suspended sentences are overused or used inappropriately. Therefore it does not recommend that length-based or offence-based restrictions be imposed on the power to order suspended sentences (3.3.27 – 3.3.30).

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<sup>2</sup> (2000) 202 CLR 321.

11. The Institute recommends that to remove confusion about the nature of the suspended sentence, legislative guidance be given in the *Sentencing Act 1997* (Tas) about the imposition of suspended sentences that does not interfere with judicial discretion (3.3.31- 3.3.32). The proposed s 23A is as follows:

A court must not impose and suspend a term of imprisonment (wholly or partly) unless, having regard to the provisions of this Act (and in particular s 13A), it has first determined that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed.

12. To give suspended sentences some punitive bite, the Institute recommends that instead of permitting combined orders, the *Sentencing Act 1997* (Tas) s 24 be amended so that it lists a range of additional conditions that may be attached to a suspended sentence (3.3.36). The new provision should be modelled on the following:

- (1) An order of a court suspending the whole or part of a sentence of imprisonment is subject to the condition that the offender must not commit another offence punishable by imprisonment during the specified period.<sup>3</sup>
- (2) Such an order may be made subject to such additional conditions as the court considers necessary and expedient including the following conditions:
  - that the offender be subject to the supervision of a probation officer;
  - that the offender be required to perform community service;
  - that the offender be required to undertake a rehabilitation program;
  - that the offender undergo specified medical or psychiatric treatment;
  - a restorative requirement.

13. The Institute recommends that to avoid the offender being punished more than once for breaching the same sentence that the *Sentencing Act 1997* (Tas) s 8(1) be amended so that a suspended sentence cannot be combined with a community service order, a probation order or a rehabilitation program order (see 3.3.38).

14. To ensure that the needs of the offender are addressed and to enhance the opportunities that a suspended sentence presents to address those needs, it is recommended that where there is reason to think that an offender may benefit from any 'additional conditions', the court should require a pre-sentence report addressing the issue of 'additional conditions' that should be included in the order. This recommendation would require an amendment to s 24 (see 3.3.39).

15. The Institute recommends that a review be conducted to see if improvements introduced to address the neglect in instituting breach proceedings have been successful. (3.3.41)

16. If breach proceedings still appear to be lax, the Institute recommends discussions between the Director of Public Prosecutions, Police Prosecutions, Department of Justice, Community Corrections, Supreme and Magistrates Courts to develop protocols for dealing with breaches and the introduction of computer software to automatically notify apparent breaches. (3.3.41)

17. The Institute recommends that s 27 of the *Sentencing Act* be amended to empower the prosecution to make an oral application to have a breach of a suspended sentence dealt with when a court is sentencing an offender for an offence the conviction for which constitutes a breach of the condition of a suspended sentence that an offender not commit an imprisonable offence. (3.3.42)

<sup>3</sup> This merely makes explicit the current position: see s 27(1).

18. To promote the deterrent value of the sanction and to enhance the integrity of the sanction in the eyes of the community, the Institute recommends that in dealing with breach cases there be a statutory presumption in favour of activation. (3.3.43)

### ***Home detention***

Home detention is not a sentencing option in Tasmania. A home detention order confines offenders to their homes during specified times for the duration of the sentence under strict supervision and conditions. It can operate as a sentence in its own right (front-end home detention) or as a form of conditional release after a period of full-time imprisonment (back-end home detention). It may involve electronic monitoring. Its claimed advantages include reduced imprisonment rates with cost benefits and avoiding disruption to employment and family life. Problems include net-widening and discriminatory operation.

#### **The adoption of home detention as a sentencing option in its own right**

Notwithstanding the dangers of net-widening, the Institute recommends the adoption of home detention as a sentencing option in its own right (front-end home detention). To avoid net-widening, the sanction should be construed as a form of custody with the court being first required to impose a term of custody before making a home detention order. In order to facilitate offenders pursuing treatment if necessary, compensating the victim where possible and taking steps to make restoration to the community where appropriate, home/residential confinement should be the core condition of the order but it should be multidimensional with additional conditions that reflect the additional needs of the offender or the restorative aims of the order.

#### **Court to obtain assessment report and the need for consent**

In order to protect the offender's family, the Institute recommends that before making a home detention order, the court should obtain an assessment report which addresses the suitability of the offender for such a disposition, the impact of the order on third parties and the environment in which the offender will be confined. The consent of co-residents should be a precondition.

#### **No discretion to make home detention longer than term of custody it replaces**

The Institute considered whether it was desirable that courts have a discretion to make a home detention order longer than the term of custody it replaces. On balance, it was decided that this was not appropriate. Although a sentence served by way of home detention is less severe than a sentence served in prison, offenders sentenced to home detention do not have access to remissions or parole so in effect will generally spend longer in detention. The Institute also recommends that no limits be placed on the length of the order, but judicial officers will be required to review orders in excess of six months. The Institute did not consider it desirable to exclude specific offences from home detention orders. However, offenders who pose a significant risk to society should be excluded. Offenders convicted of a domestic violence offence should not be returned home to serve the sentence although they could be required to serve it in a community-based residence with appropriate conditions to protect the victim.

#### **Need for additional resources**

While the Institute recommends that home detention orders be introduced in Tasmania, it should not be introduced unless Corrective Services are given additional resources to devote more time to surveillance and support of offenders. Provision should also be made for home detention programs to be available to ensure adequate support and supervision.

### **Recommendations**

19. The Institute recommends that ‘front-end’ home detention be introduced as a sentencing option and that it be called ‘home detention’. (3.4.11, 3.4.13)
20. That it should not be a condition of a suspended sentence but a custodial sentence located in the sentencing hierarchy between an immediate sentence of imprisonment and a wholly suspended sentence of imprisonment. (3.4.12)
21. That home/residential confinement be a core condition of the order but courts should have the discretion to impose additional orders to reflect the needs of the offender or the restorative aims of the sentence. (3.4.14)
22. That a home detention assessment report be a prerequisite of a home detention order. (3.4.15)
23. That a court must not make a home detention order unless the offender consents and signs an undertaking to comply with their obligations under the order. (3.4.15)
24. That consent of co-residents be a prerequisite of the order and consent should be able to be withdrawn at any time. (3.4.15)
25. That offenders sentenced to home detention not be eligible for remissions or parole. (3.4.16)
26. That there be no limits on the length of the order but that judicial officers be required to review orders in excess of six months. (3.4.17)
27. That there should be no offence-based exclusion criteria, however, an offender who poses a significant risk in terms of committing a further violent offence should not be eligible for a community custody order. (3.4.18)
28. That the courts should have a discretion to order home detention be served in a place other than the offender’s home in appropriate cases (e.g. in cases of domestic violence offences and homeless offenders). (3.4.15, 3.4.19)
29. That additional resources be allocated to Community Corrections for preparation of assessment reports, supervision of home detainees and provision of home detention programs. (3.4.20)

### ***Periodic detention***

Periodic detention involves imprisoning offenders for limited periods but allowing them to spend the remainder of their time at home, at work or otherwise in the community. It is not a sentencing option in Tasmania. It has the same kind of advantages as home detention. In addition to possible net-widening, its disadvantages include the capital cost of increasing detention facilities, operational difficulties and compliance rates.

### **No periodic detention**

The Institute considers that there is a real advantage in seeking to avoid some of the negative impacts of imprisonment such as disruption of employment, family life and education. In view of the capital costs in building appropriate facilities, the Institute’s view is that the most pressing need is for resources for programs rather than bricks and mortar.

**Recommendation**

30. The Institute does not recommend that periodic detention be introduced as a sentencing option at this time (for the reasons outlined in para 3.5.9).

***Intensive correction orders***

An intensive correction order is an intermediate sanction which is available in Victorian and Queensland. It is not a sentencing option in Tasmania. In Victoria and Queensland, intensive correction orders are an enhanced community service and probation order combined. The model in Victoria has core conditions which include requirements to report twice per week (at a minimum) and 12 hours attendance for community work (eight hours minimum) and counselling treatment or education. Additional conditions could include curfew restrictions and electronic monitoring.

**No intensive correction orders**

The advantages of an intensive correction order are similar to home detention and periodic detention. It also enables to offender to return a benefit to the community in the form of work on community projects but at the same time it has an element of punishment. The Institute's view is that the concept of an intensive correction order is a confusing one which does not convey whether it is in essence an enhanced probation order or an enhanced community service order. Evidence also suggests that increased supervision or surveillance does not operate to prevent re-offending.

**Recommendation**

31. For the reasons outlined in paras 3.6.7 – 3.6.8, the Institute does not recommend the introduction of the intensive correction order in Tasmania, either as a means of serving a sentence of imprisonment or as a sentencing option in its own right.

***Community service orders***

Community service orders require an offender to perform unpaid work or other activities in the community for a specified number of hours under the direction of a probation officer or supervisor. It is a sanction that has a punitive element, a rehabilitative element and a restorative element.

**Retention of community services orders**

After reviewing the operation of community service orders and considering the submissions received, the Institute's view is that community service orders are a credible, logical and effective sentencing option. Community service orders have consistently high completion rates. There is no comprehensive reconviction data for community services orders. The data that is available suggests that offenders sentenced to community service alone perform better than those offenders sentenced to probation alone or community service order and probation order.

The Institute considered whether to recommend adopting a generic community sentence with a menu of options including compulsory unpaid work, supervision by a probation officer, attendance at programs etc. This was rejected in favour of retaining community service orders as a distinct option with a number of changes that are set out in the list below.

### **Recommendations**

32. The Institute does not recommend that a generic community sentence should replace community service orders and probation orders, (3.7.13) however, it does recommend that s 28 of the *Sentencing Act 1997* (Tas) be amended so that supervision or attendance at a ‘rehabilitation program’ for domestic violence offenders is made available as an optional condition of a community service order. (3.7.13)

33. The Institute recommends that s 8(2)(a) and (b) (which allow a CSO to be combined with a probation order or a rehabilitation order) be omitted (3.7.13). This conforms with the Institute’s view that sanction stacking is undesirable, but there should be flexibility in relation to conditions of sentencing orders (see above para 3.3.36).

34. The Institute recommends that community service order assessments assess an offender’s need for supervision and programs, suitability for work and availability of programs. (3.7.13)

35. The Institute recommends that the Part 6 (Fines) of the *Sentencing Act 1997* (Tas) be amended to include the power to impose a community service order where the penalty prescribed is a mandatory minimum fine or imprisonment. (3.7.14)

36. The Institute does not recommend that the power to impose a community service order be broadened so it is available for offences that are not punishable by imprisonment. If an offender cannot pay a fine, the judicial officer should impose a conditional release order. (3.7.14)

37. The Institute also recommends that the New Zealand practice of remitting up to 10 per cent of the aggregate of the total of community service hours be further explored by the Justice Department. (3.7.15)

38. The Institute recommends that the Justice Department conduct a review of the community service order scheme<sup>4</sup> to ensure the availability of adequate resources to provide projects in country areas, a diversity of projects so that women and others with dependants, those with health problems and disabilities have suitable work and that promising findings from projects such as the UK’s Pathfinder project can be implemented in this state. (3.7.16)

### ***Probation orders***

A Probation order is a sentence which requires an offender to be under the supervision of a probation officer and to obey the reasonable directions of that officer. The period of probation must not exceed three years. Probation is a sentencing option that has been available to courts in Tasmania since 1934. Probation orders have the advantage of promoting rehabilitation by maintaining community contacts and allowing for remedial intervention in a cost effective way.

### **Need to revitalise probations orders**

The Institute has reviewed the operation of probation orders. It rejects the idea of a generic community sentencing order in favour of preserving the distinct identity of different community sentencing options, including probation orders. However, it has recommended that supervision by a probation officer be an optional condition of wholly suspended sentences, community service orders and a core condition of home detention. As a distinct sentencing option in its own right, the probation order has waned in popularity and the Institute sees a real need to revitalise it as credible stand-alone sentencing option.

<sup>4</sup> The Institute understands that such a review is now underway.

The Institute's view is that actions need to be taken to restore the reputation of probation orders as a reputable sentencing option and recommendation 41 outlines the steps it sees as necessary.

### **Need for rigorous monitoring**

The Institute recommends that if probation orders are to be perceived as an effective sentencing option, orders must be rigorously monitored, action must be taken in respect of breach when appropriate and a consistent approach adopted to breach by the courts. The Institute recommends that the Justice Department conduct a breach study to investigate the incidence of breach of orders and the outcomes of breach proceedings. To ensure the response to breaches of orders is consistent, fair and firm, it is recommended that guidelines be created for probation officers and judges and magistrates. Based on systematic research reviews, there is now a wealth of literature available on the effectiveness of a wide range of rehabilitative programs and effective case management and practitioner skills in supervision. The Institute recommends that a thorough review be undertaken to determine a range of evidence-based programs that can be made available for offenders to address both their criminogenic needs and utilise their strengths.

### **Recommendations**

39. The Institute does not recommend a generic community sentencing order for the reasons outlined in para 3.8.13. (and see 3.7.13)

40. The Institute does not recommend altering the place of probation orders in the hierarchy of sanctions to indicate that it is a more serious sanction than a community service order for the reasons given in para 3.8.20.

41. In the Institute's view there are two basic problems with probation orders that need to be addressed. First, there is a need to restore confidence in probation orders as an *independent* sentencing option (as evidenced by the fact that 90 per cent of probation orders in the Supreme Court and more than 50 per cent of orders in the Magistrates Court are combined with a more serious penalty) and secondly, there is the lack of resources devoted to community corrections. To help restore the reputation of probation orders as a credible independent sentencing option, the Institute recommends:

- that the Justice Department conduct a breach study of probation orders to inform guidance for probation and judicial officers in relation to breach proceedings.
- that a review be conducted to determine a range of evidence-based programs for introduction in Tasmania to enhance the potential of probation to reduce recidivism and encourage desistance and that resources be made available to offer these programs to appropriately targeted offenders.
- that such programs be supported by proper assessment, motivation, case-management and reinforcement of learning to follow-up and support program effects.
- that the possibility of ongoing supervision by the court be considered for certain categories of offenders on probation orders.

### ***Fines***

The fine is the most common sanction in the Magistrates Court, but is rarely imposed in the Supreme Court. A fine cannot be imposed unless a conviction is recorded. The Institute recommends that courts should have the discretion to fine without recording a conviction.

### **Improving the enforcement procedure for fines**

A common difficulty with fines is enforcement. However, it is an issue that the government has in hand with the enactment of the *Monetary Penalties Enforcement Act 2005*. This Act creates a new statutory scheme to improve the procedure for the enforcement of fines. The Institute has considered

the power of the Director of the Monetary Penalties Enforcement System to order suspension of an offender's driver's licence or vehicle registration for failure to comply with an enforcement order issued for fine default. While this measure has an instinctive appeal, the Institute is concerned that experience in other jurisdictions reveals real problems with this method of fine enforcement. It is inevitable that the introduction of licence and registration cancellation as a sanction for fine default for non-traffic offences will promote the use of unregistered vehicles and increase the incidence of driving while disqualified. This measure has the potential to cause real hardship to certain groups of people, such as the young, the disadvantaged and people from rural areas where access to public transport is limited. The Institute therefore recommends that the provisions in the *Monetary Penalties Enforcement Act 2005* that allow the Director of the Monetary Penalties Enforcement System to impose the sanctions of suspension of driver licences and car registration for fine default be repealed.

### **Making fines fairer**

Fines raise the issue of unequal impact. In imposing a fine, a court must determine the level of fine that reflects the seriousness of the offence and then make an appropriate adjustment downwards if the offender is unable to pay. There is no power in Tasmania to increase a fine on the grounds of the affluence of the offender. In the case of a mandatory minimum fine, there is no discretion to reduce the amount of the fine below the minimum. An option to address the principles of equity before the law and equal impact is a 'day fine' or 'unit' fine. Day fines require that the amount of the fine be calculated as a proportion of the daily income of the offender. The Institute is attracted to the day or unit fine concept. It has the potential to achieve more and fairer fining. However, the Institute recognises that it is not currently feasible within the Tasmanian framework to introduce day or unit fines. As a long-term strategy, the Institute recommends that the government set up a project to investigate how a day fine scheme could be introduced in Tasmania. In the meantime, the Institute recommends enactment of the English approach that requires courts to consider the offender's financial circumstances whether this has the effect of increasing or reducing the amount of the fine.

### **Recommendations**

42. The Institute recommends that the *Sentencing Act 1997* (Tas) s 7(e) be amended to empower courts to fine an offender without recording a conviction. (3.9.6)

43. The Institute recommends that *Monetary Penalties Enforcement Act 2005* (Tas) be amended to omit the power of the Director of the Monetary Penalties Enforcement System to order suspension of an offender's driver's licence or vehicle registration for failure to comply with an enforcement order issued for fine default. (3.9.13)

44. The Institute recommends that the government establish a feasibility study to investigate how a day fine scheme could be introduced into Tasmania. (3.9.19)

45. Pending the introduction of unit fines, the Institute recommends that the *Sentencing Act 1997* (Tas), Part 6 be amended to insert a new provision:

- (a) requiring a court to inquire into an offender's financial circumstances before fixing the amount of a fine;
- (b) providing the amount of the fine should reflect the seriousness of the offence;
- (c) that in fixing the fine a court should take into account the offender's financial circumstances;
- (d) empowering the court to make a financial circumstances order, requiring the offender to provide the court with such financial details as it requests. (3.9.20)

### ***Conditional release order (section 7(f) orders)***

A court may, with or without recording a conviction, adjourn proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender. If the offender observes the conditions, at the end of the adjournment period, the offender will be discharged or the offence dismissed. Non-compliance with the conditions will expose the

offender to being re-sentenced for the original offence as well as to being fined for the breach. However, breach of the conditions of the order is not made an offence.

### **Need to monitor outcomes**

The Institute's view is that breach of a conditional release order should not be an offence. This accords with the current position. However, it is unsatisfactory that there is no data on outcomes of these orders so the extent to which orders are breached or followed up is unknown. If conditional release orders are never followed-up and breaches never dealt with, it is pointless having such orders. To ensure that conditional release orders are a credible sentencing option, the Institute recommends that the Justice Department follow-up orders and report on breach rates annually. It also recommends that a reconviction study be done to ascertain the extent to which offenders have been of 'good behaviour' and the outcomes of these orders.

#### **Recommendation**

46. The Institute recommends:

- that the Justice Department follow-up conditional release orders and report on breach rates annually;
- that a reconviction study be done to ascertain the outcomes of conditional release orders. (3.10.4)

### ***Rehabilitation program orders and drug treatment orders***

#### **No recommendation in relation to rehabilitation program orders**

The Institute makes no recommendations in relation to rehabilitation program orders for domestic violence offenders. These orders became available from 30 March 2005 as part of the Safe at Home program. No such orders have been made in the Supreme Court and the most recent Justice Department Annual Report does not record the number made in the Magistrates Court.

#### **Drug treatment orders**

In the Issues Paper, one of the discussion points asked whether there was a need for a specialised order for offenders convicted of drug and drug-related offences. In 2005 the Institute accepted a reference on the feasibility of a drug court pilot and embarked on the project with funding from the Law Foundation of Tasmania. However, it became clear that the government had opted for a court mandated diversion project rather than a drug court. In mid 2007 the pilot program for drug offenders called Court Mandated Diversion for drug offenders (CMD) was introduced. There are three levels or tiers in the program. The first level is a bail diversion program which operates post plea and allows diversion to drug treatment for up to 12 weeks as a condition of bail. Court review is possible through additional mentions. At the second level, drug treatment can be made available in several ways. This includes as a condition of a suspended sentence or a probation order, or offenders on community service orders can be referred to drug treatment using the standard condition to attend 'other programs as directed by a probation officer'.<sup>5</sup> The drug treatment order at the third level is supported by amendments to the *Sentencing Act* that provide that if a court is constituted by a magistrate, it may record a conviction and make a drug treatment order.

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<sup>5</sup> *Sentencing Act 1997* (Tas) s 28(g).

### The retention of CMD

Funding for the program is in some doubt after June 2008 and at this stage no drug treatment orders can be made after 31 May 2008. Of equal concern is the issue of ongoing funding for treatment that supports suspended sentences, probation orders and community service orders. The Institute recommends that if the evaluation of CMD proves promising, each of the three levels of the program should continue and drug treatment orders should also be made available to offenders convicted in the Supreme Court by referral to the Magistrates Court when appropriate. There should also be power for the Supreme Court to make a drug treatment order.

#### Recommendation

47. The Institute recommends that if the evaluation of the Court Mandated Diversion of Drug Offenders program proves promising:

- each of the three levels of the program should continue; and
- the *Sentencing Act 1997* (Tas) should be amended to enable offenders convicted in the Supreme Court to be made subject to drug treatment orders. (3.11.7)

### *Breach of non-custodial orders*

Breach of a community service order, breach of probation, breach of a rehabilitation order and breach of a drug treatment order constitute an offence. The breach offence is not used for breach of a suspended sentence or for conditional release orders. It appears that the purpose of the breach offence is procedural rather than punitive. It provides a mechanism to allow the person to be brought back to the court.

### Overall of procedures in relation to breach of sentencing orders

The Institute's view is that procedures in relation to breach of sentencing orders need to be radically overhauled. In relation to suspended sentences the failure to follow-up breaches of suspended sentences and probation orders has been highlighted. A study of breach of suspended sentences found that action was only taken in five per cent of breaches of wholly suspended sentences.

The Institute recommends that expeditious procedures be put in place to enable offenders to be brought back to court when necessary to ensure that sentencing orders are credible. It recommends offences of breach of community service, probation and rehabilitation order be abolished and replaced with legislative provisions similar for breach of a suspended sentence and breach of a conditional order.

#### Recommendation

48. The Institute recommends that:

- the offences of breach of a community service order, breach of a probation order and breach of a rehabilitation program order be abolished and replaced with breach provisions similar to those in s 27 of the *Sentencing Act 1997* (Tas);
- the procedures for follow-up and actioning breaches of community orders be radically overhauled.(3.12.3)

## Part 4: Role of Victims

- (a) Consider whether the interests of victims are adequately dealt with in the sentencing process and to what extent the objective of section 3(h) [that of recognising the interests of victims] has been met.
- (b) In particular consider the efficacy of compensation orders and the victims' levy.

The role of victims in the criminal justice system has traditionally been a very limited one. However, in recent decades attempts have been made to accommodate the interests of victims in the criminal justice system. An objective of the *Sentencing Act* is to recognise the interests of victims. This report considers the extent to which the Act and the sentencing process achieves this aim.

### *Victim Impact Statements (VIS)*

The effect of the crime on the victim is relevant to the exercise of sentencing discretion. When a person is found guilty of an offence, a victim of that offence may provide the court with a written statement that gives particulars of any injury, loss or damage suffered by the victim as a direct consequence of the offence and describes the effect of the offence on the victim.

### **VIS is a valuable tool in the sentencing process**

In the Issues Paper, the Institute asked for comments in relation to any issues arising out of giving legal recognition to VIS that need to be addressed and whether victims should have the option of furnishing a VIS without having that statement read out in court. Since the release of the Issues Paper, many of the problems and concerns in relation to VIS have either been addressed by the introduction of appropriate safeguards or answered by research. It is no longer a requirement of the legislation that the VIS must be read out in court. While VIS remains controversial, the Institute's view is that VIS is a valuable tool in the sentencing process.

### **Value of VIS to victims and secondary victims needs clarification and examination**

The Institute's view is that issues associated with the value of VIS to victims and secondary victims warrant further clarification and examination. The Institute recognises that providing a VIS and the court's use of it in sentencing comments to acknowledge the effects of the crime on the victim can have a positive impact on the victim. However, to ensure that victims do not see the primary purpose of VIS as affecting the sentencing outcome, and to avoid disappointing victims, the Institute recommends that the advice given by the prosecution, by the Victims Support Services, Victims of Crime Services and Sexual Assault Services continue to make this point and that it be included in the Victims Support Services' brochure.

The Institute recommends that research be conducted to examine the effectiveness of VIS as a tool for the courts and for victims.

### **Retention of right of secondary victims to make a VIS**

The Institute recommends retaining the right of the family of victims in homicide cases to make a VIS. However, it recommends that advice to victims should make it clear that this is but one factor the court will consider in imposing sentence and that it cannot lead the court putting a greater value on one life rather than another.

**Recommendations**

49. The Institute supports the use of victim impact statements. They are a valuable tool in the sentencing process which assist the court in assessing the effects of the crime on the victim, and provide the victim with a voice in the sentencing process. The courts' use of VIS can be therapeutic and empowering for victims. To ensure that provision of a VIS provides a positive experience for victims, the Institute recommends that the advice given by the Victims Assistance Unit and other victim services assisting with VIS continue to ensure the focus is on the symbolic and communicative function of VIS rather than its impact on the sentencing outcome. It recommends that this be explained in the Victims Support Service's brochure. (4.2.9 – 4.2.12)

50. The Institute recommends retaining the right of the family victims in homicide cases to make a VIS. However, as in the previous recommendation, it recommends that advice to victims should make it clear that this is but one factor the court will consider in imposing sentence and that it cannot lead to the court putting a greater value on one life rather than another. (4.2.13)

51. The Institute recommends that research be conducted in this jurisdiction to examine the value of VIS to the courts and victims. (4.2.14)

***Victim mediation***

The *Sentencing Act 1997*, s 84(1) provides that courts may order or receive a mediation report prior to sentence. A mediation report is a report by a mediator about any mediation or attempted mediation between the offender and victim. These provisions have been rarely used if at all. Victim offender mediation has been carried out on an ad hoc basis by the Justice Department for a number of years, usually using external mediation services. In the Issues Paper, the Institute asked questions in relation to why there had been so few referrals for mediation reports.

**A pilot community conference program for young adults**

The Institute's view is that victim offender mediation appears to have been overtaken by another restorative justice measure, namely, community conferences. In the juvenile justice area, the community conference or 'family group conference' has proved extremely popular. Legislation exists in Tasmania for community conferences, which are primarily an alternative to court proceedings for young offenders. However, they may also be ordered by a magistrate prior to sentencing a youth. The Institute considers that community conferencing may be an appropriate program for young adult offenders in Tasmania.

**Recommendation**

52. The Institute recommends a pilot community conferencing program for young adults modelled on both the New South Wales pilot and on Tasmania's youth justice experience with conferencing. (4.3.5)

***Compensation Orders***

To promote a focus on victims, the *Sentencing Act 1997* made compensation orders mandatory for burglary, stealing, robbery, arson and injury to property and gave compensation orders priority over fines where the offender has insufficient means to pay both. Currently, a compensation order is an ancillary order. An examination of the use of compensation orders under the *Act* suggests that these provisions have failed to fulfil the promise of compensating victims of property crime. Despite provisions requiring the courts to make orders in respect of convictions for the above offences where

there is evidence of loss, it appears orders are not made in the majority of those cases, and of those made, very few are paid.

### **Making compensation orders discretionary**

The Institute's view is that a more realistic approach than the current mandatory approach to compensation orders is to require courts to consider making an order rather than to require them to do so. Compensation orders should be discretionary. However, the Institute also considers that the court should be required to consider whether a compensation order should be made in every case where it appears to the court that another person has suffered injury, loss, destruction or damage as a result of the offence. If a compensation order is not made, the court should have a duty to give reasons for not doing so.

### **Making compensation order a sentencing option in its own right**

The Institute considers that compensation orders should no longer be ancillary orders but included in the list of sentencing orders in the *Sentencing Act 1997*, s 7. It would automatically follow that the making of a compensation order would be relevant to the sentencing discretion, but this would not deflect the court from imposing a custodial sentence or a community service order if that is what the offence justifies.

### **The offender's means should be relevant**

The Institute considers that the offender's means should be relevant to the amount of a compensation order.

### **Need for greater resources**

Based on the study of compensation orders, the Issues Paper suggested that neither courts nor prosecutors had done all they could to make compensation orders more successful. Greater efforts could be made to adduce evidence of loss at the sentencing stage as part of the normal information supplied to the court. Adequate resources need to be provided to prosecutors to enable this to be done. There needs to be a review of the administrative procedures and resources associated with the making of compensation orders to enable them to more fully utilised.

### **Combination orders and compensation as a condition of a sentencing option**

The Institute's view is that it is possible to combine a compensation order with other sentencing orders such as a suspended sentence, a community service order or a probation order to add a reparative element to a primarily punitive, denunciatory or rehabilitative sentence. A compensation order could also be combined with a conditional release order. Compensation can be a possible condition of a suspended sentence, a community service order or a probation order.

### **Need for enforcement**

The Institute considers that payment of compensation orders be enforced in the same manner as fines.

### Recommendations

53. The Institute is of the view that the interests of victims would be better served by making some fundamental changes to compensation orders including making a compensation order a sentencing option in its own right.

54. The Institute recommends that the *Sentencing Act 1997* (Tas) s 68(1) be amended omitting the requirement that compensation orders *must be made* for injury loss, destruction or damage if the offence is burglary, stealing, robbery, arson or injury to property. Instead courts should be required *to consider* making a compensation order in cases where injury, loss, destruction or damage has been caused by the offence and where such an order is not made, give reasons for not doing so. This requirement should be inserted in s 8A of the Act. (4.4.16)

55. The Institute recommends that the option of making a compensation order should be included in the list of sentencing orders in s 7 of the *Sentencing Act 1997* (Tas) rather than as an ancillary order in Part 9. The provision should state [a court may] ‘with or without recording a conviction make a compensation order for injury, loss, destruction or damage suffered by a person as a result of the offence’. (The provisions relating to compensation orders in Part 9 will have to be relocated). (4.4.17)

56. The Institute recommends that the *Sentencing Act 1997* (Tas) be amended to provide that in determining the amount of a compensation order the court may take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.<sup>6</sup> (4.4.18 - 4.4.19)

57. The Institute recommends a review of the administrative procedures and resources associated with the making of compensation orders to enable them to be ‘adequately attended to’.<sup>7</sup> (4.4.20)

58. The Institute recommends that courts be empowered to make a compensation order in addition to imprisonment, community service order or a fine (this will require amendments to s 8 of the Act). It also recommends that courts be given the discretion to make compensation a condition of a suspended sentence, a home detention order, a community service order or a probation order. (4.4.16)

59. The Institute recommends that payment of compensation orders be enforced in the same manner as fines. It therefore recommends that:

- This be clarified in (the relocated) s 69 of the *Sentencing Act 1997* (Tas) (enforcement as a judgment debt) by adding a provision that enforcing the fine in this way does not preclude action being taken under s 47 of the *Sentencing Act 1997* (Tas) for fine default;
- That the definition of ‘fine’ in s 3 of the *Monetary Penalties Enforcement Act 2005* (Tas) be amended to include ‘or the Supreme Court’ after the words ‘Magistrates Court’. (4.4.1)

### Compensation Levies

Convicted offenders are required to pay compensation levies which are used to help fund criminal injuries compensation awards for personal injuries. The levy is \$50 for convictions in the Supreme Court and \$20 for convictions in the Magistrates Court. Offences attracting a levy include all crimes and many summary offences including drink driving and negligent driving. They are enforced in the same manner as fines. It has been argued that levies create an unfair burden on poorer offenders, particularly those convicted of driving offences, and that they compound the problems of imprisonment of offenders for fine default.

<sup>6</sup> For a similar provision see *Sentencing Act 1991* (Vic) s 86(2). See also *Criminal Law (Sentencing) Act 1988* (SA) s 53(3).

<sup>7</sup> Director of Public Prosecutions, submission, 2.

### **Retention of compensation levies**

The Institute's view is that levies are a useful means of funding criminal injuries compensation. However, the Institute considers that changes should be made to the scheme to improve its function. The levy is not about compensation or punishment but in effect a revenue raising device which should be easily calculated. A flat rate for a sentence irrespective of the number of offences should be prescribed with scales based on the most serious conviction. The levy should be imposed on infringement notices as well as on court imposed sentences.

The time for payment should be a standard period, namely 14 days from conviction or release from prison, with a discretion to the judicial officer to otherwise order.

### **Need for greater victim information**

The Institute is aware that victims sometimes misconstrue compensation levies and see the levy as in some way representing compensation for injury or damage suffered. It is therefore recommends that the nature of the levy be explained in the Victims Support Services' brochure for victims.

#### **Recommendations**

60. To increase the amount that compensation levies contribute to the criminal injuries compensation fund that the *Victims of Crime Compensation Act 1994 (Tas)* be amended to adopt a scale which increases the amount payable and better reflects the seriousness of the offence. (4.5.6)

61. That a levy be imposed on infringement notices as well as on court imposed sentences as is done in South Australia. (4.5.6)

62. That the time for payment for levies be a standard 14 days from conviction or release from prison with a discretion for the court to otherwise order. (4.5.7)

63. That the nature of the compensation levy be explained in the Victims Support Services brochure for victims to counter any misperception that the levy represents compensation for their injury or loss. (4.5.8)

### ***The Victims Register***

The Charter of Victims Rights provides that victims have the right to be advised on request of an offender's release from custody in cases of sexual assault or other personal violence. The Charter has not been formally adopted by the Tasmanian Parliament but aspects of it have been implemented. When the Issues Paper was released, the Victims' Register had just been established to create the ability to provide victims with release information. Some responses to the Issues Paper showed concerns in relation to the early stages of the development of the Victims' Register.

The Victims' Register is now well established in Tasmania and is an automated database that enables registered victims to be provided with broad range of information in relation to the sentence and release of the offender.

## Part 5: Parole

- (a) Consider and comment upon the legislative requirement that judges and magistrates state the non-parole period.
- (b) Consider the length of the minimum non-parole period.
- (c) Consider and comment upon the legislative requirement that the Parole Board take into account a Victim Impact Statement (VIS) provided to it and not make a decision until a victim whose name has been entered on the Victims' Register has been given an opportunity to make a VIS.
- (d) Consider and comment upon the legislative requirement that the Parole Board publish its decisions.

Parole is a system of early, supervised release. Models of parole vary between jurisdictions. In Tasmania the current model provides that offenders serving sentences of 12 months or more are normally eligible for release after six months or one-half of the sentence, whichever is longer. However, this will not be the case where the sentencing judge has extended the non-parole period or ordered that the offender is not to be released on parole. Legislative changes in 2002 mean that a failure by the sentencing judge to specify a non-parole period also makes an offender ineligible for parole. The release of prisoners eligible for parole is decided by the Parole Board.

Parole has clear economic benefits. It reduces the prison population and the costs of supervision are less than the costs of incarceration. It can be argued it offers offenders an incentive to rehabilitate. Although it cannot be confidently claimed that parole prevents recidivism, there is some evidence to suggest that it has a marginally positive effect.

### Retention of discretionary parole

The Institute supports the retention of the current model of parole in Tasmania. Discretionary parole, rather than automatic parole release, provides offenders with an incentive to address offending behaviour by participating in rehabilitation programs, it assists with the management of offenders in custody by providing an incentive for good behaviour and it encourages offenders to develop post-release plans.

### Recommendation

64. The Institute supports the current parole model in which parliament sets the minimum non-parole period, the court determines the parole eligibility date and the Parole Board determines the date of release for parole eligible offenders. (5.1.11)

### *Stating the non-parole period as part of the sentence*

Prior to the 2002 amendments to the *Parole Act 1975*, it was quite rare for courts either to make an order that the offender not be eligible for parole or to extend the statutory non-parole period. A primary purpose of requiring the judge to state a non-parole period was 'truth in sentencing'. In other words it was aimed at transparency by requiring the judge to be more explicit about when an offender was eligible for release. It has also had the result that judges have increased the non parole period beyond the minimum period much more often than prior to the amendments. Prior to the amendments, there was a *prima facie* presumption in favour of a non-parole period of half the sentence. This presumption has gone and non-parole periods have increased as a percentage of the operative sentence.

### **Retention of requirement to stipulate non-parole period**

The Institute supports the requirement for a judge or magistrate to stipulate the non-parole period at the time of the sentence on the grounds that a failure to do so confuses the public and the victim about what the sentence means in practice.

### **Re-instate prima facie right to apply for parole after half the sentence**

The Institute is concerned that there appears to be inconsistency between the judges in the way in which they approach fixing the non-parole period. The Institute considers that legislation should re-instate the *prima facie* right of a prisoner to apply for parole after half the sentence has been served by inserting in s 17 a provision to the effect that the court shall state a period that is one-half of the period of the sentence unless it is satisfied that the circumstances it is required to consider in s 17(4) require an extension of that period or a no non-parole period to be set.

### **Reasons to be given in all cases**

There are clear drafting problems with the *Sentencing Act 1997*, s 17. The Institute considers it incongruous to require reasons when a judge orders that an offender is not eligible for parole but not to require reasons when parole is denied because no non-parole period is set. The Institute recommends that s 17(7) be amended so that it requires reasons to be given for specifying a non-parole period and for denying parole for all sentences of imprisonment in excess of 12 months. It is also recommended that a court be required to state that an offender is not eligible for parole when parole eligibility is denied by the court.

### **Recommendations**

65. In the light of the inconsistencies that have emerged between judges in sentencing practices relating to the extension of non-parole periods and the denial of parole eligibility, the Institute recommends that s 17 be amended to include a requirement that the court state a period that is equal to the statutory non-parole period unless it is satisfied having regard to the circumstances that it is required to consider in s 17(4) that an extension of that period is necessary or parole should be denied. (5.2.17)

66. It is recommended that s 17(7) be amended so that when a sentence of more than 12 months imprisonment is imposed and an order is made under s 17(2)(a) that an offender is not eligible for parole or an order is made under s 17(2)(b) setting a non-parole period, reasons for such an order are given. (5.2.18)

67. It is recommended that a court be required to state that an offender is not eligible for parole when parole eligibility is denied by requiring a court to make an order under s 17(2)(a) or (b). (5.2.18)

### ***Should the statutory non-parole period be extended in Tasmania?***

#### **No alteration to statutory non-parole period**

The minimum period that a prisoner must serve before being eligible for parole varies between jurisdictions. The Institute acknowledges that there is some support for increasing the statutory non-parole period from 50 per cent of the sentence and that a number of other jurisdictions have done so or have introduced variable proportions depending on offence type and sentence length. The Institute's view is that there is no need to increase the statutory non-parole period beyond half of the period of the operative sentence. The operative sentence means the period of imprisonment that is not suspended. The requirement that judges are to address the non-parole period in every case sufficiently addresses concerns that a statutory non-parole period of one half of the sentence fails to recognise the gravity of the offence. If the judge is of the view that the nature and

circumstances of the offence warrant increasing the non-parole period, this can be done. It is also noted that generally, where statutory non-parole periods have been increased, this has not been done with the aim of increasing the *length* of prison sentences. The primary aim has been to promote truth in sentencing by ensuring that prisoners spend a greater *proportion* of the pronounced sentence in prison. This has meant that adjustments have to be made to sentences imposed to decrease their length.

#### **Recommendation**

68. The Institute does not recommend increasing the statutory non-parole period in the *Corrections Act 1997* (Tas) s 68(1) and the *Sentencing Act 1997* (Tas) s 17(3) beyond half of the period of the operative sentence.<sup>8</sup> (5.3.10 – 5.3.12)

#### ***Victim Statements***

Amendments to the *Corrections Act 1997* (Tas) s 72, provide a mechanism for informing victims of an offence that the release of the offender is to be considered by the Board and that they may provide a written statement to the Board. Victims whose names appear on the Victims Register managed by Victims Support Services are invited to provide a victim statement. The statement is described as one that gives particulars of any injury loss or damage suffered by the victim as a direct result of the offence and describes the effects on the victim of the commission of the offence.

The Issues Paper suggested the provision of a victim impact statement to the Parole Board in the terms of s 72B of the *Corrections Act* was inappropriate and incompatible with the basis of parole decisions and the purposes of parole. It could mislead victims because it suggests parole is a re-sentencing exercise, which it is not. However, a victim's statement concerning the prisoner's release and fears in relation to it are relevant to the Board's deliberations. The Institute's initial concerns that providing victim statements to the Board which focus on victim impact may lead victims into thinking that parole is a re-sentencing exercise which allows the Board to deny parole on the basis of past or ongoing impact of the offence on the victim does not seem to have created problems in practice.

#### **Amendment to Corrections Act 1997**

The Institute still considers that the *Corrections Act 1997* (Tas) s 72(2B)(b) and s 72(4) should be amended to reflect the kinds of information about protections of victims that would be useful to both the Board and victims. The Institute acknowledges that both what the victim is told by Victim Support Services or the Victims of Crime Services and what the Parole Board says in its reasons are likely to mean much more to victims than the terms of s 72(2B) of the *Corrections Act 1997* (Tas). It also acknowledges the importance of symbolic reasons for providing information about victim impact as well as instrumental reasons. Nevertheless, it recommends that s 72(2B)(b) be amended to better reflect the role of the statement in a Board's deliberations by adding an additional sub-paragraph referring to the 'matters relevant to the risk of the offender re-offending and the sorts of conditions which should be imposed on any parole order in relation to contact with the prisoner.'

#### **Recommendation**

69. The Institute recommends that the *Corrections Act 1997* (Tas) s 72(2B)(b) be amended to better reflect the role of the victim statement in a Board's deliberations by adding an additional sub-paragraph referring to the 'matters relevant to the risk of the offender re-offending and the sorts of conditions which should be imposed on any parole order in relation to contact with the prisoner.' (5.4.7- 5.4.9)

<sup>8</sup> Operative sentence is the term used in the *Corrections Act 1997* (see definition in s 3) – it means the period of imprisonment that is not suspended.

## ***Publication of Parole Board Decisions and open hearings***

### **Need to publish Parole Board decisions**

The *Corrections Act 1997* (Tas) requires the Parole Board to publish reasons for making a parole order and to give a copy of those reasons to any victim who has provided a victim statement to the Board. However, this does not appear to be happening in all cases. The provisions in relation to publication of the Board's decisions improve the accountability of the Board and the transparency of the criminal justice system. The Institute recommends that Parole Board decisions should be published on the Parole Board's website.

### **No open hearings**

Another way of ensuring accountability and transparency of Parole Board decisions would be to make Parole Board hearings open to the public. Hearings are not currently open to the public in Tasmania. The Institute is of the view that opening parole board procedures is not justified. It agrees that this would increase formalities, prolong hearings and would not assist in the resettlement of offenders. The interests of transparency and improving public confidence in parole would be better served by publishing reasons for granting parole.

### **Recommendations**

70. The Institute recommends that Parole Board decisions should be published on the Parole Board's website. (5.5.3)

71. It does not recommend that Parole Board hearings should be open to the public for the reasons given in para 5.5.5.

## **Part 6: Sexual offenders**

Consider whether the protection of society requires legislative change to the *Sentencing Act 1997* (Tas) and the *Youth Justice Act 1997* (Tas) in relation to sentencing sexual offenders

At the request of the Attorney-General, in December 2006 the terms of reference of the sentencing project were amended to include consideration of whether the protection of society requires legislative change to the *Sentencing Act* and the *Youth Justice Act* in relation to sentencing sexual offenders. The Institute has approached the issue referred to it by the Attorney-General in four steps:

- (1) by attempting to address the general question of whether current sentencing practices for rape and sexual offences in Tasmania are appropriate;
- (2) by asking whether the protection of society justifies special measures for sex offenders;
- (3) by reviewing sentencing legislation in other jurisdictions which aims to both protect society against sex offenders and to improve public confidence in the criminal justice system's response to sex offending;
- (4) by outlining an approach to address the criticism from some quarters that sentences for sex offenders are too lenient.

### ***Are current sentencing practices for rape and sexual offences appropriate?***

#### **Sentences for one and two counts of rape have reduced but there is no clear answer about appropriateness**

Trying to determine if current sentencing practices for rape and sexual offences in Tasmania are appropriate is difficult. Relying on public outcry or media criticism of isolated cases is an unreliable guide of informed public opinion. Examining the sentencing ranges for a particular offence is an advance on this but there are problems in deciding what is an appropriate range of sentences for any particular offence. Deciding an appropriate sentencing range for rape in particular is difficult because doing so requires an intuitive judgment about what rape is worth and what rape is worth in comparison with other crimes. In theory, comparisons with average sentences imposed in other jurisdictions could assist but this can be misleading because of the many differences between jurisdictions in custodial sentences, release practices and counting rules for sentencing statistics. Moreover, on some measures the sentence may be more severe and on others less severe. The Institute is unable to answer the question whether current sentencing practices for rape and sexual offences are too lenient. Examining the median sentence for one and two count of rape suggests that sentences have become more lenient.

#### **Need for further research**

The Institute suggests that what is an appropriate sentencing level for rape and other sexual offences is an issue that needs further consideration. This could be done in a number of ways. It could be made a focus of investigation in the University of Tasmania's jury sentencing study which is exploring the use of jurors as a means of ascertaining informed public opinion. This should be supplemented by further research by way of either a deliberative poll or focus groups. Consideration could be given to including a range of participants in focus groups, such as victim representatives, lawyers, and other experts with an interest in the issue. Another Australian study presents opportunities to obtain informed public opinion about sentencing in Tasmania. This sentencing project, which is funded by the Australian Research Council, proposes to use both representative surveys with sentencing vignettes and focus groups to elicit public opinion about sentencing issues. It is suggested that efforts be made to include Tasmania in the later stages of the study.

#### **Youth must remain a mitigating factor**

The Institute rejects the suggestion that youth should cease to be a mitigating factor. All Australian jurisdictions have accepted that special considerations apply in the sentencing of youthful offenders, even in cases as serious as rape. The special approach to the sentencing of children is based upon public interest as well as mercy. The Institute also supports the existing arrangements for determining where sentences of imprisonment are served.

#### **Recommendations**

72. The Institute recommends that the issue of whether current sentencing practices for sexual offences are appropriate should be further investigated by using a range of methods including specially designed focus groups and deliberative polls to build upon current research studies that are investigating this issue. (6.2.12)

73. The Institute recommends retaining the common law principles in relation to the sentencing of juvenile offenders and does not recommend altering the current position which allows the Director of Corrective Services to transfer juvenile offenders to Ashley Detention Centre. (6.2.13 – 6.2.14)

### ***Does the protection of society justify special measures for sex offenders?***

Currently there are two special sentencing measures that apply to sex offenders in Tasmania, namely sex offender registration orders and dangerous offender declarations.

#### **Sex offender registration orders**

An offender who is subject to reporting obligations under a sex offender registration order must provide the Registrar with a list of personal details, including address, names of children with whom he or she has regular unsupervised contact, name and place of employment, including voluntary work and practical training, club or organisation membership or affiliation if children participate, and vehicle registration details. The offender must notify of changes and interstate travel, as well as providing an annual report.

#### **Dangerous offender declarations**

Under the *Sentencing Act 1997* (Tas) s 19, a dangerous offender declaration can be made. Such offenders receive an indeterminate sentence if it is warranted for the protection of the public. Sexual offenders who are declared dangerous because they are a continuing danger to the community are held in custody until the court is satisfied that they no longer constitute a danger. In the Institute's view, very persuasive arguments for creating further exceptions to the principle of proportionality would be needed to justify the imposition of any further preventive detention measures.

#### **Sex offenders not more likely to re-offend than other offenders**

Research evidence suggests that special provisions targeting sex offenders cannot be justified on the grounds that sex offenders are more likely to re-offend than other categories of offenders. There is no evidence that this is so.

### ***Sentencing options for sex offenders***

#### **No mandatory minimum penalties**

The Institute's view is that mandatory minimum penalties for rape or sexual offences are inappropriate. They can lead to injustice because of inflexibility, they redistribute discretion so that the (less visible) decisions by the police and prosecuting authorities become more important, they lead to more trials as offenders are less likely to plead guilty and there is little basis for believing that they have any deterrent effect on rates of serious crime.

<b>Recommendation</b>
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74. The Institute opposes the use of mandatory minimum penalties for sex offenders. (6.4.5)
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#### **No standard non-parole period of sex offenders**

'Standard non-parole period' is defined as the 'non-parole period for an offender in the middle range of objective seriousness. It differs from the statutory minimum non-parole period discussed in Part 5. The parole scheme in Tasmania applies once the judge has determined the appropriate sentence for a particular offender. In contrast, a standard non-parole operates in relation to particular offences by identifying a reference point to guide sentencing discretion for the non-parole period component of a sentence for specific offences in addition to setting the maximum penalty. Standard non-parole periods

for sexual offences could be one way of addressing the perception of lenient sentencing for sex offences and the apparent decline in sentencing severity for one and two counts of rape. However, this is not an approach the Institute recommends.

While research shows that public knowledge of sentencing practices is woeful and that the public consistently underestimate the severity of sentencing practices, there is no reason to believe that specifying standard non-parole periods in legislation will have any impact on improving public understanding of, and public confidence in, sentencing practices. Standard non-parole periods also restrict judicial discretion and can lead to injustice in individual cases. Thirdly, even if only used for sexual offences, there will be problems in determining what should be the standard non-parole period for rape, aggravated sexual assault, indecent assault and maintaining a sexual relationship with a young person. There are also difficulties in relation to sentences for multiple offences. Finally, the offence of maintaining a sexual relationship can cover such a wide range of offending, from three instances of indecent assault to multiple counts of rape, that a standard non-parole period for such an offence would require so many departures from the standard that it would be meaningless and no more helpful than current sentencing statistics.

### **Recommendation**

75. The Institute does not recommend the introduction of standard non-parole periods for sex offences. (6.4.8)

### **No additional provisions for longer than proportionate sentences or indefinite sentences for sex offenders**

The Institute does not support either enacting provisions to allow courts to impose longer than proportionate sentences for sex offenders or the introduction of indeterminate sentences specifically for sex offenders. Tasmania already has dangerous offender provisions which allow courts to impose a disproportionate sentence to protect the public. A sentence imposed under dangerous offender legislation is indeterminate.

### **No need for an additional post-sentence detention scheme**

Concern with how to manage the small number of high risk offenders whose term in prison is about to end has led some Australian states to introduce legislation to enable offenders to be supervised in the community or held in further detention after their sentence has ended.

The Institute acknowledges that it is possible to argue that the greater good of protecting the public from a real risk that an offender who has caused considerable harm by offending sexually justifies a scheme which allows preventive detention or supervision. However, sex offenders are currently subject to sex offender registration orders on their release from prison and they can be subject to a dangerous offender declaration if they have a prior conviction for rape or indecent assault and such an order is necessary to protect the public from harm. The Institute notes that dangerous offender applications under s 19 of the *Sentencing Act 1997* can be made during a term of imprisonment as well as at the same time that the term of imprisonment is imposed. In effect, Tasmania already has a post-sentence preventive detention scheme.

The Institute has given consideration to the issue of whether there is a need to change the trigger conditions for a dangerous offender declaration or to extend the measure to give the court the option of imposing supervision rather than detention. It is not persuaded of the need to change the trigger conditions by abandoning the requirement for a prior conviction for an offence of violence, for example. Dangerous criminal declarations should continue to be confined to exceptional cases.

The Institute acknowledges that in some cases it may be appropriate to make an application for a dangerous offender declaration during an offender's term of imprisonment, but is of the view that

where possible the application should be made at the time of sentence. Currently the legislation provides that a dangerous offender application has to be made to the judge before whom an offender is convicted or brought up for sentence after being convicted. This could create problems if the sentencing judge has ceased to hold office during an offender's term of imprisonment. It is therefore recommended that s 19 of the *Sentencing Act 1997* be amended to insert a provision to the effect that if the sentencing judge has ceased to hold office or in other special circumstances, another judge may consider an application to declare an offender a dangerous criminal.

### **Government to consider supervision in community under dangerous offender legislation**

The option of ordering supervision as an alternative to detention is something that could be considered by the government. This would entail amendments to s 19 of the *Sentencing Act 1997* and would of course have significant resource implications.

#### **Recommendations**

76. The Institute does not recommend the introduction of provisions for post-sentence detention and supervision orders on the grounds that existing provisions for preventive detention and monitoring of released sexual offenders are adequate. The *Sentencing Act 1997* (Tas) s 19 already provides for dangerous criminal declarations, which can be made at any time during a sentence of imprisonment of an offender who is eligible for such an order. To add a new and separate set of provisions for post sentence detention would be unnecessary duplication and confusing. (6.4.25)

77. The Institute does not recommend that the trigger conditions for a dangerous offender declaration should be extended. However, it does suggest that consideration be given to amending s 19 so that courts have the option of making a supervision order after the end of the offender's sentence of imprisonment as an alternative. (6.4.26)

78. To ensure that an application for a dangerous criminal declaration can be heard when the sentencing judge is not available, it is recommended that sub-section (1A) be inserted into s 19 to provide that if the sentencing judge has ceased to hold office or in other special circumstances, another judge may hear an application for a dangerous criminal declaration. (6.4.27)

### **No sexual offender predator laws**

A number of US states have sexual predator laws which allow civil commitment procedures to detain sex offenders beyond the expiry of an offender's sentence. This is a procedure that allows for the detention of sex offenders at the end of their sentence within the mental health system. There are six reasons for the rejection of this model: (1) sex offenders do not clearly fit within the boundary of the mental health system; (2) use of civil commitment merely transfers preventive detention from criminal to civil system; (3) inpatient medical model may undermine treatment efforts for sex offenders who do not have a mental illness; (4) it may violate human rights; (5) diverts focus on the potential for restorative justice alternatives; (5) significant resource implications that may limit the availability of resources for the treatment of individuals with mental illnesses who have not offended.

#### **Recommendation**

79. The Institute does not recommend the introduction of civil commitment procedures to detain sex offenders beyond the expiry of an offender's sentence for the reasons given in para 6.4.29.

## ***Sex offender treatment and chemical castration***

### **Government should continue to fund sex offender treatment programs**

There is now considerable evidence that some forms of treatment are effective for sex offenders. The Institute recommends that the government continues to fund sex offender treatment programs both in an out of prison and that, in particular, more resources be devoted to the follow-up of offenders after their release whilst on parole.

### **Chemical castration should be available to offenders who consent as part of their treatment program**

Drug treatments are sometimes used in the treatment of sex offenders. The Institute does not support making chemical castration compulsory – either as a mandatory order if the necessary trigger conditions are satisfied or by giving courts a discretion to make a sentencing order which compels the offender to submit to drug treatment. However, if an offender chooses to have this form of treatment and it is medically indicated and appropriate for the offender, it should be made available by correctional authorities as part of an offender’s treatment program.

#### **Recommendations**

80. The Institute recommends that for the protection of the public the best possible evidence-based sex offender treatment programs should be made available in the prison system and in the community and that prisoners on sex offender treatment programs should be receive follow-up treatment and support after their release. (6.4.30)

81. The Institute does not recommend that chemical castration should be a sentencing option or a condition of a sentencing order but when appropriate it be made available to offenders who consent as part of their treatment program. (6.4.32)

### ***What is the appropriate response to the public perception that sentences for sex offenders are too lenient?***

It may be that while the protection of society cannot be shown to require measures in addition to dangerous offender declarations and sex offender registration orders such as extended detention orders, longer than proportionate measures or mandatory penalties, the existing penalties for sex offenders are regarded as too lenient on the grounds that they do not adequately reflect the seriousness with which the public views such crimes. To put this in another way, it is not a question of giving courts the power to impose penalties for sex offenders that infringe the principle of proportionality. Rather it is a question of whether existing penalties for sex offenders are disproportionately lenient – that they fail to adequately denounce such offences or to recognise the seriousness of such offences and the culpability of those who commit them.

### **Need for further research to determine whether current sentencing practices are too lenient**

The Institute has been unable to answer the question whether current sentencing practices for sex offences are too lenient. This is an issue which requires further research. It has been suggested that this could be done as an extension of the University of Tasmania's jury sentencing study and Mackenzie's ARC research (see para 6.2.12). In Part 7, the Institute recommends that a Sentencing Advisory Council be established to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. Exploring the issue of the appropriate sentencing levels of sexual offences is a matter that could be undertaken by such a body taking into account the research findings from the Jury Sentencing Study and the ARC study.

#### **Recommendation**

82. The Institute recommends that the issue of the appropriateness of sentencing patterns for sexual offenders be referred to the proposed Sentencing Advisory Council. (6.5.2)

## **Part 7: Role of the community**

- (a) Consider the level to which the objective in section 3(f) of the Sentencing Act [of promoting public understanding of sentencing practices and procedures] has been met and make recommendations as to how the public can be informed of the sentencing process.
- (b) Consider how community attitudes towards sentencing should be ascertained.
- (c) Examine whether any mechanism could be adopted to more adequately incorporate community views into the sentencing process.

One of the stated purposes of the *Sentencing Act* is to 'promote public understanding of sentencing practices and procedures.' While consolidation of sentencing legislation may assist to promote public understanding of sentencing practice and procedure, at most it is a preliminary step.

### ***The need for a well-informed public***

Robust evidence of public opinion about sentencing in Tasmania is limited and research on public knowledge of sentencing and criminal justice issues scanty. However, the limited research that exists suggests that the Tasmanian public is probably as uninformed as is the public in other jurisdictions. Low levels of public knowledge about crime and sentencing are a matter of concern because there is strong international evidence that dissatisfaction with sentencing practice is due, at least partly, to a number of aspects of public misperception and misinformation.

### ***How should the public be better informed about sentencing?***

In light of the evidence that a lack of public confidence in the criminal justice system and punitive attitudes are linked with misperceptions about crime and sentencing patterns, improving public knowledge of crime and sentencing is a priority.

### **Government funding for the publication of crime and sentencing information**

The Institute's view is that there needs to be made available simple factual information about crimes and sentencing indicating the range of sentences handed down in the Supreme Court and the Magistrates Court each year for specific offences in such a way as to communicate the 'going rate' for specific sorts of crime. In addition to sentencing data, information on crime rates should also be made more

accessible. The Institute's view is that there are a number of deficiencies in sentencing data that need to be addressed. First, there is no available data on sentencing patterns in the Magistrates Court. There are also limitations in the Supreme Court sentencing database.

#### **Recommendation**

83. The Institute recommends that the government allocate funding for the publication of easily accessible and digestible general crime and sentencing information including annual sentencing statistics to promote public understanding of crime and sentencing matters. This would also remedy the information deficit in relation to sentencing practices in magistrates' courts and promote consistency. (7.1.18)

#### **The continuation of and the development of additional public education campaigns, printed booklets and sentencing workshops**

The Institute's view is that a variety of approaches is needed to improve public information about sentencing. Existing approaches such as sentencing workshops should be continued. While the Institute is aware that the provision of accessible information by booklet and on websites has limitations, it supports the use of a sentencing information booklet and notes that the Judicial Conference of Australia' booklet 'Judge for Yourself' is already available in the Supreme Court and electronically on the Supreme Court website. The Institute also recommends reviewing the results of the study that is currently underway in Tasmania which is exploring the use of jurors both as a means of educating the public about sentencing matters and using them as a source of public opinion. Preliminary results indicate that jurors do take an interest in the sentencing outcome and many discuss it with friends and family.

The Institute agrees with the Justice Department submission that rather than piecemeal and unrelated efforts to improve public knowledge of crime and sentencing matters, a comprehensive and carefully targeted public education campaign may be more effective. However, resources for this will always be an issue.

#### **Public relations and court media officers not a priority**

Media reporting does play a critical role in the development of public opinion on sentencing. However, the Institute is not convinced that the appointment of a media liaison officer is a priority and recommends instead the strategies listed below as a starting point.

#### **Recommendation**

84. The Institute recommends that a number of strategies are necessary to improve public education about crime and sentencing including:

- continuation of sentencing workshops and making them available on a more regular basis by calling on more judges and magistrates to assist with them; (7.1.25)
- updating and expanding the materials for the You be the Judge multi-media package to ensure that it is useful and relevant for school and community groups ; (7.1.25)
- ensuring that the 'Judge for Yourself' booklet is widely available or a booklet that includes data about crime trends as well as sentencing information; (7.1.26)
- reviewing the outcome of the Jury Sentencing Study to see if it supports supplying COPS and an information booklet to jurors as a regular and ongoing procedure. (7.1.27)

### **Provision of legislative statement of purposes of sentencing**

As noted, the *Sentencing Act 1997* (Tas) contains little detail in relation to sentencing principles and goals. The Institute is somewhat sceptical of the educative value of including a list of purposes of sentencing in the *Sentencing Act*. Legislation may be easily accessible by members of the public but the extent to which the public access legislation to become better informed is open to question. However, there are no disadvantages in listing the purposes and it could be seen as having some value as a symbolic attempt to communicate with the public and improve the transparency of sentencing goals, particularly as the Act currently fails to acknowledge that retribution and restoration are goals of sentencing.

#### **Recommendations**

85. The Institute recommends that the *Sentencing Act 1997* (Tas) include separate sections for the purposes of the Act and the purposes of sentencing.

86. In the *Sentencing Act 1997* (Tas) s 3, para (b) and (e) should be replaced with the following:

- (b) to provide the courts with the purposes of punishment;
- (e) to preserve the authority of the law and to promote respect for the law

87. It recommends that to better promote the interests of victims and to complement the recommendations in Part 4, that the purposes of sentencing include restoration (reparing the harm caused by the offence and restoring the relations between the offender, the victim and the community).

88. The purposes of sentencing should provide:

A court can impose a sentence on an offender for one or more of the following purposes only:

- (a) to ensure that the offender is punished justly for the offence;
- (b) to deter the offender and others from committing the same or similar offences;
- (c) to promote the rehabilitation of the offender;
- (d) to protect the community by limiting the capacity of the offender to re-offend;
- (e) to denounce the conduct of the offenders; and
- (f) to promote the restoration of relations between the community, the offender and the victim. (7.1.35 – 7.1.36)

### **No statutory list of sentencing factors**

The Institute has considered whether the *Sentencing Act 1997* should incorporate a list of matters relevant to sentence. While the Institute has recommended a legislative statement of the purposes for which a sentence may be imposed, a legislative list of factors that should be taken into account is more problematic for a number of reasons. The common law is clear about the factors that are relevant and not relevant. However, it is more problematic to develop a list of factors as there are issues about whether factors should be classified as aggravating or mitigating, whether certain factors should be mandatory or discretionary and how the list should be structured. There are also dangers in such a list. Politicians can be subjected to public pressure to add and remove matters from the list as part of a tough on crime agenda. The Institute is of the view that the relevant factors are well known to judicial officers and the matter is best left to the common law which is not in need of restatement. The Institute is of the same view in relation to giving statutory recognition to sentencing principles.

**Recommendation**

89. The Institute does not recommend a legislative listing of common law sentencing principles or the relevant factors that should be taken into account in imposing sentence on the grounds that such legislative listing is unnecessary, complex and has dangers. (7.1.44)

***Ascertaining community attitudes towards sentencing***

The importance of ascertaining informed public opinion as part of the development of appropriate policies directed at crime and sentencing cannot be over-stated. Politicians and judicial officers should not alter sentencing policies and practices in response to populist calls for harsher penalties that are based on people's perceptions of crime levels and sentencing severity. Appropriate decisions can only be made by acting on informed public opinion. Ways of ascertaining public opinion are critically evaluated in Part 7 of this report.

**Need for research to ascertain informed public opinion**

Media polls are not an appropriate way of ascertaining informed public opinion. In order to understand the nature of informed public opinion, it is necessary to have a combination of large scale representative surveys combined with the qualitative aspects of the deliberative focus groups. There are currently two research projects underway which have the potential to go some way to providing both public knowledge of crime and justice issues and public opinion on sentencing in Tasmania. The Jury Sentencing Study is a Tasmanian based study funded by the Criminal Research Council and preliminary findings confirm the potential of this approach to ascertain public opinion about sentencing. The second project is an Australian Research Council study of public opinion which combines a large scale representative survey with a focus group approach. Only Stage 1 of this study includes Tasmania. However, by the provision of additional funding, the opportunity exists to extend this project to Tasmania in Stage 2 and the focus groups. The Institute recommends that this be done.

Public opinion research is a costly exercise. However, when policy decisions purport to be based on public opinion it is essential that it be done. The criminal justice system (and therefore politicians and judges) should be responsive to the community it was designed to protect. But being responsive to the community means responding to informed public judgment not mass public opinion. For these reasons the Institute recommends that priority be given to public opinion research as a means making the criminal justice system properly responsive to the public.

**Recommendation**

90. The Institute emphasises the importance of research which aims to ascertain informed public opinion. It therefore recommends that priority be given to allocating resources to public opinion sentencing research in Tasmania. In particular it is recommended that the ARC research team on the Sentencing and Public Confidence project be invited to conduct focus groups in Tasmania with appropriate financial support. (7.2.12)

***Incorporating community views into the sentencing process***

It is generally agreed that governments, policy makers and judicial officers should have regard to informed public opinion on sentencing when enacting sentencing legislation, formulating policy, imposing sentence or giving appellate guidance on sentencing. New mechanisms are being developed to incorporate a public voice into the criminal justice system. Sentencing advisory bodies, councils, panels and commissions with a mandate to incorporate public opinion in their advice to policy makers and judges are the obvious example of such a mechanism. More traditional means of taking public opinion into account occur by judges responding to public opinion in their sentencing decisions and by parliament setting and amending maximum penalties to reflect public views of offence seriousness.

### **Judges reflect informed public opinion**

Case law demonstrates that public opinion, which is to be factored into sentencing decisions, is informed public opinion, and the task of ascertaining this is delegated to the judge. Taking into account the restrained moral sense of the community, opinion which is rational and balanced will exclude the views of bigots, racists and other extreme views. However, it leaves open the question of how judicial officers are to discover what is the true nature of informed public opinion, legitimate community expectation or the restrained moral sense of the community.

### **No new statutory maximum penalties for crimes**

Statutory maximum penalties set by parliament for particular offences are intended to reflect the relative severity with which the community perceived particular offences. They provides a legislative view of the gravity of the offence. In Tasmania almost all summary offences have their own statutory maximum but this is rare for indictable offences. Instead of providing a separate maximum penalty for each offence, the Code provides an overall maximum term of imprisonment of 21 years for offences dealt with in the Supreme Court and leaves it to the courts to place the various crimes into different categories of gravity.

A statutory maximum penalty often bears little relationship to the usual sentence for a particular crime as the maximum penalty must be set very high to allow for the gravest possible crime of that nature. At most, the maximum penalty reveals the relative seriousness of particular crimes. As a method of taking public opinion into account, it is the view of the Institute that a statutory maximum is ineffective.

#### **Recommendation**

91. For the reasons outlined in para 7.3.10, the Institute does not recommend introducing a statutory maximum penalty for each crime in the *Criminal Code* to replace the general maximum in s 389 of 21 years.

### ***Guideline judgments and a sentencing advisory body***

Guideline judgments can provide a mechanism for taking public opinion into account. A guideline judgment is a judgment of an appeal court which goes beyond the facts of the particular case before it and suggests a starting point or range for dealing with variations of an offence. They are not intended to be construed rigidly but leave judges free to tailor the sentence to the facts of the particular case. A sentencing advisory body also provides a means for incorporating public opinion into the sentencing process by having members of the public on the body and by conducting public consultations. A sentencing commission or body and guideline judgments can together create a mechanism for providing community input into the judicial sentencing process. However, without guideline judgments, sentencing councils can still have a role in providing community input into sentencing policy as the Victorian Sentencing Advisory Council demonstrates. Conversely, guideline judgments have functions and advantages in addition to their potential as a mechanism for community input into the sentencing process.

### **There is a need for a sentencing advisory body**

Independently of the issue of guideline judgments, research undertaken by the Institute suggests that there is role for some kind of sentencing body. The following tasks have been identified in this report as important ones for tackling sentencing issues in Tasmania:

- the provision of accessible sentencing data for both the Supreme Court and the Magistrates Court which informs the courts and the public about what is happening in sentencing and may assist to address issues of inconsistencies in sentences in Magistrates Courts discussed in Part 1;
- the provision of accessible data on crime trends;

- the provision of information about recidivism rates, completion and breach rates in relation to conditional orders such as suspended sentences and community service orders; (3.10.4)
- reviewing procedures for breach of conditional orders; (3.12.3)
- gauging public opinion on sentencing;
- the co-ordination of strategies to educate the public on crime and sentencing issues;
- a feasibility study of day fines; (3.9.14-3.9.16)
- research on the value of VIS in Tasmania; (4.2.14)
- a community conferencing pilot for young adults; (4.3.5);
- a review of the administrative procedures associated with compensation orders; (4.4.21)
- a review of the appropriate penalty range for rape and sexual offences. (6.2.12)

If such a body were to be created, it should also have the following general functions:

- a media-liaison role on sentencing issues;
- to conduct research on sentencing matters;
- to consult with government departments and other interested persons and bodies as well as member of the general public on sentencing matters;
- to advise the Attorney-General on sentencing matters.

### **Recommendations**

92. The Institute recommends the creation of an independent statutory sentencing advisory council (the Sentencing Advisory Council) with a broad membership (of approximately 10 persons) drawn from persons with experience in community issues affecting courts, victim support or advocacy groups, judges and magistrates, academics in relevant disciplines, experienced defence and prosecution lawyers and those with experience in the operation of the criminal justice system. (7.3.36)

93. The primary role of the Sentencing Advisory Council should be to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. More specifically it should have the following functions:

- the provision of accessible sentencing data;
- the provision of accessible data on crime trends;
- gauging public opinion on sentencing matters;
- co-ordinating strategies to educate the public on crime and sentencing issues;
- conducting research on sentencing matters;
- consulting with government bodies, stakeholders and members of the public on sentencing matters; and
- advising the Attorney-General on sentencing matters. (7.3.36)

94. The Institute recommends that the proposed Council be supported by a full-time secretariat and a budget that can fund this and the outsourcing of some of its tasks and functions. (7.3.41)

**No support by judges or Director of Public Prosecutions for guideline judgments**

In theory the Institute believes there is a case for guideline judgments as a means of promoting consistency and providing a mechanism for community input into the sentencing process. However, it notes that such a proposal was opposed by the then Chief Justice, the then senior puisne judge and the Director of Public Prosecutions. In view of these objections, the Institute has come to the conclusion as that guideline judgments should not be recommended. However, the Institute recommends that, if the proposed Sentencing Advisory Council is established, the matter be reconsidered. The Council should be given some time, at least 12 months, to consolidate its operations before being given the task of reviewing the introduction of guideline judgments.

**Recommendations**

95. That guideline judgments should not be introduced at this stage in the absence of broad judicial and professional support for them from the legal profession. (7.3.46)
96. That, if a sentencing advisory council is established, after it has had the opportunity to consolidate its operations, it be requested to review the introduction of guideline judgments for magistrates and judges. (7.3.47)

## Part 1

# Sentencing Trends

Examine whether there has been a change in sentencing trends in Tasmania for major crimes and summary offences.

## 1.1 Introduction

### *What is sentencing?*

*1.1.1* Sentencing is the process by which people who have been found guilty of offending against the criminal law have sanctions imposed upon them in accordance with that law.<sup>1</sup> The sentence of the court is the most visible aspect of the criminal justice system's response to a guilty offender. While the courts are central to the sentencing process, they do not have sole responsibility for sentencing. The responsibility for determining the amount and nature of a sentence is shared by the legislature, the judiciary and the executive government. The legislature determines the types of sentencing options available to the courts and the amount of discretion available within those options for particular offences. Legislation places special limits on the sentencing powers of magistrates' courts and on courts dealing with juvenile offenders. Sentencing legislation also provides guidance to courts in relation to the use of some sanctions. But to a great extent, courts, and judges in particular, are left with a wide discretion to determine sentence. In deciding upon a sentence a judge or magistrate takes into account the seriousness of the offence, facts in relation to the offender, the offender's response to the charges, the aims of sentencing, sentencing principles and the range of sentences imposed for similar offences. The executive branch of government has a servicing role in relation to the sentence: that of giving effect to the sentence by administering prisons and community options. In addition the executive can modify the sentence by releasing offenders on parole, by granting remissions or pardoning the offender.

### *Evaluating sentencing*

*1.1.2* So although the courts do not have the sole responsibility for sentencing, it is the courts, the judges and magistrates who pronounce sentence in individual cases and it is their role which is the most visible. The pronouncement of sentence is the symbolic and public declaration of how society regards the offence and the offender, and how society should respond to this. In imposing sentence the courts represent the public interest. Given the public nature of sentencing it is essential that the sentencing process is a just and fair one. There are two main criteria by which the community will determine whether sentences are just and fair. First, the punishment imposed must be seen as *appropriate* – of 'sufficient severity that it is possible to say that a breach of the law, when detected, is attended by significant consequences'.<sup>2</sup> Secondly, sentences must be *consistent*. For sentencing to be seen as appropriate and consistent the sentencing process must be *transparent* and the public must be properly informed about the sentencing process. In addition the public must believe that judicial officers are *responsive* to public concerns.

<sup>1</sup> A Freiberg, *Pathways to Justice* (2002) 30, citing Victorian Sentencing Committee, *Report: Sentencing*, (1988) 15.

<sup>2</sup> Australian Law Reform Commission (ALRC), *Sentencing*, Report No 44 (1988) para 26.

1.1.3 In deciding upon an appropriate sentence, the judge or magistrate endeavours ‘to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be’.<sup>3</sup> Judicial discretion is regarded as essential to ensuring justice in the individual case so that there is flexibility for the sentencer to respond to the particular facts. Equally, consistency is essential. Like cases should be treated similarly and unlike cases differently. As Mason J of the High Court said in *Lowe v The Queen*:

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.<sup>4</sup>

1.1.4 Gleeson CJ stated the principle of consistency in the following way in *Wong v The Queen*:

All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in a like manner.<sup>5</sup>

1.1.5 Sentencing can never be uniform because of the vast range of factors to be considered when sentencing an offender with the consequence that it is unlikely that any two cases will be identical. For this reason a distinction is drawn between consistency in approach to sentencing and consistency in sentencing outcomes.<sup>6</sup> Consistency of approach requires courts to apply the same purposes and principles of sentencing, and to consider the same types of factors when sentencing.<sup>7</sup> It also requires that courts have regard to the collective wisdom of other judicial officers by treating the range of sentences that have been passed for a particular offence as a guide. Reference to purposes, principles and factors would be of little use unless viewed against the background of the scale of penalties usually imposed for a particular offence including the kinds of cases that pass the custody threshold. Consistency in outcome is concerned with the type and quantum of sentences imposed in similar cases. While it is said that consistency in approach should be the goal rather than consistency in outcomes because of the differences between cases, the two are related. Consistent outcomes in similar cases are more likely if a consistent approach is adopted and substantially different outcomes in similar cases may indicate differences in approach.

1.1.1 While consistency is regarded as an important value by the courts and as a consequence the importance of referring to sentencing statistics as a yardstick is acknowledged,<sup>8</sup> this is not to say that the courts do not and should not consciously alter the severity of sentences for a particular crime. If Parliament increases the maximum penalty for an offence, this is treated as a signal that courts should regard the offence more seriously and increase the severity of the penalty for the offence accordingly. Other reasons for change include increases in the incidence of an offence, which may be regarded as grounds for increasing the severity of the penalties for it, and changing public attitudes to a type of offence may justify the courts reviewing the penalty range for that particular offence.

1.1.2 Public dissatisfaction with sentencing appears endemic. Sentences are not, it seems, seen to be just and appropriate. Public opinion polls suggest sentences are inappropriate because they are not severe enough. There also appears to be a perception that sentences are becoming more lenient. There is also an issue of whether they are just. As is explained in Part 7, research demonstrates that public

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<sup>3</sup> *Webb v O’Sullivan* [1952] SASR 65, 66 (Napier CJ).

<sup>4</sup> (1984) 154 CLR 606, 610-611.

<sup>5</sup> (2001) 207 CLR 484, 591.

<sup>6</sup> See the New South Wales Sentencing Council’s discussion of this in *How Best to Promote Consistency in Sentencing in the Local Court*, 2005, 121-17.

<sup>7</sup> ALRC (2006), above n 2, 154.

<sup>8</sup> See K Warner, *Sentencing in Tasmania* (2<sup>nd</sup> ed. 2002) para 2.337.

opinion tends to be based on misperceptions about sentencing and crime patterns. How public opinion should be ascertained and misperceptions addressed will be discussed in Part 7. This Part seeks to answer the question of whether there has been a change in sentencing trends in Tasmania for major crimes and summary offences. As well as consistency over time, it also seeks to explore the issue of consistency between judicial officers. As explained above, consistency is a criterion of just and fair sentences and an important element of public confidence in sentencing.

## 1.2 Trends in the Supreme Court

*1.2.1* Assessing sentencing trends over time is not an easy task where data availability is limited and the jurisdiction is a small one. Differences in offence seriousness in different periods and differences in the definitions of crimes make any conclusions drawn from apparent trends extremely tentative. Nevertheless, an attempt has been made to examine trends in sentencing for the most common crimes. Given the relatively small numbers of sentences imposed by the Supreme Court for each offence, a year-by-year comparison for most offences was not possible. This was only attempted for assault and robbery.<sup>9</sup> For all other offences a comparison was made between three periods: usually 1978-1989, 1990-2000 and 2001- 2006. The first two periods correspond with data collected for the two editions of *Sentencing in Tasmania*.<sup>10</sup> The data for the third period was recorded from the Supreme Court's sentencing database for the purposes of this report. It was not possible to perform individual statistical tests on changes in the length of median custodial sentences, however, more global comparisons were possible looking at changes in the number of crimes for which there was no change in the median, an increase or a decrease over the periods. Changes in the percentage of custodial sentences for each of the crimes were also analysed.<sup>11</sup> For assault and robbery, where there were more sentences imposed, the sentencing trends by year were examined.<sup>12</sup>

### *Changes in the median sentence*

*1.2.2* Tables 1, 2 and 3 in Appendix A show the median sentences for each crime included in the table in the three periods. They show that the median sentence for some crimes remained the same, for others there were increases and for others, decreases. Because it was not possible to perform individual statistical tests on changes in the length of median sentence for each crime, statistical tests were performed to investigate whether there were significant differences between the percents of increase and decrease, both for total numbers and for crimes broken down by sentence length. This data is shown in Table 1. No significant differences were found, although it should be noted that these tests were not as sensitive as tests using the full data on individual sentences. In other words looking at changes in median sentences, no change was the most common outcome and the differences in the percentage increase and decrease were not significant.

<sup>9</sup> This data was analysed using Kendall's rank order correlation, two-tailed with a significance level of .05.

<sup>10</sup> K Warner, *Sentencing in Tasmania* (1990), and K Warner, *Sentencing in Tasmania* (2<sup>nd</sup> ed 2002). For some offences the periods were different – e.g. for stealing and burglary data collected for the earlier period was for 1983-1989 and for burglary in the latter period it was 1994-2000.

<sup>11</sup> The differences in percents were assessed using chi squared tests where numbers were sufficient and Fisher's exact test otherwise.

<sup>12</sup> Burglary would seem to be another obvious choice for a year-by-year comparison of trends but changes to the boundaries between burglary and aggravated burglary made this difficult.

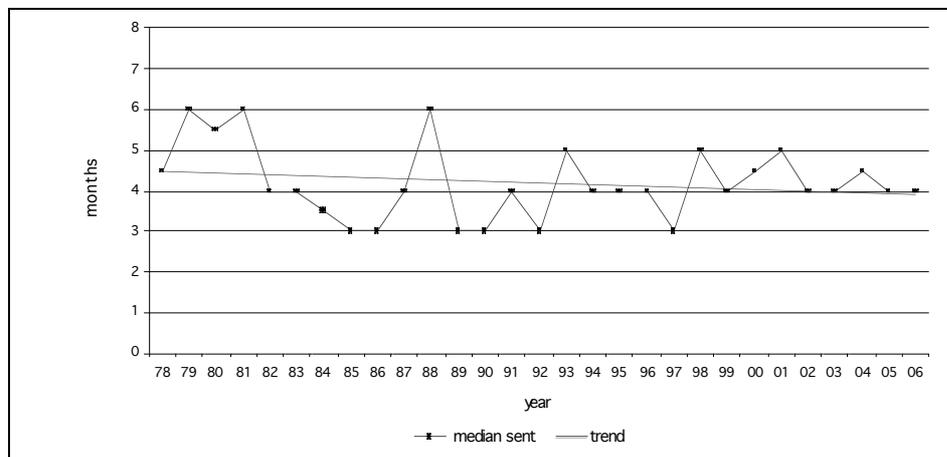
**Table 1: Numbers of crimes for which there was a decrease, no change, or an increase in median sentence between the periods**

Change in median sentence		Change 78-89 to 90-00			Change 90-00 to 01-06		
		<1 year	1 year+	Total	<1 year	1 year +	Total
Decrease	count	7	4	11	6	9	15
	percent	33%	20%	27%	30%	38%	34%
No change	count	11	4	15	10	7	17
	percent	52%	20%	37%	50%	29%	39%
Increase	count	3	12	15	4	8	12
	percent	14%	60%	37%	20%	33%	27%
Total	count	21	20	41	20	24	44
	percent	100%	100%	100%	100%	100%	100%

**Offences against the person**

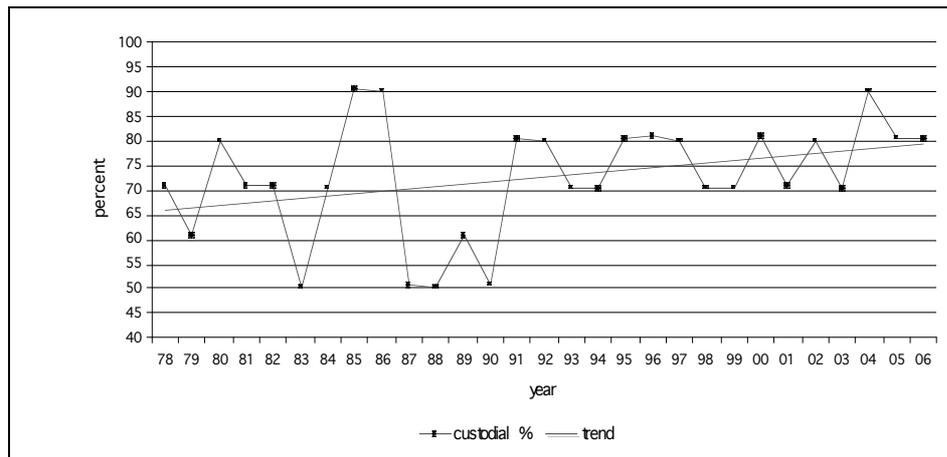
1.2.3 Sentencing patterns for the most common (non-sexual) offences against the person are shown in Table 1 of Appendix A. The sentencing trends show consistent patterns for most offences against the person. In some cases there appears to be a trend for more severe sentences. For serious assaults contrary to ss 170 and 172 of the Criminal Code the median sentences tended to be higher in the second and third periods than the first and the proportion of custodial sentences also tended to be higher in the second and third periods. However, the increases in the proportion of custodial sentences are not significant. For assault contrary to s 184 of the Code, the median sentences were almost the same but the percentage of custodial sentences increased slightly for sentences of one count and for global sentences but again not significantly.

**Fig 1: assault (1 count), median sentences, Supreme Court, 1978-2006**



1.2.4 Figs 1 and 2 show the sentencing trends by year for assault over a 24-year period. Given the number of single count sentences (custodial and non-custodial) handed down in each of the years varied, some fluctuations in sentencing patterns are inevitable. Despite this, sentencing patterns appear quite stable. The median ranged from three months to six months but was usually between three months and five months. The proportion of custodial sentences was usually between 60 per cent and 90 per cent. Despite a slight trend upwards for sentences of assault in the later periods suggested by Table 1 in Appendix A, the year-by-year data indicates no statistically significant trends upward nor downwards in either the median sentence length or the use of custodial sentences for assault.<sup>13</sup>

<sup>13</sup> A Kendall’s rank-order correlation test (two-tailed) was used with a significance level of 0.05.

**Fig 2: assault (1 count), percentage custodial sentences, Supreme Court, 1978-2006**

### *Sexual offences*

*1.2.5* The median sentence for one count of rape has dropped from four years in the first period (1978-1989) to two years one month in the third period (2001-2006) and the median sentence for two counts is also lower in the second two periods compared with the first (see Table 2 in Appendix A). Non-custodial sentences for rape remain virtually unknown. The median sentence for one and two counts of indecent assault is also lower. On the face of it, this suggests sentencing has become more lenient for one and two counts of rape and indecent assault. However, changes in the definition of rape resulted in offences which were in the first period defined as indecent assault (such as non-consensual fellatio) being included in the definition of rape in the second and third periods and the more invasive kinds of indecent assault (such as digital penetration) being covered by aggravated sexual assault in the two later periods. Therefore one would expect the median for rape and indecent assault to be lower in the second and third periods. However, this does not explain the reduction in the median from the second to the third period.

*1.2.6* In contrast, for sexual intercourse with a young person the sentences imposed appear to have increased in severity, with higher median sentences and higher (although not statistically significantly higher) percentages of custodial sentences. The median sentence for maintaining a sexual relationship with a young person has also increased. Sentencing patterns for sexual offences are discussed in more detail in Part 6.

### ***Robbery, property offences and other offences***

1.2.7 For most property offences, the median sentence has hardly varied over the three periods analysed (see Table 3 in Appendix A).<sup>14</sup> Exceptions are global sentences for over 10 counts of burglary and sentences for setting fire to property. For more than 10 counts of burglary there was both an increase in the median and an increased percentage of custodial sentences which was statistically significant between the first and second periods. However, for under 10 counts sentencing patterns were stable.<sup>15</sup> For setting fire to property the decrease in the median sentence was off-set by an increase in the proportion of custodial sentences in the most recent period, however, this was not significant. While the median for one count of stealing was four months in each period, there was a significant increase in the percentage of custodial sentences in the second period, an upward trend which was maintained in the most recent period.

1.2.8 For trafficking in a prohibited plant and trafficking in a narcotic there appears to be a slight trend to shorter custodial sentences but less use of non-custodial orders.<sup>16</sup> The increase in the use of custodial orders was significant in the period 2001-2006.

1.2.9 As a result of amendments in the Code in 1988, robbery with violence was replaced with four separate crimes: robbery, aggravated robbery, armed robbery and aggravated armed robbery. Table 3 (in Appendix A) combines these categories of robbery (robbery all) as well as displaying armed and unarmed robbery separately from 1990. For robbery (all) it shows the median sentence and the percentage of custodial sentences increased in the second period with the median sentence dropping slightly in the third period. The increase in the percentage of custodial sentences in the second period was statistically significant. This data for armed robbery (including aggravated armed robbery) and unarmed robbery (robbery and aggravated robbery) between 1990-1995, 1996-2001 and 2002-2006 suggests that while sentencing may have become more severe for robbery overall, this is because sentencing for unarmed robbery has become harsher. Sentences for armed robbery have remained stable.

1.2.10 The trends by year for all robberies combined are shown in Figs 3 and 4. By reason of the small numbers, fluctuations are to be expected. The median ranged from 10 to 24 months and the percentage of custodial sentences was between 70 per cent and 100 per cent with no significant trends.

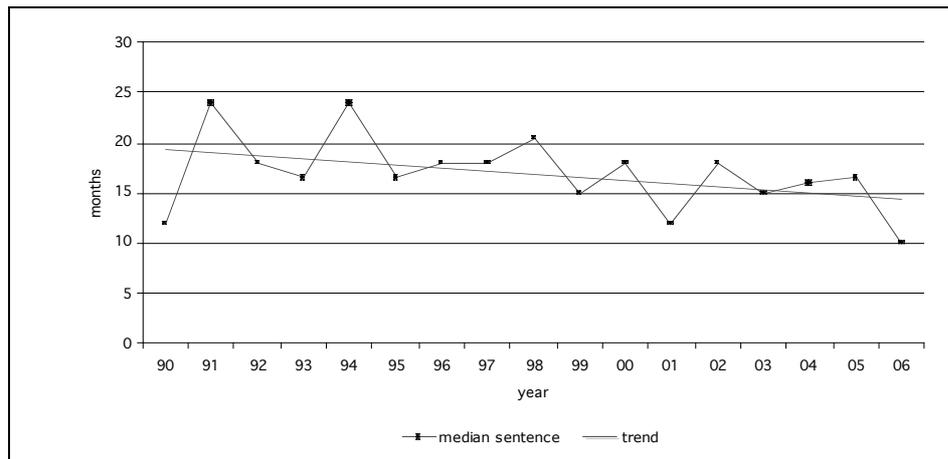
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<sup>14</sup> Note that the three periods vary for robbery, burglary and drug offences.

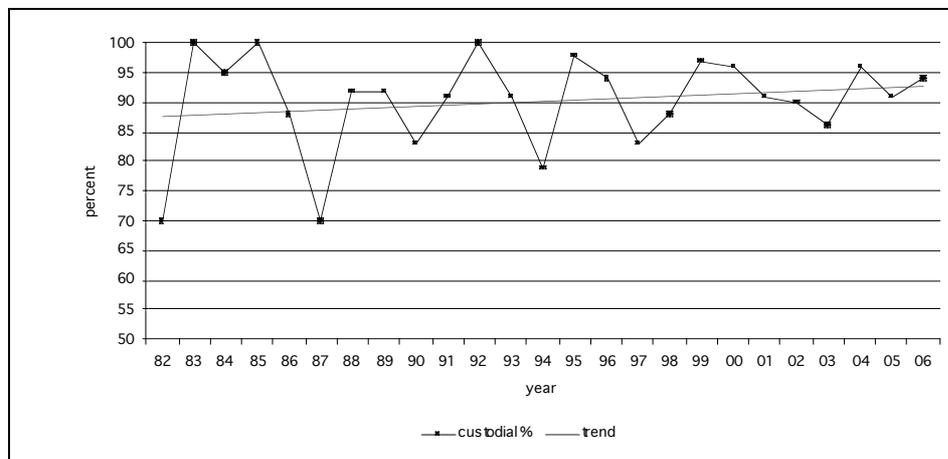
<sup>15</sup> For one count of burglary there was an increase in the proportion of custodial sentences in the third period but this was not statistically significant.

<sup>16</sup> Drug trafficking is now one offence: trafficking in a controlled substance contrary to the *Misuse of Drugs Act 2001*, and the two separate drug trafficking offences in the *Poisons Act* have been repealed. For the purpose of Table 3 in Appendix A, trafficking in a controlled substance was separated into trafficking in a prohibited plant or substance and trafficking in a narcotic.

**Fig 3: robbery, median sentences, Supreme Court, 1990-2006**



**Fig 4: robbery, percentage custodial sentences, Supreme Court, 1982-2006**



**Conclusion**

1.2.11 Sentencing data suggests that the sentencing patterns in the Supreme Court over the last 25 years or so are strikingly consistent. For many crimes the median prison sentence and the proportion of custodial sentences are the same or similar. Reductions in the use of imprisonment are rare and for no crime was the reduction significant. For some crimes there have been increases which are statistically significant. For more than 10 counts of burglary the increase in the percentage of custodial sentences is significant and there is also an increase in the median sentence. For one count of stealing the increased use of custodial sentences is significant and there are significant increases in the use of custodial sentences for drug trafficking and robbery. It also appears prison sentences have become longer for serious assaults<sup>17</sup> and for sexual offences involving young people.<sup>18</sup> Rape and indecent assault appear to be the only crimes where the median custodial sentence has become shorter. This will be further explored in Part 6. Overall, the percentage of custodial sentences was 79 per cent in the earlier period, 83 per cent in the second period and 87 per cent in the third period. Analysing changes in the median sentence for each crime showed no change to be the most likely outcome with decreases and increases about equal (see Table 1). If there is a perception that sentencing is becoming more lenient this is not borne out by the evidence of Supreme Court sentencing patterns. If anything sentencing has become more severe.

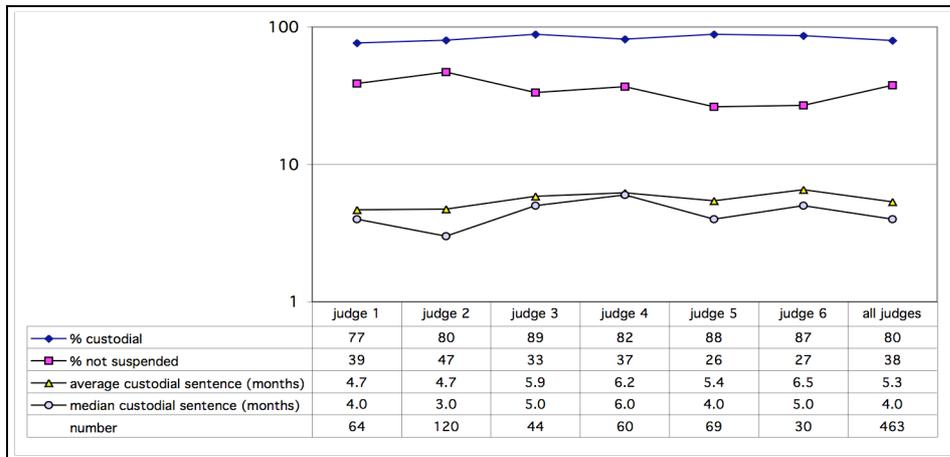
<sup>17</sup> Wounding and grievous bodily harm and acts intended to cause bodily harm.

<sup>18</sup> Maintaining a sexual relationship with a young person and sexual intercourse with a young person.

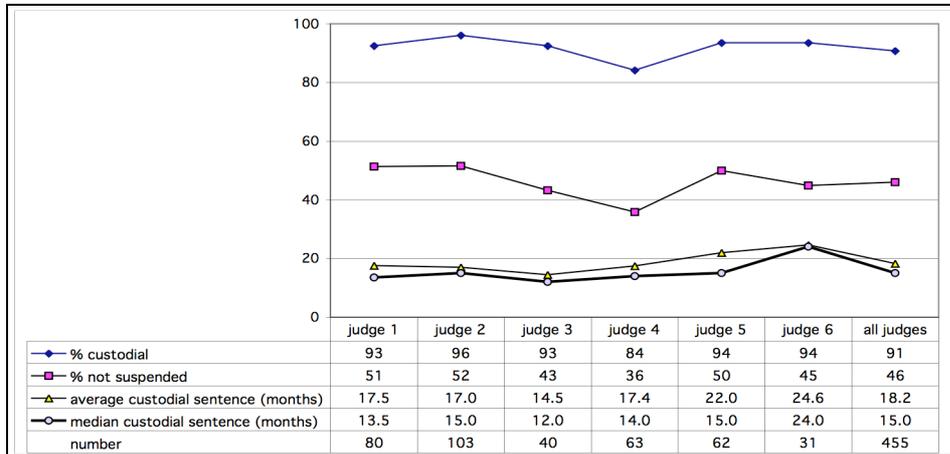
**Consistency between judges**

1.2.12 As well as examining sentencing patterns by comparing decades, sentencing patterns for individual judges were examined for two of the most frequent offences: robbery and assault for the years 1990-2006. The six judges with the most sentences were included.<sup>19</sup> It is acknowledged that this kind of comparison is fraught with problems. It cannot be assumed that each judge dealt with offences of the same degree of seriousness, or that the offenders were comparable. This comparison is made with these caveats in mind. Calculations were made of the median and average custodial sentences, percentage of custodial sentences and percentage of sentences not suspended (wholly or partly). As Fig 5 and 6 show, judges were quite consistent, with no judge standing out as the most lenient or most severe on these measures. There were no statistically significant differences between the judges on any of the percent measures.<sup>20</sup>

**Fig 5: Assault, Sentences by Judges in the Supreme Court, 1990-2006**



**Fig 6: Robbery, Sentences by Judges in the Supreme Court, 1990-2006.**



<sup>19</sup> These were not exactly the same for each offence. While there is a maximum of six judges at any one time there were a number of changes in the composition of the Bench from 1990-2006 with retirements and new appointments.

<sup>20</sup> The differences in percents were assessed by chi squared tests.

## 1.3 Trends in the Magistrates Court

1.3.1 Most sentencing is done in the Magistrates Court. While custodial sentences are imposed in less than 20 per cent of summary offences heard in a year, about 80 per cent of prison sentences are imposed by the Magistrates Court, although most are short sentences (about 70 per cent are for three months or less) and many of these short sentences are wholly suspended. Tracking sentencing trends in the Magistrates Court before 2003 is difficult because there was no state-wide database until 1 July 2003. The Issues Paper used data that had been collected for two editions of *Sentencing in Tasmania*, namely a three-month state-wide sample from 1988 of the Magistrates Court' sentences which was collected manually for the first edition and data extracted from the Hobart Magistrates Court' database for 1999-2000 for the second edition. However, data extracted for this report from the state-wide database has shown that there are differences in sentencing practices between the south of the State, the north and the north-west (see 1.3.12 below). This means that the two data-sets collected for *Sentencing in Tasmania* cannot be compared for the purposes of showing trends over time. However, a comparison of the 1988 three-month state-wide sample and data from 1 July 2003 is possible using sentences for one count of assault, stealing and motor vehicle stealing. Broad changes in custodial sentences are also examined using Bartels' data gathered for the suspended sentences project.

### *Custodial sentences*

1.3.2 Table 2 suggests that the use of custodial sentences for assault and motor vehicle stealing has been stable and that the median sentence for assault has increased from one to two months but has dropped from three months to two for motor vehicle stealing. For stealing the median is the same but there appears to be less use of custodial sentences.

**Table 2: Custodial sentences in the Magistrates Court comparing 1988 sample with 2003-2007 sample for various offences\***

Offence	Years	Total no.	No. custodial	% custodial	Median (months)
Assault	88	74	21	15	1
	03-07	2807	472	17	2
Motor vehicle stealing	88	72	30	42	3
	03-07	212	90	42	2
Stealing	88	427	127	30	1
	03-07	1767	233	13	1

\*Due to significant differences in data collection time period these figures should be taken as indicative only.

### *Non-custodial sentences*

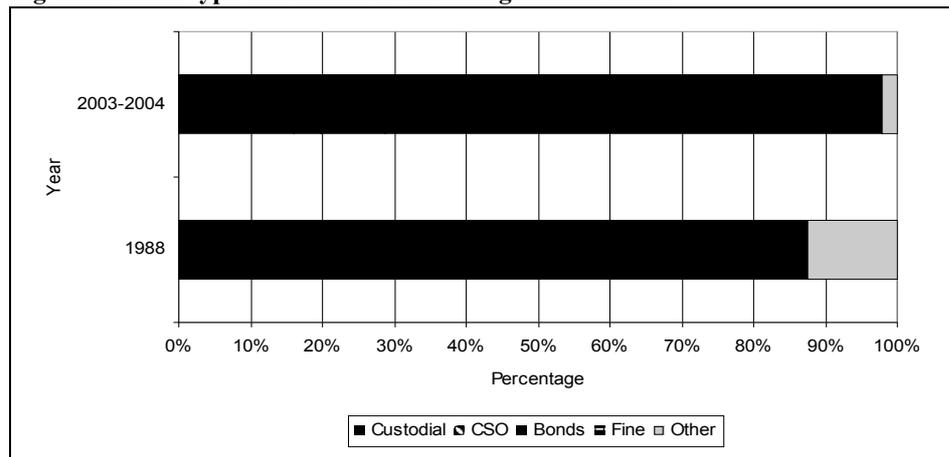
1.3.3 Fig 7 uses data from two sources: first, Bartels' sentencing database which was compiled from data supplied by the Justice Department for sentences imposed by the Magistrates Court from 1 July 2003 to 30 June 2004 and secondly, the 1988 three-month sample of sentences used in the first edition of *Sentencing in Tasmania*. Because of changes in terminology over this period the use of probation is difficult to assess. Under the *Sentencing Act 1997* (Tas), probation means conditional release subject to the supervision of a probation officer, whereas under the old sentencing regime it meant an order to be of good behaviour with conditions which did not necessarily include supervision. For this reason the term bond is used to cover probation in its current and old usage. In other words 'bond' covers all conditional release orders. As with Table 2, significant differences in the data collection periods mean that figures are indicative only. Moreover, possible differences in the range of

offences dealt with by courts of summary jurisdiction over these periods mean that caution is required in reading too much into the figures.

1.3.4 Fig 7 shows the distribution of sentence types over the two periods. It suggests:

- Overall custodial sentences (which included wholly suspended sentences) have increased;
- Community service orders have declined to 4 per cent of sentences;
- Fines are the most frequently imposed sanction. Their use appears to have increased somewhat from 60 per cent to 69 per cent in the most recent period.

**Fig 7: Sentence type distribution in the Magistrates Court**



### ***Consistency between magistrates***

1.3.5 While there were difficulties in examining sentencing trends over time, the Justice Department's database for the Magistrates Court, which contains all sentences imposed since 1 July 2003, enabled sentencing patterns between magistrates to be examined for this period. As explained above, in comparing sentences it cannot be assumed magistrates deal with similar cases in terms of type of offence and type of offender. In the 12-month sample of sentences used by Bartels in her study there were significant differences in the cases dealt with by magistrates on the basis of gender and offence.<sup>21</sup> The comparison undertaken for the purposes of this Report attempted to minimise this difficulty by comparing sentences for four offences separately, namely assault, motor vehicle stealing, stealing and burglary. Sentences for one count only were analysed and in the case of burglary, sentences for one count of burglary and one count of stealing were selected. For each of these offences the sample was taken from 1 July 2003 until a date in 2007.<sup>22</sup> Given the size of the sample, particularly in the case of assault where twelve of the magistrates had imposed more than 100 sentences for one count of assault, it is likely that these magistrates were dealing with similar kinds of cases. Magistrates imposing less than 10 sentences for a particular offence were excluded (but were included in the regional comparison).

1.3.6 As Table 3 shows, there appear to be significant differences between magistrates in their use of custodial sentences for assault. Overall custodial sentences for assault were imposed in 17 per cent of cases but this ranged from five per cent to 51 per cent. Four magistrates imposed sentences significantly above the mean rate (Magistrate 4, 6 and 17) and three magistrates imposed sentences significantly below this rate (Magistrate 5, 15, 18 and 19). These differences could not be explained in

<sup>21</sup> Lorana Bartels, *Sword or Sever? The Use and Utility of Suspended Sentences in Tasmania* (PhD thesis, University of Tasmania, 2008) 4.3.6.5.

<sup>22</sup> For burglary data was extracted from sentences imposed from 1/7/03 to 29/6/07 for the other offences from 1/7/03 to 14/12/07.

terms of a greater use of wholly suspended sentences by those who imposed custodial sentences more often. Nor was there is a lot of difference in the mean sentences imposed. The three magistrates who imposed custodial sentences more often did not tend to impose shorter sentences.

**Table 3: Custodial and Fully Suspended Sentencing Rates by Magistrate: Assault**

Assault						
Magistrate no.	n =	Instances custodial	% custodial	Instances fully suspended	% of custodial sentences fully suspended	Median term in months (for non, partial and fully suspended sentences)
1	184	37	20.1	18	49	2.0
2	113	22	19.5	17	77	1.0
3	234	27	11.5	25	93	1.0
4*	51	26	51.0	17	65	2.0
5**	37	2	5.4	1	50	0.5
6*	95	32	33.7	21	66	2.5
7	121	14	11.6	10	71	1.5
9	39	8	20.5	7	88	1.5
11	210	38	18.1	26	68	1.0
12	138	23	16.7	16	70	2.0
13	278	70	25.2	35	50	3.0
14	302	44	14.6	28	64	2.0
15**	182	13	7.1	8	62	3.0
16	84	21	25.0	12	57	2.0
17*	172	55	32.0	41	75	2.0
18**	271	16	5.9	12	75	2.3
19**	286	16	5.6	9	56	2.5
Total	2797	464	16.6	303	65	2

\* Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *above* the mean rate (19%).

\*\*Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *below* the mean rate (19%).

1.3.7 Tables 4 and 5 shows the sentencing patterns for motor vehicle stealing and stealing. Motor vehicle stealing attracts a higher proportion of custodial sentences than assault with a mean of 44 per cent. The proportion of custodial sentences ranged from 23 per cent to 71 per cent. One magistrate imposed custodial sentences significantly above the mean of 44 per cent (Magistrate 17) and three imposed custodial sentences significantly below the mean (Magistrates 14, 15 and 18). Two of these magistrates also tended to impose shorter sentences. Because the numbers of cases of motor vehicle stealing are low, it is possible that these differences could be explained by differences in the prior criminal record of the offenders.

**Table 4: Custodial and Fully Suspended Sentencing Rates by Magistrate: Motor Vehicle Stealing**

Motor Vehicle Stealing						
Magistrate no.	n =	Instances custodial	% custodial	Instances fully suspended	% of custodial sentences fully suspended	Median term in months (for non, partial and fully suspended sentences)
4	12	7	58.0	2	28.6	2.0
6	21	9	42.9	3	33.3	2.0
11	21	12	57.1	5	41.7	2.5
12	13	4	30.8	0	0.0	1.2
13	45	20	44.4	7	35.0	2.5
14**	12	3	25.0	0	0.0	2.0
15**	12	3	25.0	2	66.7	1.0
16	15	8	53.3	2	25.0	1.0
17*	14	10	71.4	3	30.0	2.0
18**	13	3	23.1	1	33.3	1.0
19	10	3	30.0	0	0.0	3.0
Total	188	82	43.6	25	30.5	1.8

\* Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *above* the mean rate (42.05%).

\*\*Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *below* the mean rate (42.05%).

**Table 5: Custodial and Fully Suspended Sentencing Rates by Magistrate: Stealing**

Stealing						
Magistrate no.	n =	Instances custodial	% custodial	Instances fully suspended	% of custodial sentences fully suspended	Median term in months (for non, partial and fully suspended sentences)
1	90	8	8.9	6	75.0	3.0
2	37	5	13.5	5	100.0	1.0
3	112	17	15.2	13	76.5	1.0
4	41	8	19.5	4	50.0	1.0
5	23	3	13.0	3	100.0	0.7
6	70	10	14.3	7	70.0	1.5
7	137	27	19.7	5	18.5	1.0
9	15	1	6.7	1	100.0	0.5
11	120	9	7.5	7	77.8	0.5
12	82	15	18.3	11	73.3	0.7
13	277	28	10.1	13	46.4	1.0
14	101	8	7.9	7	87.5	2.0
15	145	13	9.0	8	61.5	1.0
16	99	8	8.1	4	50.0	0.9
17*	129	39	30.2	21	53.8	1.0
18**	120	4	3.3	3	75.0	4.0
19	147	15	10.2	11	73.3	3.0
Totals	1745	218	12.5	129	59.2	1

\* Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *above* the mean rate (16.3%).

\*\*Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *below* the mean rate (16.3%).

1.3.8 For stealing, Table 5 shows that the proportion of custodial sentences ranged from 3 per cent to 30 per cent with a mean of 12.5 per cent. One magistrate's use of custodial sentences was significantly above the mean (Magistrate 17) and one was significantly below (Magistrate 18).

**Table 6: Custodial and Fully Suspended Sentencing Rates by Magistrate: Burglary/Stealing**

Burglary/Stealing						
Magistrate no.	n =	Instances custodial	% custodial	Instances fully suspended	% of custodial sentences fully suspended	Median term in months (for non, partial and fully suspended sentences)
1*	16	13	81.3	4	25	6
2	9	5	55.6	1	11.1	6
3	27	11	40.7	10	37	3
4	6	2	33.3	-	0	1.5
5	5	3	60	1	20	0.933
6	21	11	52.4	5	23.8	3
7**	25	6	24	2	8	2.5
9	3	1	33.3	-	0	2
11	36	19	52.8	11	30.55	3
12	20	13	65	4	20	4
13	53	23	43.4	8	15.1	3
14	28	17	60.7	8	28.6	3
15	34	14	41.2	8	23.52	2
16	32	17	53.1	7	21.875	3
17*	25	20	80	10	40	3
18**	57	20	35.1	12	21.1	3
19	44	26	59.1	10	22.7	3
Totals	441	221	50.1	101	22.9	3

Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *above* the mean rate (51.2%).

\*\*Chi Square test indicates that the custodial sentencing rate for this Magistrate is statistically significantly *below* the mean rate (51.2%).

1.3.9 Table 6 shows sentences for one count of burglary and one of stealing. Custodial sentences ranged from 24 per cent to 81 per cent with two magistrates (Magistrates 7 and 18) imposing significantly fewer custodial sentences than the mean and two (Magistrates 1 and 17) imposing significantly more custodial sentences. Magistrate 1 also appears to impose longer sentences of imprisonment, with a median of six months compared to the overall mean of three months.

1.3.10 The sentencing patterns for assault, motor vehicle, stealing and burglary were compared to see if magistrates tended to be consistently more lenient, moderate or severe on the measures of percentage of custodial sentences imposed. Table 7 shows the magistrates ranked by mean rank. Where a magistrate's custodial sentencing rate is significantly above or below the mean rate this is shown (by shading and asterisks).

**Table 7: Custodial sentencing rate ordered by mean rank**

Magistrate no.	Assault			Motor Vehicle Stealing			Stealing			Burglary/Stealing		
	n =	%	+/-	n =	%	+/-	n =	%	+/-	n =	%	+/-
17	172	32.0	+*	14	71.4	+*	129	30.2	+*	25	80	+*
4	51	51.0	+*	12	58.3	+	41	19.5	+	6	33.3	-
6	95	33.7	+*	21	42.9	-	70	14.3	+	21	52.4	+
12	138	16.7	+	13	30.8	-	82	18.3	+	20	65	+
2	113	19.5	+	8	50.0	+	37	13.5	+	9	55.6	+
16	84	25.0	+	15	53.3	+	99	8.1	-	32	53.1	+
13	278	25.2	+	45	44.4	+	277	10.1		53	43.4	-
1	184	20.1	+	1	0.0		90	8.9	-	16	81.3	+*
11	210	18.1	+	21	57.1	+	120	7.5	-	36	52.8	+
5	37	5.4	-*	-	-		23	13.0	+	5	60	+
14	302	14.6	-	12	25.0	-*	101	7.9	-	28	60.7	+
19	286	5.6	-*	10	30.0	-	147	10.2	-	44	59.1	+
7	121	11.6	-	4	25.0	-	137	19.7	+	25	24	-*
3	234	11.5	-	7	14.3	-	112	15.2	+	27	40.7	-
9	39	20.5	-	3	33.3	-	15	6.7	-	3	33.3	-
15	182	7.1	-*	12	25.0	-*	145	9.0	-	34	41.2	-
18	271	5.9	-*	13	23.1	-*	120	3.3	-*	57	35.1	-*

+\* indicates a custodial sentencing rate significantly higher than the mean rate;

+ indicates a rate above the mean rate;

-\* indicates a rate significantly below the mean rate; and

- indicates a rate below the mean rate.

1.3.11 Table 7 shows that some magistrates stand out as being consistently severe across a number of offences and others as consistently more lenient. One magistrate imposed a significantly higher percentage of custodial sentences than the mean for all four offences. And one magistrate who imposed a significantly lower proportion of custodial sentences for assault also did so for motor vehicle stealing, stealing and burglary. A number of magistrates were quite consistent in their rankings whilst others were not. However, no magistrate whose custodial sentencing rate was significantly above the median for an offence had a custodial sentencing rate for another offence which was significantly below the median and no magistrate with a rate significantly below the median had a rate for another offence significantly above it. Overall 10 magistrates imposed a proportion of custodial sentences that was significantly different from the mean for at least one offence.

### *A comparison of sentences by region*

1.3.12 In responses to the Issues Paper it was suggested by the Legal Aid Commission of Tasmania that magistrates in northern Tasmania were considerable harsher than those in the south and north-west.<sup>23</sup> This was explored by aggregating the sentencing data for assault, motor vehicle stealing and stealing for the individual magistrates into regions. The results appear in Table 8.

<sup>23</sup> Legal Aid Commission of Tasmania, submission, 2.

**Table 8: Custodial Sentences by Region for Assault, Motor Vehicle Stealing, Stealing and Burglary/Stealing**

Region	Assault		Motor Vehicle Stealing		Stealing		Burglary/Stealing	
	%	Median	%	Median	%	Median	%	Median
South	21.6	2	46.4	2	14.2	1	50.4	3
North	12.6	2	34.8	2	9.1	3	61.4	3.6
North-West	8.5	2	18.2	1.3	9	1	37.2	3
<b>All</b>	<b>16.6</b>	<b>2</b>	<b>42.2</b>	<b>2</b>	<b>12.5</b>	<b>1</b>	<b>50.1</b>	<b>3</b>

*1.3.13* This shows that there are differences between the regions in the use of custodial sentences for the four offences examined with the south imposing a higher percentage of custodial sentences for three of the offences and the north-west imposing the smallest percentage for all four offences. For motor vehicle stealing the proportion of custodial sentences was significantly higher than the mean (of 33.2%) in the south and was significantly less than the mean in the north-west. Sentences in the northern region were found to be more severe for one count of burglary and stealing and the median sentence for one count of stealing was higher with three months in the north compared with one month in the south and north-west.

## 1.4 Imprisonment rates and average time served by released prisoners

*1.4.1* Imprisonment rates could be regarded as a crude measure of sentencing trends. However, they are only a broad indicator of punitiveness and increases in imprisonment rates can be explained by a range of factors of which increased sentencing severity is but one. Increases in the crime rate and improved clear up rates also have an impact.

*1.4.2* There was little change in the imprisonment rate between 1982 (78 per 100,000) and 1997 (74 per 100,000). Since 1998 the trends have been upward. In Australia, imprisonment rates have increased from 129 per 100 000 of adult population in 1995 to 164.7 per 100 000 of adult population in 2007.<sup>24</sup> In Tasmania, the rate of imprisonment has increased from 82 per 100 000 of adult population in 1996 to 146 per 100 000 of adult population in 2007.<sup>25</sup> Over the past 10 years, there has been an increase in the prison population from 285 prisoners in 1996 to 541 prisoners in 2007 with a high of 551 in 2005.<sup>26</sup>

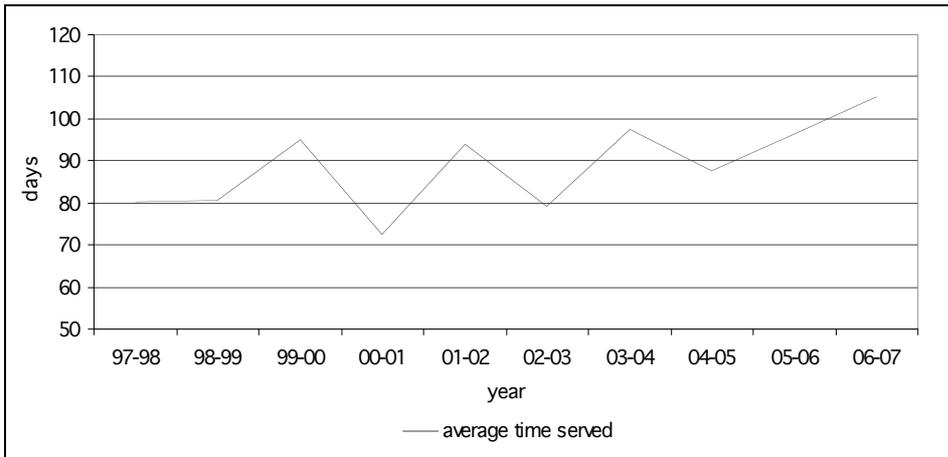
*1.4.3* A more accurate measure of punitiveness is average time served in prison for particular offences over time. However, it should be noted that in addition to the sentence imposed, the impact of remissions and parole release can affect time served. The Issues Paper examined a number of offences for which average yearly numbers of released prisoners were reasonably high to explore trends in time served since the financial year 1985-1986. It showed a slight upward trend for drink driving and assault and reasonably stable figures for burglary with an increase in the 2000-2001 financial year. For all sentenced offenders, the average time served by released prisoners in the years since 1985-1986 was found to have increased. More recent data looking at trends over the last decade has confirmed this trend.

<sup>24</sup> Australian Bureau of Statistics (ABS), Cat. No. 4512.0 ABS (2007).

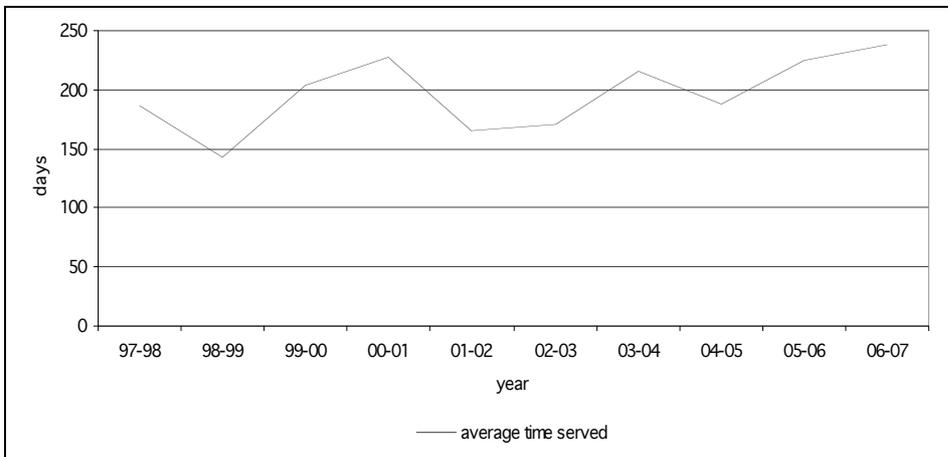
<sup>25</sup> Ibid.

<sup>26</sup> ABS, Persons in Corrective Services, Quarterly Comparisons, Cat No. 4512.0 ABS (2007).

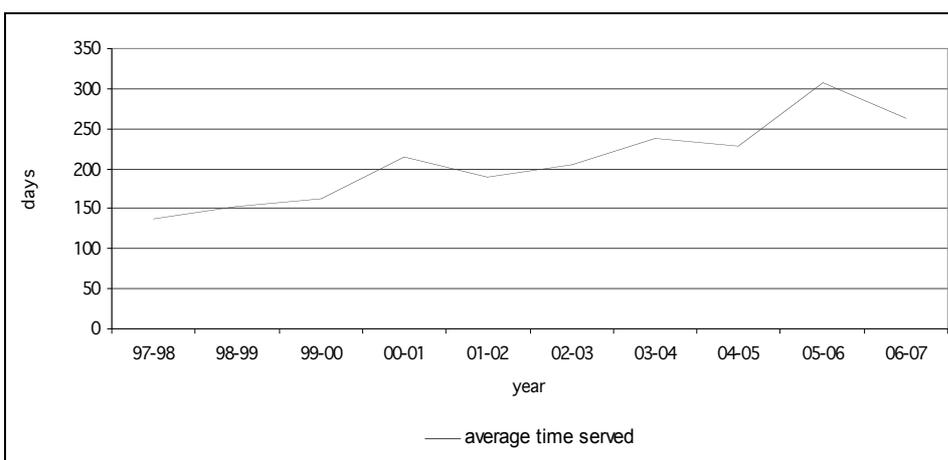
**Fig 8: Drink driving, average time served (days) by released prisoners, 1997/98 – 2006/07 (average no. per financial year = 89; min = 79; max = 118)**



**Fig 9: Assault, average time served (days) by released prisoners, 1997/98 – 2006/07 (average no. per financial year = 196.2; min = 142; max = 238)**

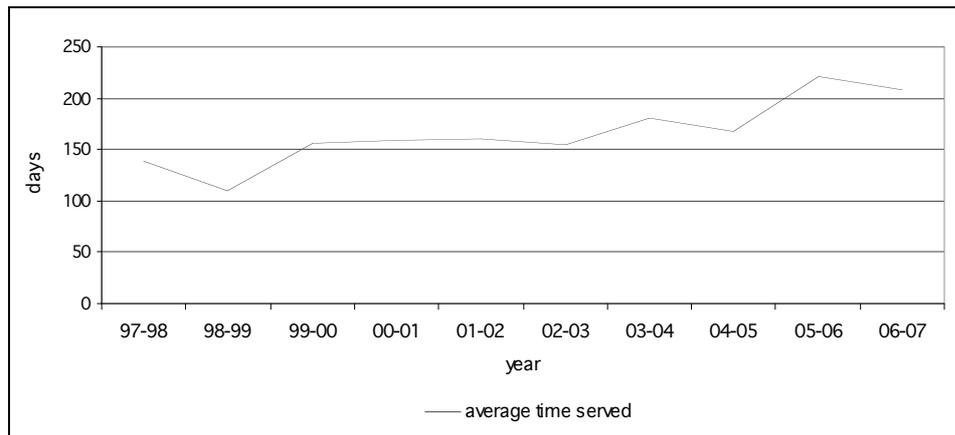


**Fig 10: Burglary, average time served (days) by released prisoners, 1997/98 – 2006/07 (average no. per financial year = 209.9; min = 137; max = 308)**



1.4.4 Average days served for drink driving, assault and burglary have all tended to increase, conforming to the patters for all offences (see Fig 12 below.)

**Fig 11: All Sentenced Offences, average time served (days) by released prisoners, 1997/98 – 2006/07 (average no. per financial year = 165.4; min = 110; max = 221)**



### **Summary**

*1.4.5* Using the limited data available, sentencing patterns appear relatively stable and consistent over time. Certainly there is no evidence supporting increased leniency, if anything sentencing may have become more severe.

*1.4.6* Data was available to analyse Supreme Court sentences from 1978 to 2006 for some crimes. Numbers were too small for a year-by-year comparison for most crimes so three periods were analysed – usually 1978-1989, 1990-2000, and 2001-2006. This revealed that there was consistency in median sentences and percentage of custodial sentences for most crimes. For some crimes there were significant increases in the percentage of custodial sentences imposed. Global sentences for more than ten counts of burglary increased in severity – the increase in percentage of custodial sentences was statistically significant and the median sentence increased. Significant increases in the percentage of custodial sentences for one count of stealing, drug trafficking and robbery were found. Sentences appear to have become more severe for serious assaults and for sexual offences involving children. The only sentences that appear to have become more lenient are for one and two counts of rape and sentences for indecent assault.

*1.4.7* A state-wide database for outcomes in the Magistrates Court only became available in 2003. However, some idea of changing patterns can be gleaned from comparing a 1988 three-month state-wide sample of sentences with sentences imposed since 1 July 2003. Comparisons of the percentage of custodial sentences for assault and motor vehicle stealing suggest a stable custodial sentencing pattern with an increased median sentence for assault (from one to two months) and a decreased median for motor vehicle stealing (from two months to one month). For burglary and stealing the custodial rate has increased but it has decreased for sentences for one count of stealing. Overall the rate of custodial sentences appears to have increased. The problems with the size of the earlier sample make any conclusions that can be drawn from the data tentative. However, the inference of quite stable sentencing patterns with a trend to more severe sentences is supported by data on average time served for released prisoners.

*1.4.8* Sentencing consistency was also explored by a comparison of sentences between judges and magistrates. Comparing judges' sentences for robbery and assault showed little disparity between judges on three measures: proportion of custodial sentences, use of suspended sentences and the median sentence. For these crimes judges appear to be reasonably consistent. Whether they are consistent in their use of wholly suspended sentences and non-parole periods will be explored in later parts of this report.

*1.4.9* Magistrates Court sentencing data was analysed from two perspectives. First, consistency between magistrates and secondly, consistency between regions. To examine the claim that there are disparities between magistrates in the sentences they impose, their sentences for four common offences were compared. This revealed that there do appear to be inconsistencies between magistrates for sentences for assault in particular, but also for motor vehicle stealing, stealing and burglary. Some magistrates had custodial sentencing rates for some offences which were statistically significantly more than the mean and some had rates which were significantly less than the mean. This suggests that the custody threshold for each of these offences can differ depending on which magistrate hears the case. While the possibility of relevant differences in offence severity and offender factors cannot be discounted, it does appear that there is some inconsistency in sentences imposed in the Magistrates Court.

*1.4.10* The second claim that was explored was the assertion that magistrates in the north are more severe than magistrates in the south and north-west. This was not found to be the case for the custodial rate for three of the four offences – only for burglary was the custodial rate higher. Sentences in the north were found to be more severe with respect to the median sentence for one count of stealing where the median was three months in the north but one month in the south and in the north-west. For these four offences sentences appeared to be more lenient in the north-west on the measure of custodial sentencing. How these inconsistencies between magistrates and regions should be addressed is discussed in the final part of this Report.

## Part 2

# Crime Reduction

- (a) Examine whether there is a relationship between crime levels and sentencing in Tasmania.
- (b) What role can sentencing legislation and sentencing measures have in achieving the Tasmania Together Goals in relation to perceptions of safety and achieving safe environments?

## 2.1 (a) Crime levels and sentencing

### *Introduction*

2.1.1 A major obstacle to more effective policies to reduce the level of serious crime is the ‘common sense view of crime’.<sup>1</sup> Elements of ‘Law and Order Commonsense’ include the view that we have soaring crime rates and that the solution lies, in part, in tougher penalties. Similarly, it is assumed that rising crime can be attributed to more lenient sentencing, or at least to sentencing that is not tough enough. All too often these assumptions require no empirical verification and are taken for granted as the starting point for solutions to the crime problem. In seeking an evidence-based response to the crime problem, this section of the report explores the relationship between crime levels and sentencing. The issue of sentencing trends was explored in Part 1, so this Part begins with the issue of crime trends before moving on to consider the relationship between crime levels and sentencing.

### *Crime levels*

2.1.2 Crime is not a static phenomenon. Over time and in different social conditions there are changes in the types of crime committed, the frequency with which different crimes are committed and who commits them. However, if criminologists are agreed about one thing, it is that caution is required in interpreting crime statistics as a measure of ‘real’ levels of crime. As a measure of crime they have many flaws. Some argue that all the figures tell us is how various institutions deal with crime and the ways in which an action comes to be called criminal.<sup>2</sup> Crime statistics are at best a flawed indication of real crime levels.

2.1.3 There are two main sources of crime data available in Australia that seek to measure crime levels. These are (1) administrative records obtained from police agencies, and (2) crime victim surveys.<sup>3</sup>

2.1.4 Official statistics that are traditionally relied upon as a measure of crime levels are *crimes recorded* by the police, data which is based on crimes reported by the public to the police and crimes detected by the police. Weaknesses of such official statistics are that police statistics are incomplete

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<sup>1</sup> Russell Hogg and David Brown, *Rethinking Law and Order* (1998).

<sup>2</sup> John Lea and Jock Young, *What is to be Done about Law and Order* (1984).

<sup>3</sup> See Australian Bureau of Statistics (ABS), *Information Paper: Measuring Crime Victimization, Australia: The Impact of Different Collection Methodologies*, Cat. No. 4522.0, ABS, (2002).

and represent an estimated less than one third of all criminal conduct. Moreover, reporting rates differ significantly between offences, with a high reporting rate for homicide and motor vehicle stealing and a much lower rate for crimes such as sexual assault.<sup>4</sup> Changing attitudes to crimes like domestic violence and sexual assault can increase reporting rates with increases in reported crime rates reflecting an increased willingness to report rather than an actual increase in crime. Changes in policing policy, such as special initiatives targeting particular offences, and different recording procedures may also inflate or decrease recorded crime figures (without a corresponding increase or decrease in the amount of crime committed).<sup>5</sup>

2.1.5 An alternate measure of crime is victimisation data obtained through victim surveys. These involve surveys of individuals in the community about their experiences of crime. These surveys may reveal crimes that are not captured in the recorded crime data (the so called ‘dark figure’ of crime).<sup>6</sup> They also provide an insight into reporting patterns for different offences and in this way can be used to contextualise police data. Again, there are limitations to this type of data. Morgan and Weatherburn suggest that police data and survey data both:

- include events which are either not criminal, or not in the identified legal category of crime (lay interpretations of ‘robbery’ may be far removed from legal definitions); and
- omit some serious offences ostensibly within their scope, such as domestic assaults.<sup>7</sup>

2.1.6 In Australia, the Australian Bureau of Statistics (ABS) National Crime and Safety Survey,<sup>8</sup> the ABS Personal Safety Survey<sup>9</sup> and the International Crime Victims Survey<sup>10</sup> are large-scale community surveys that provide a useful adjunct to the recorded crime data.

2.1.7 With these cautionary comments in mind, the trends in Tasmania in relation to recorded crime will be discussed.

### ***Recorded crime in Tasmania***

2.1.8 Recorded crime statistics in Tasmania for the last 25 years suggest a general increase in crime until 1997-98 followed by a decrease until 2005, with the crime rate increasing slightly in 2005-06. The crime rate is now lower than it was 10 years ago but higher than it was 20 years ago (see Fig 12).

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<sup>4</sup> See ABS, *Crime and Safety, Australia*, Cat. No. 4509.0, ABS, (2005).

<sup>5</sup> See Frank Morgan and Don Weatherburn, ‘The Extent and Location of Crime’ in Andrew Goldsmith, Mark Israel and Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (3<sup>rd</sup> ed, 2006) 15, 19-22, for a discussion of the criticisms of recorded crime data and responses to those criticisms.

<sup>6</sup> See Clive Coleman and Jenny Moynihan, ‘Haunted by the Dark Figure: Criminologists as Ghostbusters?’ in Mike Maguire (ed), *Understanding Crime Data: Haunted by the Dark Figure* (1996) 1.

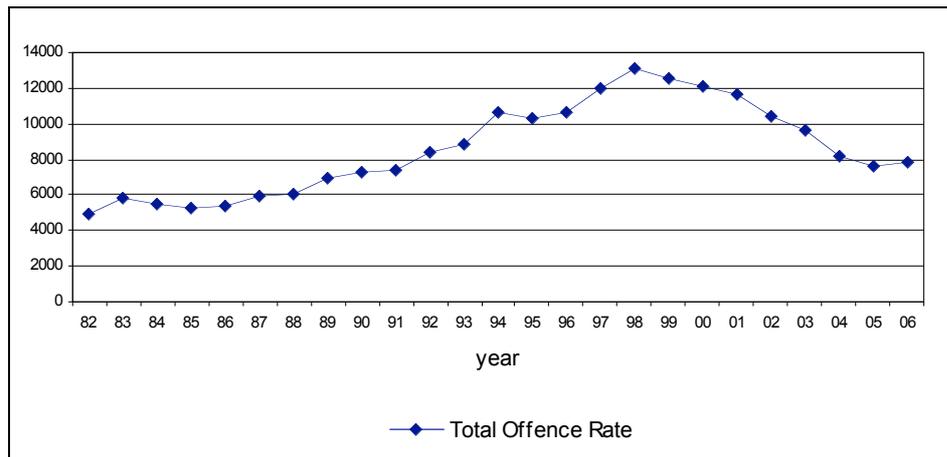
<sup>7</sup> Frank Morgan and Don Weatherburn (2006), above n 5, 25.

<sup>8</sup> The latest is ABS 2005, *Crime and Safety, Australia*, Cat. No. 4509.0, 7, ABS, Canberra.

<sup>9</sup> See ABS, *Personal Safety, Australia, 2005*, Cat. No. 4906.0, ABS, (2005).

<sup>10</sup> The latest is Holly Johnson, *Crime Victimisation in Australia Key Results of the 2004 International Crime Victimisation Survey*, Research and Public Policy Series No 64, Australian Institute of Criminology (2005).

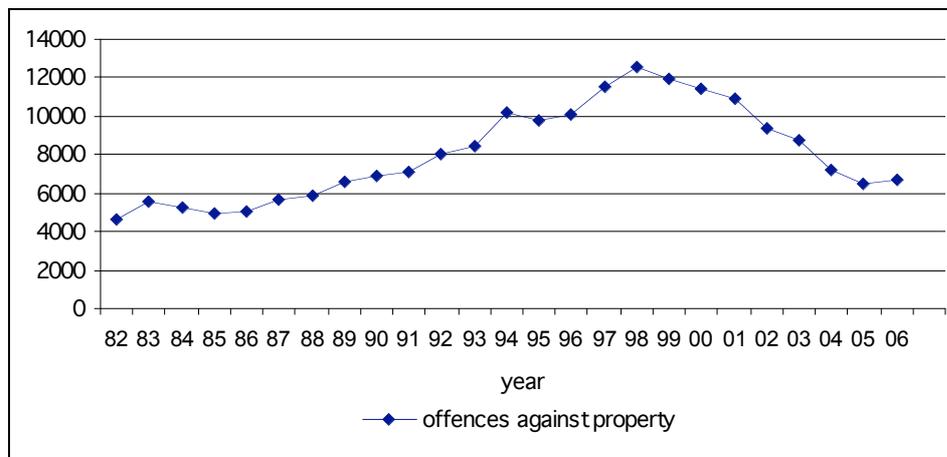
**Fig 12: Total recorded offence rate per 100,000 population for financial years 1982-2006**



**Source:** Compiled from Department of Police and Emergency Management, Tasmania, *Annual Reports* 1982-2006 and ABS, *Population by Age and Sex, Australian States and Territories, 1982-2006*, Catalogue No 3201.0.

2.1.9 This overall crime rate reflects the changes in the rate of offences against property, which represent about 80 per cent of all offences.<sup>11</sup> Fig 13 and Fig 14 show the rates for offences against property and offences against the person for the same period.<sup>12</sup> They indicate that while the rate for offences against property declined after 1998, the rate for offences against the person has steadily increased so that the rate in 2005-06 was four times the 1981-82 rate, whereas the rate for offences against property has increased over that period but is not double the 1981-82 rate.

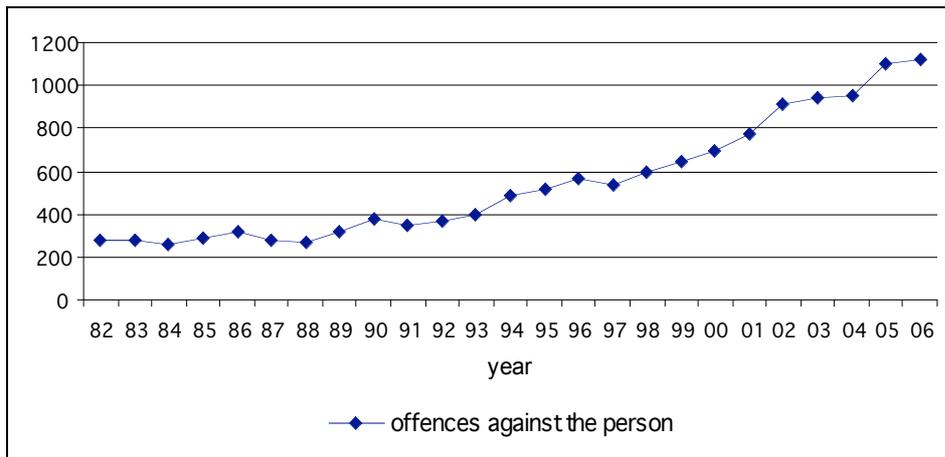
**Fig 13: Recorded offences against property, rate per 100,000 population, financial years ending 1982-2006**



**Source:** Compiled from Department of Police and Emergency Management, Tasmania, *Annual Reports* 1982-2006 and ABS, *Population by Age and Sex, Australian States and Territories, 1982-2006*, Catalogue No 3201.0.

<sup>11</sup> The four categories in the police recorded crime data are: offences against property, offences against the person, fraud and related offences, and other offences. In 2005-06 crimes against property were 79 per cent and offences against the person 13 per cent: see Department of Police and Emergency Management, *Annual Report, (2006) Appendix A, 62.*

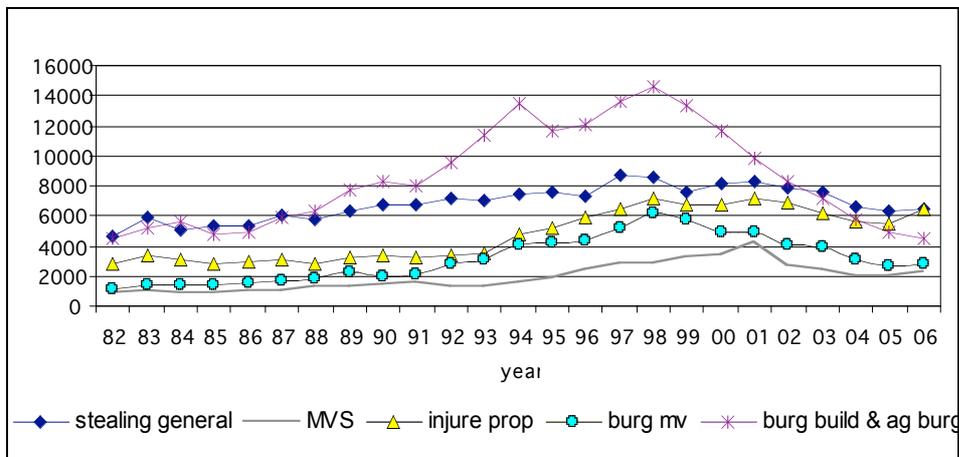
**Fig 14: Recorded offences against the person, rate per 100,000 population, financial years ending 1982-2006**



Source: Compiled from Department of Police and Emergency Management, Tasmania, *Annual Reports 1982-2006* and ABS, *Population by Age and Sex, Australian States and Territories, 1982-2006*, Catalogue No 3201.0.

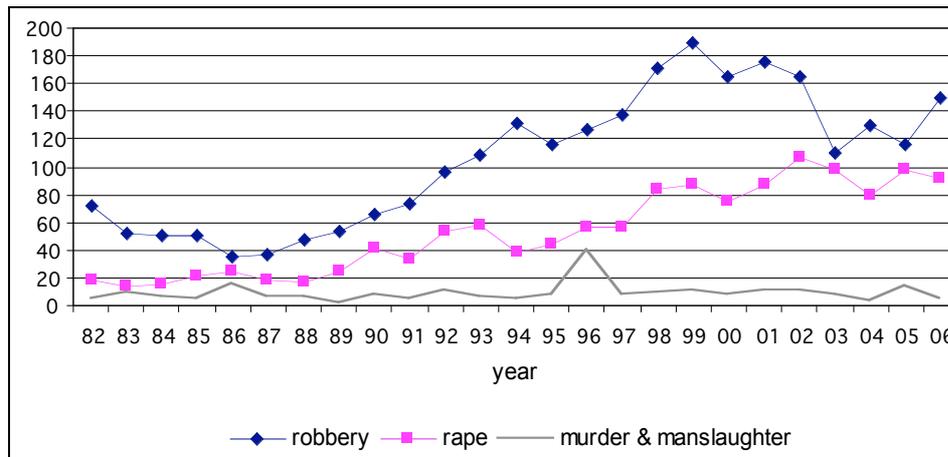
2.1.10 The data for specific property offences (see Fig 15) shows that burglary of buildings (private and commercial premises) has declined since 1998 and that the number of such burglaries is comparable with the number recorded in 1982-1991. Stealing is also continuing to show a downward trend. While all categories of offences against property have declined since earlier peaks, injury to property, burglary of motor vehicles and motor vehicle stealing increased in the last financial year.

**Fig 15: Selected offences against property, number recorded by the police, financial years ending 1982-2006**



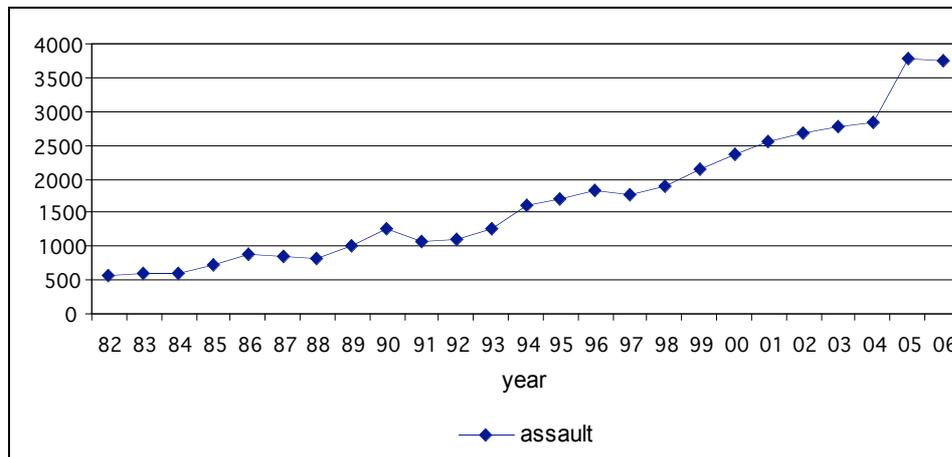
Source: Department of Police and Emergency Management, Tasmania, Crime Analysis System.

**Fig 16: Selected offences against the person, number recorded by the police, financial years ending 1982-2006.**



Source: Department of Police and Emergency Management, Tasmania, Crime Analysis System

**Fig 17: Assault, number recorded by the police, financial years ending 1982-2006**



Source: Department of Police and Emergency Management, Tasmania, Crime Analysis System. Note: included are assault under the Tasmanian Criminal Code and assault Police Offences Act.

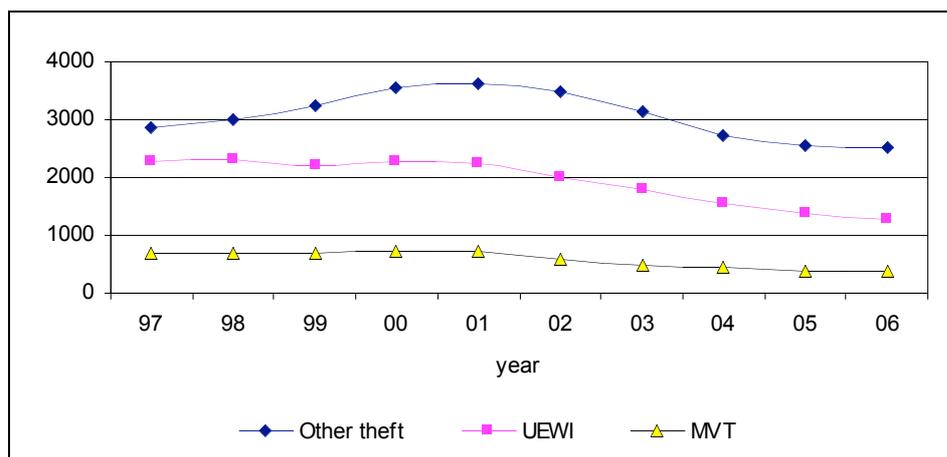
2.1.11 As indicated above, recorded offences for crimes against the person cannot be regarded as reflecting the true rate for these offences so the increasing number of recorded assaults (see Fig 17) and rape (see Fig 16) does not mean that the crime rate for these offences is increasing. For example in 2004-05 there was a sharp increase in the number of recorded assaults, which has been attributed to an increase in the reporting of assaults related to family violence incidents as result of the Tasmanian Government’s Safe at Home initiative.<sup>13</sup> Similarly, the increasing number of rapes recorded in the 20 years between 1982 and 2002 can be attributed to a widening of the definition of rape and an increased willingness to report and to record complaints of rape. Numbers of recorded robberies peaked in 1998-99 and have since fluctuated. Fig 16 suggests that the steady increases in recorded robberies and rapes may be levelling out. The homicide rate has remained largely stable with the exception of the year of the Port Arthur massacre (1996).

<sup>13</sup> Department of Police and Emergency Management, *Annual Report 2005-2006* (2006), Appendix A.

### Tasmania in the Australian context

2.1.12 The ABS publishes recorded crime data (based on police statistics) for eight categories of offences – homicide, assault, sexual assault, robbery, kidnapping, unlawful entry with intent (UEWI), motor vehicle theft and other theft.<sup>14</sup> This represents about 60 per cent of all crime recorded by the police.<sup>15</sup> The ABS recorded crime data shows that property crime has undergone a decline in recent years. However, it should be noted that property crime has a long way to go before it reaches the levels it was at in the 1970s when recorded rates were under 500 per 100,000 for household break and enter and under 400 per 100,000 for motor vehicle stealing.<sup>16</sup>

**Fig 18: Australian trends in property crime, rates per 100,000 population, 1996 -2006**



Source: Compiled from ABS, *Recorded Crime – Victims*, Cat no. 4510.0 (2006).

2.1.13 From 1996 to 2001, the rate for UEWI was steady but between 2001 and 2006 it declined by 43 per cent (from 2,245 to 1,271 per 100,000 population). The rate of motor vehicle theft increased from 1993 to 2001 but decreased thereafter and in 2006 had the lowest rate (365 per 100,000) since national reporting began in 1993.<sup>17</sup> Other theft figures are only available from 1995 onwards. As Fig 15 shows, the rate increased from 1996 to 2001 and since then has declined. Broadly, the Tasmanian downward trend in property crime in the last decade matches the national trend.

2.1.14 Fig 19 shows the national trends in recorded violent crime categories of assault, sexual assault, robbery and homicide. Assaults make up the vast majority of recorded violent crimes and the overall trend has been upwards in the period from 1996 to 2005. Robbery is the second largest category. The robbery rate peaked at 137 per 100,000 in 2001, the highest recorded since 1996.<sup>18</sup> Since 2001 the rate has declined to 84 per 100,000 in 2006.<sup>19</sup> However the 1996 robbery rate was considerably higher than the rates in the 1970s and 1980s as was the assault rate.<sup>20</sup>

<sup>14</sup> The latest is ABS, *Recorded Crime, Victims, Australia 2006*, Cat. No. 4510.0, ABS, (2006).

<sup>15</sup> Australian Institute of Criminology, *Australian Crime, Facts & Figures 2006*, AIC (2006) 8.

<sup>16</sup> D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004) 11, citing Australian Institute of Criminology Statistics (Satyanshu K Mukherjee and Dianne Dagger, *The Size of the Crime Problem in Australia*, Australian Institute of Criminology (1990) which, it should be noted, are not directly comparable with ABS data).

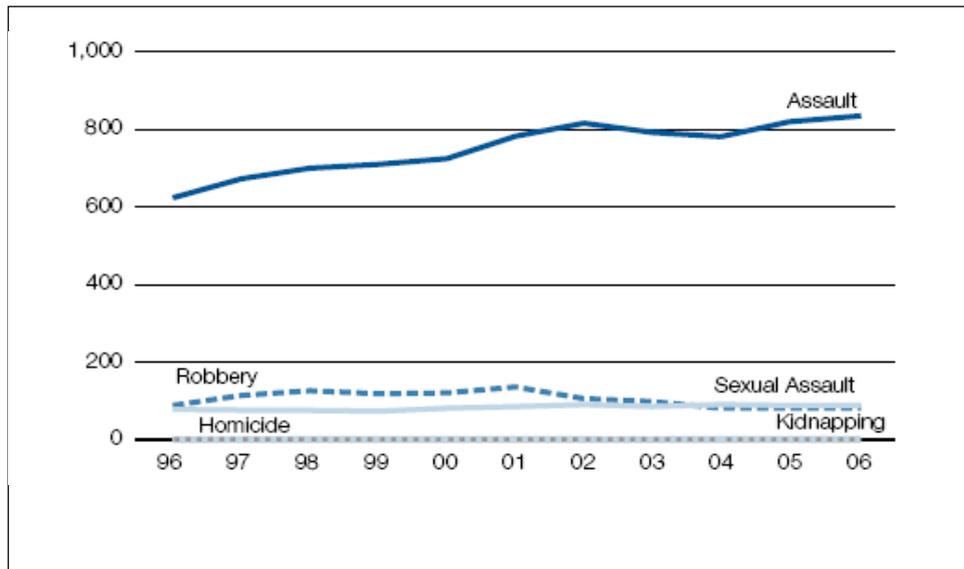
<sup>17</sup> ABS 2006, *Recorded Crime, victims, Australia 2006*, Cat. No. 4510.0, 4, ABS, (2006).

<sup>18</sup> Australian Institute of Criminology, *Australian Crime, Facts & Figures 2006*, AIC (2006) 12.

<sup>19</sup> ABS 2006, *Recorded Crime, Victims, Australia 2006*, Cat. No. 4510.0, 8, ABS, (2006), Table 1. Note also the caveats in relation to robbery data in Explanatory Notes, para 21.

<sup>20</sup> Weatherburn (2004), above n 16, 12-13.

**Fig 19: Australian trends in violent crime, rates per 100,000 population, 1996-2006**

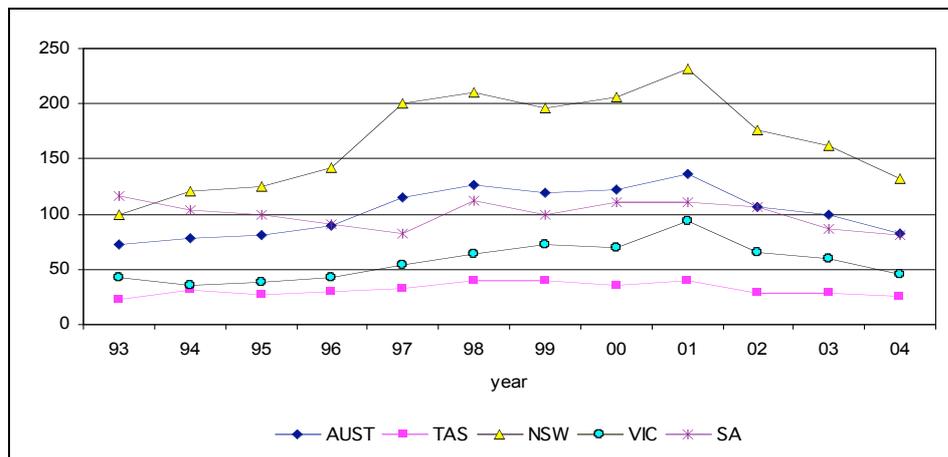


Source: Australian

Institute of Criminology, *Australian crime: facts and figures 2007* (2008).

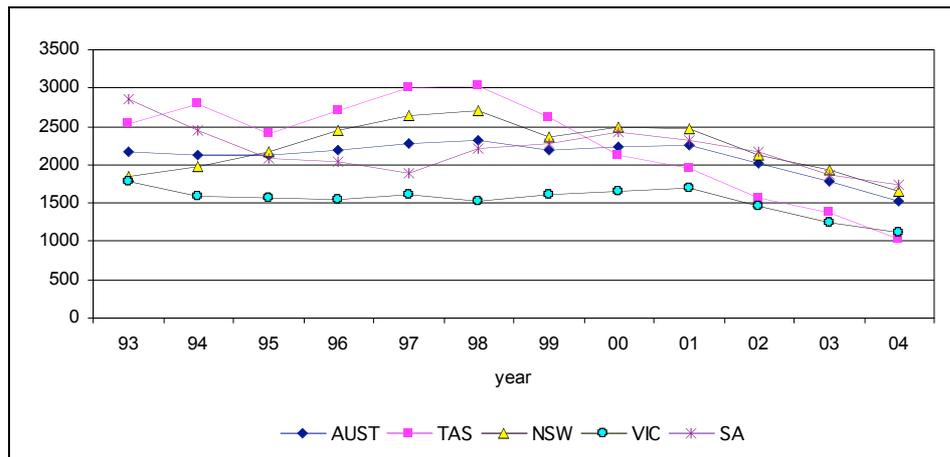
2.1.15 As a consequence of finding inconsistent recording practices between states and territories for assault and sexual assault in particular, the ABS no longer publishes crime rates per 100,000 for states and territories for the various categories of crime collected and accordingly cross-jurisdictional comparisons cannot be made after 2004. Instead, indexes are provided to assist in interpreting change within a jurisdiction. Figs 20-22 show Tasmanian rates in comparison with national data for the years 1993-2004 for robbery, UEWI (burglary) and motor vehicle theft, categories of crime that are likely to be less susceptible to differences in recording practices. Tasmania is below the national rate of recorded crime for the crimes of robbery (Fig 20), burglary (Fig 21), and motor vehicle theft (Fig 22). The robbery rate has been consistently the lowest.

**Fig 20: Robbery, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2004**



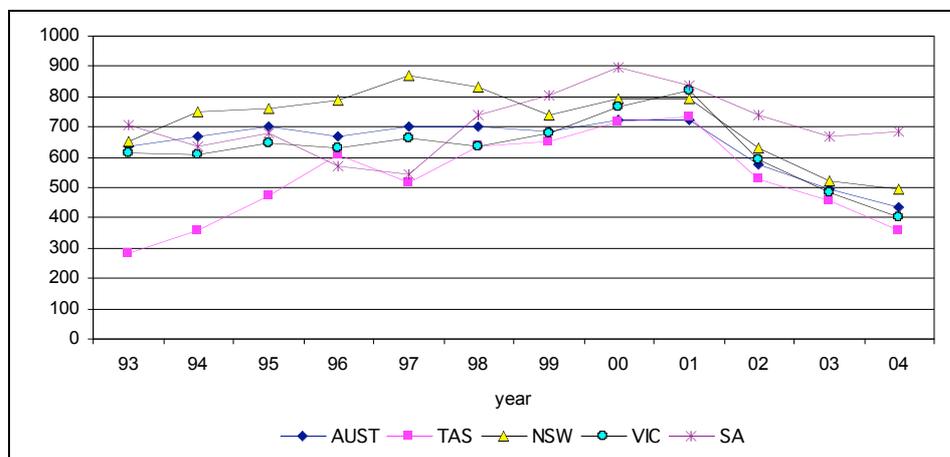
Source: ABS, *Recorded Crime, victims, Australia*, [various issues] Cat 4510.0.

**Fig 21: Burglary, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2004**



Source: ABS, *Recorded Crime, victims, Australia*, [various issues] Cat 4510.0

**Fig 22: Motor vehicle stealing, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2004**



Source: ABS, *Recorded Crime, victims, Australia*, [various issues] Cat 4510.0

### Victim surveys

2.1.16 The ABS *Crime and Safety, Australia 2005*, reported that the 2005 victimisation prevalence for household crime (break-in, attempted break-in and motor vehicle theft) was 6.2 per cent compared to 8.9 per cent in 2002.<sup>21</sup> For break-in and motor vehicle theft, the rates were 3.3 per cent and 1 per cent compared to 4.7 per cent and 1.8 per cent in 2002. In 2002, comparisons with 1998 and 1993 surveys showed very small changes in the prevalence of victimisation for household crime.<sup>22</sup> Unfortunately, changes in the wording of the questions and the survey samples limit the value of comparisons between the earlier 1975 and 1983 surveys and the later surveys although they do suggest an increase in break and enter in the 1980s.<sup>23</sup> The 2005 survey showed the lowest levels of prevalence of victimisation for household crimes were in Tasmania (4.5 per cent). This was a substantial reduction from 9.3 per cent in 1998.

2.1.17 The 2005 victimisation prevalence rate for personal crime (robbery, assault and sexual assault) in Australia was unchanged from the 2002 figure of 5.3 per cent. For robbery the rate declined from 0.6 per cent in 2002 and 0.4 per cent in 2005 - the increase from 1998 to 2002 was not

<sup>21</sup> ABS, *Crime and Safety, Australia, 2005*, Cat. No. 4509.0, ABS, (2005), 4.

<sup>22</sup> ABS, *Crime and Safety, Australia, 2005*, Cat. No. 4509.0, ABS, (2005).

<sup>23</sup> Weatherburn (2004), above n 16, 14.

statistically significant. However, between 1983 and 1993 the estimated prevalence of robbery doubled.<sup>24</sup> The prevalence rate for assault was 4.8 per cent in 2005 and 4.7 per cent in 2002. Comparisons with earlier surveys suggest the prevalence of assault declined between 1983 and 1993 but increased between 1998 (4.3 per cent) and 2002. In Tasmania, the prevalence rate for personal crimes was 4.7 per cent which was the second lowest after Victoria (4.5 per cent). Changes in assault and robbery victimisation rates in Tasmania in 2005 from 2002 were not statistically significant. The Australian component of the 2004 International Crime Victimization Survey also suggests rates of crime victimisation have declined in Australia with 17 per cent of the sample experiencing at least one incident of crime in the previous 12 months, down from 24 per cent in 2000. Declines were statistically significant for personal theft (without violence), burglary and theft of property from motor vehicles.<sup>25</sup>

2.1.18 The crime surveys support the recorded crime data in suggesting a real decline in the new millennium in burglaries and motor vehicle theft in Australia. In relation to robbery, the victim surveys confirm the increase in robbery in the 1980s and the decline since 2001. For assault the picture is less clear. However, it could be argued that increases in police-recorded assault is an artefact of increased reporting, as steady increases in recorded assaults are not reflected in the same increases in the prevalence rates for this crime in victim surveys.

### **Australia in the international context**

2.1.19 The homicide rate in Australia has remained quite stable over the last 25 years or so with a rate usually of about 2 per 100,000. This rate falls between Canada, which usually has recorded a slightly higher rate than Australia, and the United Kingdom, which has a slightly lower rate. Over the last 30 years or so the US homicide rate has been, on average, about four times that of countries such as Australia, Canada, England and Wales and Germany.<sup>26</sup> The US rate declined in the 1990s and plateaued from 2000 at a rate just under 6 per 100,000.<sup>27</sup> The Australian robbery rate was lower than the US rate and marginally lower than the rate in England and Wales. Victim surveys suggest that Australia has higher crime rates than many other industrialised countries,<sup>28</sup> but that comparatively, these rates are declining. In the International Crime Victimization Survey of seventeen industrialised countries conducted in 2000, Australia had the highest victimisation rate for burglary, theft and assault and was second to England and Wales for car theft, and second to Poland for robbery (with England and Wales).<sup>29</sup> In the 2005 survey, the victimisation rate in Australia for burglary was 6<sup>th</sup> out of 30 surveyed countries, 8<sup>th</sup> for assault and car theft and 14<sup>th</sup> for robbery.

### ***The relationship between crime levels and sentencing***

2.1.20 We have seen that sentencing levels appear to have remained quite stable in Tasmania over the last 25 years. There have been increases in severity for some offences and apparent reductions in severity for some others. Overall the patterns appear stable with perhaps an upward trend. Over the same period, crime statistics suggest that the level of reported crime increased until 1997-98 but thereafter it fell, so the crime rate is now higher than it was 20 years ago but lower than it was 10 years ago. Despite the fall in the crime rate after 1999, the imprisonment rate in Tasmania has increased

<sup>24</sup> From .6 per cent to 1.2 per cent, but note that the questions are not comparable with the later surveys: Weatherburn (2004), above n 16, 15.

<sup>25</sup> Holly Johnson, *Crime Victimization in Australia Key Results of the 2004 International Crime Victimization Survey*, Research and Public Policy Series No 64, Australian Institute of Criminology (2005).

<sup>26</sup> Satyanshu Mukherjee, 'Crime Wave: Australia in Context' in Duncan Chappell and Paul Wilson (eds), *Australian Crime and Criminal Justice* (2005) 21-22.

<sup>27</sup> *Ibid.*, 53.

<sup>28</sup> Mostly European countries with the addition of Japan, US, Canada and Australia.

<sup>29</sup> John van Kesteren, Pat Mayhew and Paul Nieuwebeerta, *Criminal Victimization in Seventeen Industrialised Countries: Key-findings from the 2000 International Crime Victims Survey* (2000) Ministry of Justice <<http://www.minjust.nl/b-organ.wodc/publicaties/>> at 1 November 2007.

since that time. From 1999 to 2001 the rates (based on 30 June Prison census) stabilised at around 98 per 100,000 only to jump to 149.9 in 2005 and then drop slightly to 140.6 in 2007.<sup>30</sup>

2.1.21 While on the face of it a plausible explanation for the decrease in crime after 1998 might be the increased imprisonment rate, experts caution against such reasoning. It seems that there is little evidence to suggest that changes in the crime rates are attributable to sentencing practice or sentence severity. The fact that an inverse relationship can be found between imprisonment rates and crime rates does not mean that higher rates of imprisonment cause less crime. An apparent relationship between crime rates and imprisonment might be due to some third factor (the omitted variable problem) or might be because high crime rates were pushing imprisonment down (the simultaneity problem).<sup>31</sup> However, public opinion clearly links crime rates to sentencing and this is reinforced by the media, politicians and even by the courts. The media commonly blames lenient sentencing (and occasionally low clear-up rates) for rising crime, or crime rates which are at an unacceptably high level. Media-hype and community anxiety about crime is exploited by some politicians who use the rhetoric of ‘Law and Order’ and ‘Tough on Crime’ to attract votes.

2.1.22 The courts could also be said to contribute to the perception of a causal link between sentencing practice and crime rates by emphasising general deterrence as a goal of sentence in sentencing remarks. While expert opinion may be divided about the extent to which prison reduces crime,<sup>32</sup> there is little support for the proposition that harsher sentencing brings about any significant reduction in the crime rate. In reviewing the literature on the relationship between crime rates and sentencing, it is useful to consider the assumptions underlying the assertion that there is a causal relationship. Four bases for the link are commonly suggested:

- First, it is suggested that the imposition of penalties can operate as a *general deterrent*. In other words that the imposition of a penalty at a certain level will induce persons who may be tempted to commit crime to desist out of fear of the penalty. The assumption is that increasing the level of penalties will reduce crime through general deterrence.
- Another basis on which common sense or intuition may suggest increasing sentencing severity may reduce crime rates is *incapacitation*. Even if imprisonment fails to deter or rehabilitate at least it may make the imprisoned offender incapable of offending for the period of their imprisonment.
- A third basis for suggesting that increasing penalties may reduce crime is *specific deterrence*; increasing penalties may reduce reconviction rates of convicted offenders by deterring them from reconvicting.
- Less often it is suggested imprisonment may operate as a cure, that offenders may be *rehabilitated* by the process.

2.1.23 Each of these ‘common sense’ assumptions will be considered in the light of the empirical evidence. It could also be argued that increased sanctions control crime by strengthening social norms against proscribed behaviour. It would appear that most people obey the law because of their moral beliefs rather than fear of incurring a penalty. However, the limited research available suggests that public views of the seriousness of an offence are not much affected by their beliefs about the sanction actually imposed for the offence.<sup>33</sup> The process is more subtle with the possibility that ‘punishment levels influence social norms only slowly and over time’.<sup>34</sup>

<sup>30</sup> ABS, *Prisoners in Australia*, Cat. No. 4517.0, ABS, (2007).

<sup>31</sup> Weatherburn (2004), above n 16, 122

<sup>32</sup> Ibid, 123.

<sup>33</sup> Ibid, 117.

<sup>34</sup> Ibid.

## General deterrence

2.1.24 Evaluating the deterrent effect of harsher penalties is notoriously difficult. For example, it is difficult to separate deterrent effects from the impact of other influences such as situational factors and so a statistical association which appears to establish cause and effect may have an entirely different explanation. A well-known review of deterrence research<sup>35</sup> states that the ideal research project would include:

- the use of variables that adequately distinguish severity from certainty of punishment;
- adequate controls for other possible influences on crime rates; and
- satisfactory methods of examining whether and to what extent changes in criminal justice policies actually alter potential offenders' beliefs concerning the risks of punishment.

2.1.25 Few studies meet these criteria. While reviews of deterrence research accept there is some evidence that the *probability* of sanctions can affect offence rates, there is much more scepticism of such a relationship between *severity* of sanction and offence rates. In other words, it is the prospect of getting caught that has the deterrent value rather than alterations in the severity of sentences. Some of the research will be reviewed to illustrate the problem of isolating deterrent effects from other explanations and the inconclusiveness of the evidence in support of the deterrent effect of harsher penalties.

### *Mandatory sentencing in Western Australia and the Northern Territory*

2.1.26 Mandatory sentencing in Western Australia provided a research opportunity to examine the general deterrent efficacy of increased penalties. The *Crime (Serious and Repeat Offenders) Act 1992* (WA) aimed to reduce the number of high-speed pursuits involving stolen vehicles. The legislation was officially justified on grounds of deterrence, involved dramatic changes in penalties (mandatory 18 month custody time followed by detention at the governor's pleasure for the main target group) and was extremely well publicised and well known.<sup>36</sup> While there was another car chase death on the day following the passage of the legislation, there were no such deaths in the following seven months and the Government pointed to this lull as evidence of a deterrent effect.<sup>37</sup> However, deaths on the roads are an inappropriate measure of deterrent effects of the legislation because they reflect too many other variables including such factors as police pursuit practices, which changed from early 1992 with many more pursuits being aborted. Broadhurst and Loh<sup>38</sup> examined a number of variables including police pursuits of stolen vehicles, thefts from motor vehicles and motor vehicle thefts and showed that the rate of motor vehicle theft had declined significantly in the months before the introduction of the legislation and thereafter increased following its introduction. The conclusion reached is that the 1992 *Act* had no deterrent effect. An evaluation of the three strikes burglary laws also failed to show evidence of a deterrent effect. This law came into effect in November 1996 and mandated a 12-month minimum sentence of imprisonment for offenders convicted of home burglary on the third and subsequent occasions. Home burglaries had increased significantly from 1991 to 1995 but had declined in 1996. This decline could not be attributed to the new laws because they only came into force in November of that year. In 1997, the burglary rate did not decline but remained constant and it increased in 1998. The monthly figures showed a sharp increase after the introduction of the laws. Morgan concluded, 'burglary rates appear to have a lifecycle that is to some extent seasonal and that operates quite independently of punishment levels'.<sup>39</sup> Before the Senate's Legal and Constitutional References Committee, the Western Australian Department of Justice conceded that the legislation had no impact on the rate of burglary and the Committee concluded that the mandatory sentencing

<sup>35</sup> Andrew Von Hirsch et al, *Criminal Deterrence and Sentencing Severity: an Analysis of Recent Research* (1999).

<sup>36</sup> Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of New South Wales Law Review* 267, 271.

<sup>37</sup> Ibid.

<sup>38</sup> Roderic Broadhurst and Nini Loh, 'The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) Sentencing Act' (1993) 26 *The Australian and New Zealand Journal of Criminology* 251.

<sup>39</sup> Neil Morgan, 'Mandatory Sentences in Australia' (2000) 24 *Criminal Law Journal* 164, 172.

legislation has not brought about a reduction in the rate of home burglaries in Western Australia.<sup>40</sup> Nor did the Northern Territory mandatory sentences for property offences appear to have a deterrent effect. The scheme, which came into effect in March 1997 provided a range of mandatory penalties, which for adults consisted of a minimum term of 14 days for a first offender, 90 days for a second offender and 12 months for third and subsequent offenders. The legislation was repealed in October 2001. Available data for about two years before the repeal of the legislation and two years after showed recorded property offences increased in the two years before and then decreased in the two years after. While it has not been claimed this demonstrates mandatory sentencing did not have a deterrent effect on level of property crime, it does suggest that the mandatory sentencing regime was not as ‘dominant a factor influencing the level of crime as may have been expected at the time that mandatory sentencing was introduced’.<sup>41</sup>

### *Capital punishment*

2.1.27 Research on capital punishment for homicide is sometimes relied upon by some commentators to demonstrate that penalty severity has no impact on deterrence and by others to demonstrate quite the opposite. In the case against deterrence it has been claimed that in the United States, comparisons of the murder rates in ‘abolitionist’ and ‘retentionist’ states give no indication of which are the abolitionist states.<sup>42</sup> In New Zealand between 1924 and 1962 the death penalty was in force, abolished, reintroduced, in abeyance and then abolished again. The murder rate fluctuated but the fluctuations bore no discernible relationship to the status of the death penalty.<sup>43</sup> A study of Queensland data showed murder rates fell from 1911, and this trend was not halted by the abolition of capital punishment in 1922.<sup>44</sup> There are some econometric studies reporting results showing support for a strong deterrent effect of capital punishment.<sup>45</sup> However, a recent review of 74 research studies has concluded that three decades of deterrence research has failed to deliver conclusive evidence that capital punishment deters homicide more effectively than life imprisonment.<sup>46</sup> Moreover, the majority of studies – including the more sophisticated econometric studies – favour the no deterrence conclusion.<sup>47</sup>

### *Successful deterrents?*

2.1.28 The introduction of the breathalyser, acknowledged as having an impact on road traffic casualties, is generally accepted as evidence of a deterrent effect, although this appears to be due to an increased subjective probability of sanctions rather than simply an increase in penalty severity.<sup>48</sup> Later studies examining the potential deterrent effect of increased enforcement by the police suggest that a

<sup>40</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (2002) 21.

<sup>41</sup> Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: the Northern Territory Experience* (2003) 10.

<sup>42</sup> Nigel Walker, *Why Punish?* (1991) 15.

<sup>43</sup> *Ibid.*, 16.

<sup>44</sup> RN Barber and PR Wilson, ‘Deterrent Aspect of Capital Punishment and its Effect on Conviction Rates: The Queensland Experience’ (1968) 2 *Australian and New Zealand Journal of Criminology* 100, 108.

<sup>45</sup> Hashem Dezhbakhsh, Paul H Rubin and Joanna M Shepherd, ‘Does Capital Punishment have a Deterrent Effect? New Evidence from Post Moratorium Data’ (2003) 5 *American Law and Economics Review* 344, 376.

<sup>46</sup> Janet Chan and Deborah Oxley, *The Deterrent Effect of Capital Punishment: A Review of the Research Evidence*, Contemporary Issues in Crime and Justice No 84, New South Wales Bureau of Crime Statistics and Research (2004).

<sup>47</sup> *Ibid.*

<sup>48</sup> H Lawrence Ross, ‘Law, Science and Accidents: the British Road Safety Act of 1967’ (1973) 2 *Journal of Legal Studies* 1; Ross Homel, ‘Penalties and the Drink Driver: a Study of One Thousand Offenders’ (1981) 14 *Australian and New Zealand Journal of Criminology* 225. Even with drink driving there are problems with a deterrence strategy because of optimism about the risk of being caught, ignorance of the penalty and the amount of alcohol that produces a reading over the limit: David Riley, ‘Drink Drivers: the Limits of Deterrence’ (1981) 24 *Howard Journal of Criminal Justice* 241.

general crime prevention strategy with publicity and attempts to change people's attitudes is likely to be more effective than either sentencing or enforcement changes alone.<sup>49</sup> An example of an apparently successful deterrent is Harding's finding that an additional penalty for carrying a firearm in a robbery deterred some robbers from carrying a firearm.<sup>50</sup> This suggests that general deterrence may be more effective for planned crimes than impulsive crimes. Burglars, however, do not appear to be susceptible to deterrence, but to be short-term hedonists or eternal optimists rather than rational calculators.<sup>51</sup> If active burglars consciously refuse to dwell on the possibility of being caught as another study suggests, increasing the penalty is unlikely to have an impact on their decision-making.<sup>52</sup>

### General deterrence: conclusions

2.1.29 The issue in relation to general deterrence and sentencing levels is whether the severity of sentence has an impact on crime levels. There is no dispute that the absence of a punishment structure (police, courts and sentences) would lead to an increase in crime. The overall system deters many offences that would otherwise be committed. The existence of a specific offence, such as using a mobile phone whilst driving may well discourage that behaviour. And it is likely that if robbery, for example, were known to be punishable only by a trivial penalty, that this would have an impact on the robbery rate. The issue for sentencing is whether harsher sanctions – in the sense of penalty increases within plausible limits - have the effect of deterring would-be offenders. Would a three or four-year sentence for armed robbery deter more people than a two-year sentence?

2.1.30 Reviews of the deterrence literature show there is no scientific basis for expecting that general penalty increases, which do not involve an unacceptably harsh punishment, will do anything to control the crime rate.<sup>53</sup> While there are some reviews that claim increases in sentencing severity deter crime,<sup>54</sup> these reviews have been criticised for being selective, incomplete and for relying on studies that can be explained by mechanisms other than general deterrence such as incapacitation and specific deterrence.<sup>55</sup> Similarly, there are individual studies that are occasionally held out as evidence that harsher sentences deter crime, but again these studies have been dismissed on the basis of methodological problems such as measurement problems and data selection issues as well as problems of differentiating increased severity from other causes.<sup>56</sup> The majority of both reviews of the evidence and individual studies deny that there is conclusive evidence supporting the deterrent effectiveness of increasing the severity of sanctions. A recent review by Doob and Webster of both reviews of the literature and individual studies, including scenario based studies and studies of offenders' thought processes, goes further and argues that the time has come to accept the null hypothesis: variation in sentence severity does not cause a variation in crime rates.<sup>57</sup>

2.1.31 So while the deterrent effectiveness of increasing penalty severity has intuitive/common sense appeal, the evidence to support its effectiveness is lacking. We do not know how to determine the increase in penalty severity that is required, how to communicate the increase to the target audience or whether the severity of penalties has reached saturation point. If we want evidence-led

<sup>49</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed, 2005) 77 citing David Riley, *Drink Driving: The Effects of Enforcement*, Home Office Research Study 121 (1991).

<sup>50</sup> Richard Harding, 'Rational Choice in Gun Use in Armed Robbery' (1990) 1 *Criminal Law Forum* 427.

<sup>51</sup> Ashworth (2005), above n 49, 77 citing Trevor Bennett and Richard Wright, *Burglars on Burglary* (1984) ch 5-6.

<sup>52</sup> Lucia Benaquisto (1997), 'The Non-Calculating Criminal: Inattention to Consequences in Decisions to commit Crime, unpublished paper cited by Anthony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' 30 *Crime and Justice* 143, 183.

<sup>53</sup> Deryck Beyleveld, *A Bibliography of General Deterrence Research* (1979); von Hirsch et al (1999), above n 35; Ashworth (2005) above n 49, 81.

<sup>54</sup> E.g. Donald E Lewis, 'The General Deterrent Effect of Longer Sentences' (1986) 26 *British Journal of Criminology* 47.

<sup>55</sup> Doob and Webster (2003), above n 52, 149, 152.

<sup>56</sup> See *ibid*, 155-173, for a critique of these studies.

<sup>57</sup> Doob and Webster (2003), above n 52.

policies, increasing penalty severity to reduce offending is not one.<sup>58</sup> Moreover, in addition to the empirical criticisms of general deterrence, there are principled objections to it – it is unfair to impose a disproportionately harsh sentence on one offender in order to deter several others from committing a similar offence.<sup>59</sup> That we sometimes knowingly harm non-offenders for the benefit of others (e.g. quarantine, compulsory acquisition) is no answer because these measures do not have the censuring dimension that punishment has.<sup>60</sup>

## Incapacitation

2.1.32 Collective incapacitation involves imprisoning offenders for longer or imprisoning more offenders to reduce crime or perhaps imprisoning all offenders convicted of particular crimes. Selective incapacitation involves selecting offenders who are at high risk of offending and imprisoning them for longer.

2.1.33 Collective incapacitative policies cannot be justified in cost-benefit terms. For crimes such as burglary, imprisonment does have an incapacitative effect in that those imprisoned tend to be the most frequent offenders and imprisoning them does prevent them offending whilst they are imprisoned.<sup>61</sup> But it does not follow that increasing the imprisonment rate is a good way to reduce crime. The *Halliday Report* concluded that the precise measure of the incapacitative effects of imprisonment is elusive. While some Home Office estimates suggest the prison population in England and Wales would need to increase by around 150 per cent for a reduction in crime of 10 per cent, there are indications that such a reduction may well be only temporary with crime rates returning to normal and more offenders in the system consuming more resources.<sup>62</sup> In the US it has been estimated that a 10 per cent reduction in the crime rate would require a doubling of the imprisonment rate.<sup>63</sup> In New South Wales it has been estimated that doubling the average length of imprisonment for burglary would increase the prison population by about eight percentage points.<sup>64</sup> Clearly, substantial increases in imprisonment are needed for even modest reductions in crime. Doubling the period of time offenders spend in prison or doubling the number of people we imprison will not result in halving the crime rate.<sup>65</sup>

2.1.34 It must also be recognised that incapacitation will not work if the shoes of those imprisoned are filled by someone else.<sup>66</sup> In the US, one of the results of the War on Drugs was that one-fourth of all prison beds were occupied by offenders convicted of drug possession and dealing. Researchers estimating the incapacitative effect of this suggest that this policy has had the effect of increasing and not reducing the crime rate because of the effect of replacement: removal of one dealer opens up the opportunity for another to enter.<sup>67</sup>

2.1.35 Incapacitative strategies are said to work most effectively when they are selective - when high risk re-offenders are targeted either on the basis of assessments of dangerousness or on the basis of a prediction method that identifies certain high risk offenders. However, this strategy has been

<sup>58</sup> See also The Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales (The Halliday Report)* (2001) 8.

<sup>59</sup> Ashworth (2005), above n 49, 77, 80; Australian Law Reform Commission (ALRC), *Sentencing*, Report No 44 (1988).

<sup>60</sup> Ashworth (2005), above n 49, 67.

<sup>61</sup> The fact that only one person is imprisoned for every 1000 offences committed does not mean that doubling the imprisonment rate will only affect about one tenth of one per cent of offences: see Don Weatherburn, Jiuzhao Hua and Steve Moffatt, 'How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary' (2006) (93) *Crime and Justice Bulletin*.

<sup>62</sup> *The Halliday Report* (2001), above n 58, 9.

<sup>63</sup> Weatherburn (2004), above n 16, 125.

<sup>64</sup> Weatherburn, Hua and Moffatt (2006), above n 61, 6.

<sup>65</sup> See Weatherburn (2004), above n 16, 124-125 for an explanation of this; see also Michael Tonry, *Sentencing Matters*, (1996) 138-139.

<sup>66</sup> Weatherburn (2004), above n 16, 125.

<sup>67</sup> William Spelman, 'The Limited Importance of Prison Expansion' in Alfred Blumstein and Joel Wallman (eds), *The Crime Drop in America* (2000) 97, 116.

shown to have major flaws. First, predictions of future criminality are inherently unreliable and with false positives rates that can reach two in three.<sup>68</sup> So for each future high-rate offender incapacitated, two other people would have to be imprisoned for an extended period.<sup>69</sup> Moreover, calculations of the incapacitative effects of such strategies have been shown to be exaggerated.<sup>70</sup> ‘Three-strikes and you’re out’ is a crude example of selective policies. In the Western Australian context, neither the 1992 laws nor the 1996 laws had a selective incapacitative effect. The 1992 laws were introduced with the claim they would incapacitate hard-core juvenile offenders. In fact they impacted primarily on older Aboriginal men in remote localities.<sup>71</sup> As Mackenzie has concluded from the international literature, the impact on minority groups of incapacitative strategies is disastrous.<sup>72</sup>

2.1.36 As well as empirical objections to incapacitative policies, there are principled objections to incapacitation as a rationale for increasing sentence length. It is morally objectionable to punish an offender beyond their just deserts in order to increase the future safety of others, particularly if the successful prediction rate is low.<sup>73</sup> Spelman has suggested that the most effective programmes are those that give the predicted high risk offenders sentences that are about 20 times as long as those given to the low risk group. Clearly this is ethically unacceptable as the high rate offender group commit crimes only two or three times more often than the low rate group.<sup>74</sup>

### ***Specific deterrence and rehabilitation***

2.1.37 Specific deterrence raises two questions. First, whether the use of tougher penalties deters those convicted, and secondly, whether imprisonment deters those convicted more effectively than other penalties. Research on the deterrent effect of tougher penalties suggests no such effect or inconsistent effects.<sup>75</sup> Two Australian examples demonstrate this general conclusion. Briscoe studied the impact of increasing the statutory penalties for drink driving in New South Wales – the maximum penalties were doubled as well as the minimum disqualification periods. She found that this led to substantial increases in the penalties actually imposed by the courts but there was no change in the rates of recidivism among drink drivers in Sydney and only a very slight reduction in recidivism among drink drivers in the country.<sup>76</sup> In the Northern Territory the deterrent impact of the three strikes legislation was explored on those sentenced for a property offence under the legislation. It was found that there was no appreciable change in the rates of reconviction rates of those sentenced to a second strike compared to the first strikers suggesting the possibility of a second strike had no increased deterrent effect.<sup>77</sup>

2.1.38 The fact that so many prisoners re-offend (the usual estimate is between a half and two-thirds) explains scepticism about the effectiveness of prisons to deter those sentenced (or to reform them). The evidence suggests that comparing conviction rates for custody with community penalties

<sup>68</sup> Ashworth (2005), above n 49, 80; and see ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No. 103 (2006) 138.

<sup>69</sup> Tonry has suggested the best prediction methods over-predict by three or four to one: Tonry (1996), above n 65, 139.

<sup>70</sup> Ashworth (2005), above n 49, 81; Weatherburn (2004), above n 16, 126.

<sup>71</sup> N Morgan, ‘Why we should not have mandatory penalties: theoretical structures and political realities’ (2002) 23 *Adelaide Law Review* 141, 153.

<sup>72</sup> Doris Mackenzie, ‘Reducing the criminal activities of known offenders and delinquents: Crime prevention in courts and corrections’ in Lawrence W Sherman, D P Farrington, Doris Layton MacKenzie and Brandon C. Welsh (eds) *Evidence-Based Crime Prevention* (2002) 330, 386.

<sup>73</sup> Ashworth (2005), above n 49, 81.

<sup>74</sup> W Spelman (2000), above n 67, 118.

<sup>75</sup> Weatherburn, Hua and Moffatt (2006) above n 61, 2.

<sup>76</sup> Suzanne Briscoe, *The Impact of Increased Drink Driving Penalties on Recidivism Rates in NSW*, Alcohol Studies Bulletin No 5, New South Wales Bureau of Crime Statistics and Research (2004).

<sup>77</sup> Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offender: The Northern Territory Experience* (2003) 5-6: the reconviction rates after one strike were 26 per cent for indigenous offenders and 11 per cent for non-indigenous offenders and 27 per cent for indigenous offenders and 10 for non-indigenous after two strikes.

generally shows no significant differences in reconvictions rates.<sup>78</sup> One comparative study of reconviction rates following various types of sentence, which took account of age, type of offence and previous record, found that custodial sentences perform slightly worse than expected for all offenders other than the few first offenders. The proportion reconvicted within two years of release was 54 per cent for prison, 49 per cent for community service and 42 per cent for ‘straight’ probation.<sup>79</sup> Weatherburn agrees with the general conclusion that there is little difference in the offending rates between similar offenders given custodial and non-custodial penalties.<sup>80</sup> In support, he cites a US study in which a group of drug offenders given a probation order were compared with a group of drug offenders sentenced to prison.<sup>81</sup> After controlling for factors that might have affected the rate and speed of re-offending, it was found that the offenders given a prison sentence performed worse than those given probation on each measure of re-offending, namely charges, conviction, imprisonment and elapsed time. Bartels’ Tasmanian study is consistent with these findings with unsuspended sentences performing worst (see below para 3.2.3).

2.1.39 English evidence also suggests that reconviction rates following release from prison are generally lower as the length of sentence increases. This is thought to be due to the characteristics of offenders who are given longer sentences (such as the nature of the offences they commit) and the higher proportion of such offenders who receive parole supervision. It is suggested that once allowance is made for the characteristics of offenders receiving different sentences and the known beneficial effect of parole, there is no clear relationship between sentence length and propensity to re-offend.<sup>82</sup>

## Rehabilitation

2.1.40 Rehabilitation fell into disfavour because of lack of evidence of its effectiveness and also because of the possibility of imposing oppressive and disproportionate punishment in the name of treatment. However, it now appears that ‘Nothing works’ is an overstatement.<sup>83</sup> Criminologists no longer accept that treatment programmes are ineffective in reducing crime. More sophisticated research techniques such as ‘meta-analysis’ of large numbers of small rehabilitative programs shows positive results can be obtained in favourable circumstances with selected offenders.<sup>84</sup> As a consequence, the pessimism of the of last decades of the twentieth century has been replaced by a cautious optimism that some programmes are effective in reducing the criminal behaviour of at least some offenders. This optimism was exemplified in England by the *Halliday Report* which suggested that based on the international evidence, by using risk assessment and identifying programs most likely to work for the offender in question, it may well be possible to reduce re-offending by five to

<sup>78</sup> Christopher Nuttall, Peter Goldblatt and Chris Lewis, *Reducing Offending: An Assessment of Research Evidence on Ways of Dealing With Offending Behaviour*, Home Office Research Study 187 (1998) 90; and see Weatherburn (2004), above n 16, 122.

<sup>79</sup> Ashworth (2005), above n 49, 267 citing Charles Lloyd, George Mair and Mike Hough, *Explaining Reconviction Rates: a Critical Analysis*, Home Office Research Study 135 (1994).

<sup>80</sup> Weatherburn (2004), above n 16, 122.

<sup>81</sup> Cassia Spohn and David Holleran, ‘The effect of Imprisonment on Recidivism Rates for Felony Offenders: A focus on Drug Offenders’ (2002) 40(2) *Criminology* 329, 357.

<sup>82</sup> Nuttall, Goldblatt and Lewis (1998), above n 78, 93. An earlier study had shown no difference in re-offending rates between shorter and longer sentences: S R Brody, *The Effectiveness of Sentencing: A Review of the Literature*, Home Office Research Study 35 (1976).

<sup>83</sup> ‘Nothing works’ was and is a socially constructed reality rather than a scientific truth: Rick Sarre (2001) ‘Beyond “What Works?” A 25-year Justice Retrospective of Robert Martinson’s Famous Article’ 34 *Australian and New Zealand Journal of Criminology* 38.

<sup>84</sup> Ashworth (2005), above n 49, 83 citing James McGuire, *What Works: Reducing Reoffending* (1995); Julie Vernard, Carol Hedderman and Darren Sugg, ‘The Influence of Cognitive Approaches’ in The Home Office, *Changing Offenders Attitudes and Behaviour: What Works?* Home Office Research Study 171 (1997); Lawrence W Sherman, et al, *Preventing Crime: What Works, What Doesn’t, What’s Promising* (1997); Mackenzie (2002), above n 72. More recent reviews support these conclusions: Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates* (2006); Gemma Harper and Chloe Chitty (eds) *The Impact Of Corrections on Re-Offending: A Review of ‘What Works’*, Home Office Research Study 291 (3<sup>rd</sup> ed, 2005).

fifteen percentage points. Instead of ‘nothing works’ it argued for ‘what works’ strategies and programs, meaning a rigorous analysis of what works in preventing re-offending.<sup>85</sup> Consequently there has been a roll-out of rehabilitative programmes in that country based on ‘what works’ principles.

2.1.41 Increased optimism about the possibilities of achieving some improvement in recidivism rates by adopting new programs for prisoners in no way justifies increasing the use of imprisonment beyond current levels. All it suggests is that more effort should be put into rehabilitative programs for offenders sentenced to custodial and non-custodial options. The implications of the international research on what works will be further discussed in Part 3: Sentencing Options.

### ***Conclusion***

2.1.42 If criminal justice and sentencing policy is to be evidence-based, then increasing sentence severity with the aim of reducing crime is not the appropriate response. This is a point that has been made by criminologists for years. The challenge is to get this message across. Whether a sentencing council or other body should be established in Tasmania to assist in disseminating information about crime and sentencing, and to provide a policy buffer between the public and the government will be considered in Part 7.

## **2.2 (b) The role of sentencing in achieving the Tasmania Together Goals**

2.2.1 The terms of reference require the Institute to explore the role that sentencing legislation and sentencing measures have in achieving the Tasmania Together Goals in relation to perceptions of safety and achieving safe environments. The Tasmania Together Goals were formulated in 2001, and revised in 2006. Goal 2 dealt with community perceptions of safety and actual safety and standard 1 related to safety and perceptions of safety in public places and private homes and it had a number of indicators and targets that relate to perceptions of crime and crime levels. The revised Goal 2, standard 1 and the targets and indicators are similar. However, the indicator relating to percentage of people who feel safe on public transport has been abandoned. The table below sets out the revised indicators that are relevant to crime from Goal 2 standard 1 together with baseline data, targets for 2005, 2010, 2015 and 2020, and the latest data.

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<sup>85</sup> *Halliday Report* (2001), above n 58, 6-7.

**Table 9: Tasmania Together Goals relating to perceptions of crime and crime rates**

Indicator	Targets	Latest Data
1.2 Percentage of people who feel safe at home 2001/02: 92.5% (day) 80% (night) Source: <i>Department of Police and Emergency</i>	2005: 94% (day) 86% (night) 2010: 96% (day) 88% (night) 2015: 97% (day) 90% (night) 2020: 97% (day) 92% (night)	2004/05: 95% (day) 86% (night) Source: <i>National Police Survey (AC Nielson)</i>
1.3 Percentage of people who feel safe in public places 2001/02: 86.1% (day) Source: <i>Department of Police and Emergency</i>	2005: 90% (day) 46% (night) 2010: 92% (day) 48% (night) 2015: 94% (day) 52% (night) 2020: 96% (day) 56% (night)	2004/05: 91% (day) 50% (night) Source: <i>National Police Survey (AC Nielson)</i>
1.4 Percentage of people who feel safe on public transport 2001/02: 50.3% (day) 22.2% (night) Source: <i>Department of Police and Emergency</i>	2005: 59% (day) 30% (night) 2010: 65% (day) 33% (night) 2015: 68% (day) 36% (night) 2020: 70% (day) 40% (night)	2004/05: 57% (day) 29% (night) Source: <i>National Police Survey (AC Nielson)</i>
1.4 Crime victimisation rate April 1998: 13.6% Source: <i>Crime and Safety Australia (ABS 4509.0)</i>	2005: 12% 2010: 8% 2015: 7% 2020: 6%	April 2005: 8.7% Source: <i>Progress Report 2006 (2006), Tasmania Together 2020.</i>
1.5 Reported level of family violence 2000/01: 1300 domestic violence incidents Source: <i>Department of Police and Emergency Management</i>	2005: 10% compounding reduction 2010: 10% reduction on 2005 2015: 10% reduction on 2010: 2020: 10% reduction on 2010	2004/05: 4095 Source: <i>Department of Police and Emergency Management</i>
1.6 Proportion of adult offenders convicted again in 2 years 2001/02: 23% Source: <i>Department of Justice</i>	To be established in 2007	

Source: *Goals and Benchmarks (2006) Tasmania Together 2020* <[http://www.tasmaniatgether.tas.gov.au/goals\\_and\\_benchmarks](http://www.tasmaniatgether.tas.gov.au/goals_and_benchmarks)> at 18 August 2007; *Progress Report 2006 (2006), Tasmania Together 2020*, <[http://www.tasmaniatgether.tas.gov.au/our\\_progress/progress\\_report](http://www.tasmaniatgether.tas.gov.au/our_progress/progress_report)> at 18 August 2007.

2.2.2 As Table 9 indicates, the 2005 targets were met for feelings of safety at home and feelings of safety in public places. The target victimisation rate of 12 per cent for the percentage of persons who were victims of robbery, assault or sexual assault or who lived in households that were victims of break-in, attempted break-in or motor vehicle theft was also met by a victimisation rate of 8.7 per cent as reported in the 2005 Crime and Safety Survey. However, the target for perceptions of safety on public transport were not met with performance in 2004-05 data slipping back to below the 2005

target.<sup>86</sup> Nor were the targets for level of family violence achieved with significant increases in reports of family violence since 2000/01.<sup>87</sup> The 2006 Report did not report on the recidivism indicator.

### *Improving perceptions of safety*

2.2.3 The rationale for addressing the issue of fear of crime in the Tasmania Together Goals is that quality of life is related not only to how safe people actually are but also is related to their perceptions of safety. Setting targets in relation to percentages of people who feel safe raises the issue of how one determines at what level an objective risk justifies a feeling of safety. As Weatherburn has noted, '[t]he same objective risk that troubles you may not bother me in the slightest'.<sup>88</sup> This difficulty aside, there are two ways of improving perceptions of safety from crime: first, by clarifying any misconceptions and overestimates of the objective risks and secondly, by reducing the actual risk. Ways in which sentencing measures and legislation may be able to impact on actual risk is discussed below. It is difficult to see how sentencing measures and legislation can impact on misperceptions about the risk of falling victim to offences such as assault, robbery and burglary. However, such misperceptions can be tackled in other ways, and addressing them may assist in improving confidence in the criminal justice system as well as improving perceptions of safety.

### **What do we know about public perceptions of crime?**

2.2.4 An ABS Survey in Tasmania in 1998 showed that eight out of ten Tasmanians aged 18 and over were worried (very worried or slightly worried) about having their home broken into and almost two thirds were worried about being mugged or robbed.<sup>89</sup> The ABS Crime and Safety Surveys also gather national data on feelings of safety at home alone at day and night.<sup>90</sup> Tasmania Together relies on the National Police Survey conducted by AC Nielson for its benchmark in relation to feelings of safety – in the latest data reported 95 per cent of people 18 years and older feel safe in their homes in the day and 86 per cent of people feel safe at night. Just 50 per cent of people feel safe in public places at night (see Table 9). While it is difficult to say what level of risk justifies fear or concern, other research findings suggest that perceptions of risk are out of kilter with the facts. The public in general have a poor understanding of crime rates and do not know whether crime rates are falling or increasing.<sup>91</sup> Most people overestimate the risk of falling victim to crimes such as car theft, assault and robbery.<sup>92</sup> Moreover, there is no systematic link between the prevalence of common offences such break and enter, robbery and assault and the level of public concern in that state about these offences.<sup>93</sup> Research in Britain links misperceptions and misinformation about crime with worry about crime and feelings of safety. Based on the British Crime Survey, Finney reports that misperceptions about changes in crime rates were associated with increased worry about crime and fear when walking alone after dark or being home alone at night and a lack of confidence in the criminal justice system.<sup>94</sup> Canadian evidence has shown that people with high levels of fear are more likely to be punitive and lack confidence in the criminal justice system.<sup>95</sup> As levels of fear increased (measured by feelings of safety, walking alone at night or at home alone at night) so did levels of punitiveness. Misconceptions about crime and sentencing have also been shown to be linked with punitiveness. Hough and Roberts have

<sup>86</sup> Tasmania Together Board, Parliament of Tasmania, *Progress Report 2006* (2006) 23.

<sup>87</sup> *Ibid.*, 24.

<sup>88</sup> Weatherburn (2004), above n 16, 3.

<sup>89</sup> ABS, *Community Safety, Tasmania*, Cat. No. 4515.6, ABS (1999) 7 and Table 17 (note that worried includes slightly worried as well as very worried).

<sup>90</sup> ABS, *Crime and Safety Survey*, Cat. No. 4509.0, ABS (2005).

<sup>91</sup> Don Weatherburn and David Indermaur, *Public Perceptions of Crime Trends in New South Wales and Western Australia*, Crime and Justice Bulletin No 80, New South Wales Bureau of Crime Statistics and Research (2004).

<sup>92</sup> Don Weatherburn (2004), above n 16, 3, citing Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Crime Perception and Reality: Public Perceptions of the Risk of Criminal Victimization in Australia*, Crime and Justice Bulletin 28 (1996).

<sup>93</sup> *Ibid.*

<sup>94</sup> Andrea Finney, 'Perceptions of Changing Crime Levels' in Sian Nicholas and Alison Walker (eds), *Crime in England and Wales 2002/2003: Supplementary Volume 2: Crime Disorder and the Criminal Justice System – Public Attitudes and Perceptions*, (2004) 25, 32.

<sup>95</sup> Jane Spratt and Anthony Doob, 'Fear, Victimization and Attitudes to Sentencing, the Courts and the Police' (1997) 39 *Canadian Journal of Criminology* 275, 281.

found that misperceptions about such facts as changes in crime rate, the proportion of crime that involves violence and the number of burglars sent to prison were significantly associated with a belief that sentences are too lenient.<sup>96</sup>

2.2.5 While there are problems with ascertaining public opinion by means of media polls and representative surveys (see para 7.2.2 below), these methods of measuring public opinion consistently demonstrate that a majority of respondents think that sentencing is too lenient and that judges are unresponsive to community concern about crime. Various media polls and crime prevention and customer satisfactions surveys conducted by TASPOL have suggested a widespread view that courts are too soft on offenders and that this hampers the police.<sup>97</sup> The Australian Survey of Social Attitudes has consistently reported that over 70 per cent of respondents agree that people who break the law should be given stiffer sentences (the figure was 70 per cent in 2003) with a trend to slightly less punitive attitudes.<sup>98</sup>

2.2.6 Given that international evidence suggests fear of crime is linked with dissatisfaction with sentencing,<sup>99</sup> increasing the severity of penalties may be an attractive knee-jerk response to fear of crime. However, given that crime rates are largely unaffected by sentencing levels any attempts to improve perceptions of community safety by increasing sentencing severity would be disingenuous and exploitative. There is a tendency for some politicians to exploit the unsophisticated nature of the public debate about crime, a debate which is premised on the notion that most crime is processed by the criminal justice system and governments can achieve decisive changes in the extent of crime by modifications to the criminal justice system. A vigorous law and order policy may well appease public concern in the short-term and attract votes but it is nothing more than pragmatic populist policy making. While our government should respond to the demands of the electorate, it should not encourage it to think that crime can be solved by increasing the severity of punishment.

2.2.7 This is not to say that sentencing levels, sentencing measures or sentencing policy have no role in achieving the Tasmanian Together Goals relating to perceptions of community safety. Dissatisfaction with sentencing and perceptions of leniency clearly damage public confidence in the criminal justice system and exacerbate fear of crime. To reiterate comments made in Part 1 of this paper, more subtle criticisms of sentencing include:<sup>100</sup>

- Accountability: the current system, with judges and magistrates exercising broad discretionary powers, is not sufficiently accountable;
- Consistency: current practices are inconsistent;
- Transparency: the current system is inaccessible (except to lawyers) and is not open to scrutiny;
- Responsiveness: judges and magistrates are out of touch and are not sufficiently responsive to public concerns.

2.2.8 Public confidence in the criminal justice system could be addressed by righting misconceptions as to accountability and consistency, and responding to perceptions of leniency, a lack of transparency and unresponsiveness by:

- promoting public understanding of sentencing practice;
- reviewing aspects of the system that may undermine public confidence; and

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<sup>96</sup> Mike Hough and Julian Roberts, 'Sentencing Trends in Britain: Public Knowledge and Public Opinion' (1999) 1 *Punishment & Society* 11.

<sup>97</sup> E.g., Operation Switch On (interviews with Claremont Residents) and Neighbourhood Watch Survey.

<sup>98</sup> D Indermaur and L Roberts, 'Perceptions of Crime and Justice' in S Wilson et al, *Australian Social Attitudes: The First Report*, (2005) 141, 155.

<sup>99</sup> Sprott and Doob (1997), above n 95, 281.

<sup>100</sup> Neil Morgan, 'A Sentencing Matrix for Western Australia: Accountability and Transparency or Smoke and Mirrors?' in Neil Hutton and Cyrus Tata (eds), *Sentencing and Society: International Perspectives* (2002) 65.

- establishing mechanisms for feeding in public attitudes to the criminal justice system.

2.2.9 In addition, because misconceptions about crime trends are also linked with fear of crime, improving public knowledge about crime could help reduce fear of crime.

### **Promoting understanding of crime trends and sentencing practice**

2.2.10 Australian studies are consistent with the research from other countries. The public has very little accurate information about either crime or punishment trends. People perceive crime to be constantly increasing, over-estimate the proportion of recorded crime that involves violence, and over-estimate the percentage of offenders who re-offend. The public also under-estimates the severity of sentencing practices (e.g. the imprisonment rate), and over-estimates the percentage of prisoners released on parole and the proportion of prison terms served in the community on parole.<sup>101</sup> Misperceptions about sentencing practice correlate with a belief that sentences are too lenient: the lower the estimated use of imprisonment, the greater is the belief that sentencing is too lenient. This suggests that those dissatisfied with the criminal justice system are those whose perceptions are particularly inaccurate. Therefore, it seems that misperceptions about crime and sentencing practice contribute to public dissatisfaction. Moreover, misperceptions are linked with fear. A better understanding of crime and sentencing practice should lead to an improvement in public confidence and a reduction in fear of crime. How this should be done is considered in Part 7.

### **Reviewing aspects of the system that undermine public confidence**

2.2.11 An examination of sentencing options may indicate that the available options are inadequate. Some existing options may be misunderstood and contribute to criticism of the system. A review of sentencing options is undertaken in Part 3 of this paper. Parole is another aspect of the criminal justice system that has come under public criticism. It is sometimes viewed as a charade which makes a mockery of the criminal justice system by reducing the sentence below the level needed to adequately punish the crime. It is also criticised as giving priority to offender considerations rather than those of the victim. Parole will be considered in Part 6.

2.2.12 Changing the rationale of punishment is not something that can be effectively achieved by legislation. However, as a longer-term goal the possibility of changing the fundamental rationale of punishment from the mix of desert and goal based considerations should be considered. The emphasis placed by courts on general deterrence for example implies promises of crime prevention that cannot be met.

### **Taking public opinion into account**

2.2.13 The manner and extent to which public opinion about crime should shape sentencing theory and practice are dealt with in Part 7.

### ***Sentencing smarter to reduce actual risk of crime, reduce victimisation rates and improve recidivism rates***

2.2.14 The strategies addressed so far relate to improving public perceptions of public safety rather than actual improvements in public safety by reductions in the crime rate. As discussed above in the section on the relationship between crime levels and sentencing, because crime levels are largely unaffected by sentencing levels, sentencing reform cannot *significantly* impact on crime levels and hence the Tasmania Together Goals relating to community safety and crime reduction. It has been shown that the intuitive appeal of the assumption that crime levels are easily controlled by sentencing measures collapses in the face of the empirical evidence and normative arguments to the contrary. As

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<sup>101</sup> Mike Hough and Julian Roberts, 'Public Knowledge and Public Opinion of Sentencing' in Cyrus Tata and Neil Hutton (eds) *Sentencing and Society* (2006) 157.

the Institute has argued in relation to the general deterrent effect of sanctions, the time has come to accept the null hypothesis – increasing the severity of penalties does not reduce crime by deterring would-be offenders. Incapacitation is equally problematic. Collective incapacitative policies cannot be justified in cost-benefit terms, and selective incapacitation suffers from the problem of over-prediction and is morally objectionable. As for specific deterrence, research evidence provides little support for the proposition that more severe sanctions deters those convicted. Nor does imprisonment deter those convicted more effectively than non-custodial sanctions. However, while the public should not be encouraged to think that crime can be *solved* by punishment, there are undoubtedly improvements that could be made in using public resources more efficiently and imaginatively. The evidence that those imprisoned do no better than those given non-custodial sanctions suggests that reducing imprisonment may be a cost-effective option. A wider range of sentencing options and reserving custodial sentences for particularly serious offenders may allow expenditure to be redirected to measures which are likely to have more potential to address re-offending. At the same time, integrating criminal justice with broader social issues is something that should be part of government policy. The international evidence now suggests there is also some scope for addressing the issue of recidivism of offenders through rehabilitation – if recidivism rates could be improved this could impact on crime levels. Ways of sentencing smarter will be discussed in Part 3.

## Part 3

# Sentencing Options

Examine the suitability of present sentencing options (including options provided in the *Youth Justice Act 1997* (Tas) and consider whether any changes should be made to existing options and whether new sentencing options should be introduced.

## 3.1 Sentencing options

### *Introduction*

3.1.1 The sentencing options for courts dealing with adult offenders are set out in the *Sentencing Act 1997* (Tas) s 7. They are:

- a sentence of imprisonment (at least some of which must be actually served);
- a drug treatment order;
- a wholly suspended sentence of imprisonment;
- a community service order;
- a probation order;
- a rehabilitation program order;
- a fine;
- an adjournment with an undertaking (section 7(f) order);
- conviction only;
- dismissal without conviction.

3.1.2 In this Part, existing sentencing options will be reviewed and additional sentencing options considered. It is recognised that changing the sentencing framework is only part of the issue and that there are important questions of resources that need to be addressed. Providing properly resourced and staffed programs to address the criminogenic needs of offenders is not simply a matter of financial resources. It has much wider implications for community corrections and prisons.

## 3.2 Imprisonment

3.2.1 The Supreme Court has the power to impose sentences of imprisonment for all crimes. The maximum is 21 years except for murder and treason, which attract maxima of life imprisonment.<sup>1</sup> The power of magistrates to impose a sentence of imprisonment for summary offences depends on the penalty provisions attached to the offence. The usual maximum ranges from three months to 12

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<sup>1</sup> *Criminal Code 1924* (Tas) s 389(3).

months. For indictable offences that are heard by magistrates the offender is liable to 12 months imprisonment for a first offence and three years for a subsequent offence.<sup>2</sup>

3.2.2 A sentencing principle of particular relevance to the choice of imprisonment as a sanction is that imprisonment is a punishment of last resort to be imposed only where a non-custodial sentence is inappropriate. There are four good reasons for this principle:

- doubts about the rehabilitative potential of custody;
- belief in its deleterious effects;
- doubts about the preventive effect of custody; and
- human rights and humanitarian concerns.<sup>3</sup>

3.2.3 International evidence indicates that reconviction rates for released prisoners are poor and that taking into account age, type of offence and previous record, prisoners perform worse than those given other sentences.<sup>4</sup> A reconviction study of offenders dealt with in the Supreme Court in Tasmania has found similarly poor reconviction rates for prisoners, particularly those sentenced to fully served or unsuspended sentences. While half of the sample of all offenders sentenced by the Supreme Court re-offended within two years, 62 per cent of offenders given unsuspended sentences re-offended in that period, with 42 per cent of offenders receiving wholly suspended sentences and 52 per cent receiving non-custodial sentences. Only those with no prior convictions performed best when given a prison sentence (unsuspended or partly suspended).<sup>5</sup> This suggests that prison in itself neither effectively rehabilitates nor deters prisoners. To what extent it makes offenders worse is difficult to establish. However, such factors as loss of employment, loss of housing, loss of contact with family, increased financial problems and possible deterioration in physical and mental health are all known adverse effects of imprisonment.<sup>6</sup> As for other preventive effects, the absence of evidence of a general deterrent effect from greater use of custody has been discussed in Part 2. Part 2 also demonstrated that the incapacitative effect of imprisonment is marginal. While imprisonment does succeed in incapacitating those imprisoned for the duration of the sentence, incapacitation as a penal policy is hardly persuasive when so many re-offend on release and when so few offenders are actually convicted.<sup>7</sup> The very limited role that the imprisonment rate has on the crime rate been recognised for many years by the judiciary. In a review of aspects of sentencing conducted in 1994, consultations with the judiciary, magistrates and others found a general scepticism about the effectiveness of imprisonment in terms of crime reduction.<sup>8</sup> Having a low imprisonment rate does not mean that a community is less safe than a community with a higher imprisonment rate. Tasmania's imprisonment rate is the six highest at 140.6 per 100,000 of the adult population compared with the Australian rate of 169.4 per 100,000.<sup>9</sup> It by no means follows that those jurisdictions with higher rates are safer.

3.2.4 A relevant factor in considering imprisonment rates is the issue of cost. The Productivity Commission reports that nationally in 2005-2006 the total net cost per prisoner per day, comprising recurrent expenditure, depreciation, debt servicing fee, and user cost of capital, was \$240 per day or \$87,600 per year. The cost per prisoner in Tasmania was just under this.<sup>10</sup> The latest Department of Justice Annual Report reports the cost was \$222 in 2006-2007.<sup>11</sup> The fact that imprisonment is the most expensive sentencing option, that imprisoned offenders perform no better in terms of re-

<sup>2</sup> *Sentencing Act 1997* (Tas) s 13.

<sup>3</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed 2005), 266-269.

<sup>4</sup> See Part 2; see also Ashworth (2005) above n 3, 267.

<sup>5</sup> L Bartels (2007), 'The weight of the Sword of Damocles: A reconviction analysis of suspended sentences in Tasmania' under review with the *Australian and New Zealand Journal of Criminology*.

<sup>6</sup> Ashworth (2005) above n 3, 266; Alison Liebling and Shadd Maruna, *The Effects of Imprisonment* (2005) ch 1.

<sup>7</sup> Ashworth (2005) above n 3, 268.

<sup>8</sup> L Jones, *Review of Certain Criminal Penalties*, Tasmanian Department of Justice (1994) 126.

<sup>9</sup> Australian Bureau of Statistics, *Prisoners in Australia 2007*, Cat. No. 4517.0, ABS, (2007) 18.

<sup>10</sup> Steering Committee, Parliament of Australia, *Report on Government Services 2007* (2007) [7.22].

<sup>11</sup> Tasmanian Department of Justice, *Annual Report 2006-2007* (2007), 42.

offending and often worse than similar offenders given other sentences, leads to the conclusion that attempts should be made to curtail the use of imprisonment.

3.2.5 In the light of the strong arguments in favour of restraint in the use of imprisonment, the Issues Paper invited submission in relation to the following strategies:

- abolishing sentences of 3 months or less;
- statutory recognition of imprisonment as a last resort;
- requiring reasons for short sentences;
- reforming the use of short custodial sentences.

### ***Prohibiting short sentences***

3.2.6 The Issues Paper asked whether the possibility of abolishing sentences of three months or less should be explored. Very short sentences of imprisonment are common in Tasmania. In Magistrates Courts in 2003-2004, 67 per cent of custodial sentences were for three months or less and 89 per cent six months or less.<sup>12</sup> In the Supreme Court from 2001-2006, 18 per cent of sentences of imprisonment were three months or less and 47 per cent six months or less. Western Australia abolished terms of imprisonment of three months or less in 1996 following the recommendations of the *Halden Report*,<sup>13</sup> and in 2004 this was extended to sentences of six months or less. Section 86 of the *Sentencing Act 1995* (WA) provides that a term of six months or less can only be imposed if the aggregate of sentences exceeds six months, if the offender is already serving another term or if the term is imposed for a prison disciplinary offence. The context of the 1996 change was the very high imprisonment rate in Western Australia (second behind the Northern Territory), an outdated sentencing regime with relatively few alternatives to imprisonment and insufficient use of the options that did exist.<sup>14</sup> The Act aimed to encourage sentencers to avoid short custodial sentences by the carrot of new non-custodial options and the stick of the prohibition. In New South Wales, investigating the issue of banning sentences under six months was one of the first tasks given to the Sentencing Council. The Council released its report in 2004.<sup>15</sup> The same year, the Tasmanian Leader of the Opposition and the Shadow Attorney-General released a policy statement advocating the abolition of short terms of imprisonment. In the responses to the Issues Paper that addressed this issue, only Tasmania Police and the Legal Aid Commission of Tasmania expressed support for this proposal.

### **Arguments supporting the abolition of short terms of imprisonment**

3.2.7 It is argued that short periods of imprisonment should be avoided because they have all of the deleterious effect of imprisonment (loss of the deterrent effect of imprisonment on a first offender, exposing minor offenders to more serious offenders, and negative effects on family, housing and employment) without any benefits (too short to deploy therapeutic programs) and minimum incapacitative effects. Cost saving is also raised as an argument. A study by the Bureau of Crime Statistics and Research (BOCSAR), modelling the impact of the abolition of sentences of six months and less in New South Wales, predicted a big impact on the flow of prisoners with the number of new prisoners received dropping from 150 per week to 90 per week. The impact on the stock of prisoners would be smaller of course – it was predicted that the prison population would be reduced by about 10 per cent with savings of between \$33 million and \$47 million in the recurrent costs of housing prisoners.<sup>16</sup> The authors also predicted that the abolition of short terms of imprisonment could reduce the remand population because if a prison sentence was less likely, it may be more difficult to justify

<sup>12</sup> From database created by Lorana Bartels, Ph D student, Faculty of Law.

<sup>13</sup> Joint Select Committee, Parliament of Western Australia, *Report of the Joint Select Committee on Parole (The Halden Report)* (1991).

<sup>14</sup> Neil Morgan, 'Business as Usual or a New Utopia? Non-custodial Sentences Under Western Australia's New Sentencing Laws' (1996) 26 *University of Western Australia Law Review* 364, 365.

<sup>15</sup> New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004).

<sup>16</sup> Bronwyn Lind and Simon Eyeland, 'The Impact of Abolishing Short Prison Sentences' *Crime and Justice Bulletin* No 73, NSW Bureau of Crime Statistics and Research (2002).

refusal of bail.<sup>17</sup> It has also been argued that the questionable rehabilitative and deterrent value of short prison terms has implications in terms of the costs of re-offending by ex-prisoners.<sup>18</sup>

### Arguments against the abolition of short terms of imprisonment

3.2.8 First, the cost impact of abolishing short prison terms has been questioned. Even assuming that short sentences will be replaced with alternative sentences, there will be cost implications associated with these alternatives. Some offenders will breach these alternatives in any event or re-offend and attract a prison sentence within a short time so that the cost of imprisonment is simply deferred.<sup>19</sup> It has also been argued that there are cost implications associated with the use of remand. While a possible decrease in remands in custody has been predicted (because if a prison sentence is unlikely, a refusal of bail would be more difficult to justify),<sup>20</sup> Morgan has warned that if judicial officers no longer have the option of a short sentence, custodial remands may be used as an alternative.<sup>21</sup>

3.2.9 A major concern with abolishing short terms is that sentencers might simply increase the length of shorter sentences in order to ensure that certain offenders serve a period of imprisonment. This has been termed ‘sentence creep’ and would have the opposite effect to that intended: increasing the use of custody rather than reducing it. It has been suggested that in Western Australia, following the abolition of sentences of three months or less, the number of four month sentences increased. There is also a perception that courts have adopted more punitive remand practices, achieving a ‘short, sharp shock’ by remanding in custody before ultimately giving a non-custodial penalty.<sup>22</sup> However, in support of the effectiveness of abolition it has been argued that there was no shift from sentences of three months or less towards longer sentences after abolition,<sup>23</sup> and there was a decrease in the prison population between 2001 and 2002 with a substantial decrease of 20 per cent in the indigenous imprisonment rate. But as this decrease was some five years after the legislation was introduced and has not continued, it may not be due to the abolition of short prison terms.<sup>24</sup> The New South Wales Sentencing Council concluded that the impact of abolishing terms of six months and less was not yet known, and recommended that New South Wales await an evaluation before adopting a similar proposal.<sup>25</sup> A number of respondents to the Issues Paper mentioned the ‘sentence creep argument’ as a reason for opposing the abolition of short terms of imprisonment.<sup>26</sup>

3.2.10 Against the proposal it has been argued that removing the option to impose a short prison sentence is an unnecessary fetter on judicial discretion and that in some circumstances a short prison sentence may be appropriate. Breach of a non-custodial sentence may be one such circumstance. The New South Wales Sentencing Commission lists a number of examples including the following:

- a short prison sentence may be proportionate to the offence in question;
- although the offence is minor, the offender’s criminal history and attitude to rehabilitation may suggest that full-time imprisonment as the option of last resort has been reached;
- an offender may have repeatedly refused to comply with alternative non-custodial options;

<sup>17</sup> Ibid, 4; see also submission by the Department of Corrective Services to the NSW Sentencing Council, above n 15, 91-92.

<sup>18</sup> NSW Sentencing Council (2004), above n 15, 11.

<sup>19</sup> See *ibid*, 63-66.

<sup>20</sup> Lind and Eyland (2002), above n 16, 4; Department of Corrective Services submission to the NSW Sentencing Council, above n 15, 61.

<sup>21</sup> Neil Morgan, ‘The Abolition of Six-month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia’s Latest Sentencing Laws’ (2004) 28 *Criminal Law Journal* 8, 16.

<sup>22</sup> *Ibid*, 15-16; see also Australian Law Reform Commission (ALRC), *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [7.69].

<sup>23</sup> See reference to letter from Director General, WA Department of Justice, in the NSW Sentencing Council’s Discussion Paper, above n 15, 16.

<sup>24</sup> NSW Sentencing Council (2004), above n 15, 16.

<sup>25</sup> *Ibid*, 21.

<sup>26</sup> The Honourable Justice Cox, Chief Justice, submission, 2; Craig Mackie, Legal Aid Commission consultation, 1 October 2002.

- an offender may be refused bail and have spent a period of under six months in custody and the circumstances of the offence make it appropriate that the sentence imposed be back-dated to the date of arrest.

3.2.11 The then Chief Justice in his response makes a similar point, namely that short prison sentences are a useful sentencing choice in some circumstances. He argues:

The question is posed generally and does not have regard to situations where the offender is any event going to be incarcerated. Thus a blanket prohibition on sentences of three months or less would operate even if they were to be made cumulative upon an existing sentence.

...

There are many crimes at the lower end of the scale which warrant sentences of three months or less whether suspended or not: prison offences, minor sexual assaults, and some acts of defilement, actual assault, perverting justice by the giving of a false name to name but a few.<sup>27</sup>

3.2.12 Some of the situations mentioned could be addressed by allowing exceptions to rule, and in Western Australia, short terms can be imposed if the offender is already serving a prison sentence or if the term is imposed for a prison offence. However, the range of possible situations identified when a short sentence would be appropriate suggests that short prison sentences should be retained rather than abolished.

3.2.13 A further objection to abolishing short terms of imprisonment is that it is likely to require an increase in the maximum penalties for some offences. Many offences in the *Police Offences Act 1935* (Tas) attract three month maxima. In Western Australia, Morgan reports that while there is a long list of offences that are no longer imprisonable, most of these offences are unenforced, irrelevant or never attracted a prison sentence in any event. On the other hand, enhanced maxima of nine or 12 months apply to offences that in practice are likely to attract a prison sentence.<sup>28</sup> Morgan points out that enhancing the maxima is not a neutral exercise. An increased penalty indicates that Parliament intends the offence be dealt with more severely and sentencing practices should reflect such changes.<sup>29</sup> Enhancing the maximum penalty for some offences would also have flow-on effects for other maxima.

### ***The Institute's view***

3.2.14 Abolishing short terms of imprisonment has the appeal of substituting more cost effective measures for less serious offences. However, the Institute is of the view that the arguments against such a proposal are persuasive. The gap which would be left in the sentencing continuum could lead to counterproductive practices such as the use of custodial remands to circumvent the rules and the imposition of longer custodial sentences ('sentence creep'). Moreover, the proposal creates problems for dealing with breaches of non-custodial sentences and prison disciplinary offences, disrupts the penalty scale and has undesirable implications for the nexus between suspended sentences and imprisonment.

### **Recommendation**

1. That short sentences of imprisonment should continue to be a sentencing option for the reasons given in para 3.2.14.

<sup>27</sup> The Honourable Justice Cox, Chief Justice, submission, 2.

<sup>28</sup> Morgan (2004), above n 21, 15.

<sup>29</sup> Ibid, 15.

### ***Statutory recognition of the principle of restraint in the use of imprisonment***

3.2.15 Tasmania is the only State that does not give statutory recognition to this principle. It does nevertheless apply as part of the common law and courts here have quite frequently referred to it.<sup>30</sup> It is also a principle to which there is widespread international assent.<sup>31</sup> The Issues Paper asked whether greater strength could be given to the principle by embodying it in legislation. Section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. The *Crimes Act 1914* (Cth) contains a similar provision in s 17A. In addition, s 17B provides that a court is not to impose a sentence of imprisonment on an offender for certain offences relating to property or money of a total value of \$2000 or less unless the court is satisfied that there are exceptional circumstances to warrant such a sentence. Section 11 of South Australia's *Criminal Law (Sentencing) Act 1988* is a more detailed provision. It provides that a sentence of imprisonment cannot be imposed unless:

- the defendant has shown a tendency to violence towards other persons; or
- the defendant is likely to commit a serious offence if allowed to go at large; or
- the defendant has previously been convicted of an offence punishable by imprisonment; or
- any other sentence would be inappropriate, having regard to the gravity or circumstances of the offence.

3.2.16 It is argued that incorporating this principle into sentencing legislation serves as a salutary reminder of the importance of the principle of parsimony, particularly when imprisonment is being considered.<sup>32</sup> Three submissions strongly supported enacting such a statutory statement. For instance the Tasmanian Catholic Justice and Peace Commission stated that since studies show that imprisonment is not an effective deterrent, statutory recognition should be given to the principle of imprisonment as a last resort.<sup>33</sup>

3.2.17 Against such a statutory provision it could be argued that it is unlikely to achieve any more than the common law principle and is, in any event, 'merely teaching grandmother to suck eggs'. The then Chief Justice was of the view that such a statement is unnecessary and stated '[m]otherhood statements to that effect are easily misunderstood.'<sup>34</sup> Indeed formulating the principle in terms of imprisonment as a sanction of last resort has been criticised because it implies that custody may justifiably be used for someone who persistently commits minor offences, and for whom other measures have been tried.<sup>35</sup>

### ***The Institute's views***

3.2.18 The Institute agrees with the Australian Law Reform Commission that a statutory statement of restraint in the use of custody does serve as a salutary reminder of principle of parsimony and an encouragement of such restraint. The Institute considers that data on magistrates' sentencing practice in Part 1 revealing disparities in magistrates' views of the custody threshold demonstrate the need for more guidance as to when a custodial sentence is appropriate. However, to avoid misunderstanding, the formulation should not be in terms of using imprisonment as a last resort. Rather, the principle should be one that argues for the use of non-custodial sentences rather than custodial ones, and shorter custodial sentences rather than longer ones.<sup>36</sup> The recommended formulation is based on ss 152 and

<sup>30</sup> Kate Warner, *Sentencing in Tasmania* (2<sup>nd</sup> ed, 2002) [9.118].

<sup>31</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) Resolution VIII para 5(e).

<sup>32</sup> ALRC (2006), above n 22, 7.64.

<sup>33</sup> Tasmanian Catholic Justice and Peace Commission, submission, 2.

<sup>34</sup> Submission, 1.

<sup>35</sup> Ashworth (2005), above n 3, 266.

<sup>36</sup> *Ibid.*

153 of the *Criminal Justice Act 2003* (UK) and provides that the court must not sentence an offender to imprisonment unless it is of the opinion that the offence/s was so serious that neither a fine nor a community sentence can be justified for the offence and if it does so decide the sentence must be for the shortest term that is commensurate with the seriousness of the offence. It should be noted that urging that prison terms be as short as possible does not mean that short prison terms are to be encouraged. The Institute accepts the criticisms of very short terms of imprisonment that are outlined above (see para 3.2.7). Rather, the purpose of the statutory provision is to encourage non-custodial sentences rather than short custodial sentences, and when only a custodial sentence is appropriate to urge that it is as short as possible.

### **Recommendation**

2. The principle of restraint in the use of imprisonment should be enacted by inserting an amendment into the *Sentencing Act 1997* (Tas) s 13A, providing:

- (1) that a court must not sentence an offender to imprisonment unless the offence, or a combination of the offence and one or more offences associated with it, was so serious that neither a fine nor a community sentence can be justified for the offence.
- (2) If a sentence of imprisonment is justified under subsection (1) the sentence must be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence. (3.2.18)

### ***Reasons justifying short sentences***

3.2.19 There is no statutory requirement in Tasmania for courts to give reasons for imposing a custodial sentence. However, for many years it has been regarded as ‘most desirable’.<sup>37</sup> The New South Wales Law Reform Commission recommended that judges and magistrates should provide reasons justifying any decision to impose a sentence of imprisonment of six months or less with the hope it would encourage more appropriate use of imprisonment. To ensure that this requirement would not merely attract token compliance, it was also recommended that courts should not only provide reasons for any decision to impose a sentence of six months or less but also should expressly state why a non-custodial sentence was not appropriate.<sup>38</sup> Section 5(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) implements this recommendation. Some responses to the Issues Paper recommended enacting such a provision in Tasmania.<sup>39</sup>

3.2.20 There is some evidence that there has been a downward trend in the number of prisoners serving prison sentences of 6 months or less in New South Wales, however, it is unclear whether this is attributable to the introduction of s 5(2). Moreover, submissions to the Sentencing Council suggested the provision was ineffectual in reducing short terms of imprisonment and that the requirement for reasons has become an ‘empty incantation’.<sup>40</sup> The Sentencing Council has recommended amending s 5 so that in addition to requiring reasons for a sentence of six months or less it provides that a court may not impose such a sentence unless it is satisfied that it is appropriate. In assessing this, a list of circumstances is provided.<sup>41</sup>

### ***The Institute’s views***

<sup>37</sup> *Conlan v Arnol* [1979] Tas SR (NC 9).

<sup>38</sup> New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) 166-169; implemented in *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2).

<sup>39</sup> Legal Aid Commission Tasmania, submission and Warwick Dunstan, submission.

<sup>40</sup> New South Wales Sentencing Council (2004), above n 15, 65-66.

<sup>41</sup> *Ibid*, 23, 29.

3.2.21 The Institute is of the view that enacting the principle of restraint in the use of imprisonment as recommended above is sufficient to discourage the use of short prison terms in inappropriate circumstances and that requiring reasons for short sentences could well become an empty incantation. Adding a lengthy provision listing circumstances when short sentences may be appropriate adds unnecessary complexity to sentencing legislation. In any event, if a court has not said enough to indicate that it has made the decision that a sentence other than a short prison term is appropriate, the sentencing discretion could miscarry.<sup>42</sup>

### **Recommendation**

3. The Tasmanian Law Reform Institute does not recommend enacting a legislative provision requiring courts to give reasons for short sentences of imprisonment. (3.2.21)

### ***Reforming the use of short custodial sentence in the UK***

3.2.22 In the UK, the *Halliday Report* on sentencing reform<sup>43</sup> and the white paper, *Justice for All*,<sup>44</sup> denounced short custodial sentences (defined as sentences of less than 12 months imprisonment) because they involved no support or supervision after release (which occurred automatically at the half way point), did not allow the correctional services to do any meaningful rehabilitation work with prisoners and had unacceptably high reconviction rates. A bold new penalty structure was recommended and has since been adopted.<sup>45</sup> The new structure introduces three new custodial sentences of less than 12 months: a revamped suspended sentence; intermittent custody and custody plus. Custody plus should not be imposed if a sentence of intermittent custody can be justified and intermittent custody should not be ordered if a suspended sentence could be justified. In turn, a suspended sentence should not be imposed if a non-custodial penalty could be justified. Custody Plus consists of a minimum period of two weeks and a maximum period of 13 weeks in custody which is served in full, followed by a compulsory period of supervision of at least 26 weeks in the community, within an overall ‘sentence envelope’ of up to 51 weeks. During the period in the community, offenders are to be subject to rigorous requirements designed to address the particular factors that underlie their criminal behaviour and cause them to re-offend. The conditions of the community portion of the sentence are either set by the court or determined by the National Offender Management Service at the time of release. In effect courts are prevented from imposing a sentence of less than 12 months unless it is Custody Plus, a suspended sentence or intermittent custody.<sup>46</sup>

3.2.23 The New South Wales Sentencing Council has recommended that consideration be given to introducing a form of ‘custody plus’ subject to considerations of cost effectiveness and other resource and supervision issues.<sup>47</sup> The advantage of such a proposal was seen to lie in improvements in the rehabilitation and reintegration of short-term prisoners by provision of post release supervision and continuity of rehabilitative programs post release.<sup>48</sup>

<sup>42</sup> See for example *Clayton v Mulcahy* Serial No A19/1990.

<sup>43</sup> Home Office, *Making Punishments Work: A Review of the Sentencing Framework for England & Wales (Halliday Report)*. This report was published in July 2001 with a consultation phase through to 31 October 2001.

<sup>44</sup> This paper was released on 17 July 2002 (CM 5563).

<sup>45</sup> *Criminal Justice Act 2003* (UK).

<sup>46</sup> For a fuller description of the proposals see Ashworth (2005) above n 3, 271-281.

<sup>47</sup> New South Wales Sentencing Council (2004), above n 15, 5.

<sup>48</sup> *Ibid*, 24-26.

3.2.24 The Issues Paper asked whether the English idea of ‘custody plus’ should be explored in Tasmania as a means of reducing the reconviction rate of offenders. The Department of Justice and Industrial Relations submitted that the idea of custody plus had merit:

The English idea of ‘Custody Plus’ which involves a tailor made ‘envelope’ of supervision and rehabilitation strategies, appears to have significant merit as a possible means of reducing recidivism and it allows sentencing to be customised to the offence and the offender. This may also encourage increased community confidence in sentencing, particularly if magistrates were required to outline the details of the ‘envelope’ when handing down a sentence.<sup>49</sup>

3.2.25 In the consultations, Community Corrections Launceston was also attracted to the idea of ‘custody plus’.

3.2.26 Custody plus has generally been commended as a bold and positive step towards addressing the problems of short prison sentences.<sup>50</sup> However, Ashworth has pointed out the possible pitfalls of introducing such a measure. First, the aim of reducing offending in a group of offenders that will include many difficult cases (such as persistent minor offenders who are often socially dislocated) may be difficult to achieve. Secondly, there is the risk of net-widening<sup>51</sup> – that if custody plus is the type of short sentence that courts have been waiting for, there is the risk it will be used even more frequently than short terms of imprisonment, perhaps as a community sentence with teeth. Custody plus may lead to longer sentences for offenders who otherwise would have received a sentence of only one or two months imprisonment. For such offenders the effective minimum is over six months in total. If sentencers take the view that custody plus fails to deliver the amount of custody they think appropriate in a given case (the maximum is 13 weeks) they may impose a sentence of 12 months – just above the limit for custody plus – when the case does not warrant a sentence of that length.<sup>52</sup>

### *The Institute’s views*

3.2.27 The Institute agrees with need to address the issue of the reconviction rates of short-term prisoners. Bartels’ reconviction study suggests that offenders on shorter sentences – those under 12 months – may be more likely to be reconvicted than offenders with longer sentences.<sup>53</sup> This conforms with English data which shows longer sentences are associated with lower reconviction rates.<sup>54</sup> Avoiding short terms of imprisonment where possible and providing support and rehabilitation in the community post release are clearly desirable goals. However, rather than risking the pitfalls of custody plus, the Institute is of the view that the same goals could be achieved by providing post-release support for short-term prisoners and partly suspended sentences with conditions tailored to meet the needs of the particular offender in appropriate cases. The success of such a strategy is likely to depend on the availability of effective interventions for this group of offenders. Where the offender does not require such support, but a short prison sentence is necessary because of the seriousness of the offence, the introduction of an additional intermediate sanction or community custody may provide a solution. This will be considered below (see 3.4). All short-term prisoners should be assessed to determine their needs on release and provided with appropriate support if necessary. The issue of tailored conditions

<sup>49</sup> Department of Justice and Industrial Relations, submission, 12.

<sup>50</sup> Ashworth (2005), above n 3, 279.

<sup>51</sup> Net-widening refers to the use of a more severe sentencing order than required to achieve the purpose of the sentence in a particular case.

<sup>52</sup> Ashworth (2005), above n 3, 279-281.

<sup>53</sup> Bartels (2007), above n 5, Table 13: 50 per cent of offenders with sentences under six months were reconvicted within two years and 55 per cent of offenders with sentences between six months and under 12 months compared with 46 per cent for offenders with sentences between 12 and 18 months and 40 per cent between 18 and 24 months. However, these differences were not statistically significant.

<sup>54</sup> Jack Cunliffe and Adrian Shepherd, *Re-offending of adults: results from the 2004 cohort*, Home Office Statistical Bulletin, (2007) 2.

for partly suspended sentences is taken up in the discussion of suspended sentences (see para 3.3.36 below).

### **Recommendation**

4. That post release interventions be made available for short-term prisoners in appropriate cases and particularly for prisoners with partly suspended sentences with supervision. (3.2.23)

### ***Improving the rehabilitative potential of custody***

3.2.28 The point has been made (2.1.41 and 3.2.3) that high conviction rates for released prisoners mean that imprisonment cannot be justified as a rehabilitative measure. Nor can sentencers have any confidence that prison is more effective as an individual deterrent than less severe sanctions. However, it is now widely accepted that there are some rehabilitative programs that work for some prisoners and that reconviction rates can be reduced by properly resourced and targeted programs. Reviews of the international evidence suggests that the following rehabilitative programs have been shown to have positive outcomes in reducing recidivism among prisoners:

- cognitive behavioural therapy;
- sex offender treatment;
- drug treatment programs;
- education and work programs.

### **Cognitive behavioural therapy**

3.2.29 Cognitive behavioural therapy (CBT) attempts to change behaviour by changing the problematic thought processes of offenders that contribute to criminal behaviour.<sup>55</sup> It seems there are at least twenty types of cognitive behavioural therapies which generally fall into two groups: first, moral reasoning and development and secondly, information processing.<sup>56</sup> Mackenzie's review of the evidence (based on a review of the research literature and meta-analyses up to the end of 1999) focused on Moral Reconciliation Therapy which has a moral reasoning and development focus and Reasoning and Rehabilitation, which focuses on information processing. Mackenzie concluded that both therapies were effective in reducing the recidivism of offenders.<sup>57</sup> A recent review, a report by Aos, Miller and Drake for the Washington State Institute for Public Policy, confirms this finding on the basis of 25 studies, many of them too recent to be included in Mackenzie's review. The authors estimated that cognitive behaviour therapy in prison or the community can be expected to reduce recidivism rates by 6.3 per cent. In other words, without the program about 63 per cent of offenders will recidivate with a new conviction after a 13-year follow-up, but if they participated in the evidence based cognitive behavioural therapy program, their recidivism rate would probably drop to 59 per cent, a 6.3 per cent reduction.<sup>58</sup> Together with an assessment of its cost effectiveness, this finding led Aos et al to put it second in the list of recommended programs for adult offenders in Washington State.<sup>59</sup> A 2005 Home Office Research Study review of 'what works' agreed there was robust international evidence to support the effectiveness of cognitive behavioural treatment programs in

<sup>55</sup> Doris Layton Mackenzie, 'Reducing the Criminal Activities of Known Offenders and Delinquents: Crime Prevention in the Courts and Corrections' in LW Sherman, DP Farrington, BC Welsh and DL Mackenzie, *Evidence-Based Crime Prevention*, (2002) 330, 366.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, 366-370.

<sup>58</sup> Steve Aos, Marna Miller, and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates*, Washington State Institute for Public Policy, (2006) 8.

<sup>59</sup> Ibid, 12.

reducing recidivism.<sup>60</sup> However, the evidence from evaluations in England and Wales of two prison-based cognitive skills programs (Enhanced Thinking Skills and Reasoning and Rehabilitation) were mixed, a result which was explained by methodological limitations of the studies and implementation difficulties such as rapid expansion of the programs affecting program quality after initial promising signs of success.<sup>61</sup>

3.2.30 It is pleasing to note that in November 2006, the prison service introduced a new cognitive skills program and that by Spring 2007, about one hundred inmates had completed the course.<sup>62</sup> The program, called 'Preparing for Change', covers issues such as self-awareness, learning to change, anger and stress management, communication and interpersonal skills, problem solving and goal setting.<sup>63</sup> A second introductory cognitive skills program, 'Taking up Change' has also been introduced for maximum security prisoners. In 2008 the Integrated Offender Management Unit will offer a formal induction program for all sentenced inmates that will include participation in 'Preparing for Change'. In addition to these introductory programs a more intensive program utilising a range of methods such as relapse prevention planning, problem solving, safety planning, mood management techniques and cognitive behavioural models has been introduced to target general offending behaviour. This 100-hour program called 'Making Choices' was introduced in February 2008. It was developed in New Zealand and has been used in Queensland and New South Wales. Another program, 'Offending is not the Only Choice', a 44-hour cognitive skills program, has been run in the women's prison.

### Sex offender treatment

3.2.31 Due to the comparatively low recidivism rates of untreated sex offenders, robust evaluation of sex offender treatment is difficult and is even more dependent on meta-analysis. Mackenzie concluded that prison-based sex offender programs using cognitive behavioural therapy were a promising method for reducing sex offender recidivism, caution being due to the scientific merit of the studies.<sup>64</sup> More recent reviews are more definite. On the basis of six studies Aos et al claimed that sex offender treatment in prison with aftercare can be expected to reduce recidivism rates by an average of seven per cent.<sup>65</sup> Preliminary indications from a national sex offender treatment program in England and Wales suggest the program is having an impact on reconvictions for sex or violent offences.<sup>66</sup>

3.2.32 There have been two Australian reviews of the international evidence of the efficacy of sex offender treatment programs. Both agree that the answer to the question, 'does sex offender treatment work?' is a cautious 'yes' – the evidence does support the existence of small but significant reductions in sexual recidivism following cognitive behavioural treatments.<sup>67</sup> Gelb suggests that this is particularly true for sex offender treatment programs delivered in the community. Citing an evaluation of a support program for released sex offenders, she also highlights the benefits of social support and follow-up assistance for prisoners after release.<sup>68</sup>

3.2.33 Over the years there have been many calls for more and better sex offender treatment programs. In 2007 a new sex offender program was introduced to replace the program offered in a

<sup>60</sup> Mia Debidin and Jorgen Lovbakke, 'Offending Behaviour Programs in Prison and Probation' in Gemma Harper and Chloe Chitty (eds), *The Impact of Corrections on Re-Offending: A Review of 'What Works'*, Home Office Research Study 291 (3<sup>rd</sup> ed, 2005) 31, 33.

<sup>61</sup> Ibid, 38.

<sup>62</sup> Steven Kons, 'Prison Programs in the Tasmanian Prison Service' (2007) 97 *Law Letter* 13.

<sup>63</sup> Ibid.

<sup>64</sup> Mackenzie (2002), above n 55, 371.

<sup>65</sup> Aos, Miller and Drake (2006), above n 58, 9.

<sup>66</sup> Debidin and Lovbakke (2005), above n 60, 44.

<sup>67</sup> Denise Lieveore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy*, Australian Institute of Criminology, (2004) 102; Karen Gelb, *Recidivism of Sex Offenders*, Victorian Sentencing Advisory Council (2007) 37.

<sup>68</sup> Gelb (2007), above n 67, 36-37, citing Robin Wilson, Janice Picheca and Michelle Prinzo, *Circles of Support and Accountability: an Evaluation of the Pilot Project in South-Central Ontario* (2005).

therapeutic community. It is an open program tailored to accommodate medium risk of offending (132 hours) through to high and very high risk (up to 360 hours).

### Drug treatment

3.2.34 Drug treatment for prison inmates may be delivered from a therapeutic community, which operates as a 24-hour live-in facility within the prison or it may be offered as an out-patient type program. Mackenzie's conclusion that prison-based therapeutic communities (with or without community after-care) are effective in reducing the recidivism of prisoners<sup>69</sup> is supported by Aos et al's 2006 review which also found out-patient drug treatment programs for inmates to be effective.<sup>70</sup> The Home Office 'what works' report acknowledged that the evidence base for England and Wales was limited and that the indications from evaluations suggesting prison-based drug treatment programs were effective needed to be treated with some caution.<sup>71</sup> It was emphasised that the gains made in prison can be quickly lost. 'One of the most consistent findings from the drug treatment literature is that outcomes are most favourable for offenders who participate in, and complete, after-care.'<sup>72</sup> It is noted that with drug treatment, housing and other forms of social support are needed as part of the package.

3.2.35 Drug and alcohol programs at Risdon Prison have been expanded in recent years. A program called 'Getting Smart' has recently been introduced. It is a 22-hour program which was developed in the United States and has also been offered in Queensland. The Salvation-Army is contracted to provide the program at the Ron Barwick Minimum Security Prison in 2007-2008. In early 2008, 'Pathways', a more intensive 120-hour program commenced. It is part of the same family as 'Getting Smart' and participants will be able to join 'Getting Smart' maintenance groups for follow-up. A drug and alcohol program called 'Substance Abuse is not the Only Choice' will be offered in 2008 in the women's prison.

### Education and work programs

3.2.36 On the basis of an early review of the effectiveness of vocational programs in prisons, John Braithwaite suggested that such programs may 'emerge as one of the few types of intervention which can have an impact on crime.'<sup>73</sup> However, in relation to academic education that is not directed at any particular skill, he found insufficient evidence that investment in academic education for prisoners is a way of reducing crime.<sup>74</sup> More recent reviews show increasing confidence in the effectiveness of prison education as a crime reduction tool. While Mackenzie found adult basic education to be a promising strategy,<sup>75</sup> Aos et al estimated general education programs in prison reduce recidivism on average by seven per cent.<sup>76</sup> According to both Mackenzie and Aos et al, vocational education programs in prisons and residential settings are effective in reducing recidivism.<sup>77</sup> Evidence from the British experience is more equivocal and the message from the Home Office review is that for education and employment related interventions to be effective, housing and other forms of social

<sup>69</sup> Mackenzie (2002), above n 55, 376.

<sup>70</sup> Aos, Miller and Drake (2006), above n 58, 9.

<sup>71</sup> Robin Elliott-Marshall, Malcolm Ramsay and Duncan Stewart, 'Alternative Approaches to Integrating Offenders into the Community' in Gemma Harper and Chloe Chitty (eds), *The Impact of Corrections on Re-offending: a Review of 'what works'*, Home Office Research Study 291 (3<sup>rd</sup> ed, 2005) 57, 64.

<sup>72</sup> Ibid.

<sup>73</sup> John Braithwaite, *Prisons, Education and Work*, (1980) 29.

<sup>74</sup> Ibid 36. Of course, as Braithwaite recognised, such education has a worth of its own irrespective of its effect on employment and recidivism (at 28).

<sup>75</sup> Mackenzie (2002), above n 55, 358.

<sup>76</sup> Aos, Miller and Drake (2006), above n 58, 9: based on 17 evaluations a number of them very recent.

<sup>77</sup> Mackenzie (2002), above n 55, 364-365; Aos, Miller and Drake (2006), above n 58, 9 (this includes a 2005 Queensland study).

support are also needed and that there is a need for prisons to arrange adequate aftercare and support before prisoners are released.<sup>78</sup>

### **Knowing what works for prisoners is not enough**

3.2.37 The ‘what works’ literature emphasises that it is not enough to know ‘what works’. We also need to know ‘what works for whom and why’. To be effective these programs need to be carefully designed to target dynamic risk factors, namely the specific characteristics of offenders that can be changed in treatment and that are predictive of the individual’s future criminal activities. There is consensus in the international literature that the main dynamic risk factors are attitudes, cognitions, behaviours, education training and employment, substance abuse, accommodation and interpersonal relationships.<sup>79</sup> To identify these needs, effective assessment systems are clearly a prerequisite. For prisoners to benefit from rehabilitation programs, they need to be properly targeted to the prisoners’ individual needs. In other words, effective rehabilitation programs need to use ‘multiple treatment components’<sup>80</sup> or a ‘multi-modal’<sup>81</sup> and individually targeted approach which aims to provide offenders with items selected from a menu of cognitive skills training, drug treatment, sex offender treatment, educational and vocational training and help in securing accommodation.

### **The Institute’s views**

3.2.38 The terms of reference for this project did not explicitly include a review of the rehabilitation programs that are offered or could be offered to Tasmanian prisoners. However, the issue is clearly relevant to the Tasmania Together targets of reducing recidivism rates (terms of reference 2(b)). Whilst imprisonment cannot be justified on the basis of either its rehabilitative or deterrent effects on those sentenced to it, there is scope for improving the reconviction rates of prisoners by some selected and properly targeted programs. On the basis of international evidence-based reviews of rehabilitative programs for prisoners the following are cost effective programs:

- cognitive behavioural therapy;
- sex offender treatment;
- drug treatment programs;
- education and work programs.

3.2.39 It is pleasing that since the opening of the new Risdon Prison Complex in August 2006, new rehabilitation programs have been introduced in four areas: cognitive skills, drug and alcohol, sex offender programs and a prison mentor program.<sup>82</sup> While some of these programs such as sex offender programs and drug treatment programs appear to be most effective when delivered within a therapeutic community within the prison, the outcomes are also worthwhile for the type of out-patient programs being offered at Risdon. The research evidence consensus is that programs need to target the dynamic risk factors of individual offenders with appropriate programs, and in addition, appropriate social support and after-care must be provided to ensure program gains are not quickly lost in release. The Integrated Offender Management Unit at Risdon with six program staff is limited in the courses it can offer. It is important that adequate resources are devoted to this Unit so that it can offer an adequate range of programs and repeat them regularly.

<sup>78</sup> Elliott-Marshall, Ramsay and Stewart (2005), above n 71, 68; C Chitty ‘The Impact of Corrections on Re-offending: Conclusions and the way Forward’ in Gemma Harper and Chloe Chitty (eds), *The Impact of Corrections on Offending: a Review of ‘what works’*, Home Office Research Study 291 (3<sup>rd</sup> ed, 2005) 75, 78.

<sup>79</sup> Mackenzie (2002), above n 55; Gemma Harper at al, ‘Factors Associated with offending’ in Gemma Harper and Chloe Chitty (eds), *The Impact of Corrections on Offending: a Review of ‘what works’*, Home Office Research Study 291 (3<sup>rd</sup> ed, 2005) 17, 29.

<sup>80</sup> Doris Layton Mackenzie, *What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents*, (2006) 385.

<sup>81</sup> Haper et al (2005), above n 79, 67.

<sup>82</sup> Similar mentor programs elsewhere have proved promising.

## Recommendations

5. Advantage should be taken of the opportunity imprisonment presents by continuing to direct resources to evidence-based rehabilitative programs for prisoners in the areas of cognitive behavioural therapy, sex offender treatment and drug treatment programs.
6. In addition, education and work programs should be introduced.
7. Program participants should be supported after release with appropriate social support and after-care to ensure that any program gains are not lost.

### *Deferral of commencement of prison sentences*

3.2.40 Some time ago the Legislative Council Select Committee on Correctional Services and Sentencing in Tasmania recommended that courts be given the power to defer sentence for a limited time to enable offenders sentenced to imprisonment to put their affairs in order prior to the commencement of their sentence.<sup>83</sup>

3.2.41 When a sentence of imprisonment is passed it takes effect from the day on which it is imposed, or, if the offender is not in custody, on the day on which the offender is apprehended under the warrant of imprisonment issued in respect of the sentence. There is no power to defer a sentence except to order that a sentence be served cumulatively with a sentence the offender is already serving or liable to serve. The Select Committee was concerned with cases where an offender had been free for many months after being charged, where neither conviction nor imprisonment were inevitable and where the offender was employed and would not present any greater danger to the community after the sentence had been imposed than in the months preceding the trial or sentence. It was argued that deferral of the sentence of imprisonment in such a case would provide an opportunity for the arrangements to be made to retain employment to the benefit of the offender, the offender's family and also to the community. Holland was cited as an example of effective use of this practice.

3.2.42 The idea of deferral of prison sentences has very recently been floated by the Minister for Corrective Services in Western Australia.<sup>84</sup> Rather than providing a means for offenders to organise their affairs, it was suggested as a means of reducing overcrowding in the prison system which was reported to be about 20 per cent over capacity.<sup>85</sup> The system would apply to tax evasion, bank fraud, social security fraud and other white collar offenders who posed no flight risk or threat to community safety. The proposal was attacked by the Opposition who claimed it would do little to relieve overcrowding.<sup>86</sup>

3.2.43 A number of responses to the Issues Paper addressed the power to defer imprisonment. The Department of Justice and Industrial Relations expressed concern about the public acceptability of such a measure. The need for inclusion of adequate risk assessment material in pre-sentence reports was adverted to and the comment was made that if imprisonment were to be reserved only for dangerous, persistent or those guilty of serious crimes, the introduction of sentence deferral would be unnecessary.<sup>87</sup> Deferrals were also opposed by Tasmania Police on the grounds of the threat to the credibility of the criminal justice system, particularly where the offender re-offended before serving the sentence. The need for such an option was also questioned on the grounds that there is generally

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<sup>83</sup> Legislative Council Select Committee, Parliament of Tasmania, *Correctional Services and Sentencing in Tasmania* (Wing Committee Report) (1999) 135.

<sup>84</sup> Janine MacDonald, 'White Collar Crimes May Have to Book Cells for Later', *The Australian* (Sydney), 10 September 2007, 5.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Department of Justice and Industrial Relations, submission, 12.

sufficient time prior to trial and sentence for an offender to arrange their affairs.<sup>88</sup> Only one submission supported deferral.<sup>89</sup>

### The Institute's views

3.2.44 The Institute is not persuaded of the need to defer sentences of imprisonment. It agrees that there is normally sufficient time prior to trial and sentence and even between an early plea of guilty and sentence for an offender to arrange his or her affairs.

### Recommendation

8. The Institute does not recommend that courts be given the power to defer sentence for the reasons given in para 3.2.44.

## 3.3 Suspended sentences of imprisonment

3.3.1 A suspended sentence is a prison sentence, which although imposed is not activated or not wholly activated but is suspended on conditions similar to probation and parole. The power to impose a suspended prison sentence in Tasmania is a broad one.<sup>90</sup> Any sentence of imprisonment can be wholly or partly suspended<sup>91</sup> and there is no maximum or minimum operational period (i.e. the period during which breach will put the offender at risk of having the suspended sentence activated). However, because it is a prison sentence its imposition first requires a decision that a sentence of imprisonment of a specific length is appropriate before the decision is made to suspend it. Breach of a suspended sentence is not an offence but, if proved, it exposes the offender to an order that the sentence take effect or to a substituted sentence.<sup>92</sup> In some jurisdictions it is mandatory for the courts to restore the sentence held in suspense unless the circumstances are exceptional.<sup>93</sup>

3.3.2 Suspended sentences are a popular sentencing measure in this State. In Magistrates Courts in the financial year 2003-2004, 60 per cent of prison sentences were wholly suspended and 12 per cent were partly suspended. Of all penalties they comprised 10 per cent and two per cent respectively of the principal sentence imposed on offenders. Sentences of imprisonment imposed by the Supreme Court in financial years 2002-2004 were suspended in about 50 per cent of cases: 34 per cent were wholly suspended and 15 per cent partly. In total it would appear that more than half of all prison sentences are wholly suspended in this State.<sup>94</sup> Tasmania ranks second in its use of wholly suspended sentences in the higher courts in Australia, between South Australia (at 48 per cent) and Victoria (at 24 per cent).<sup>95</sup> While there is no statutory limit on the length of a term of imprisonment that may be suspended, in practice it is unusual for a sentence exceeding 24 months to be wholly suspended. Some data on suspended sentences appears in Tables 9 and 10.<sup>96</sup>

<sup>88</sup> Department of Police and Public Safety, submission, 2.

<sup>89</sup> Warwick Dunstan, submission.

<sup>90</sup> *Sentencing Act 1997* (Tas) s 7(b).

<sup>91</sup> In some jurisdictions there are restrictions on the length of sentences that can be suspended, see Lorana Bartels 'The use of suspended sentences in Australia: Unsheathing the Sword of Damocles' (2007) 31 *Criminal Law Journal* 113, 132.

<sup>92</sup> *Sentencing Act 1997* (Tas) s 27.

<sup>93</sup> E.g. *Sentencing Act 1991* (Vic) s 31(5A).

<sup>94</sup> Data supplied by Lorana Bartels, Ph D student, Faculty of Law.

<sup>95</sup> Victorian Sentencing Advisory Council, *Suspended Sentences: Final Report, Part 1* (2006) ch 2.

<sup>96</sup> Data supplied by Lorana Bartels, from chapter 4 of her thesis, Tables 4-4 and 4-6: Lorana Bartels, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania* (PhD thesis, University of Tasmania, 2008).

**Table 9: Proportion of sentences suspended by length – Supreme Court**

Sentence length (months)	Unsusended (n=372)	Party suspended (n=105)	Wholly suspended (n=246)
0>3 (n=40)	35%	0%	65%
3>6 (n=167)	38%	6%	56%
6>9 (n=132)	45%	11%	45%
9>12 (n=77)	48%	14%	38%
12>18 (n=123)	46%	29%	24%
18>24 (n=59)	64%	25%	10%
24>36 (n=49)	65%	29%	6%*
36+ (n=76)	93%	7%	0%
TOTAL (n=723)	51%	15%	34%

\* This figure relates to all sentences of 24>36 months, but the three wholly suspended sentences imposed were in fact of exactly 24 months.

**Table 10: Proportion of sentences suspended by length – Magistrates Court**

Sentence length (months)	Unsusended (n=443)	Partly suspended (n=200)	Wholly suspended (n=1032)
0>1 (n=86)	40%	0%	60%
1>2 (n=393)	21%	2%	77%
2>3 (n=327)	22%	5%	73%
3>4 (n=348)	28%	8%	64%
4>6 (n=243)	34%	16%	50%
6>8 (n=135)	29%	25%	46%
8>12 (n=86)	31%	43%	26%
12+ (n=99)	51%	38%	11%
TOTAL (n=1717)	28%	12%	60%

3.3.3 Tables 9 and 10 show that in both the Supreme Court and Magistrates Courts, short sentences were most likely to be wholly suspended and that (sentences of less than one month in Magistrates Courts aside) the proportion of wholly suspended sentences decreased inversely with sentence length. The mean length of wholly suspended sentences was six months in the Supreme Court and 80 days in Magistrates Courts.<sup>97</sup>

3.3.4 In Tasmania it is permissible to combine suspended sentences with other sentencing options such as community service orders, fines, probation orders, rehabilitation program order and driving disqualification orders.<sup>98</sup> This kind of suspended sentence is sometimes referred to as a ‘conditional suspended sentence’. In the Supreme Court in the period 2002-2004, 68 per cent of wholly suspended sentences and 60 per cent of partly suspended sentences were combined with some other order, most often with compensation orders but also commonly community service orders or probation. An additional 11 per cent of partly and wholly suspended sentences made supervision by a probation order a condition of the order, and nine per cent of wholly suspended sentences were combined with a

<sup>97</sup> Ibid, 4.3.2.

<sup>98</sup> *Sentencing Act 1997* (Tas) s 8(1).

fine.<sup>99</sup> In a total of 23 per cent of suspended sentences, the offender was subject to supervision. In Magistrates Courts, fines and wholly suspended sentences were a common combination (33 per cent of cases) and probation was combined with partly suspended sentences in 21 per cent of cases and 16 per cent of wholly suspended sentences.<sup>100</sup>

### *Criticisms of suspended sentences*

3.3.5 Suspended sentences are a controversial order and it has been suggested that they are a major source of public dissatisfaction with sentencing. At least six discrete criticisms of suspended sentences have been raised.

#### **The disjuncture between the legal view and the public view of suspended sentences**

3.3.6 Suspended sentences are viewed very differently by the legal system and by the general public. From the legal point of view they are the penultimate penalty. In the list of sentencing options in the *Sentencing Act 1997* (Tas), they follow a sentence of imprisonment. Moreover, they are a 'substitutional sentence'. In other words, before a suspended sentence can be passed the court must be satisfied that a sentence of imprisonment and not some lesser sentence is appropriate. Additionally, the length of the sentence should be determined before any consideration is given to the decision to suspend it. From a legal point of view, a wholly suspended sentence remains a sentence of imprisonment. However, the public perception of a suspended sentence is entirely different. When a suspended sentence is imposed, the offender 'walks free'. The consequences of a suspended sentence appear less than a community service order, a fine or a probation order. Far from being the penultimate sanction, in the public view, it ranks as less severe than probation or a small fine.<sup>101</sup> Media reports of offenders being granted suspended sentences reflect and reinforce this view by describing offenders who receive suspended sentences as having 'walked free',<sup>102</sup> being 'thrashed with a legal feather'<sup>103</sup> or by characterising this option as a 'no-fine, no jail sentence'.<sup>104</sup>

#### **Illogicality in the reasoning process justifying suspended sentences**

3.3.7 The process of reasoning required in reaching the decision that a suspended sentence should be imposed has also attracted criticism. The factors which the court is required to take into account in deciding to suspend a sentence of imprisonment – such as previous good character, steady employment and the likelihood of rehabilitation if not sent to prison – are the same factors which the court is required to take into account in deciding whether a sentence of imprisonment is warranted at all.<sup>105</sup> It is said that giving double effect to mitigating factors means that white collar and middle class offenders tend to benefit disproportionately.<sup>106</sup>

<sup>99</sup> Bartels (2008), above n 96, 4.3.4, 4.3.5.

<sup>100</sup> Data is not available on the extent to which probation is made a condition of a suspended sentence.

<sup>101</sup> Leslie Sebba and Gad Nathan, 'Further Explorations in the Scaling of Penalties' (1984) 24 *British Journal of Criminology* 221, 229; the 'Pearson Report' found that while judicial officers ranked suspended sentences as the next most severe community-based sanction after home detention; victims of crime ranked it as the least severe and offenders ranked it as moderately severe: Jenny Pearson and Associates, *Review of Community Based Offender Programs: Final Report*, South Australian Justice Strategy Unit (1999) 40, cited by Arie Freiberg *Sentencing Review 2001: Discussion Paper* (2001) 121, note 139.

<sup>102</sup> *The Mercury*, (Hobart) 26 July 2000: reporting the anguish of the mother of a victim of a road crash when the driver who was sentenced to 9 months imprisonment wholly suspended, 'walked free'.

<sup>103</sup> Richard Ackland, referring to the suspended sentence imposed on John Laws for soliciting information from a juror in 1999: see Kate Warner, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355, 362.

<sup>104</sup> 'Crown Refuses Leave to Appeal on Laws', *Sun Herald* (Sydney), 10 September 1999.

<sup>105</sup> Kate Warner, *Sentencing in Tasmania*, (2002) [9.215]; Arie Freiberg, *Pathways to Justice* (2002) 120.

<sup>106</sup> Ashworth (2000), above n 3, 294; Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535; Warner (2000) above n 103.

## Ineffectiveness

3.3.8 Critics have questioned the effectiveness of suspended sentences on the grounds that there is no evidence that the suspended sentence has a deterrent or reformatory effect and avoiding unnecessary prison sentences could be achieved by other means.<sup>107</sup> However, more recent English evidence contradicts the first assertion, with two studies reporting that offenders given suspended sentences had the lowest reconviction rates of offenders in the sample.<sup>108</sup> Bartels has followed-up offenders sentenced in the Supreme Court of Tasmania over a two-year period between July 2002 and June 2004 in order to investigate the reconviction rate of offenders given suspended sentences in comparison with other dispositions. There is no other published research in Australia examining reconviction rates for suspended sentences. Her sample included all non-custodial sentences and all custodial sentences of up to and including two years allowing a two-year period at risk for the follow-up. She found that exactly half of all offenders in her sample were reconvicted within two years. Wholly suspended sentences had the lowest reconviction rate at 42 per cent compared with 52 per cent of offenders with a non-custodial order and 62 per cent of offenders with an unsuspended sentence. These differences were highly significant in a statistical sense. Moreover, those reconvicted on a wholly suspended sentence were the group of offenders most likely to be reconvicted of a minor offence only and the differences in reconviction rates remained significant even for offenders whose index offence was serious, rather than moderate or minor. Both violent and property offenders performed better on wholly suspended sentences than other dispositions. For first offenders, unsuspended and partly suspended sentences were less likely to result in reconviction than wholly suspended sentences or non-custodial sentences but offenders with a minor record on a wholly suspended or partly suspended sentence performed better than offenders on unsuspended sentences or non-custodial sentences. Young offenders (those aged between 18-24) performed much better on wholly suspended (53 per cent reconvicted) and partly suspended sentences (55 per cent) than on unsuspended sentences (86 per cent) or non-custodial orders (72 per cent). As Bartels claims, these findings demonstrate that suspended sentences are ‘not only a cost-effective sentencing disposition but one whose rate of reconviction suggests that they do in fact work’.<sup>109</sup> However, it is acknowledged that the relationship between re-offending and disposal is complex and it is difficult to attribute differences in re-offending rates to a particular disposition rather than selection factors.<sup>110</sup>

## Net-widening and sentence inflation

3.3.9 Contradicting the claim that wholly suspended sentences divert offenders from prison, it is argued that suspended sentences have had no real impact on the imprisonment rate because of the susceptibility of the suspended sentence to net-widening and sentence inflation. In other words, courts will impose suspended sentences in some cases when custody was not justified (net-widening or penalty escalation) or longer sentences when suspending (sentence inflation). When suspended sentences are breached and prison sentences activated, a lagged increase in the prison population results counteracting any immediate diversionary impact wholly suspended sentences have on the imprisonment rate. This was the experience in Britain in the early days of suspended sentences.<sup>111</sup> In New South Wales, a study looking at the effect on the prison population and the use of non-custodial sentences following the re-introduction of suspended sentences found clear evidence of net-widening.<sup>112</sup> In Victoria, Tait’s early study of suspended sentences claimed that there was evidence of sentence inflation of suspended sentences in magistrates’ courts with more very short unsuspended

<sup>107</sup> Anthony Bottoms, ‘The Suspended Sentence in England’ (1981) 21 *British Journal of Criminology* 1, 18-20; Anthony Bottoms, ‘Limiting Prison Use: Experience in England and Wales’ (1987) 26 *Howard Journal of Criminal Justice* 171.

<sup>108</sup> Mia Debidin and Jorgen Lovbakke, above n 60; National Probation Service (West Yorkshire), *Using Reconviction Data to Explore the Effectiveness of Community Penalties in West Yorkshire*, National Probation Service Report No 2005/6-5 (2006).

<sup>109</sup> Bartels (2007), above n 5, 38.

<sup>110</sup> Bartels (2008), above n 96, 6.4 quoting A Shepherd and E Whiting, *Re-Offending Adults: Results from the 2003 Cohort*, Home Office Statistical Bulletin, no. 20/06 (2006).

<sup>111</sup> Bottoms (1981), above n 107.

<sup>112</sup> Georgia Brignell and Patrizia Poletti, *Suspended Sentences in New South Wales*, *Sentencing Trends and Issues* 29 (2003).

prison sentences than wholly suspended sentences and more wholly suspended sentences of than unsuspended sentences. However, there was an immediate reduction in the use of imprisonment but no lagged increase in the prison population.<sup>113</sup> More recent data on sentence lengths has led the Sentencing Advisory Council to suggest that the higher percentage of suspended sentences under 12 months compared with the percentage of immediate prison sentences of that length may be some evidence of net-widening. However, it is acknowledged that rather than showing net-widening, these trends could suggest courts are quite properly suspending short prison sentences in recognition of the negative effects of such sentences on offenders.<sup>114</sup>

3.3.10 Bartels has sought to ascertain if there is evidence of suspended sentences leading to sentencing inflation or net-widening in Tasmania by analysing the distribution of the length of prison sentences. Because there is neither a gap in the use of wholly suspended sentences under six months relative to the use of unsuspended sentences of that length, nor an increase in the use of them for sentences of more than six months, Tait's 'gap and bulge test'<sup>115</sup> suggests that neither the Supreme Court nor Magistrates Courts are inflating the length of wholly suspended prison sentences. It could be argued that heavy use of short wholly suspended sentences suggests net-widening (namely that they are being used instead of non-custodial sentences) rather than as a substitute for an immediate prison sentence. However, it could equally be argued that courts are quite properly suspending a greater number of shorter sentences in recognition of the negative effects of such sentences on offenders.<sup>116</sup>

### **Suspended sentences and proportionality**

3.3.11 The Victorian Sentencing Advisory Council argues that suspended sentences violate the principle that punishment should be proportional to the gravity of the offence and the culpability and degree of responsibility of an offender. Having decided that a sentence of imprisonment of a particular length is required, the decision that it should be suspended on the basis of the individual circumstances of the offender raises concerns about the proportionality of the sentence, particularly when contrasted with offenders who are required to serve an immediate term of imprisonment.<sup>117</sup> In the Council's view this argument supports the contention that suspended sentences should be abolished, or if they are to be retained in the sentencing hierarchy above non-custodial orders, additional conditions should attach to the orders.

### **Breach proceedings and the empty threat of imprisonment**

3.3.12 The Issues Paper noted that there were real concerns in Tasmania that breach proceedings are neglected.<sup>118</sup> In the consultations with Community Corrections, the failure of the police and the Director of Public Prosecutions to initiate proceedings for breach was raised.<sup>119</sup> Moreover, it was stated that the Director of Public Prosecutions was reluctant to initiate proceedings for breach of conditions relating to supervision as distinct from the commission of an offence. In her study of suspended sentences, Bartels has explored the issue of breach proceedings.<sup>120</sup> Following-up her sample

<sup>113</sup> David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143, 153.

<sup>114</sup> Victorian Sentencing Advisory Council (2006), above n 95, 34-36.

<sup>115</sup> *Ibid.* Tait suggests that if the length of the sentence is irrelevant to the decision to suspend (and vice versa) there should be an even distribution in the percentage of suspended sentences amongst different sentence lengths (though it would be natural for more short sentences to be suspended than long sentences). So, for example, there should not be 10 per cent of one month sentences suspended, 50 per cent of three month sentences suspended, and 20 per cent of five month sentences suspended – this would be a clear 'gap' at the one-month level and 'bulge' at the three-month level suggesting that sentences are being increased because they are being suspended.

<sup>116</sup> Victorian Sentencing Advisory Council (2006), above n 95, 36.

<sup>117</sup> *Ibid.*, 29-30.

<sup>118</sup> Tasmanian Law Reform Institute, *Sentencing*, Issues Paper No 2 (2002) 71.

<sup>119</sup> Consultations with Community Corrections, Hobart, (September 2002); Consultations with Community Corrections, Devonport (26 September 2002).

<sup>120</sup> Bartels (2008), above n 96.

of all wholly and partly suspended sentences imposed in the Supreme Court in a two-year period, she found that 41 per cent of suspended sentences (126 sentences) were breached by the offender committing an imprisonable offence during the operational period of their sentence.<sup>121</sup> However, breach action was only taken in respect of seven offenders, two on a partly suspended and five on a wholly suspended sentence. This represented six per cent of breached partly suspended sentences and five per cent of breached wholly suspended sentences. Of the seven cases where breach action was taken, the sentence was activated in full in three cases, in part in one case, and the operational period was extended or the original term resuspended in the remaining three cases. These results are startling. Whilst failure to initiate breach proceedings is not an inherent flaw of the suspended sentence, such a failure merely fuels the public perception that such sentences are an ineffectual slap on the wrist and contributes to a lack of confidence in sentencing. Moreover, it erodes the argument that the deterrent threat of an immediate prison sentence in the event of breach justifies the claim that a suspended sentence is the penultimate sanction in the sentencing hierarchy.

### ***Suspended sentences in other jurisdictions***

3.3.13 Criticism of suspended sentences has led to their abolition in New Zealand.<sup>122</sup> In Victoria, the Sentencing Advisory Council has recommended phasing out suspended sentences by December 2009. In the Council's view it is an inherently flawed and intrinsically ambiguous order. It is argued that with a credible and flexible range of intermediate sentencing orders it is not necessary to retain it.<sup>123</sup> In contrast, the recommendation of the New South Wales Law Reform Commission<sup>124</sup> was adopted and suspended sentences were reintroduced in New South Wales in 2000.<sup>125</sup> In the UK the suspended sentence has been recently replaced with a revamped suspended sentence which gives judges and magistrates the power to suspend a sentence of imprisonment of between 28 and 51 weeks for up to two years provided a minimum of at least one of a range of quite onerous conditions is attached – these conditions include compulsory unpaid work, activity or program requirements, drug testing requirements and treatment, supervision, curfew requirements, exclusion requirements, residence requirements with or without electronic monitoring and attendance centre requirements.<sup>126</sup> In the event of breach, the court must order the custodial term to take effect, either in whole or in part, unless it concludes it would be unjust to do so.<sup>127</sup> A recent report found that supervision was the most common condition attached to the orders (44 per cent), followed by program requirements (24 per cent) and unpaid work (17 per cent).<sup>128</sup>

### ***Reforming suspended sentences: the options***

3.3.14 The Issues Paper asked whether changes were needed in Tasmania to make the suspended sentence a more logical, credible and effective sentencing option. Many of the submissions were critical of the suspended sentence on the grounds it is seen by offenders and the public at large as a soft option.<sup>129</sup> In one submission a member of the public was incredulous that a suspended sentence could be regarded as the penultimate penalty and she refused to accept the proposition that the need to

<sup>121</sup> A suspended sentence is breached by breaching a condition of suspension or by committing an imprisonable offence: *Sentencing Act 1997* (Tas) s 27.

<sup>122</sup> *Sentencing Act 2002* (NZ).

<sup>123</sup> Victorian Sentencing Advisory Council (2006), above n 95, 51.

<sup>124</sup> New South Wales Law Reform Commission (1996), above n 38.

<sup>125</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>126</sup> See *Criminal Justice Act 2003* (UK) ss 189-192.

<sup>127</sup> *Criminal Justice Act 2003* (UK), sch 12 para 8(2).

<sup>128</sup> National Offender Management Service, *Offender Management Caseload Statistics: Quarterly Brief July to September 2005*, The Home Office (2006).

<sup>129</sup> Criminal Law Subcommittee of the Law Society, submission; Community Corrections Hobart, submission; Tasmanian Catholic Justice and Peace Commission, submission: as a means of overcoming the attitude that suspended sentence means 'walking free' it was suggested that a system of restorative justice be used in conjunction with suspended sentences.

keep the imprisonment rate down justified such a measure.<sup>130</sup> The following options for change have been considered to address the criticisms of the suspended sentences.

### **Abolition**

3.3.15 This is the recommendation of the Victorian Sentencing Advisory Council on the basis that the inherent flaws in the order cannot be overcome by tinkering with it. In the submissions in response to our Issues Paper, Tasmania Police recommended abolition. This was conditional on the availability of options such as home detention and intensive correctional orders.<sup>131</sup> However, most submissions favoured retention. The then Chief Justice, for example, submitted that ‘they serve a useful purpose’.<sup>132</sup> The Director of Public Prosecutions described it as a useful sentencing option but suggested that it be required to be combined with another sentencing option (see below). Bartels’ interviews with six judges and ten magistrates about suspended sentences found no support for the abolition of suspended sentences. In response to a question about possible legislative changes, sentencers were keen ‘to retain the status quo’ and three respondents referred to the undesirability of abolishing them.<sup>133</sup>

### **Restricting the availability of suspended sentences**

3.3.16 Rather than abolishing suspended sentences, some jurisdictions have restricted the use of suspended sentences in some way. In England between 1991 and 2003, the use of suspended sentences was limited by providing that suspended sentences could only be ordered if they were ‘justified by the exceptional circumstances of the case’.<sup>134</sup> As an interim measure during the phasing out of suspended sentences in Victoria, the Sentencing Council has recommended that restrictions be placed on the availability of suspended sentences for a range of serious violent offences, including murder, manslaughter, rape, sexual penetration of a child and intentionally causing serious injury.<sup>135</sup> In the Council’s view, creating a presumption against fully suspending a sentence in such cases would address the community concern about the use of suspended sentences in cases where the level of harm caused to the victim is high. In such cases a suspended sentence may be seen as failing to meet the purposes of denunciation, deterrence and just punishment.

3.3.17 An alternative means of limiting the use of suspended sentences would be to place a limit on the term that could be suspended. There is no limit in Tasmania (nor in South Australia and the ACT) on the length of sentence that can be suspended. However, in New South Wales, the maximum term of imprisonment that can be held in suspense is two years, in Victoria it is three years (two years in the Magistrates Court) and in Queensland, Western Australia and the Northern Territory, a five year limit applies. It could be argued that placing a limit on the length of suspension would prevent the use of suspended sentences in the most controversial cases.

### **Providing guidance as to the use of suspended sentences**

3.3.18 In some jurisdictions the legislation specifically provides that a suspended sentence may only be imposed if an unsuspended sentence would be appropriate in all of the circumstances.<sup>136</sup> In her interviews with judges and magistrates, Bartels asked whether such a provision would be an appropriate addition to the *Sentencing Act 1997* (Tas). All judges and most magistrates rejected the suggestion on the grounds that it was already clear in the case law and was therefore unnecessary. However, one magistrate stated that such a provision would change the law in Tasmania as both the *Sentencing Act* and the Supreme Court state that a suspended sentence is a ‘free floating option’ and

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<sup>130</sup> Dianne Jackson, submission.

<sup>131</sup> Tasmania Police, submission, 2.

<sup>132</sup> The Honourable Justice Cox, Chief Justice, submission, 2-3.

<sup>133</sup> Bartels (2008), above n 96, 3.4.9.

<sup>134</sup> *Criminal Justice Act 1991* (UK) s 5.

<sup>135</sup> Victorian Sentencing Advisory Council (2006), above 95, 71-72.

<sup>136</sup> Victoria, Western Australian and the Northern Territory: see Bartels (2007), above n 91, 117.

that it is no longer necessary to come to the preliminary decision that a sentence of imprisonment is deserved.<sup>137</sup> Only two magistrates supported such an amendment. They considered that it would be a useful educational tool for the public and it would help emphasise the point for judicial officers.<sup>138</sup>

### **Increasing the punitive and rehabilitative elements**

3.3.19 A number of submissions favoured giving suspended sentences more bite by imposing additional conditions. The Director of Public Prosecutions favoured a statutory requirement that a suspended sentence only be given in combination with some other sentencing option such as a probation order, fine or community service. The Department of Justice was also attracted to this idea and referred with approval to the then proposed English suspended sentence ‘custody minus’ which requires the imposition of supervision or some other positive requirement.<sup>139</sup> It was contended that the inclusion of a supervision requirement would counter the ‘walking-free’ perception of the order and improve its effectiveness by allowing the supervising officer to address the offender’s behavioural issues. It was also suggested that white-collar offenders should be required to pay for their attendance at any programs to which they were directed. John Heathcote (a probation officer) suggested that some involvement with community corrections should be a requirement of all orders. He too was attracted to the English approach.<sup>140</sup> On behalf of the Tasmanian Catholic Justice and Peace Commission, Maureen Holloway recommended that in order to avoid the virtual let-off perception of suspended sentences, restorative components be added – for example, that the sentence be suspended on condition damage is restored or the victim compensated in some way.<sup>141</sup>

3.3.20 In Bartels’ interviews, judges and almost all magistrates were very supportive of the use of combination orders to add punitive and rehabilitative components to the sentence.<sup>142</sup> The suspended sentence and fine combination, however, was thought to be generally of little utility because of most offenders’ inability to pay. Magistrates were particularly supportive of combining suspended sentences with probation. One of the judges suggested the efficacy of suspended sentences would be enhanced by more structured obligations such as attendance at a specific program a condition of suspension coupled with a report-back system.<sup>143</sup> One magistrate spoke of the need for a greater range of community based programs to support people on suspended sentences.<sup>144</sup> However, whilst one judge stated a combination order is ‘nearly always appropriate’ and ‘should always be looked at,’ judicial officers had little difficulty in identifying cases where a combination order was not appropriate and there was some concern with overloading probation case loads.

### **Reforming breach proceedings**

3.3.21 In addition to urging that breach proceedings not be neglected, it has been suggested that breach proceedings be subject to a limitation period and that activation be automatic in cases of breach. In his submission to the Institute, the then Chief Justice referred to the problems caused by delay in initiating breach proceedings. He stated:

In some cases breach proceedings are initiated long after the breach is proved by conviction. It goes against the grain to activate a sentence if the breach has already been punished and the prisoner released after a subsequent sentence. Some limitation period for the institution of such proceedings after discovery of the breach is worth examining. There is also an inbuilt reluctance (not logically warranted) to activate a sentence for the first

<sup>137</sup> Bartels (2008), above n 96, 3.4.2.

<sup>138</sup> Ibid.

<sup>139</sup> Department of Justice and Industrial Relations, submission, 13; note that the terminology ‘custody minus’ was abandoned when the *Halliday Report* was implemented; see para 3.3.13 above.

<sup>140</sup> John Heathcote, submission, 2.

<sup>141</sup> Tasmanian Catholic Justice and Peace Commission, submission, 2.

<sup>142</sup> Bartels (2008), above n 96, 3.4.3.

<sup>143</sup> Ibid, 3.4.3 quoting Judge 1.

<sup>144</sup> Ibid, 3.4.9 quoting Magistrate 2.

crime when the second crime which constitutes the breach has already been adequately punished.<sup>145</sup>

3.3.22 In her interviews with judges and magistrates, Bartels found a strong desire to see more proactive action by the prosecuting authorities and better management of breaches.<sup>146</sup> She found there was little knowledge about the process of monitoring and dealing with breached sentences and their comments suggested that judicial officers generally infer that offenders who are not brought back for breach have complied with their order, although, that this could be optimistic was conceded by some. On the basis of her breach study (see above para 3.3.12) Bartels argued that judicial officers are currently sentencing on a flawed basis. She also found some judicial officers were ambivalent about receiving breach information because of its potential to destroy their confidence in suspended sentences.

3.3.23 In some jurisdictions, courts have the power to initiate action in relation to breach of its own motion.<sup>147</sup> Bartels asked judicial officers whether such a power would be beneficial. No judges supported this proposal generally on the grounds that it was inappropriate for a judicial officer to adopt a prosecutorial or investigative role. One judge said he could see no reason for such a change as the Director of Public Prosecutions seemed to work quite effectively. Magistrates on the other hand were divided on this issue with at least two supporting the proposal on the grounds of efficiency and poor performance of the police in prosecuting breaches.

3.3.24 Breach provisions in most jurisdictions create a presumption in favour of the activation of the original sentence. In South Australia and New South Wales, for example, if the offender breaches a condition of the sentence, the court must activate the original sentence of imprisonment unless the court is satisfied that the breach was trivial or there are good reasons for excusing the offender's failure to comply.<sup>148</sup> In Victoria the discretion is even more constrained. The court must order the offender to serve all or part of the original prison term unless it is of the view that 'it would be unjust to do so in view of any exceptional circumstances.'<sup>149</sup>

3.3.25 It could be argued that failing to activate the original sentence on breach erodes the effectiveness of the order as a deterrent and brings the legal system into disrepute.<sup>150</sup> In response to the Issues Paper, the Department of Justice recommended that consideration be given to breach automatically leading to the sentence being served.<sup>151</sup> However, the then Chief Justice's submission favours retaining the discretion on breach to enable the court 'not to fully activate them and even to discharge or extend them'.<sup>152</sup> In her interviews with judges and magistrates, Bartels found that respondents were almost unanimous in their view that a broad and unfettered discretion in relation to the consequences of breach should be retained. Only two respondents thought otherwise with one magistrate suggesting that legislating for the circumstances in which activation would not be appropriate could improve the image of the suspended sentence in the public view. Two magistrates were of the impression that the case law either created a presumption that the sentence should be activated, or stated a principle that this generally should be the case.<sup>153</sup>

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<sup>145</sup> The Honourable Justice Cox, Chief Justice, submission, 2-3.

<sup>146</sup> Bartels (2008), above n 96, 3.4.6.

<sup>147</sup> *Crimes (Sentencing and Procedure Act 1999* (NSW) s 98(1); *Sentencing Act* (NT) s 43(4A), (4B).

<sup>148</sup> *Criminal Law (Sentencing) Act 1988* (SA) ss 58(1) and (3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3).

<sup>149</sup> *Sentencing Act 1991* (Vic) s 31(5)-(5A). For more detail on breach provisions and relevant case law see Bartels (2007), above n 91, 128-131.

<sup>150</sup> See the Attorney-General of Victoria's reasons for altering the law in that State in 1998: Victoria, Parliamentary Debates, Legislative Assembly, 24 April 1997, 874.

<sup>151</sup> Department of Justice and Industrial Relations, submission, 13.

<sup>152</sup> The Honourable Justice Cox, Chief Justice, submission, 2.

<sup>153</sup> Bartels (2008), above n 96, 3.4.6.

## *The Institute's views*

### **Abolition?**

3.3.26 Despite the flaws of the suspended sentence, it has the advantage of deterring the offender with the threat of imprisonment whilst avoiding the costs and adverse impact of actual imprisonment. To abolish it would remove a valuable tool, one which enables courts to mark the seriousness of the offence by imposing a sentence of imprisonment while showing mercy in the particular case by suspending it. There is also the fear that removing it will have a significant impact on the imprisonment rate – a very real fear in this jurisdiction where more than half of the sentences of imprisonment imposed are wholly suspended. In New Zealand, the increase in custodial sentences from 2002 to 2003 was explained in part by the abolition of suspended sentences.<sup>154</sup> The Institute concedes that there are problems with suspended sentences – including their confusing nature and poor public perception. However, it is of the view that they remain a very useful sentencing option and that in a jurisdiction with no other sanctions in the sentencing hierarchy between a prison sentence and a community service order it is premature to contemplate abolition. If the range of custodial and intermediate non-custodial options were to be extended and accepted by the courts, then abolition could be reconsidered.

### **Restricting the availability of suspended sentences**

3.3.27 The Institute has considered whether the poor public perception of suspended sentences could be improved by legislative limits on the length of suspended sentences. However, an analysis of sentence length for suspended sentences in Tasmania suggests that sentences in excess of two years are possibly never wholly suspended. From 2001 to July 2007, no wholly suspended Supreme Court sentences of this length were found.<sup>155</sup> In the case of partly suspended sentences, the period held in suspension very rarely exceeds two years.<sup>156</sup> These figures suggest that it is unnecessary to restrict the length of suspended sentences in Tasmania.

3.3.28 A second way of restricting the availability of suspended sentences for more serious types of offending would be to impose offence-based restrictions, limiting the availability of wholly suspended sentences for serious offences to exceptional circumstances. The Victorian Sentencing Advisory Council has recommended that this restriction should apply to murder, manslaughter, rape, sexual penetration of a child and intentionally causing serious injury. In Tasmania, from 2001 to 2006 there was just one wholly suspended sentence for manslaughter,<sup>157</sup> one for attempted murder,<sup>158</sup> three for rape<sup>159</sup> and one for intentionally causing harm.<sup>160</sup>

<sup>154</sup> Victorian Sentencing Advisory Council (2006), above n 95, 14-15.

<sup>155</sup> Bartels found no wholly suspended sentences of this length in Magistrates Courts in 2003-2004, the longest wholly suspended sentence was 21 months.

<sup>156</sup> From 2001 to July 2007 just two sentences were found where this was the case – in both 30 months was suspended. They were exceptional cases: *ALR* (Crawford J 21/11/06) was a juvenile offender convicted of crimes including burglary followed by rape of two elderly women; he was sentenced to five years imprisonment with two years six months suspended; *Parkinson* (Evans J 16 July 2001) was a disability pensioner with schizophrenia who set fire to his unit; his back-dated sentence of three years was suspended and coupled with a continuing care order. In Magistrates' Courts 15 months was the longest period suspended in 2003-2004.

<sup>157</sup> *Horner* (Underwood J, 17 March 2003) where D panicked and shook his choking eight-week-old baby causing her death.

<sup>158</sup> This was a mercy killing case: *Pryor* (Hill AJ, 19 December 2006) see also *Godfrey* (Underwood CJ, 26 May 2004) a case of aiding suicide.

<sup>159</sup> *B* (Evans J, 20 December 2002): a case of an intellectually impaired 15 year-old who put his penis into the mouth of seven year-old daughter of his step sister. An 18 month detention order was wholly suspended; *CJH* (Blow J, 27 July 2006): 6 months wholly suspended for rape on the basis of continuation of sexual intercourse committed by an intellectually impaired 18 year-old upon a 19 year old who was also intellectually impaired; *Sharma* (Crawford J 24 March 2003): intoxicated man put penis of sleeping neighbour in his mouth, six months wholly suspended.

<sup>160</sup> *DeKroon* (Evans J, 14 May 2004): a wholly suspended sentence of 18 months imprisonment was imposed on a plea of guilty to aggravated burglary, assault and committing an unlawful act intended to cause bodily harm. The offender, a 50

3.3.29 The Institute recognises that the use of wholly suspended sentences for very serious crimes can give rise to public concern and undermine confidence in the criminal justice system. However, there is no evidence that wholly suspended sentences are being used inappropriately for serious crimes in Tasmania. In cases of manslaughter, rape and intentionally causing bodily harm, the Supreme Court is only wholly suspending prison sentences in exceptional cases. In the case of maintaining a sexual relationship with a child, because of the wide range of seriousness that such an offence covers, restrictions on the use of wholly suspended sentences would constitute an unnecessary fetter on the exercise of judicial discretion.

3.3.30 The Institute's conclusion that there is no need to restrict the use of suspended sentences in the case of serious crimes still leaves open the question whether wholly suspended sentences are being over-used in other cases. This raises the issue of whether there is any evidence of bottom-end net-widening. The Institute has found no conclusive evidence of this. Nor is there any evidence of sentence inflation. In summary, the Institute is not convinced that suspended sentences are being over-used in Tasmania in a way that requires restrictions on their use. Bartels argues that wholly suspended sentences are over-used for first offenders.<sup>161</sup> The Institute does not recommend that this be addressed by legislative provision. The recommended formulation of the principle of restraint in the use of custody could assist to encourage restraint in the use of imprisonment for all offenders including first offenders by reminding judicial officers that a sentence of imprisonment should only be imposed if the offence was so serious that a non-custodial sentence cannot be justified.

### **Providing guidance as to the use of suspended sentences**

3.3.31 As discussed above (see para 3.3.18) Bartels' study reveals that some magistrates are confused about the way in which a suspended sentence is supposed to operate.<sup>162</sup> They do not start with the proposition that the seriousness of the offence demands a prison sentence and one magistrate believes the law no longer requires this. Nor was there agreement on the issue of whether it was impermissible to increase the length of a sentence if it was suspended. If judicial officers are confused then it is not surprising that the public have little understanding of how the suspended sentence is supposed to operate. Although all judges and most magistrates rejected the need for legislative guidance, uncertainty about the current law and the impact of *Dinsdale v The Queen*<sup>163</sup> demonstrates there is a good case for giving some legislative guidance as to when it is appropriate to impose a suspended sentence. It is therefore recommended that guidance be given about the imposition of suspended sentences in a way that does not interfere with judicial discretion but that makes it clear that two distinct steps are involved. In *Dinsdale* Kirby J said:

The starting point ... is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment and not some lesser sentence is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise.<sup>164</sup>

3.3.32 The Institute recommends that a new section, s 23A, be inserted into Division 4 of Part 3 of the *Sentencing Act 1997* (Tas) to give recognition to this principle. It should provide that:

A court must not impose and suspend a term of imprisonment (wholly or partly) unless, having regard to the provisions of this Act (and in particular s 13A), it has first determined that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed.

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year-old man with no relevant prior convictions, went to his daughter's house in a justified state of anxiety and concern over the welfare of his grandchildren. He sprayed capsicum spray on his daughter's partner and when she tried to remove the car keys from his car, he stabbed her in the arm with a knife. His relationship with his daughter was probably destroyed and he was devastated by the outcome of the episode.

<sup>161</sup> Bartels, above n 96, 4.3.6.2.

<sup>162</sup> Bartels (2008), above n 96, 3.4.2.

<sup>163</sup> (2000) 202 CLR 321.

<sup>164</sup> (2000) 202 CLR 321, 346.

3.3.33 This accords with Kirby J's statement in *Dinsdale*<sup>165</sup> and the generally accepted interpretation of the decision. The Institute favours this formulation over that in the *Sentencing Act 1991* (Vic) s 27(3) that provides:

A court must not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to the provisions of this Act.

### **Increasing the punitive and rehabilitative elements**

3.3.34 One of the most compelling criticisms of the suspended sentence is its confusing nature. It is difficult for the public to accept that it is indeed the penultimate sanction. Where a wholly suspended sentence includes at least one condition that requires some positive action on behalf of the offender it becomes a more demanding sentence and makes the place of suspended sentences in the sentencing hierarchy more plausible. If a condition of community service were to be attached, the order would have more punitive bite. If supervision or participation in an offender treatment program were to be required, arguably this would make the order more onerous and assist rehabilitation. Bartels' study compared the reconviction rates of wholly suspended sentences combined with additional sentencing orders with suspended sentences *simpliciter* (this does include orders with a condition of supervision). She found that those with a suspended order *simpliciter* had a lower reconviction rate (38 per cent) than those who received a suspended sentence and a community service order (50 per cent) and those who received a wholly suspended sentence and a probation order (61 per cent). In comparison, only 33 per cent of offenders with a wholly suspended sentence and a compensation order were reconvicted. Moreover, the re-offending of the supervised offenders was more serious. Bartels states:

It is unclear however whether this poor outcome [for probation in particular] is because increased scrutiny picked up instances of offending which might otherwise have gone undetected... or because the sentencing judge imposed the probation order on an offender who was in any event less likely to be able to comply with a suspended sentence, or for some other reason.<sup>166</sup>

3.3.35 The poor reconviction rate for probation was confirmed when suspended sentences with a condition of supervision were also examined. This revealed that unsupervised wholly suspended sentences had a reconviction rate of 38 per cent, which was statistically significantly better than the 54 per cent of wholly suspended sentences with a probation order and the 58 per cent of wholly suspended sentences with a supervision condition.<sup>167</sup> The Institute accepts that being monitored by a probation officer could well lead to more instances of offending being picked up. But whatever the interpretation, it should be noted that supervised suspended sentenced offenders performed better than offenders who received unsuspended prison sentences (62 per cent reconvicted).

3.3.36 The idea of adding supervision, program or community service requirements to bolster the credibility of the suspended sentence as a serious penalty is an attractive one. However, the Institute does not recommend that courts be *required* to impose additional conditions. However, it does recommend that the *Sentencing Act 1997* (Tas) s 24 be amended to make explicit the kinds of conditions that can be attached to a wholly or partly suspended sentence. The list should include supervision, community service, attendance at an offender treatment program or a restorative requirement. At the same time the Institute is aware that there are problems with overloading offenders with requirements and orders. In particular, if an additional order, say a probation order, is made rather than making supervision a condition of suspension, the offender will be exposed to triple jeopardy. If the offender commits an offence within the operational period he/she is liable to be punished for the

<sup>165</sup> *Dinsdale v The Queen* (2000) 202 CLR 321, Gummow and Gaudron JJ agreed with Kirby J in a separate joint judgment. The interpretation of the judgment of Gleeson CJ and Hayne J is controversial; see Bartels (2007), above n 91, 117-119.

<sup>166</sup> Bartels (2008), above n 96, 6.4.4.

<sup>167</sup> This includes offenders who received a probation order and a community service order hence the difference between the total for this calculation and that in the comparison between wholly suspended sentences *simpliciter* and those with community service orders and probation orders.

offence that constitutes the breach of the suspended sentence, for the breach of the suspended sentence and breach of the probation order. The Institute is of the view that it is preferable to make additional punitive, rehabilitation or restorative requirements conditions of suspension. This will require amendment to the *Sentencing Act* to allow a wider range of conditions to be attached to a suspended sentence than is currently the case.<sup>168</sup>

3.3.37 The recommended new s 24 should be modelled on the following:

(1) An order of a court suspending the whole or part of a sentence of imprisonment is subject to the condition that the offender must not commit another offence punishable by imprisonment during the specified period.<sup>169</sup>

(2) Such an order may be made subject to such additional conditions as the court considers necessary and expedient including the following conditions:

- that the offender be subject to the supervision of a probation officer;
- that the offender be required to perform community service;
- that the offender be required to undertake a rehabilitation program;
- that the offender undergo specified medical or psychiatric treatment;
- a restorative requirement.

3.3.38 This recommendation also requires an amendment to s 8(1) of the Act to omit the power of courts to combine wholly suspended sentences with probations orders, community service orders and rehabilitation program orders.<sup>170</sup>

3.3.39 The Institute has considered whether a pre-sentence report should be made a prerequisite to a wholly or partly suspended sentence to ensure that the offender's needs are addressed by appropriate conditions. However, it considered that this would impose an unnecessary burden on Community Corrections. In some cases, there is no need for special conditions. Instead, it is recommended that new provision (s 24A) be inserted into the *Sentencing Act 1997* (Tas), providing that where there is reason to think that an offender may benefit from 'additional conditions' the court should order a pre-sentence report addressing these issues.

### Reforming breach proceedings

3.3.40 Quite clearly a situation in which only five per cent of breached orders result in proceedings is unacceptable. It makes a farce of the suspended sentence – the sword of Damocles is barely a butter knife.<sup>171</sup> The underlying rationale of the suspended sentence is the clear deterrent threat involved if the offender re-offends. If there is little chance of breach action in the event of re-offending the deterrent threat is severely compromised. In Julian Roberts' words, '[a]n indulgent response to breaches of conditions will encourage more breaches and undermine still further the deterrent power of the sanctions.'<sup>172</sup> The fact that the certainty of being caught has a stronger deterrent effect than the severity of the punishment<sup>173</sup> underlies the importance of ensuring that breach proceedings are not lax. Another problem with the failure to bring breach cases back to court is that judges and magistrates get no feedback on their sentences and little opportunity to develop a feel for the type of offender who typically

<sup>168</sup> While the power to impose 'such conditions as the court considers necessary or expedient' is broad, it is unlikely that courts would countenance community service as a condition or even admission to a drug treatment program: see *Wighton v Taws* [2004] TASSC 21 and *Bartels* (2007), above n 91, 124-128 for discussion of this issue.

<sup>169</sup> This merely makes explicit the current position: see s 27(1).

<sup>170</sup> A drug treatment order under the *Sentencing Act 1997* s 7(ab) cannot be combined with a suspended sentence (see s 27B(c)).

<sup>171</sup> This metaphor was used in *R v Brady* [1998] ABCA 7, [46], see Victorian Sentencing Advisory Council, above n 95, 9, note 24 for an explanation of the context.

<sup>172</sup> Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (2004).

<sup>173</sup> A von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) 5-6.

succeeds and the type who does not. Breach proceedings can provide an opportunity for sentencers to develop the experience to better target this measure.

3.3.41 It seems that efforts have been made by the Director of Public Prosecutions and Tasmania Police to ensure that proceedings for breach are initiated in all cases and in a timely manner. This is to be commended. However, there are a number of obstacles to achieving improvements in actioning breaches and a review should be undertaken to explore whether the administrative changes put in place have produced improvements. The Institute also recommends that this review investigate breaches of all conditions of the sentence and not merely the requirement not to commit an imprisonable offence. Commenting on her findings in relation to breach action, Bartels suggests closer liaison between the Director of Public Prosecutions, Police Prosecutions, Department of Justice, Community Corrections, Supreme and Magistrates Courts is necessary to develop protocols for dealing with breaches. Any discussion, she suggests, should consider the use of computer software to automatically notify apparent breaches.<sup>174</sup> The Institute agrees with these suggestions and adopts them.

3.3.42 The Institute has considered the thorny issue of whether it would be appropriate for a judge or magistrate to deal with a breach of their own motion rather than waiting for an application to the court that sentenced the offender in accordance with s 27 of the *Sentencing Act 1997* (Tas). It was noted above (see para 3.3.23) that Bartels found judges were universally opposed to this idea and only a minority of magistrates supported it. However, they were unaware of the dire position in relation to breach proceedings. It is arguable that in the interests of efficiency and to help address the problem of breach proceedings, that courts should be permitted to deal with a breach of their own motion at the same time that an offender is being sentenced for a conviction of an imprisonable offence which constitutes a breach of a suspended sentence. In addition to certainty and severity, celerity is the third aspect of punishment that deters. Allowing a court to deal with a breach of its own motion would address this element of deterrence. However, if there is judicial opposition to acting on breach without an application from the prosecution or a probation officer on the grounds that it usurps the role of the prosecutor, there would be little point in legislating for it. The power of the judge or magistrate to deal with the breach would be ignored. To avoid this objection, it is recommended that the prosecution be given the power to make an oral application at the time of sentence of the breaching offence for the breach to be dealt with simultaneously or following an adjournment. The prosecution would be required to verify the details of the suspended sentence so that the judicial officer's position is not compromised.

3.3.43 The Institute is of the view that there is merit in tightening the consequences of breach by enacting a presumption in favour of activation of the sentence on proof of breach. A suspended sentence implies a sentence imposed but not executed conditional on the offender not re-offending. As the Victorian Sentencing Advisory Council has pointed out, the less certain are the consequences, the less its potential capacity for special deterrence.<sup>175</sup> The Institute acknowledges that while the certainty of detection is more important than the severity of the punishment for breach, it is nevertheless important that there is a need to clearly communicate to offenders and to the community that breaches will be dealt with seriously if the order is to have integrity and not be regarded as a let-off with no serious consequences. To help address the public perception of the suspended sentence as a let-off, the Institute recommends that the *Sentencing Act 1997* (Tas) s 27(4) be amended to provide that the court must order that the sentence held in abeyance takes effect, either in whole or in part, unless it concludes it would be unjust to do so.<sup>176</sup> The Institute has also considered whether the words 'in view of any exceptional circumstances which have arisen since the order suspending the sentence was made' should be added in accordance with the provision in *Sentencing Act 1991* (Vic) s 31(5A). The formulation in South Australia and New South Wales is that the original sentence must be activated 'unless the court is satisfied that the breach was trivial or there are good reasons for excusing the offender's failure to comply'. The Institute prefers the 'unjust to do so' formulation as an appropriate

<sup>174</sup> Bartels (2008), above n 96, 7.7.

<sup>175</sup> Victorian Sentencing Advisory Council (2006) above n 95, 104.

<sup>176</sup> This is similar to provisions in Queensland, Western Australia and the Northern Territory.

compromise between flexibility and certainty. As discussed above (in para 3.3.25) some magistrates were confused as to the legal position in relation to response to breach. Creating a legislative presumption in favour of activation of the sentence would have the added benefit of clarifying this confusion.

3.3.44 The Institute does not recommend reducing the range of options a court has in the event of a breach finding.

## Recommendations

9. Notwithstanding criticisms of the suspended sentence, the Institute is of the view that the suspended sentence is a useful sentencing option that should be retained (see para 3.3.26).

10. The Institute found no evidence that suspended sentences are overused or used inappropriately. Therefore it does not recommend that length-based or offence-based restrictions be imposed on the power to order suspended sentences (3.3.27 – 3.3.30).

11. The Institute recommends that to remove confusion about the nature of the suspended sentence, legislative guidance be given in the *Sentencing Act 1997* (Tas) about the imposition of suspended sentences that does not interfere with judicial discretion (3.3.31- 3.3.32). The proposed s 23A is as follows:

A court must not impose and suspend a term of imprisonment (wholly or partly) unless, having regard to the provisions of this Act (and in particular s 13A), it has first determined that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed.

12. To give suspended sentences some punitive bite, the Institute recommends that instead of permitting combined orders, the *Sentencing Act 1997* (Tas) s 24 be amended so that it lists a range of additional conditions that may be attached to a suspended sentence (3.3.36). The new provision should be modelled on the following:

(1) An order of a court suspending the whole or part of a sentence of imprisonment is subject to the condition that the offender must not commit another offence punishable by imprisonment during the specified period.<sup>177</sup>

(2) Such an order may be made subject to such additional conditions as the court considers necessary and expedient including the following conditions:

- that the offender be subject to the supervision of a probation officer
- that the offender be required to perform community service
- that the offender be required to undertake a rehabilitation program
- that the offender undergo specified medical or psychiatric treatment
- a restorative requirement.

13. The Institute recommends that to avoid the offender being punished more than once for breaching the same sentence that the *Sentencing Act 1997* (Tas) s 8(1) be amended so that a suspended sentence cannot be combined with a community service order, a probation order or a rehabilitation program order (see 3.3.38).

<sup>177</sup> This merely makes explicit the current position: see s 27(1).

14. To ensure that the needs of the offender are addressed and to enhance the opportunities that a suspended sentence presents to address those needs, it is recommended that where there is reason to think that an offender may benefit from any ‘additional conditions’, the court should require a pre-sentence report addressing the issue of ‘additional conditions’ that should be included in the order. This recommendation would require an amendment to s 24 (see 3.3.39).

15. The Institute recommends that a review be conducted to see if improvements introduced to address the neglect in instituting breach proceedings have been successful. (3.3.41)

16. If breach proceedings still appear to be lax, the Institute recommends discussions between the Director of Public Prosecutions, Police Prosecutions, Department of Justice, Community Corrections, Supreme and Magistrates Courts to develop protocols for dealing with breaches and the introduction of computer software to automatically notify apparent breaches. (3.3.41)

17. The Institute recommends that s 27 of the *Sentencing Act* be amended to empower the prosecution to make an oral application to have a breach of a suspended sentence dealt with when a court is sentencing an offender for an offence the conviction for which constitutes a breach of the condition of a suspended sentence that an offender not commit an imprisonable offence. (3.3.42)

18. To promote the deterrent value of the sanction and to enhance the integrity of the sanction in the eyes of the community, the Institute recommends that in dealing with breach cases there be a statutory presumption in favour of activation. (3.3.43)

## 3.4 Home detention

3.4.1 A home detention order confines offenders to a specified residence during specified times for the duration of the sentence under strict supervision and subject to conditions. The conditions can vary from conditions that place an offender under curfew at home for certain hours to conditions requiring confinement at home at all times except for a very limited number of court-authorized absences. It takes at least two forms:<sup>178</sup>

- ‘front-end’, where an offender is specifically sentenced to home detention as an alternative to a sentence of imprisonment;
- ‘back-end’, where home detention follows a period of full-time imprisonment.

3.4.2 Both forms of home detention involve supervision and surveillance by probation officers but back-end home detention is not a sentencing option, rather parole board or corrective services personnel have the authority to make the order. For this reason this section of the report will only consider ‘front-end’ home detention. In many jurisdictions the home detainee wears an electronic bracelet, which cannot be removed without detection. The bracelet interacts with a small monitoring unit attached to the telephone at the offender’s residence. Supervising officers can also use mobile units that interact with the bracelet to monitor attendance at approved locations. More recent developments include global positioning systems (GPS) which permit the monitoring of offenders beyond the confines of their homes.

3.4.3 Internationally, there is a range of terms to describe sanctions that require the offender to remain in the precincts of a specified residence.<sup>179</sup> Such sanctions can be implemented using a number

<sup>178</sup> It can also be an alternative to remand or a condition of supervised bail for unsentenced offenders. Such a program has operated in South Australia since 1987.

<sup>179</sup> These include community custody, community control (in Florida), a conditional sentence of imprisonment (in Canada), home confinement, home arrest and home detention: Roberts (2004), above n 172, 50. Roberts uses the term ‘community custody’ to embrace this group of measures and he includes the revamped English suspended sentence within this term, presumably because it allows curfew and electronic monitoring requirements (at 4-5, 85).

of different statutory frameworks.<sup>180</sup> Home detention is the terminology favoured in Australian and New Zealand. In New South Wales home detention is a sentencing option for offenders sentenced to no more than 18 months imprisonment.<sup>181</sup> Offenders placed on a home detention order (HDO) are subject to surveillance by means of electronic monitoring as well as visits from probation officers. There is a lengthy list of offences for which an HDO cannot be imposed and also prior offence history exclusions. The program commenced in 1997 and operates in Sydney, Newcastle and Illawarra regions only. In South Australia, home detention operates state-wide but front-end home detention has a very narrow scope, applying only to prisoners whose health, disability or frailty makes service of the prison term unduly harsh. Home detention orders were piloted in Victoria for a period of three years from 2004-2006 for offenders sentenced in Melbourne to no more than 12 months imprisonment.<sup>182</sup> The program has been extended indefinitely. Prior history exclusions include violence, sex offences, firearms offences, stalking, commercial drug trafficking and breach of family violence intervention orders. In the Northern Territory home detention operates as a form of conditional suspended sentence. Offenders sentenced to an imprisonment term of five years or less that the court has suspended in whole or in part are eligible and there are no current offence or prior offence exclusions in the legislation.<sup>183</sup> In New Zealand, rather than having the power to order home detention, the courts' role is limited to granting permission to apply for an order to the Parole Board. Application for leave is made from prison so offenders granted leave to serve their sentence at home will have spent some time in prison. Home detention is not available for sentences of imprisonment longer than two years but there are no current offence or prior history exclusions.<sup>184</sup>

3.4.4 Home detention is not available in Tasmania. In 1999 the Magistracy recommended to the 'Wing Committee' that home detention be introduced in Tasmania and 'without seeking to be exhaustive' suggested that offenders particularly suitable for such an option would be repeat drink drivers, disqualified drivers and young repeat offenders involved in acts of dishonesty with some prospects of rehabilitation remaining. The Wing Committee recommended that a Home Detention Scheme be introduced (both as a front-end and back-end option) and that electronic surveillance be used to monitor participants.<sup>185</sup> The 2000-2001 Justice Department Annual Report flagged a pilot program, scheduled to be implemented and evaluated in the fourth quarter of the 2001-2002 year.<sup>186</sup> However, plans for the pilot were abandoned before it began when a viability study indicated it was too costly per offender and a new Attorney-General had other priorities.

### *Advantages of home detention*

3.4.5 The Wing Committee summarised the strengths of home detention as follows:

- offenders are not exposed to the negative influences of a prison environment;
- employment can be maintained;
- family and community ties can be maintained;
- it provides flexibility for employment, study, medical treatment, etc;
- the financial position of the offender and their family can be maintained;

<sup>180</sup> It may be a curfew condition of another sanction monitored by electronic surveillance, or it may be a sanction in its own right.

<sup>181</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.

<sup>182</sup> *Sentencing Act 1991* (Vic) ss 18ZR-18ZT.

<sup>183</sup> *Sentencing Act 1995* (NT) s 40, 44, 45.

<sup>184</sup> *Sentencing Act 2002* (NZ) s 97; see also Roberts (2004), above n 172, 75 for a description of the New Zealand model. The differences between the various Australian models are usefully described in Monica Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand*, Report to the National Corrections Advisory Group (2006) 74.

<sup>185</sup> Wing Committee Report (1999), above n 83, 140.

<sup>186</sup> Department of Justice and Industrial Relations Tasmania, *Annual Report 2000-2001* (2001) 77.

- it provides a semi-controlled environment where persons released from prison and their families can work towards establishing normal lives with assistance and encouragement, rather than being left to flounder after release from prison;
- there are distinct cost advantages to the State which is relieved of the obligation to maintain the offender.<sup>187</sup>

3.4.6 In more general terms, Julian Roberts has argued that home detention has the advantage of being able to satisfy multiple penal objectives including punitive, restorative and rehabilitative elements.<sup>188</sup> He also argues that detention in a private residence may well encourage society to see a greater role for the community in the administration of legal punishments.<sup>189</sup>

### ***Disadvantages***

3.4.7 The literature on home detention raises a number of problems with it:

- net-widening/penalty escalation: the object of front-end home detention – to divert people from the prison system and provide a more humane option – is likely to be subverted by home detention being used in place of non-custodial options;
- it is likely to operate in a discriminatory fashion because without a permanent residence or a residence appropriately equipped for electronic monitoring an offender is unlikely to be assessed as suitable for a home detention order;
- differences in the quality of offenders' housing may mean that home detention is a harsher punishment for some offenders than others;
- there is the potential for home detention to have a very negative impact on the offender's family particularly for victims of domestic violence but also because of the stresses of living with an offender subject to home detention and pressure on the family/co-residents to supervise the offender;<sup>190</sup>
- electronic monitoring is a degrading form of punishment and violates human rights.<sup>191</sup>

3.4.8 Various suggestions have been made to address some of these disadvantages. It has been recommended that the scheme be monitored to ensure it is diverting offenders from imprisonment.<sup>192</sup> To avoid the scheme operating in a discriminatory fashion by excluding poor offenders, the New South Wales Law Reform Commission recommended that, in addition to a legislative requirement that reasonable efforts be made to find accommodation for homeless offenders, consideration be given to allocating resources to equip offender's homes so as to make them suitable for detention.<sup>193</sup> The potential for domestic violence and the negative effect of home detention on an offender's family have been addressed in some jurisdictions by removing domestic violence offenders from eligibility for home detention orders,<sup>194</sup> making the household residents' consent a condition of the order and withdrawal of consent by a co-resident grounds for revocation.<sup>195</sup>

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<sup>187</sup> Ibid, 139.

<sup>188</sup> Roberts (2004), above n 172.

<sup>189</sup> Ibid, 184.

<sup>190</sup> See Andrew von Hirsch, 'The Ethics of Community Based Sanctions' (1990) 36 *Crime and Delinquency* 162.

<sup>191</sup> See Ashworth (2005), above n 3, 93.

<sup>192</sup> New South Wales Law Reform Commission (1996), above n 38, 146.

<sup>193</sup> Ibid, 153.

<sup>194</sup> As in New South Wales and Victoria.

<sup>195</sup> Ibid.

### ***Responses to the Issues Paper***

3.4.9 Many of the responses to the Issues Paper addressed the topic of home detention and most supported the introduction of front-end home detention.<sup>196</sup> Reasons for supporting the introduction of this measure included the avoidance of the disruption to family life,<sup>197</sup> cost saving by reducing the costs of imprisonment<sup>198</sup> and avoiding making an adverse personality worse.<sup>199</sup> The then Chief Justice was a little more guarded in his support, suggesting that home detention should be explored further.<sup>200</sup> Craig Mackie argued that changes to probation and community service were a priority and necessary before home detention was introduced.<sup>201</sup> The Justice Department was opposed to introducing ‘front-end’ home detention ‘straight-up’, preferring instead to trial it as back-end option with offenders known to the system.<sup>202</sup> The principal concern was net-widening – the potential to ‘capture offenders who might otherwise have not been given a custodial sentence’.<sup>203</sup> A victims of crime service worker raised concerns in relation to the safety of family members of home detainees.<sup>204</sup>

3.4.10 Few submissions contained a discussion of views as to details of a home detention option. However, Tasmania Police recommended that it be an alternative to imprisonment, and that it be subject to strict eligibility criteria and of limited duration similar to the New South Wales model. One respondent recommended that the discriminatory nature of the sanction be addressed by finding suitable accommodation for the homeless and putting offenders who live in mansions in group homes in the community.<sup>205</sup> The Legal Aid Commission of Tasmania submitted that home detention not be an alternative to prison, that it be limited to 18 months and that orders be subject to family consent.

### ***The Institute’s views***

3.4.11 Notwithstanding the dangers of net-widening, the Institute is attracted to the concept of home detention. It notes that its introduction in Canada has been a success and has led to a decline in prison sentences with only a small net-widening effect. In the first three years of its introduction, a 13 per cent reduction in prison admissions was directly attributable to the new sanction.<sup>206</sup> Moreover, the proportion of offenders completing without breach is high.<sup>207</sup> Similarly high completion rates have been reported in Australia and New Zealand.<sup>208</sup> It appears that such a measure can reduce reliance on imprisonment with considerable cost benefits, and at the same time address many of the purposes of sentencing. Appropriately constructed it can punish and deter as effectively as prison, and yet also contribute to rehabilitative and restorative goals.<sup>209</sup>

- While not as severe as institutional imprisonment it has ‘penal bite’. Research indicates that offenders see home detention as very restrictive and in that sense punitive.<sup>210</sup> This is well

<sup>196</sup> Submissions in favour included Tasmania Catholic Justice and Peace Commission; Tasmania Police; Criminal Law Subcommittee of the Law Society; Warwick Dunstan.

<sup>197</sup> Maureen Holloway, on behalf of the Tasmanian Catholic Justice and Peace Commission, submission.

<sup>198</sup> The Commissioner of Police, Mr Richard McCreadie, submission.

<sup>199</sup> Anonymous victim of crime, submission.

<sup>200</sup> The Honourable Justice Cox, Chief Justice, submission, 3.

<sup>201</sup> Submission, 3.

<sup>202</sup> Department of Justice and Industrial Relations, submission, 13.

<sup>203</sup> Ibid.

<sup>204</sup> Liz Tanton-Buchanan, The Victims of Crime Service, submission.

<sup>205</sup> Anonymous victim of crime, submission.

<sup>206</sup> Julian Roberts, ‘Reducing the use of Incarceration: Recent International Experiences’ (2005) 86 *Reform* 15, 17.

<sup>207</sup> Andrew Ashworth, ‘Foreword’ in Roberts (2004), above n 172.

<sup>208</sup> Henderson (2006), above n 184, 74.

<sup>209</sup> Roberts (2004), above n 172, 52.

<sup>210</sup> Ibid, 114.

illustrated by detainees in the New South Wales program, where most respondents in an exit survey were ‘shocked at how tough the scheme actually was.’<sup>211</sup>

- In theory home detention can offer the same degree of specific deterrence as institutional custody. Research shows that severity of punishment has only limited impact on the likelihood of re-offending and that when background factors are controlled for, the recidivism rate for released prisoners is no better than less severe sanctions. Evaluations of electronic monitoring have suggested that electronically monitored offenders ‘generally do no better or no worse than similar offenders sentenced to more restrictive sanctions’,<sup>212</sup> nor significantly better or worse ‘compared with those being manually supervised.’<sup>213</sup> On the basis of 12 control-group studies, Aos et al found that electronic monitoring does not reduce recidivism, nor does it increase it.<sup>214</sup>
- Home detention has the advantage of achieving rehabilitative and restorative goals. Roberts argues it is clearly a more effective way of promoting rehabilitation than custody and through conditions imposed it can encourage offenders to engineer changes in their lives and can permit the kind of initiatives associated with restorative justice.
- The Institute accepts that home detention cannot achieve the same incapacitative effects as institutional imprisonment and so offenders who pose a significant risk to the public should be excluded from eligibility.

### Statutory framework

3.4.12 The Institute has considered the statutory framework that should be recommended for this sanction. The first issue is whether home detention should be seen as a standard or core condition of a suspended sentence or whether it should be a separate custodial sanction. In Canada, England and the Northern Territory it is a condition of a suspended sentence but in New South Wales and Victoria it is an independent sanction. While there are advantages in giving the suspended sentence more punitive bite by making home detention or curfew requirements a standard condition of suspension, the Institute is of the view that this would inevitably result in net-widening in Tasmania, a jurisdiction where the suspended sentence is so widely accepted by judicial officers. In the Institute’s view, it should be seen as a separate custodial sentence that is more severe than a wholly suspended sentence. To avoid net-widening, the sanction should be constructed as a form of custody with the court being first required to impose a term of custody before making a home detention order. The Institute recommends that this pre-requisite be located in a statutory framework that contains the principle of restraint in the use of custody.

### Labelling the sanction

3.4.13 The name of the sanction should reflect its nature as a form of custody and promote public acceptance of it as such. Moreover, it is not desirable to restrict orders to residence in the offender’s home, and there are cases where alternative accommodation may be more appropriate, for the homeless, wealthy and mentally ill<sup>215</sup> for example, and for domestic violence offenders. While these considerations suggest a name like community custody might be preferable, home detention or home detention order is the terminology that is better understood in Australia.

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<sup>211</sup> Kyleigh Heggie, *Review of the NSW Home Detention Scheme*, Department of Corrective Services (NSW) Research Publication No 41 (1999) 79.

<sup>212</sup> Roberts (2004), above n 172, citing Rogers and Jolin (1989).

<sup>213</sup> Mackenzie (2002), above n 55, 344.

<sup>214</sup> Aos, Miller and Drake (2006), above n 58, 3, 6.

<sup>215</sup> In *R v Knoblauch* [2000] 2 SCR 780, the Supreme Court of Canada upheld a community custody order which required the offender to be detained in a secure psychiatric facility.

### **A multi-dimensional sanction**

3.4.14 Julian Roberts, a respected sentencing scholar and international advocate of community custody, has argued that in 'order for community custody to realize its potential, the sanction must consist of more than simply a restriction on an offender's liberty.'<sup>216</sup> The Institute agrees. Home or residential confinement alone will achieve little more than punishment. Offenders should be encouraged to pursue treatment if necessary, to compensate the victim where possible and to take steps to make restoration to the community where appropriate. The Institute therefore recommends that home/residential confinement should be the core condition of the order but it should be multidimensional with additional conditions that reflect the additional needs of the offender or the restorative aims of the order.

### **The impact of the order on co-residents**

3.4.15 One of the disadvantages of home detention is the stress and pressure it places on the offender's family. The Issues Paper asked that submissions address the issue of how the offender's family should be protected. One submission recommended that an HDO be subject to the consent of the offender's family.<sup>217</sup> To protect the offender's family the Institute recommends that before making an HDO, the court should obtain an assessment report which addresses the suitability of the offender for such a disposition, the impact of the order on third parties and the environment in which the offender will be confined. The consent of co-residents should be a prerequisite as it is in New South Wales and Victoria and this should be able to be withdrawn at any time. However, if co-residents do not consent or consent is withdrawn, the sentence should be served in a half-way house or other suitable accommodation. The Institute was concerned that to state in the report that one or more residents did not consent to the order may put them in a particularly difficult position *vis a vis* the offender. However, on balance, it was decided to recommend that consent in writing should be a prerequisite for the offender to reside at his or her home or normal residence. If the writer of the assessment report has concerns for the safety of the residents then it would be possible to merely state that the offender was not a suitable person to serve the sentence by way of home detention and that it was not appropriate that the sentence be served by way of home detention, or alternatively that it was preferable in the circumstances that alternative accommodation be found for the offender.

### **Discretion as to length**

3.4.16 The issue of whether courts should have the discretion to make an HDO longer than the term of custody it replaces has been considered by the Institute. In Canada the Supreme Court has determined that this is permissible for the reason that community custody cannot match the penal value of institutional custody.<sup>218</sup> However, elsewhere, including in New South Wales, the length of the custodial term must be determined without regard to the possibility that a home detention order may be made. In other words, the length of a home detention order is tied to the length of the sentence of imprisonment which is determined without regard to the manner in which it is to be served.<sup>219</sup> The advantage of the Canadian approach is that it ensures that the principles of parity and proportionality are not violated. If two comparable offenders are sentenced, one to community custody for six months and one to imprisonment for six months, they are usually going to be serving sentences of varying severity in violation of the principle of parity.<sup>220</sup> The principle of proportionality may be infringed if the appropriate sentence is one of six months imprisonment and this is replaced by six months community custody.<sup>221</sup> The public may also be more supportive of a sanction which replaces prison if the replacement is longer than the term of imprisonment that would have been imposed. The disadvantage of giving courts a discretion to increase the length of an HDO is that it conflicts with the accepted method of reasoning for wholly suspended sentences and could not be accepted without also

<sup>216</sup> Roberts (2004), above n 172, 155.

<sup>217</sup> Legal Aid Commission of Tasmania, submission, 6.

<sup>218</sup> *R v Proulx* [2000] 1 SCR 61.

<sup>219</sup> *R v Douar* (2005) 159 A Crim R 154, [70]; *R v Lo*; *R v Ouyang* [2004] NSWCCA 382, [10].

<sup>220</sup> Roberts (2004), above n 172, 161.

<sup>221</sup> *Ibid.*

allowing courts to increase the length of wholly suspended sentences. The Institute also notes that while home detention cannot match the punitive value of institutional custody, the home detainee does not have access to remission or parole so in effect will generally spend longer in detention. The Institute recommends that this made be clear in the legislation.

### **Limiting the length of the order**

3.4.17 The Issues Paper asked whether HDOs should be limited to 18 months in length. This is the maximum length in New South Wales. Tasmania Police directly addressed this issue submitting that HDOs should be of limited duration, as in New South Wales. The Legal Aid Commission of Tasmania disagreed submitting instead that there should be a wide judicial discretion in respect of length. In Victoria the maximum is 12 months, it is five years in the Northern Territory and in South Australia there is no sentence length restriction. In New Zealand the court can only give leave to apply for HDOs to offenders sentenced to two years or less. In England and Wales the limit adopted for the suspended sentence is 12 months and in Canada a sentence of imprisonment that can be ordered to be served in the community (a conditional sentence of imprisonment) must be less than two years. Sentence length restrictions are open to the criticism that they unnecessarily restrict judicial discretion and that there may be exceptional cases where it is appropriate to impose home detention for a longer period than 18 months. However, there are two good reasons in favour of sentence length restrictions. First, setting no ceiling or a ceiling as long as two years allows HDOs to be imposed in very serious cases which can attract media and public criticism and undermine the acceptability of community custody in the eyes of the public. A lower limit, say of 12 months, would avoid such controversy and have little impact on increasing admissions to prison compared with a higher upper limit of no limit at all.<sup>222</sup> Secondly, long HDOs place considerable hardships and pressures on the families of offenders. These pressures may be tolerable for months but may be an intolerable burden for longer periods.<sup>223</sup> Moreover, Roberts argues that research suggests that the likelihood of continued compliance is inversely related to the length of time the offender is required to observe conditions.<sup>224</sup> The Institute accepts the strength of the arguments against and in favour of length restrictions. However, it is of the view that the arguments in favour can be adequately addressed by requiring judicial officers to conduct periodic reviews of offenders sentenced to an HDO in excess of 12 months with power to vary the conditions of the order.<sup>225</sup> It therefore recommends that no limits be placed on the length of the order but that judges and magistrates be required to review orders in excess of six months.

### **Offence-based exclusion criteria**

3.4.18 As discussed in para 3.4.3, jurisdictions differ in the offences that are statutorily excluded from home detention orders. In general the Institute does not favour excluding specific offences from HDOs. If the court is prevented from imposing HDOs for offences such as manslaughter, sexual assault or violent offences but is permitted to impose a less severe sanction for such offences, anomalies are created unless similar changes are also made to the ambit of less severe sanctions. Excluding specific offences prejudices the relative seriousness of the crimes excluded. Moreover, as Roberts has pointed out, such schedules can be subject to political interference with Parliament adding crimes to the schedule in a knee-jerk response to appease the public.<sup>226</sup> However, there are principled reasons for some exclusions. Offences that pose a significant risk to society should be excluded, and offenders convicted of a domestic violence offence should not be returned home to serve the sentence although they could be required to serve it in a community-based residence with appropriate conditions to protect the victim. It has been argued that it is appropriate to exclude offenders convicted of drug dealing, manufacture or cultivating drugs in cases where the offender has used his or her home

<sup>222</sup> Roberts (2004), above n 172, 162-163.

<sup>223</sup> Ibid, 163.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid, 164.

<sup>226</sup> Ibid, 165.

for the commission of the offence.<sup>227</sup> However, the Institute does not recommend including such an exclusion. The matter should be left to the discretion of the judge.

### Homeless and wealthy offenders

3.4.19 The Issues Paper invited submission on ways homeless offenders or those with unsuitable accommodation could be included in the scheme. Two submissions suggested that disadvantaged offenders should be required to serve HDOs in group homes or ‘suitable accommodation’<sup>228</sup> while it was suggested that ‘rich offenders who usually live in mansions, should also be placed in suitable group homes’.<sup>229</sup> Roberts’ observation that ‘[a]llowing a rich defendant to purge his sentence in luxury would scandalise public opinion’ is borne out by the public response to the decision to allow Paris Hilton to serve her 42 week prison sentence at her luxury home with an ankle monitor.<sup>230</sup> The Institute is of the view that it is as inequitable to deny the sanction to wealthy offenders as it is to deny it to the homeless. The homeless should be required to serve home detention in a half-way house. In the case of the affluent, on the face of it, being required to stay in a ‘mansion’ or a beautifully appointed house may not seem much of a punishment. However, it is the confinement and lack of freedom that is the punishment. The wealthy are accustomed to travel and a choice of activities, entertainments and destinations denied to the less well-off. Being confined to their home could severely constrain the freedom they are accustomed to.

### Provision of adequate resources for supervision and assistance

3.4.20 Community custody should not be introduced unless corrective services are given additional resources to devote more time to surveillance and support of offenders. Fundamental to acceptance of the sanction by police, judicial officers and the public will be the perception that ‘home detainees will be subject to strict surveillance under a system that cannot be circumvented’.<sup>231</sup> Provision should also be made for home detention programs to be available to ensure adequate support and supervision.<sup>232</sup>

### Recommendations

19. The Institute recommends that ‘front-end’ home detention be introduced as a sentencing option and that it be called ‘home detention’. (3.4.11, 3.4.13)
20. That it should not be a condition of a suspended sentence but a custodial sentence located in the sentencing hierarchy between an immediate sentence of imprisonment and a wholly suspended sentence of imprisonment. (3.4.12)
21. That home/residential confinement be a core condition of the order but courts should have the discretion to impose additional orders to reflect the needs of the offender or the restorative aims of the sentence. (3.4.14)
22. That a home detention assessment report be a prerequisite of a home detention order. (3.4.15)
23. That a court must not make a home detention order unless the offender consents and signs an undertaking to comply with their obligations under the order. (3.4.15)
24. That consent of co-residents be a prerequisite of the order and consent should be able to be withdrawn at any time. (3.4.15)
25. That offenders sentenced to home detention not be eligible for remissions or parole. (3.4.16)

<sup>227</sup> Ibid, 166.

<sup>228</sup> Legal Aid Commission of Tasmania, submission; Anonymous victim, submission.

<sup>229</sup> Anonymous victim, submission.

<sup>230</sup> Sharon Waxman, ‘Celebrity Justice Cuts Both Ways for Paris Hilton’ *The New York Times* (New York) 9 June 2007.

<sup>231</sup> Dennis Challenger ‘An Australian Case Study: the Northern Territory Home Detention Scheme’, in Ugljesa Zvekić, *Alternatives to Imprisonment in Comparative Perspective* (1994) 274-275.

<sup>232</sup> In Victoria an approved home detention program must be available before a court can make an order: *Sentencing Act 1991* (Vic) s 18ZW(1)(c).

26. That there be no limits on the length of the order but that judicial officers be required to review orders in excess of six months. (3.4.17)
27. That there should be no offence-based exclusion criteria, however, an offender who poses a significant risk in terms of committing a further violent offence should not be eligible for a community custody order. (3.4.18)
28. That the courts should have a discretion to order home detention be served in a place other than the offender's home in appropriate cases (e.g. in cases of domestic violence offences and homeless offenders). (3.4.15, 3.4.19)
29. That additional resources be allocated to Community Corrections for preparation of assessment reports, supervision of home detainees and provision of home detention programs. (3.4.20)

## 3.5 Periodic detention

3.5.1 Periodic detention involves imprisoning offenders for limited periods but allowing them to spend the remainder of their time at home, at work or otherwise in the community. It is a sentencing option in New South Wales and the Australian Capital Territory but not in Tasmania. In New South Wales there are eleven detention centres at eight locations<sup>233</sup> and in the ACT there is one.

3.5.2 In New South Wales, where an offender is sentenced to a term of imprisonment for not more than three years, the sentencing court may order that a sentence of imprisonment be served by way of periodic detention.<sup>234</sup> This generally requires the offender to remain in custody for two consecutive days of each week for the duration of the sentence. An offender serving periodic detention may also be required by the Commissioner of Corrective Services to carry out community work and attend training or counselling.<sup>235</sup> Certain offenders are ineligible for periodic detention including those convicted of prescribed sexual offences.<sup>236</sup> The periodic detention scheme in New South Wales operates in two stages. During Stage 1 detainees are required to remain in custody in a detention centre for the detention period. After serving one third or three months (whichever is the greater), periodic detainees, who have attended regularly and been of good behaviour, are eligible for Stage II. Stage II is a non-residential component of periodic detention which allows the detainee to sleep at home at night and attend at the designated work site on two consecutive days from 8am to 4pm. One of the advantages of Stage II is that it provides an incentive for regular attendance and good behaviour in Stage 1.

3.5.3 The New South Wales Law Reform Commission recommended abolition of Stage II detention because it was inconsistent with truth in sentencing and because of the negative effect on public perception of periodic detention as an effective sentencing option. It was anticipated that abandoning Stage II would encourage greater use of periodic detention because it would be seen as having a stronger punitive element.<sup>237</sup> The Commission's recommendation has not been adopted. The use of periodic detention has been declining in New South Wales, with numbers of detainees dropping from 1,424 in 1996 to 1,045 in 2001<sup>238</sup> and 724 in 2006.<sup>239</sup> The scheme is under review and it seems likely that it will be phased out. In contrast, in the ACT, periodic detention accommodation is being expanded. The ACT scheme differs from the NSW scheme in that there is no staged approach to detention.<sup>240</sup>

<sup>233</sup> New South Wales Department of Corrective Services, *Annual Report 2005-2006* (2006), Appendix 31.

<sup>234</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6, for the decision sequence see *Douar* (2005) 159 A Crim R 154, [69]-[72].

<sup>235</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 84.

<sup>236</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 65A.

<sup>237</sup> New South Wales Law Reform Commission (1996), above n 38, 141.

<sup>238</sup> New South Wales Department of Corrective Services (2006), above n 233, Appendix 28.

<sup>239</sup> Australian Bureau of Statistics 2006, *Prisoners in Australia 2006*, Cat. No. 4517.0.

<sup>240</sup> See *Crimes (Sentencing) Act 2005* (ACT) s 11; *Crimes (Sentence Administration) Act 2005* (ACT) pt 5.

3.5.4 In the United Kingdom, periodic detention – under the label intermittent custody – was introduced on a pilot basis in 2004<sup>241</sup> and national roll-out is still on the agenda. The Sentencing Guidelines Council has advised that public safety should be the paramount consideration and so ‘intermittent custody’ should not be ‘used for sex offenders or those convicted of serious offences of either violence or robbery’ but may be suitable for those who are ‘full-time carers; employed; or in education’.<sup>242</sup>

### ***Advantages***

3.5.5 The advantages of periodic detention are said to include the following:

- it registers disapproval of the offender’s criminal activities without all the negative effects of full-time imprisonment;
- it enables the offender to maintain contact with family, friends and employment and to contribute to the community through community work;
- it keeps the offender away from hotels and the possibility of excessive drinking thereby decreasing the risk of re-offending;
- it is much cheaper than full-time imprisonment;<sup>243</sup>
- it is compatible with principles of restorative justice by returning a benefit to the community in the form of work on community projects but at the same time it has an element of punishment;
- it is perceived by detainees to be a fairer sanction than full-time imprisonment,<sup>244</sup> and this is a factor associated with better crime outcomes.

### ***Disadvantages***

3.5.6 The disadvantages of periodic detention are said to include the following:

- as with home detention there is the possibility of net-widening;
- it will require an increase in detention facilities, and in a small state like Tasmania with a dispersed population this will be at a significant capital cost;
- it is difficult to run because of the burden of processing prisoners’ frequent entry and exit from custody;
- a possible reluctance to use this sentencing option because judges are ambivalent about the equivalence between a sentence of full-time imprisonment and a sentence of periodic detention;<sup>245</sup>
- problems with compliance rates.<sup>246</sup>

<sup>241</sup> The power to impose intermittent custody is found in the *Criminal Justice Act 2003* (UK) s 183.

<sup>242</sup> Ashworth (2005), above n 3, 277 quoting Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (2004) [2.3.11].

<sup>243</sup> In New South Wales in 1996, the estimated cost of periodic detention per prisoner per day was an estimated \$30 compared with fulltime minimum security imprisonment of \$104.35: New South Wales Law Reform Commission (1996), above n 38, 111 note 9; in the ACT periodic detention in costs \$191 per day compared with imprisonment (NSW) \$224 per day and remand \$503 per day: Kim Hosking, A/g manager, Business, policy and co-ordination, ACT Corrective Services, personal communication 22 October 2007.

<sup>244</sup> Judy McHutchison, *Outcomes for NSW Periodic Detention Orders Commenced 2003-04*, Department of Corrective Services (NSW) (2006).

<sup>245</sup> Arie Freiberg *Pathways to Justice* (2002) 100, citing Ivan Potas, Natalie Marsic and Stephen Cumines *Periodic detention revisited*, Judicial Commission of New South Wales (1998) 18.

<sup>246</sup> Freiberg (2002), above n 245, 137; McHutchison (2006), above n 244, reported 68 per cent of detainees in 2003-2004 successfully completed their detention order.

3.5.7 As discussed in the Issues Paper, the Tasmanian Legislative Council's Select Committee (the 'Wing Committee') investigated periodic detention and visited detention centres in New South Wales and the Australian Capital Territory. They were satisfied that it has considerable merit and recommended its adoption in Tasmania.<sup>247</sup> This recommendation was supported by the submission from the Tasmanian Magistracy. The Committee recommended the establishment of Periodic Detention Centres accessible to the three regions of Tasmania either in prisons or other suitable facilities. The Committee envisaged a two-stage scheme, similar to that operating in New South Wales. It was argued this would give courts the opportunity to include offenders living in remote areas in the scheme.

### ***Response to the Issues Paper***

3.5.8 Responses to the Issues Paper were divided on the issue of whether periodic detention should be introduced in Tasmania. The then Chief Justice opposed it on the grounds that it 'would be an administrative nightmare' and could not be satisfactorily enforced and 'disciplinary action as the result of inevitable breaches would clog up the court system'.<sup>248</sup> Consultations with community corrections officers in Hobart emphasised the large cost of providing special facilities and productive programs and activities for detainees. Craig Mackie submitted that increased resources for existing community sentences were a greater priority than new initiatives such as periodic detention. However, supporters of periodic detention were more numerous than detractors with the Legal Aid Commission of Tasmania, the Criminal Law Subcommittee of the Law Reform Commission, the Tasmanian Justice and Peace Commission and other individuals recommending the introduction of periodic detention.<sup>249</sup> In Bartels' interviews with judges and magistrates, two judges responded to a general question about sentencing reform of suspended sentences with a comment supporting the inclusion of periodic detention as a sentencing option.<sup>250</sup> The Justice Department's response did not oppose the notion of introducing periodic detention but noted the need for funds for developing appropriate physical infrastructure in each of the three regions of the State and the need for some form of rehabilitative or reparative component to be devised for the non-detention period of orders.<sup>251</sup> Advocates were divided on whether periodic detention should be a substitutional sanction or not. The Wing Committee envisaged it as an option 'without limitation, notwithstanding the risk of net widening'<sup>252</sup> but the Legal Aid Commission recommended that it be a substitutional sanction, in other words that the judicial officer's decision sequence be that it is first decided that a term of imprisonment be imposed before the decision is made to order that it be served by way of periodic detention.

### ***The Institute's views***

3.5.9 There is a real advantage in seeking to avoid some of the negative impacts of imprisonment such as disruption of employment, family life and education. Periodic detention avoids placing family members in the invidious position of gaolers. However, the costs associated with housing offenders for short periods are large and given expenditure of 'around \$90M' on the new prison at Risdon<sup>253</sup> it is unlikely that the government would put more money into custodial infrastructure for some time. Moreover, the Institute is of the view that the most pressing need is for resources for programs rather than bricks and mortar. It therefore does not recommend that periodic detention be introduced as a sentencing option until funding is available.

<sup>247</sup> Wing Committee Report (1999), above n 83, 124-131.

<sup>248</sup> The Honourable Justice Cox, Chief Justice, 3.

<sup>249</sup> Warwick Dunstan, submission.

<sup>250</sup> Bartels (2008), above n 96, 3.4.9.

<sup>251</sup> Justice Department, submission, 14.

<sup>252</sup> Don Wing, MLC, submission, 3.

<sup>253</sup> Parliament of Tasmania, *Risdon Prison: Business Case*, Auditor General Special Report No 68 (2007) 2.

### Recommendation

30. The Institute does not recommend that periodic detention be introduced as a sentencing option at this time (for the reasons outlined in para 3.5.9).

## 3.6 Intensive correction orders

3.6.1 The intensive correction order (ICO) is an intermediate sentencing sanction which is available in Victoria and Queensland. It has an international counterpart in the US in Intensive Supervised Probation, a program which was designed to provide increased supervision and restraint on offenders in comparison with regular probation. However, rather than enhanced probation, intensive correction orders in Victoria (and Queensland) are an enhanced community service and probation order combined and have been described as ‘a community service order with teeth’. In some ways they are closer to one form of the new English generic community sentence which has a core supervision requirement and one or more of 12 possible requirements of which unpaid community work is one.<sup>254</sup>

3.6.2 The intensive correction order was introduced in Victoria in the early 1990s with the aim of diverting offenders from short terms of imprisonment.<sup>255</sup> Where a court has obtained a pre-sentence report on the offender and has imposed a sentence of imprisonment that does not exceed 12 months it may order that it be served by way of intensive correction in the community.<sup>256</sup> Core conditions which must be agreed to by the offender include not to commit another imprisonable offence; to report to or receive visits from a community corrections officer at least twice a week; and to attend at a specified community corrections centre for at least 12 hours per week to perform community work for at least eight hours and to spend any balance in counselling, treatment or education. Other special conditions may be added by the judicial officer in relation to attendance at prescribed programs. In the event of breach, there is a presumption of imprisonment, unless there are exceptional circumstances.

### *Advantages*

3.6.3 The advantages of the intensive correction order are similar to home detention and periodic detention:

- it permits the courts to impose a custodial sentence which lends weight to the penalty, emphasising its seriousness and has symbolic value for victims;
- it enables the offender to maintain contact with family, friends and employment;
- by providing for frequent contact with a community corrections officer and the opportunities for treatment, counselling and education, it can address the causes of the offending behaviour;
- it avoids the contaminatory effects of imprisonment;
- it is cheaper than full-time imprisonment;
- it is compatible with principles of restorative justice by returning a benefit to the community in the form of work on community projects but at the same time it has an element of punishment.

### *Disadvantages and problems*

<sup>254</sup> *Criminal Justice Act 2003* (UK) s 199.

<sup>255</sup> Freiberg (2002), above n 245, 134.

<sup>256</sup> See the *Sentencing Act 1991* (Vic) ss 19-26.

3.6.4 While there is a risk that any sanction that is intended to be diversionary can be used inappropriately with ‘net-widening’ effects, Freiberg suggests that one of the reasons the ICO has not been particularly successful in Victoria is the reverse: the substitutional nature of the sanction (in other words, its link with a sentence of imprisonment) has meant that some sentencers may be reluctant to impose it in cases where they believed that the offender required a high degree of supervision but where the offence itself may have not warranted imprisonment.<sup>257</sup> Other problems with it include:

- the program conditions have not been made available;
- insufficient resources have been devoted to the sanction causing sentencers to lose confidence in it;
- high breach rates because of insufficient resources and lack of flexibility resulting in a loss of confidence in the order;
- the order may be too short for effective rehabilitation;
- the breach conditions are too severe and inflexible.

3.6.5 Freiberg made a number of recommendations to address these problems, including that the nexus with imprisonment be severed by making the ICO a sentencing option in its own right but one which should only be imposed where a court is considering sentencing an offender to a term of imprisonment.<sup>258</sup> However, none of his recommendations have been followed and the take-up rate of this sentencing option does not appear to have increased.<sup>259</sup>

### ***Responses to the Issues Paper***

3.6.6 The Issues Paper asked whether the intensive corrections order should be introduced in Tasmania and, if so, whether it should be a sentence in its own right or a substitutional sanction for imprisonment. There was some support for its introduction.<sup>260</sup> The Legal Aid Commission of Tasmania and Tasmania Police suggested that the intensive corrections order should be introduced as a sentencing option in its own right rather than a substitutional sanction. The submission from Tasmania Police recommended that the main emphasis of the order should be on restorative justice and rehabilitation but a discretion to attach additional surveillance requirements such as home detention or curfew conditions was also suggested. A submission from a probation officer favoured introducing intensive correction orders but it is clear from the submission that he had in mind intensive supervised probation rather than the a community service order with bite.<sup>261</sup> The Justice Department commented that further research was necessary to determine the best model for intensive correction orders and noted that more intensive supervision would require increased funding.<sup>262</sup>

### ***The Institute’s views***

3.6.7 The submissions and consultations suggest that the concept of an intensive correction order is a confusing one which does not convey whether it is in essence an enhanced probation order or an enhanced community service order. International evidence suggests that intensive supervised

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<sup>257</sup> Freiberg (2002), above n 245, 135.

<sup>258</sup> Ibid, 138.

<sup>259</sup> See the Victorian Sentencing Advisory Council figures on Sentencing outcomes for higher courts and magistrates courts at: Victorian Sentencing Advisory Council, *Sentencing Statistics* (2007) Sentencing Advisory Council, <http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/Home/Sentencing+Statistics/> at 21 November 2007.

<sup>260</sup> Community Corrections in consultations in Devonport and Launceston (26 September 2002); Anonymous Victim, submission; Criminal Law Subcommittee of the Law Society, submission.

<sup>261</sup> John Heathcote, Probation Officer, submission.

<sup>262</sup> Submission, 14.

probation which involves increased supervision and surveillance is not effective in reducing recidivism. Based on her review of evaluation studies, Mackenzie concluded:

there is no evidence that recidivism is reduced by increasing surveillance and other restraints over offenders on ISP [intensive supervised probation]. In fact, the increased surveillance may be associated with increases in technical violations.<sup>263</sup>

3.6.8 This is supported by the Washington State Institute for Public Policy review. Based on 23 studies, Aos et al report that intensive supervision with an emphasis on surveillance had no impact on crime outcomes compared to treatment as usual.<sup>264</sup> However, both of these reviews agree that the evidence suggests that if offenders are offered increased treatment in addition to increased surveillance and control, crime outcomes are improved – sometimes significantly so.<sup>265</sup> These findings are not relevant to the Victorian model of an intensive corrections order. However, the evidence suggests that it is perhaps worth exploring the idea of a generic community sentence, or a community sentence that offers considerable flexibility to sentencers. Nonetheless, it should avoid the twin problems of threatening the relationship between the gravity of the offence and the severity of the penalty and the imposition of too many conditions. The Institute does not support introducing an order which is in effect an additional custodial order and is of the opinion that the home detention order/community custody order is a more appropriate option than the intensive correction order. This raises the question whether it would be a more attractive option if the nexus with imprisonment was broken so that the ICO became a sentencing alternative in its own right and not a means of serving a sentence of imprisonment. The Institute is of the view that having an order which combines the punitive, reparative and rehabilitative aspects of an enhanced community service order could be achieved in other ways.

### **Recommendation**

31. For the reasons outlined in paras 3.6.7 – 3.6.8, the Institute does not recommend the introduction of the intensive correction order in Tasmania, either as a means of serving a sentence of imprisonment or as a sentencing option in its own right.

## **3.7 Community service orders**

3.7.1 Community service orders (CSOs) require an offender to perform unpaid work or other activity in the community under the direction of a probation officer or supervisor. In the sentencing hierarchy they sit below a suspended sentence. When first introduced, community service orders (work orders) were an alternative to imprisonment but they are now a sentencing option in their own right. The authorising legislation is the *Sentencing Act 1997* (Tas) s 7(c). The offender may be required to work on any day of the week and in conformity with trends elsewhere, community service includes attendance at educational or other programs. The Community Service Order Scheme co-ordinates work, work sites and supervision for persons subject to CSOs. It provides assistance to a broad range of community organisations and individual pensioners. In recent years, the trend has been away from individual assistance and more towards working with organisations that are able to provide supervision, tools and equipment.<sup>266</sup> It is not known what proportion of the projects assigned or hours completed consist of personal development or education activities. An early study of community

<sup>263</sup> Mackenzie (2006), above n 80, 310.

<sup>264</sup> Aos, Miller and Drake (2006), above n 58, 9. There is also an early English random allocation study which showed no overall differences in reconviction between offenders given more probation supervision on lower case loads compared to those given less supervision on normal caseloads: M. Steven Folkard, David E Smith and David D Smith, *IMPACT Volume II: The Results of the Experiment*, Home Office Research Study 36 (1976).

<sup>265</sup> Aos, Miller and Drake (2006), above n 58.

<sup>266</sup> Wing Committee Report (1999), above n 83, 142.

service orders in Tasmania found only 3.3 per cent of projects fell outside the work category.<sup>267</sup> The 2002 audit gave examples of personal development and education courses but gave no indication of the extent to which such programs were used.<sup>268</sup> Breach of a community service order is an offence for which the offender may be fined or imprisoned. In addition or alternatively, the court may confirm the order, increase the number of hours or cancel the order and re-sentence the offender for the original offence.<sup>269</sup>

3.7.2 Community service orders have many advantages over imprisonment not the least of which is cost. The cost of corrective services supervision in Tasmania in 2005-2006 was \$8.97 per day compared with a cost of \$222 per day for keeping a person in custody.<sup>270</sup> The extent to which community service orders have been used to replace imprisonment is not entirely clear. An obvious advantage of community service is that it has a restorative element: it provides an opportunity for offenders to give something back to the community. It is a sanction that has a punitive element (by constraining the offender's time and freedom), a rehabilitative element (by providing possibilities of education and work experience) and a restorative element. It appears to be a useful and credible sentencing option in the sentencing hierarchy for medium range offences.

3.7.3 In 1999 the Wing Committee reported that there had been a steady upward trend in the use of CSOs since 1980 and that there was a significant increase in 1996/1997 with 1,091 orders made.<sup>271</sup> However, since then their use has declined with 826 orders made in 2005-06<sup>272</sup> and 840 in 2006-07.<sup>273</sup> In the Magistrates Court community service orders comprise about 4 per cent of orders made.<sup>274</sup> In the Supreme Court they are imposed in about 5 per cent of sentences (as the most serious outcome).<sup>275</sup>

3.7.4 Section 7(i) of the *Sentencing Act 1997* (Tas) allows community service orders to be combined with other orders and combinations with suspended sentences and/or probation orders are not uncommon. From 2001 to 2006 in the Supreme Court 16 per cent of those who received community service orders also received probation orders.<sup>276</sup> In the Magistrates Court 20 per cent of community service orders are combined with probation orders.<sup>277</sup> There are clearly advantages in combining community service with a wholly suspended sentence in some cases so that the suspended sentence is given a punitive bite. Similarly, combining probation with community service allows rehabilitation to be emphasised as well as punishment and reparation. However, if this combination is over-used it may stretch the resources of community corrections by the supervisory requirements of combined orders. It may also result in a disproportionate outcome and set-up offenders to fail by overloading the sentence with requirements.

3.7.5 Some jurisdictions, such as Victoria and Western Australia, have a different model for community-based orders. Rather than separate categories of order for community service and probation they have an order (called a community-based order) with multiple elements capable of being tailored to the needs of different types of offenders.<sup>278</sup> While this has the advantage of flexibility,

<sup>267</sup> Terese Henning, 'Hidden Factors in the Assessment of Offenders for Community Service Orders in Tasmania' (1997) 8 *Current Issues in Criminal Justice* 287, 304: data from this study were taken from 1992-1993.

<sup>268</sup> Tasmanian Audit Office, *Managing Community Service Orders*, Special Report No 44 (2002), 22.

<sup>269</sup> *Sentencing Act 1997* (Tas) s 36.

<sup>270</sup> Tasmanian Department of Justice (2007), above n 11, 45 (community supervision, there is no differentiation between probation, parole and community service costs), 42 (prison).

<sup>271</sup> Wing Committee Report (1999), above n 83, 143; Tasmanian Audit Office (2002), above n 268, 10.

<sup>272</sup> Tasmanian Department of Justice, *Annual Report 2005-2006* (2006) 58.

<sup>273</sup> Tasmanian Department of Justice (2007), above n 11, 47.

<sup>274</sup> Data supplied by Lorana Bartels, PhD student, University of Tasmania. She found that in her lower court sample for 2003-2004 community service orders comprised 3.7 per cent of orders made.

<sup>275</sup> Based on Supreme Court sentencing data for 2001-2006.

<sup>276</sup> Supreme Court Sentencing data 2001-2006. Bartels (2007), above n 91, found 14.2 per cent of wholly and partly suspended sentences were combined with a community service order.

<sup>277</sup> From Bartels' 2003-2004 sample.

<sup>278</sup> *Sentencing Act 1991* (Vic) ss 36-48, *Sentencing Act 1995* (WA) ss 61-67.

there are problems with a lack of clarity regarding the aims of the order.<sup>279</sup> England and Wales also have a generic community sentence that gives sentencers a menu of options which can be combined to form a single sentence. The basic requirement is supervision and the ‘menu’ of optional requirements includes compulsory unpaid work; curfew or exclusion orders; electronic monitoring and participation in restorative justice programs.<sup>280</sup> Other jurisdictions such as New South Wales have retained the community service order as a discrete order.

### ***Responses to the Issues Paper***

3.7.6 Responses to the Issues Paper were generally supportive of community service orders as a credible sentencing option. The Chief Justice, for example, stated, ‘I think that by and large, these have been very successful. Curiously, many of those subject to them are far from reluctant to carry them out satisfactorily because they are doing something worthwhile.’<sup>281</sup> However, a number of problems were identified and a lack of resources was a recurring theme. Craig Mackie had no issues with the legislative framework but submitted that there were a raft of problems associated with CSOs because of a lack of resources allocated to them resulting in too few officers administering them, lack of availability of programs in some areas and delays in assessing suitability of offenders for orders. He was also critical of the quality of the work programs available stating, ‘[p]rograms that could really benefit the community and the offender are frustratingly rare’. He also complained that offenders receive little or no rehabilitative assistance from CSOs.<sup>282</sup> A probation officer also referred to the lack of diversity in the availability of programs and commented on a lack of selectivity in orders made by courts and community corrections.<sup>283</sup> Community Corrections Officers in Hobart recommended a person be employed with the role of seeking out new projects and providing organisations with support and advice in relation to supervision. It was suggested that high profile projects result in an increase in orders.<sup>284</sup> A respondent from a Community Legal Centre suggested insufficient use was made of community service orders, adverting to their potential to result in community benefit.<sup>285</sup> Tasmania Police favoured changing the legislative framework so that community service orders would have a menu of options in addition to unpaid work including supervision and participation in restorative justice programs. The Hobart Community Legal Centre submitted that community service orders should also have a rehabilitation component with more resources allocated to enable referral to different rehabilitation programs.<sup>286</sup>

3.7.7 The Justice Department response referred to the difficulty in sourcing placements for community service orders and predicted problems if there were to be an increase in the number of orders made.

### **Rewards**

3.7.8 The Issues Paper raised the question of whether a form of reward should be built into the community service order. In New Zealand, s 67 of the *Sentencing Act 2002* provides that if a probation officer is satisfied that the offender has a good record of compliance with a sentence of community work, the probation officer may, as the sentence nears its end, remit up to 10 per cent from the aggregate number of hours of community work imposed by the court. Tasmania Police supported such a system<sup>287</sup> as did Community Corrections in Hobart and Launceston.<sup>288</sup> The Legal Aid Commission of

<sup>279</sup> Freiberg (2002), above n 245, 166.

<sup>280</sup> See Ashworth (2005), above n 3, 312-321 for an explanation.

<sup>281</sup> The Honourable Justice Cox, Chief Justice, submission, 3.

<sup>282</sup> Submission from Craig Mackie, solicitor. Consultation in October 2007 revealed that his views are unchanged.

<sup>283</sup> J Heathcote, probation officer, submission.

<sup>284</sup> Consultation with Community Corrections Hobart, 14 September 2002.

<sup>285</sup> Mr Bob Hamilton, Manager, Launceston Community Service, submission.

<sup>286</sup> Hobart Community Legal Centre, submission from Jane Hutchison and Olivia Montgomery.

<sup>287</sup> Tasmania Police, submission.

<sup>288</sup> Consultations 30 September 2002 (Launceston), 14 September 2002 (Hobart).

Tasmania thought rewards should be limited to a certificate or statement outlining competencies attained by the person.

## **Breach**

3.7.9 A number of submissions addressed the issue of breach. Tasmania Police recommended that the breach offence should be abolished provided appropriate mechanisms exist for monitoring performance. Community Corrections Launceston suggested that the first failure to appear should result in a warning and that there should be an administrative increase in number of hours for a third failure.

## **Community service orders and fines**

3.7.10 A number of submissions were in favour of making community service orders a broader option that was available for offences which were not punishable by a term of imprisonment.<sup>289</sup> It was also noted that there was inconsistency among magistrates as to whether a community service order was available instead of a mandatory minimum fine for an offence such as drink driving.<sup>290</sup> An examination of Bartels' data set for the Magistrates Court in 2003-2004 revealed that only six of the twelve magistrates had imposed a community service order in lieu of a mandatory fine or imprisonment in this period for drink driving suggesting magistrates do not have a consistent view about the availability of a community service order where the penalty provision prescribes a mandatory minimum fine or imprisonment.

## ***The Institute's views***

3.7.11 The Institute is of the view that community service orders appear to be a credible, logical and effective sentencing option. The latest Justice Department's annual report suggests they are 'imposed by the courts to encourage offenders to achieve responsible behaviour including: performing useful tasks that provide reparation to the community; improve social attitudes and skills and improve interaction between offenders and the public.'<sup>291</sup> The Institute would add that they are also punitive and so a community service order can condemn and censure the crime by inflicting a deserved response as well seeking reparation and desistance from crime. An indication of effectiveness can be assessed by completion rates and reconviction rates. Justice Department annual reports show that completion rates were consistently high from 2002-2006 although the completion rate has dropped in the last financial year from 90 per cent in 2005-2006 to 81 per cent in 2006-2007.<sup>292</sup> The Tasmanian rate compares favourably with other jurisdictions.<sup>293</sup> An audit of community service orders was conducted in 2002 in Tasmania.<sup>294</sup> It reported that cases of non-attendance were promptly reported to the Community Corrections Services. Together with good completion rates this supports the general view of respondents that community service orders are a credible sentencing option.

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<sup>289</sup> Submissions of the Legal Aid Commission of Tasmania, Tasmania Police, Bob Hamilton, Community Corrections Hobart.

<sup>290</sup> Legal Aid Commission of Tasmania, submission; Magistrate Dixon (personal communication, October 2007).

<sup>291</sup> Tasmanian Department of Justice (2007), above n 11, 46.

<sup>292</sup> *Ibid*, table 9.11., 47.

<sup>293</sup> The Justice Department's submission reported that the Tasmanian rate of 90.3 per cent in 2000-2001 compared with 66.6 per cent for Australia as a whole. In New South Wales, for example, the annual average successful completion rate was 76.5 per cent in 2003-2004: I Potas, S Eyland and J Munro (2005) 'Successful Completion Rates for Supervised Sentencing Options' *Sentencing Trends and Issues*, Number 33 (Judicial Commission of New South Wales), 5.

<sup>294</sup> Tasmanian Audit Office (2002), above n 268. However, it was found that the procedures for handling warnings and breach were not uniform around the State. A number of other problems with management of orders were highlighted in the 2002 audit. These included that the way in which educational and personal development programs were credited was not uniform around the State, some orders being made without assessment input from CCS and a question-mark over the time taken to complete CSOs in some cases.

3.7.12 The lack of availability of reconviction data by order type was highlighted in the Auditor's report in 2002. This has still not been remedied. However, some data is available from Bartels' study for community service orders imposed in the Supreme Court. CSOs in the Supreme Court account for about 10 per cent of community service orders imposed annually. Bartels' study found that 52 per cent of offenders who received a non-custodial sentence were reconvicted. Those on community service alone performed better than probation alone or community service order and probation, probably due to selection effects. The reconviction rate for wholly suspended sentences combined with community service orders was 50 per cent, whereas the rate for all wholly suspended sentences was 42 per cent and for unsuspended sentences it was 62 per cent. A recent UK Home Office study showed that taking into account age, gender, offence type and criminal history, in the 2004 cohort community punishment order disposals (community service orders) and community punishment rehabilitation orders (community services orders and probation combined) were associated with lower rates of re-offending than imprisonment whereas drug testing and treatment orders and probation orders were associated with higher rates than imprisonment. However, the authors caution against reading too much into these findings because of the failure of the study to control for other characteristics related to re-offending.<sup>295</sup> In other words, while these findings are interesting, they cannot be relied upon to assert that community service orders (community punishment orders) work better than custodial or other disposals. There is some evidence that the quality of the community service experience for offenders may be associated with reductions in recidivism.<sup>296</sup> McIvor's research on community service in Scotland found that reconviction rates were lower among offenders who believed community service to be worthwhile, with more positive experiences being associated by high levels of contact with the beneficiaries, opportunities to acquire new skills and work that is seen as having some intrinsic value for the recipients.<sup>297</sup>

### **A generic community order?**

3.7.13 The Institute has considered whether to recommend adopting a generic community sentence with a menu of options including compulsory unpaid work, supervision by a probation officer, attendance at programs etc. Courts in Tasmania appear to appreciate the flexibility of being able to combine community service orders with other sentencing options such as probation orders. One disadvantage of doing so is that if an offender breaches this sentence they are likely to be in breach of both orders. While having a generic community sentence would avoid this and could also encourage judges and magistrates to tailor the sentence to the individual offender's needs in a constructive way, the Institute is of the view that a generic community sentence lacks clarity regarding the aims of the order. Rather than a generic community sentencing order the Institute favours a community service order with core requirements of unpaid work, attendance at educational or other programs and the option of additional conditions such as supervision. The Institute also recommends that attendance at a rehabilitation program for domestic violence offenders be made a possible condition. To assist in the task of selecting appropriate conditions, the Institute recommends that judicial officers be assisted in the task of selecting appropriate conditions by a community service assessment which includes an offender's needs for supervision and programs, suitability for work and availability of the program.

### **A broader sentencing option?**

3.7.14 The Institute sees merit in the argument that a community service order should be available instead of a minimum fine. The present situation in which there is confusion about whether a magistrate has the power to substitute community service for a minimum fine or imprisonment is clearly undesirable and the Institute recommends that this should be clarified by a legislative provision which makes it clear that this is permissible. This raises the question whether the requirement that a community service order can only be imposed for offences which are punishable by imprisonment

<sup>295</sup> Cunliffe and Shepherd (2007), above n 54, 12-13.

<sup>296</sup> Gill McIvor, 'Reparative and Restorative Approaches' in Anthony Bottoms, Sue Rex and Gwen Robinson (eds), *Alternatives to Prison: Options for an Insecure Society* (2004) 176.

<sup>297</sup> *Ibid.*

should be altered so that in cases of an impecunious offender a community service order can be ordered in the first instance. While there may be some force in the argument that for such offenders a community service order may be a less severe sanction than a fine, the Institute is of the view that such a provision would subvert the position of community service orders in the sentencing hierarchy and could lead to net-widening. If an offender lacks the means to pay a fine of a level appropriate to the severity of the offence, the amount of the fine should be reduced to a level that the offender can pay and this should be explained in the sentencing remarks. Alternatively, a conditional unsupervised release order under s 7(f) of the *Sentencing Act 1997* (Tas) should be imposed in lieu of a fine. This position may appear to sit rather uncomfortably with the last recommendation that in the case of an impecunious offender, the court may substitute a community service order for a minimum fine or imprisonment. However, in such a case, neither a fine less than the minimum nor a conditional supervised release order is available as a means of avoiding an unaffordable fine. And in any event the offence is imprisonable, so allowing the courts to substitute community service for a minimum fine does not subvert the position of a community service order as more severe than a fine. Finally, if there is an inconsistency it can be blamed on the need to avoid the injustice of mandatory penalties.

3.7.15 The Institute also recommends that the New Zealand practice of remitting up to 10 per cent of the aggregate of the total of community service hours be further explored by the Justice Department. It should also be noted that rather more controversially, a recent amendment that came into effect in October 2007 provides that a penalty of up to 10 per cent may be imposed on an offender for poor performance.<sup>298</sup>

### **A diversity of projects and programs**

3.7.16 While the Audit in 2002 did not find evidence of difficulties in finding suitable work projects or a lack of project supervisors,<sup>299</sup> the experience of at least some lawyers is that in some areas work is not available for offenders.<sup>300</sup> Two submissions stated that there is lack of diversity in the types of programs available.<sup>301</sup> The submission of the Justice Department adverted to difficulties in sourcing placements. Henning's study of community service orders in 1992-1993 found no evidence that offenders living in rural areas were disadvantaged in the assessment process for CSOs by a lack of available work,<sup>302</sup> however, she did find that work is less likely to be available for women offenders, offenders with health problems and offenders with dependants. This was of concern because she also found that where community service work is not available there was an increased likelihood that the offender will receive a custodial sentence.<sup>303</sup> It is not known whether the community service order scheme continues to operate in a discriminatory fashion. The Institute recommends that the Justice Department conduct a review of community service order projects to ensure that there is a diverse range of projects available in the different regions of Tasmania. Community service orders are a valuable sentencing option and their potential needs to be fully exploited. It may well be that more resources need to be put into the community service order scheme to address these issues. In reviewing community service orders, account should be taken of the Community Punishment Pathfinders Project in the UK which is testing a range of approaches to community punishment including skills accreditation, quality placements (based on McIvor's research), pro-social modelling, use of combination orders and involvement of the voluntary sector.<sup>304</sup>

<sup>298</sup> *Sentencing Act 2002* (NZ) s 66D.

<sup>299</sup> Tasmanian Audit Office (2002), above n 268, 35-36, 42-44.

<sup>300</sup> Submission of Craig Mackie, and personal communication, October 2007.

<sup>301</sup> Submissions of Craig Mackie and John Heathcote, Probation Officer.

<sup>302</sup> Henning (1997), above n 267, 302.

<sup>303</sup> *Ibid*, 313.

<sup>304</sup> Preliminary results suggested projects focussed on skills accreditation and pro-social modelling were promising: Sue Rex et al, *What's Promising in Community Service: Implementation of Seven Pathfinder Projects*, Home Office Findings No 231 (2004).

## Recommendations

32. The Institute does not recommend that a generic community sentence should replace community service orders and probation orders, (3.7.13) however, it does recommend that s 28 of the *Sentencing Act 1997* (Tas) be amended so that supervision or attendance at a ‘rehabilitation program’ for domestic violence offenders is made available as an optional condition of a community service order. (3.7.13)

33. The Institute recommends that s 8(2)(a) and (b) (which allow a CSO to be combined with a probation order or a rehabilitation order) be omitted. (3.7.13). This conforms with the Institute’s view that sanction stacking is undesirable, but there should be flexibility in relation to conditions of sentencing orders (see above para 3.3.36).

34. The Institute recommends that community service order assessments assess an offender’s need for supervision and programs, suitability for work and availability of programs. (3.7.13)

35. The Institute recommends that the Part 6 (Fines) of the *Sentencing Act 1997* (Tas) be amended to include the power to impose a community service order where the penalty prescribed is a mandatory minimum fine or imprisonment. (3.7.14)

36. The Institute does not recommend that the power to impose a community service order be broadened so it is available for offences that are not punishable by imprisonment. If an offender cannot pay a fine, the judicial officer should impose a conditional release order. (3.7.14)

37. The Institute also recommends that the New Zealand practice of remitting up to 10 per cent of the aggregate of the total of community service hours be further explored by the Justice Department. (3.7.15)

38. The Institute recommends that the Justice Department conduct a review of the community service order scheme<sup>305</sup> to ensure the availability of adequate resources to provide projects in country areas, a diversity of projects so that women and others with dependants, those with health problems and disabilities have suitable work and that promising findings from projects such as the UK’s Pathfinder project can be implemented in this state. (3.7.16)

## 3.8 Probation orders

3.8.1 A probation order is a sentence which requires an offender to be under the supervision of a probation officer and to obey the reasonable directions of that officer. It is a sentencing option that has been available to the courts in Tasmania since 1934. In the sentencing hierarchy a probation order is less severe than a community service order but more serious than a fine.<sup>306</sup> There are a number of core conditions which are automatically included in a probation order. They include that during the period of probation the offender must not commit any offence punishable by imprisonment; during the period of probation the offender must report as required to the supervising officer and must notify the officer of a change of address or employment.<sup>307</sup> Probation orders may be tailored to the needs of a particular offender by the inclusion of special conditions. Examples of such conditions are conditions which require the offender to undergo treatment for alcohol or drug dependence; submit to medical or psychiatric treatment or a requirement to attend educational, health or personal programs.<sup>308</sup> The period of probation must not exceed three years. The purpose of supervision is

<sup>305</sup> The Institute understands that such a review is now underway.

<sup>306</sup> *Sentencing Act 1997* (Tas) s 7(d).

<sup>307</sup> *Sentencing Act 1997* (Tas) s 37(1).

<sup>308</sup> *Sentencing Act 1997* (Tas) s 37(2).

to minimise the risk of offending and its effect on the community by encouraging offenders to achieve responsible behaviour through the administration and enforcement of orders and conditions imposed by the courts... The focus is on offending behaviour, and referral to programs aimed at improving social attitudes and personal circumstances...<sup>309</sup>

3.8.2 A probation order will be breached if an offender fails without reasonable excuse to comply with a condition of the order or if he or she assaults or uses abusive language to a probation officer. Breach is a separate offence for which the offender may be fined or imprisoned. Additionally, the court may confirm or extend the order, vary a condition or cancel the order and re-sentence the offender for the original offence.<sup>310</sup>

3.8.3 Probation orders (as the most serious sanction imposed) represent only about one per cent of sanctions.<sup>311</sup> However, they may be used in combination with more serious sanctions such as community service orders and suspended sentences. In the Supreme Court almost 90 per cent of probation orders are combined with some other penalty, usually a community service order or a wholly suspended sentence.<sup>312</sup> In the Magistrates Court more than 50 per cent of probation orders are combined with a more serious penalty, usually community service or a wholly suspended sentence.<sup>313</sup> The Wing Committee noted that in Tasmania, in common with other Australian jurisdictions, the use of probation orders is declining. This was explained as being in part due to an increase in the use of community service orders.<sup>314</sup> The table below shows the number of probation orders imposed since 1998-1999 as well as the numbers completed and revoked or breached.

**Table 11: Probation order made and completed, 1998-99 to 2006-07**

	98-99	99-00	00-01	01-02	02-03	03-04	04-05	05-06	06-07
<b>Number of orders imposed</b>	618	589	495	569	384	528	571	653	688
<b>Number of orders completed</b>	598	558	482	548	371	508	506	528	676
<b>Percentage of orders completed</b>	86	94	97	96	97	96	97	96	97
<b>Number revoked/cancelled</b>	20	31	13	21	13	20	14	12	19

Source: Department of Justice Annual Reports

3.8.4 Table 11 shows the number of probation orders declined from 1998-1999 to 2002-2003 with a low of 384 orders made in 2002-2003. Thereafter the numbers have increased, with numbers in the last two years exceeding the number in 1998-1999. However, the number of orders is still considerably below the high point in 1995-1996 when close to 800 orders were made. It is important to note that in the majority of cases probation orders are now combined with a more severe sanction such as a wholly suspended sentence or a community service order.

### ***Responses to the Issues Paper***

3.8.5 The Institute received a number of useful submissions in relation to probation orders. The Issues paper asked the following questions:

- Are probation orders being used appropriately by the courts?

<sup>309</sup> Tasmanian Department of Justice, *Annual Report 2002-2003* (2003) 61; the most recent report contains a shorter version referring only to the minimising the risk of reoffending and its effect on the community.

<sup>310</sup> *Sentencing Act 1997* (Tas) s 42.

<sup>311</sup> In the Supreme Court from 2001-2006 they accounted for just .8 per cent of orders (Institute's data collected from Supreme Court Sentencing database) in the Magistrates Court in 2003-2004 they accounted for 1.02 per cent.

<sup>312</sup> Based on sentencing data for 2001-2006.

<sup>313</sup> Based on Bartels' data for 2003-2004.

<sup>314</sup> Wing Committee Report (1999), above n 83, 120.

- Is it an appropriate, logical, credible and effective sentencing option?
- Are conditions used appropriately?
- Is there a need to restructure orders in any way?
- Is there a need for a specialised order for offenders convicted of drug and drug-related offences?
- Are completion rates satisfactory?
- Are breach procedures satisfactory?
- Are the resources available to support probation orders adequate?

3.8.6 The decline in the use of probation orders was addressed by a number of respondents. The Justice Department hypothesised that custodial sentences have been substituted for both probation and community service orders. The decline in use was explained by one probation officer as a consequence of a failure to prosecute breaches:

The pity of the matter is that over the years some probation officers did not prosecute breaches of conditions because they ignored the reality of what is written on the probation order and focussed only on the rehabilitation side of the probation. I think this is one reason for the lessening use of probation by magistrates – a loss of faith in its administration by community corrections. Breaching has been paid more attention in recent years but a reputation is hard to regain once lost.<sup>315</sup>

3.8.7 In his view, probation does have a punitive element in the requirement to be of good behaviour but this is lost if breaches are not prosecuted. Another explanation suggested for declining use was:

the custom that has grown of linking it with other sentences such as community service orders and suspended sentences, which I think diminishes the impact of a probation order. In my opinion probation would be better used as a stand alone penalty.

3.8.8 Community Corrections officers in Launceston considered that probation was not used enough as a stand-alone sanction because it was not regarded by judges and magistrates as sufficiently harsh. Echoing the views of the probation officer quoted above, the suggested explanation for the perception that it was not harsh enough was probation officers' focus on assistance to the offender at the expense of probation's punitive element.<sup>316</sup> Another view was that the use of a risk assessment tool meant that probation orders were only recommended for high/medium risk offenders. It was suggested that the sentencing hierarchy needs to be rethought because a community service order is not necessarily more serious than probation which is recommended for more serious risks.<sup>317</sup> As one probation officer commented, an offender can sometimes get a CSO over and done with very quickly, whereas probation is dragged out for a long time and can be a greater infringement on liberty.<sup>318</sup>

3.8.9 A number of respondents saw no need for a restructuring of orders.<sup>319</sup> However, Tasmania Police favoured a generic community sentencing order with a menu of options.<sup>320</sup>

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<sup>315</sup> J Heathcote, submission, 1.

<sup>316</sup> Consultation with Community Corrections Launceston, 30 September 2002.

<sup>317</sup> Ibid.

<sup>318</sup> Consultation with Justice Department employees, Hobart, 14 September 2002.

<sup>319</sup> The Honourable Justice Cox, Chief Justice, submission, 3; Legal Aid Commission of Tasmania, submission, 8.

<sup>320</sup> Department of Police and Public Safety, submission, 4.

3.8.10 A recurring theme in the submissions in relation to probation was the lack of resources to provide suitable programs for offenders on probation. Community corrections officers in the north-west of the State described the allocated resources for such programs as ‘miserable’ and officers in Hobart also emphasised the need for more resources for programs and referral options.<sup>321</sup> A lack of resources was also mentioned in submissions by Legal Aid Tasmania and by Craig Mackie. The latter said:

Frequently probation orders have specific conditions attached to target populations such as drug and alcohol issues, gambling, mental health, financial budgeting, anger management etc. Because of a lack of resourcing, this is frequently not followed up.

3.8.11 He also referred to the failure of community corrections to act on breaches, stating that prosecution was so rare as to be almost unknown. He submitted that as a priority probation and community service should be adequately funded and no new sentencing options introduced until this happened.

3.8.12 On the issue of drug and alcohol treatment, Tasmania Police favoured specialised orders rather than utilising conditions of a probation order. This issue has been overtaken by new developments funded by the Commonwealth Government and will be considered separately below.

### ***The Institute’s views***

3.8.13 The Institute has rejected the idea of a generic community sentencing order in favour of preserving the distinct identity of different community sentencing options including probation orders. However, it has recommended that supervision by a probation officer be an optional condition of wholly suspended sentences, community service orders and a core condition of home detention. As a distinct sentencing option in its own right, the probation order has waned in popularity and the Institute sees a real need to revitalise it as a credible stand-alone sentencing option. There is a perception, at least, that there are insufficient resources to provide the kinds of assistance an offender requires to address their ‘criminogenic needs’ and to support rehabilitation and that breach action is rarely taken with offenders able to abuse this sentencing order.<sup>322</sup> The Institute is aware that recurrent funding for community corrections in the 2007-2008 budget has increased by \$650,000 and this will enable additional staff to be employed and new programs offered.<sup>323</sup> However, offender to staff ratios will remain high and despite the increase in the number of probation orders made in the last four years, in the Institute’s view, the probation order appears to have lost its impact as a plausible stand-alone alternative to imprisonment.

3.8.14 The Justice Department’s information on breach action shows breach action resulting in revocation is rare (see Table 11 above). In 2005-2006 just 12 orders were revoked or cancelled. This represents less than two per cent of orders made in that year. In comparison, a study of supervised bonds in New South Wales has shown a revocation rate of 11 per cent.<sup>324</sup> Breach rates cannot be taken as a measure of success, particularly for sanctions such as probation where levels of intensity and strictness of supervision are low. On the contrary, breach rates in the order of two per cent suggest that breaches may not be appropriately followed-up. In the absence of a thorough breach study is it not known whether this is the case. There are a number of alternative explanations. It could be that it is a better strategy to take breach action only as a last resort with probation officers working with offenders to motivate them to reduce their risk of re-offending and complete their orders successfully. Or it could be that community corrections initiate breach proceedings appropriately but in many cases the order is simply confirmed and there is no additional penalty. Feed-back from community corrections suggested that community corrections is clear about its responsibilities to take breach

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<sup>321</sup> Consultations in Hobart, 14 September 2002 and Devonport, 30 September 2002.

<sup>322</sup> This was also suggested in the submission of Criminal Law Subcommittee of the Law Society.

<sup>323</sup> Budget Estimates Brief, Community Corrections, Additional Resources, June 2007.

<sup>324</sup> Ivan Potas, Simon Eyland and Jennifer Munro, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues No 33 (2005) 5.

action. However, magistrates vary in their response to breach proceedings.<sup>325</sup> Anecdotally, it was said that some magistrates appear to be of the view that it is inappropriate to impose a more severe penalty than they did in the first place despite the fact they have a power to fine or imprison for breach and in addition to resentencing the offender.<sup>326</sup> Others give quite significant penalties in breach cases. The Institute recommends that if probation orders are to be perceived as an effective sentencing option, orders must be rigorously monitored, action must be taken in respect of breach when appropriate and a consistent approach adopted to breach by the courts. Lax enforcement for whatever reason undermines the credibility of orders. The Institute recommends that the Justice Department conduct a breach study to investigate the incidence of breach of orders and the outcomes of breach proceedings. To ensure the response to breaches of orders is consistent, fair and firm, it is recommended that guidelines be created for probation officers and judges and magistrates.

### **How effective is probation as a sentencing option?**

*3.8.15* While reconvictions studies have their drawbacks, such studies may shed more light on the effectiveness of probation than revocation. A recent English study has shown that community rehabilitation orders (in effect renamed probation orders) are associated with higher rates of re-offending than prison.<sup>327</sup> However, the author's caveat must be emphasised – not all factors that influence re-offending were controlled for.<sup>328</sup> Weatherburn has recently conducted a study of the effectiveness of supervision in New South Wales by comparing offenders placed upon supervised bonds with offenders placed on bonds without supervision in terms of the proportion re-offending and time to first offence.<sup>329</sup> 'Propensity Score Matching' was used to control for differences in the two groups. He found offenders who were supervised were no less likely to re-offend and took no longer to re-offend than offenders who are unsupervised. A possible explanation which is currently being explored is that the level of supervision and/or treatment support actually provided to supervised offenders is inadequate.<sup>330</sup>

*3.8.16* One of the problems of a focus on crude reconviction rates is that they may obscure possible interaction effects, in other words, the fact that probation supervision may be effective for a particular type of offender but not for all offenders. Moreover, combining all forms of supervision together in one group may obscure differences in outcome for different degrees of supervision or surveillance and different programs that offenders may be referred to in the course of supervision. As noted above (see para 3.8.15) overseas research suggests that supervision involving increased surveillance and monitoring has no effect on the risk of re-offending.<sup>331</sup> However, when offenders receive treatment in addition to the increased surveillance and control, intensive supervised probation does have an impact. In their review of the research evidence, Aos et al found that while intensive supervision surveillance oriented programs had no impact on crime outcomes, when combined with treatment oriented programs, intensive supervision reduced crime outcomes on average by 16.7 per cent.<sup>332</sup> Moreover, a number of offending behaviour programs for offenders on probation have been found to be effective including cognitive behavioural therapies,<sup>333</sup> sex offender treatment using cognitive behavioural treatment methods,<sup>334</sup> and employment training and job assistance in the community.<sup>335</sup> Relying upon

<sup>325</sup> Dr Marja Elizabeth, Director Community Corrections, personal communication, 16 November 2007.

<sup>326</sup> *Sentencing Act 1997* s 42.

<sup>327</sup> Cunliffe and Shepherd (2007), above n 54, 12.

<sup>328</sup> *Ibid*, 13.

<sup>329</sup> Don Weatherburn, 'Does Supervision Make a Difference? A Comparison Of Re-Offending Rates Among Offender on Supervised and Unsupervised Bonds' (Paper presented at the Local Courts of New South Wales Annual Conference, (Sydney), 2<sup>nd</sup> August 2007).

<sup>330</sup> *Ibid*.

<sup>331</sup> Mackenzie (2002), above n 55, 342.

<sup>332</sup> Aos, Miller and Drake (2006), above n 58, 9.

<sup>333</sup> Mackenzie (2002), above n 55, 366; Aos, Miller and Drake (2006), above n 58, 9; Chitty (2005), above n 78, 75.

<sup>334</sup> Mackenzie (2002), above n 55, 370; Aos, Miller and Drake (2006), above n 58, 9.

<sup>335</sup> Aos, Miller and Drake (2006), above n 58, 9.

systematic research reviews, commentators have listed the characteristics of successful programs<sup>336</sup> and the types of skills which are effective in individual supervision and case management.<sup>337</sup> While the international evidence suggests there is reason to be optimistic about the possibilities of constructive interventions in the lives of offenders, the English experience suggests that some caution is needed. In the enthusiasm to embrace the ‘What Works’ movement, programs were rolled out on a large scale before they were properly evaluated and there were problems with staffing and with targeting the programs appropriately to offenders’ needs.<sup>338</sup>

3.8.17 The Institute is aware that since 2002, Community Corrections have offered a cognitive behavioural program for offenders serving community-based sentences which is called ‘Offending is Not the Only Choice’.<sup>339</sup> The program targets moderate to high-risk offenders. It aims to provide offenders with skills to consider the impact of their offending on themselves and others and to think and behave in ways that are generally accepted in the community.<sup>340</sup> This program will be rolled out state-wide. Community Correction also offers a family violence intervention program, which is delivered to offenders who receive a rehabilitation program order for a family violence offence (see para 3.11.2) and a program called ‘Substance Abuse is Not the Only Choice’ which is delivered as part of the Court Mandated Diversion Project (see para 3.11.3). Community Corrections have plans to offer a program targeting adult offenders convicted of more than one drink driving offence within a five-year period. It is an educational and therapeutic program that addresses issues such as the consequences of drink driving, the effects of alcohol on driving, managing drinking situations, alternative behaviours and relapse prevention.

3.8.18 Based on systematic research reviews, there is now a wealth of literature available on the effectiveness of a wide range of rehabilitative programs and effective case management and practitioner skills in supervision. If probation is to regain its reputation as a credible sentencing option, judges and magistrates need to have confidence that it can be effective. The Institute recommends that a thorough review be undertaken to determine a range of evidence-based programs that can be made available for offenders to address both their criminogenic needs and utilise their strengths.<sup>341</sup> These programs should be carefully rolled-out, evaluated and well publicised in an effort to revive probation as an independent sentencing measure. In addition to a focus on programs, there should be a focus on the broader concept of human services in probation supervision.<sup>342</sup> It is likely that Community Corrections are well aware of evidence-based options which could be usefully offered. It is less clear whether they are adequately funded to deliver them.

3.8.19 International research reveals another possibility for improving the confidence of judicial officers in the probation. Evaluations of drug courts and other problem solving courts have shown the potential of greater positive involvement by sentencers in the encouragement and maintenance of change. Under the banner of therapeutic jurisprudence, drug courts have pioneered the concept of the judicial officer as an agent of rehabilitation by the provision of ongoing supervision by the court. While this has resource and cost implications it has considerable potential to both enhance the perception of probation orders and to improve outcomes for offenders. The Institute recommends that this be explored for particular categories of offenders. It is aware that in Hobart, the Magistrates Court runs a mental health list each month and, inspired by the tenets of therapeutic jurisprudence, bail

<sup>336</sup> Peter Raynor (2004), ‘Rehabilitative and Reintegrative approaches’ in Anthony Bottoms, Sue Rex and Gwen Robinson (eds), *Alternatives to Prison: Options for an Insecure Society* (2004), 200-201.

<sup>337</sup> *Ibid*, 202-204.

<sup>338</sup> Ashworth (2005), above n 3, 320-330; Anthony Bottoms, ‘Empirical research relevant to sentencing frameworks’ in Anthony Bottoms, Sue Rex and Gwen Robinson (eds), *Alternatives to Prison: Options for an Insecure Society* (2004) 59, 62-63; Raynor (2004), above n 337, 195-223.

<sup>339</sup> This program called ‘Offending is Not the Only Choice’ is offered throughout Tasmania: Department of Justice and Industrial Relations, submission, 15; Tasmanian Department of Justice (2007), above n 11, 44.

<sup>340</sup> *Ibid*.

<sup>341</sup> There is an emerging literature advocating that offenders not be assessed on the basis solely of their criminogenic needs, deficits and risks but that their strengths, skills and potential be a focus in the effort prevent recidivism and promote desistance: see Tony Ward and Shadd Maruna, *Rehabilitation* (2007).

<sup>342</sup> As described by Raynor (2004), above n 337, 216.

conditions are used to assist offenders to meet their treatment requirements. However, where longer-term treatment is required, sentencing options are more appropriate than bail conditions.

3.8.20 The Institute has given some thought to whether the place of probation in the sentencing hierarchy should be altered as suggested in some submissions. This would have the advantage of underlining the seriousness of the order. It is generally accepted that community service is a more severe sanction than probation. Three reasons support this: first, a community service order can only be imposed if the offence is punishable by imprisonment; secondly, in the list of orders in s 7 of the *Sentencing Act* it appears below imprisonment and thirdly, it is a more obviously punitive order than probation. The Institute recognises that in some cases a probation order of 18 months is likely to be more onerous than a community service order of 14 hours. However, it does not see the need to re-order the list of sanctions in the Act to indicate that probation is a more severe sanction than community service. Whilst in general a community service order is regarded as a more severe penalty than probation and probation as more severe than a fine, in some cases a heavy fine may be more severe than either community service or probation and in some cases probation will be more onerous than community service.

3.8.21 Another way to resuscitate the probation order would be to rename it as a community rehabilitation order, as was done in the UK by the *Criminal Justice Act 2003*. However, such a change would be merely window dressing and is not supported by the Institute.

### Recommendations

39. The Institute does not recommend a generic community sentencing order for the reasons outlined in para 3.8.13. (and see 3.7.13)

40. The Institute does not recommend altering the place of probation orders in the hierarchy of sanctions to indicate that it is a more serious sanction than a community service order for the reasons given in para 3.8.20.

41. In the Institute's view there are two basic problems with probation orders that need to be addressed. First, there is a need to restore confidence in probation orders as an *independent* sentencing option (as evidenced by the fact that 90 per cent of probation orders in the Supreme Court and more than 50 per cent of orders in the Magistrates Court are combined with a more serious penalty) and secondly, there is the lack of resources devoted to community corrections. To help restore the reputation of probation orders as a credible independent sentencing option, the Institute recommends:

- that the Justice Department conduct a breach study of probation orders to inform guidance for probation and judicial officers in relation to breach proceedings.
- that a review be conducted to determine a range of evidence-based programs for introduction in Tasmania to enhance the potential of probation to reduce recidivism and encourage desistance and that resources be made available to offer these programs to appropriately targeted offenders.
- that such programs be supported by proper assessment, motivation, case-management and reinforcement of learning to follow-up and support program effects.
- that the possibility of ongoing supervision by the court be considered for certain categories of offenders on probation orders.

## 3.9 Fines

3.9.1 The fine is the most frequently used penalty. It is used predominantly in relation to summary offences, but it is also available as a sanction against those convicted of indictable offences. In the

sentencing hierarchy a fine is less severe than a probation order. In the Magistrates Court they account for 69 per cent of penalties imposed, far exceeding wholly suspended sentences (the next most common sanction).<sup>343</sup> In the Supreme Court between 2001-2006 fines accounted for 3.6 per cent of penalties imposed.

3.9.2 In 1987 a new system of specifying fines in penalty provisions was introduced. Rather than specifying the fine in dollar terms, fines were changed to penalty units and the value of a penalty unit was stated in s 4 of the *Penalty Units and Other Penalties Act 1987* (Tas). The advantage was said to be that the eroding effect of inflation on fine penalty provisions could be dealt with by a single amendment. This was not merely a revenue producing argument. The effects of inflation on fines may not only reduce their deterrent efficacy but could also discourage the use of fines if the maxima were perceived to be too low. The worth of a penalty unit remained as it was in 1987 at \$100 until October 2007 when it was increased to \$120 and an indexation formula was inserted into the Act to take effect from 1 July 2008.<sup>344</sup>

3.9.3 As a sentencing option the fine has many advantages: it produces revenue; it is flexible in the sense that it can be easily adjusted to gravity, culpability and means; it is straightforwardly punitive and it is said to be effective as it seems to be followed by fewer reconvictions than other penalties.<sup>345</sup> The Issues Paper ascertained that there are three problems with the fine that need to be addressed. First, there is no power in Tasmania to impose a fine without recording a conviction; secondly, the issue of fine enforcement; and thirdly, the problem of the unequal impact of fines.

### ***Fine without conviction***

3.9.4 A fine cannot be imposed unless a conviction is recorded.<sup>346</sup> This is by no means the position in all jurisdictions. In Victoria, Queensland, Western Australia and South Australia courts have the power to fine with or without recording a conviction.<sup>347</sup> The Wing Committee recommended that courts be empowered to impose a fine without recording a conviction, noting that this issue had been raised by a number of magistrates. It was argued that in some cases a fine may well be appropriate but recording a conviction may be undesirable because of its impact on the employment prospects of an offender.

### **Responses to the Issues Paper**

3.9.5 Only five submissions addressed the issue of the power to fine without recording conviction. Three submissions supported the proposition that courts should be empowered to fine an offender without recording a conviction<sup>348</sup> and two opposed the idea. One respondent regarded 'no conviction recorded' as a farce as the police record the finding of guilt anyway.<sup>349</sup> The Legal Aid Commission of Tasmania opposed giving the courts a discretion to convict or not on the grounds that a person who accepts an infringement notice has a conviction recorded.

### **The Institute's view**

3.9.6 The absence of a discretion to fine without a conviction seems to be an ongoing concern of magistrates. A number of them mentioned it in Bartels' interviews with them in relation to suspended

<sup>343</sup> Data from Bartels' 2003-2004 sample.

<sup>344</sup> *Penalty Units and Other Penalties Act 1987* (Tas) s 4A.

<sup>345</sup> Ashworth (2005), above n 3, 303.

<sup>346</sup> *Sentencing Act 1997* (Tas) s 7(e).

<sup>347</sup> *Sentencing Act 1991* (Vic) s7(1)(f); *Penalties and Sentences Act 1992* (Qld) s44; *Sentencing Act 1995* (WA) s 39(2)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 16.

<sup>348</sup> Tasmania Police, submission, 4; Craig Mackie, submission; WD Dunstan, submission.

<sup>349</sup> John Heathcote, probation officer, submission.

sentences.<sup>350</sup> The Institute considers courts should have a discretion to fine without recording a conviction. It seems quite anomalous that courts can make a probation order without recording a conviction but have no such power in relation to fines. It is acknowledged, as one respondent to the Issues Paper pointed out, that if no conviction is recorded, the police will still record that the person has been found guilty of an offence. But in legal terms the offender will not have a criminal conviction, and in job or licence applications will not be required to disclose the offence as a conviction. While a person who accepts an infringement notice does usually incur a conviction, the conviction is for an offence which is generally viewed as not ‘truly criminal’ and is unlikely to impact on personal integrity, character or job prospects. The Institute does not regard an automatic conviction for acceptance of an infringement notice as sufficient reason to deny the courts a discretion to decline to convict when imposing a fine.

### ***Fine default***

3.9.7 A common difficulty with fines is enforcement. Up to 50 per cent of court fines are unpaid in Tasmania.<sup>351</sup> As at 31 March 2007, \$32.1M was due and payable to the Consolidated Revenue Fund from unpaid court fines and \$1.4M from infringement notices.<sup>352</sup> Approximately 3000 fine defaulters are brought back to court each year.<sup>353</sup> Clearly fine enforcement is an expensive and resource-intensive process. Moreover, failure to pay fines can undermine the credibility of the criminal justice system. If offenders are able to avoid payment they may be less deterred and come to believe they can commit further offences with impunity. Courts may also lose faith in fines if it comes to be known that fines are very often unmet.

3.9.8 Prior to 28 April 2008, if an offender failed to pay a fine ordered by the court, a warrant of apprehension issued to bring the offender before the court. The same happened if an infringement notice was unpaid, the matter had gone to court and the court ordered fine remained unpaid. A magistrate, faced with an offender brought to court for non-payment of a fine, had four alternatives: a community service order; a direction that civil proceedings be taken, a warrant of commitment for a term of imprisonment or a suspended committal order.<sup>354</sup> For an offender who was committed to prison for fine default, the amount in respect of which the warrant was issued was reduced by \$100 for each day served in prison.<sup>355</sup> The number of fine defaulters has fluctuated in recent years from 192 in 1997-1998 to 445 in 2000-2001<sup>356</sup> and down to 57 in the ‘12 months to 2007’.<sup>357</sup> Both the level of outstanding fines and the numbers imprisoned for fine default is unsatisfactory.

3.9.9 Fine enforcement was an issue that was addressed in a number of submissions to the Institute. However, it is an issue that the government has in hand and the Monetary Penalties Enforcement Project has been on the agenda since at least 2002.<sup>358</sup> In 2005 the *Monetary Penalties Enforcement Act 2005* (Tas) was passed and was assented to on 9 December 2005. It commenced on 28 April 2008. The scheme of the Act is that when a fine is imposed by the court or an infringement notice issued, a new statutory officer, the Director, Monetary Penalties Enforcement Service (MPES) will, on the application of an offender, have the power to vary the payment period, order payment by instalments or convert the fine to a monetary penalty community service order (MPCSO).<sup>359</sup> If a

<sup>350</sup> Bartels (2008), above n 96, 3.4.9.

<sup>351</sup> Parliament of Tasmania, Legislative Council, *Monetary Penalties Enforcement Bill 2005* (No 76), Second Reading, 29 November 2005 (Michael Aird, MLC).

<sup>352</sup> Parliament of Tasmania, Estimates Committee A, 20 June 2007.

<sup>353</sup> Ibid.

<sup>354</sup> *Sentencing Act 1997* (Tas) s 47(2).

<sup>355</sup> *Sentencing Act 1997* (Tas) s 51(1) and *Sentencing Regulations 1998* (Tas) reg 5.

<sup>356</sup> Tasmania Law Reform Institute, *Sentencing*, Issues Paper No 2 (2002) 86.

<sup>357</sup> Parliament of Tasmania, Estimates Committee A, 20 June 2007.

<sup>358</sup> The Monetary Penalties Enforcement Service (MPES) was described in the Department of Justice’s submission to the Institute and a business case was prepared in that year.

<sup>359</sup> *Monetary Penalties Enforcement Act 2005* (Tas) s 27 (infringement orders), s 42 (fines).

person is in extreme hardship and is unable to undertake a MPCSO, the Director has the power to deem the fine uncollectible.<sup>360</sup> Failure to pay a fine or infringement notice will result in the Director issuing an enforcement order which gives the defaulting offender the option of paying the fine in full, entering into an agreement to pay by instalments or applying to convert the amount to a MPCSO.<sup>361</sup> If the offender fails to exercise any of these options the Director will have a range of sanctions to enforce payment without further recourse to the courts including suspension of the offender's driver licence, vehicle registration or prescribed licence (for example a firearms licence);<sup>362</sup> civil enforcement including a garnishee-type order, redirection of money from an offender's bank account, seizure and sale of the offender's possessions or registration of a charge on a title to land.<sup>363</sup> The Director also has the power to apply to a court for the offender to be imprisoned pursuant to a commitment order.<sup>364</sup>

### ***Driving sanctions for fine default***

3.9.10 Licence sanctions for fine default have an instinctive appeal and many jurisdictions have introduced them to improve fine recovery.<sup>365</sup> Advantages include administrative ease, relative cheapness and provision of an acceptable alternative to imprisonment for fine default.<sup>366</sup> It has been argued that they are an effective means of encouraging payment of fines.<sup>367</sup> However, the New South Wales and Western Australian experience reveals real problems with this method of fine enforcement. In its Interim Report, the New South Wales Sentencing Council identified the issue of driver licence sanctions for fine default as a matter of 'grave concern'.<sup>368</sup> A survey of magistrates, public consultations and submissions to the Council warned that these sanctions interfere with employment, particularly in rural areas where driving may be necessary to keep a job. The consequence is secondary offending – people are being convicted for driving offences attributable to licence sanctions imposed for fine and penalty default, in many instances where the fine for an offence is unrelated to the purpose of ensuring road safety. Concern was also expressed to the Council that licence suspension for fine default confused the 'Road Safety' message. Licence sanctions for non-driving related offences 'effectively makes people rethink their commitment and adherence to the road rules. The system actually subverts the road safety message'.<sup>369</sup>

3.9.11 A study in Western Australia has shown that licence sanctions for fine default results in a significant increase in the total rate of licence disqualification.<sup>370</sup> Between 1995 and 2003, the rate of licence disqualification increased in that State by 60 per cent, due largely to increases in fine suspensions. Ferrante found fine suspension comprised 84 per cent of all disqualifications, and 45 per cent of licence disqualifications were for reasons unrelated to road traffic law enforcement. This highlights the issue of secondary offending. Various studies have estimated the proportion of disqualified drivers who drive illegally ranges from 25 per cent to 75 per cent.<sup>371</sup> Ferrante found that licence disqualification for non-payment of fines was seen as an "unfair act committed against those

<sup>360</sup> *Monetary Penalties Enforcement Act 2005* (Tas) s 109.

<sup>361</sup> *Monetary Penalties Enforcement Act 2005* (Tas) ss 44-46.

<sup>362</sup> *Monetary Penalties Enforcement Act 2005* (Tas) s 54.

<sup>363</sup> *Monetary Penalties Enforcement Act 2005* (Tas) s 66.

<sup>364</sup> *Monetary Penalties Enforcement Act 2005* (Tas) s 103.

<sup>365</sup> See *Fines, Penalties and Infringement Notices Act 1994* (WA) ss 42-43; *Fines Act 1996* (NSW) ss 65-67; *Criminal Law (Sentencing) Act 1988* (SA) s 70E; *Infringements Act 2006* (Vic), Pts 7-8.

<sup>366</sup> New South Wales Sentencing Council, *Interim Report: The Effectiveness of Fines as a Sentencing Option: Court Imposed fines and Penalty Options* (2007) 142.

<sup>367</sup> *Ibid*, according to the New South Wales Office of State Revenue. In England, a pilot study showed licence disqualification was more effective in encouraging payment of fines than community service or a curfew order: Robin Moore, 'The Methods for Enforcing Financial Penalties: the Need for a Multi-dimensional Approach' [2004] *Criminal Law Review* 728, 741.

<sup>368</sup> New South Wales Sentencing Council (2007), above n 367, 6.

<sup>369</sup> *Ibid*, 143.

<sup>370</sup> Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia*, Crime Research Centre (2003).

<sup>371</sup> *Ibid*, v.

who could least afford the consequences of such action'.<sup>372</sup> Such a perception by drivers is not conducive to compliance. The consequence of non-compliance if they are caught will be further sanctions – in some cases, imprisonment.<sup>373</sup> The issue of secondary offending has been explored by the New South Wales Sentencing Council. It was speculated that the significant increase in the prevalence of offences of driving while disqualified and driving while suspended in the decade between 1992-2002 was attributable to the use of licence sanctions for fine default.<sup>374</sup> This was confirmed by Road and Traffic Authority New South Wales data which showed secondary offending has indeed increased. Of the almost 108,000 licences suspended for fine or penalty default in the 12 months to 30 June 2005, approximately 2.5 per cent (over 2,750 people) were subsequently convicted for driving while suspended and of these over 10 per cent went on to be convicted of driving while disqualified.<sup>375</sup> While it is not known how many were imprisoned for those offences, the evidence of secondary offending is clear.

### Responses to the Issues Paper

3.9.12 The Issues Paper asked the question should cancellation of driver licences and vehicle registration be introduced as alternative sanctions for fine default. Responses were divided. Community Corrections in Hobart and Devonport were strongly opposed to the idea. In his submission, John Heathcote, a probation officer, rejected the suggestion on the grounds that it would impose too heavily on the poor. On the other hand, a number of submissions were supportive of using licence disqualification and cancellation of vehicle registration as a sanction for fine default.<sup>376</sup>

### The Institute's view

3.9.13 New South Wales and Western Australia have used licence and registration cancellation as a sanction for fine default for non-traffic offences for over a decade. The Institute shares the concerns of the New South Wales Sentencing Council about the use of these sanctions. It is inevitable that their introduction will promote the use of unregistered vehicles and increase the incidence of driving while disqualified. There is a real danger that fine defaulters may end up in prison not for fine default as such, but as a consequence of continuing to drive after licence suspension for fine default. If implemented, it is likely that licence suspension will disguise the true rate of imprisonment for what is really fine default. Queensland did follow the lead of other states in invoking these sanctions for fine default because of similar concerns. This measure has the potential to cause real hardship to certain groups of people, such as the young, the disadvantaged and people from rural areas where access to public transport is limited. The Institute therefore recommends that the provisions in the *Monetary Penalties Enforcement Act 2005* (Tas) that allow the Director of MPES to impose the sanctions of suspension of driver licences and car registration for fine default be repealed.

### *The problem of unequal impact: day fines or unit fines*

3.9.14 In imposing a fine, a court must determine the level of fine that reflects the seriousness of the offence and then make an appropriate adjustment downwards if the offender is unable to pay. There is no power in Tasmania to increase a fine on the grounds of the affluence of the offender. In the case of a mandatory minimum fine there is no discretion to reduce the amount of the fine below the minimum. The new Monetary Penalties Enforcement Scheme seeks to address the problems of offenders who are unable to pay fines by allowing offenders to seek additional time to pay, to apply to convert the fine to a MPCSO or even to apply for exemption from payment in cases of extreme hardship. However, the

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<sup>372</sup> Ibid, vii.

<sup>373</sup> Ibid, viii. Ferrante found one in 10 charges of driving without a valid licence results in a custodial sentence, with a further 12 per cent given a suspended sentence of imprisonment.

<sup>374</sup> New South Wales Sentencing Council (2007), above n 367, 157.

<sup>375</sup> Ibid.

<sup>376</sup> Tasmania Police, submission, 5; Legal Aid Commission of Tasmania, submission, 10.

fact remains that the fine disadvantages those who lack financial resources. Inability to pay may result in an offender incurring a community service order which is generally regarded as a harsher sanction than a fine. If a fine is the appropriate penalty but the offender lacks the means to pay it, the proper course is to move down the penalty scale and impose a conditional discharge order rather than up the scale and impose a community service order. This does not always happen and cannot happen in the case of a mandatory minimum fine. Since a fine cannot be increased in the case of an offender with substantial financial resources, the fine has unequal impact on the affluent and the less so.

3.9.15 From time to time the European idea of ‘day fines’ or ‘unit fines’ has been suggested as a means of addressing the principles of equality before the law and equal impact. They are common in Western Europe and are used in some parts of the US. Day fines require that the amount of the fine be calculated as a proportion of the daily income of the offender. So instead of merely allowing means to reduce the amount of a fine, the fine will increase in proportion to the financial means of the offender. Day fines have been considered and rejected in Tasmania<sup>377</sup> and have not yet found favour in any Australian jurisdiction although some reports have approved the concept, at least in theory.<sup>378</sup> There are strong arguments in favour of day or unit fines in terms of greater justice in fining. Day fines mean that, in the case of drink driving offences for example, fines will have a more equal impact on offenders. It can also be argued that setting fairer fine levels should lead to the greater use of fines and less difficulty in enforcing them.<sup>379</sup> In the United Kingdom unit fines were introduced in 1991 and then abandoned in 1993. It has been argued that the problems which led to the failure of unit fines were avoidable and they are still on the agenda in the UK with the Carter Review in 2003 recommending their re-introduction.<sup>380</sup>

3.9.16 Another way of dealing with the issue of equal impact is to allow financial circumstances to increase as well as reduce the amount of the fine. This is now the position in the UK.<sup>381</sup> It seems this has not been nearly as effective in dealing with the fairness problem as unit fines, with average fines increasing for the unemployed and decreasing for the employed following the abandonment of unit fines.<sup>382</sup>

### Responses to the Issues Paper

3.9.17 A number of respondents supported the idea of introducing day fines in Tasmania.<sup>383</sup> Tasmania Police submitted:

The capacity to increase a financial penalty according to the means of the offender will assist in ensuring that the same amount of ‘pain’ is felt by the wealthy as it is by the poor. ... The proposed model involves establishing a monetary penalty determined at the level to be imposed on an unemployed family in rental accommodation and scaled up according to the economic status of the individual. The multiplying factor could be the value of the principal residence rather than income as the taxable income of the wealthy is often a poor guide to their means and few, despite their low formal income, are prepared to live in substandard accommodation.

3.9.18 Don Wing MLC did not explicitly support the introduction of day fines but he expressed support for the idea of allowing financial circumstances to increase as well as reduce the amount of a

<sup>377</sup> Law Reform Commission of Tasmania, *Fines*, Report No 41 (1985).

<sup>378</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980) 235; Committee of Inquiry into the Rate of Imprisonment in Western Australia, Parliament of Western Australia, *Report of the Committee of Inquiry into the Rate of Imprisonment in Western Australia* (The Dixon Report) (1981) 169; but see New South Wales Law Reform Commission (1996), above n 38, 52-54.

<sup>379</sup> The Home Office, *Crime Justice and Protecting the Public*, (1990); see Ashworth (2005), above n 3, 303.

<sup>380</sup> Ashworth (2005), above n 3, 305-306.

<sup>381</sup> This was rejected by the Law Reform Commission of Tasmania on privacy grounds: Law Reform Commission of Tasmania (1985), above n 378, 9.

<sup>382</sup> Ashworth (2005), above n 3, 307.

<sup>383</sup> Submissions of Tasmania Police; Legal Aid Commission of Tasmania; John Heathcote; Craig Mackie; Community Corrections Hobart (consultation); Victim (name withheld).

fine. The Chief Justice was particularly critical of the unfairness of ‘draconian’ mandatory minimum fines.

### The Institute’s view

3.9.19 The Institute is attracted to the day or unit fine concept. It has the potential to achieve more and fairer fining as is demonstrated by the UK experience which saw an increase in the use of fines, the unemployed fined less and the employed more. Increasing the use of fines has the advantage of relieving pressure on community penalties. Imposing community orders rather than fines has the effect of taking offenders more quickly up-tariff with flow-on effects on the imprisonment rate. However, the Institute appreciates that there are difficulties in obtaining accurate information about an offender’s financial situation and the task of calculating the amount of a fine would be burdensome. This need not necessarily be done by the judicial officer who could determine the number of units and leave the value of the unit to be assessed administratively by the Director of MPES. Establishing a day fine scheme would be a complex task and could not be undertaken until the MPES is operational. As a long-term strategy the Institute recommends that the government set up a project to investigate how a day fine scheme could be introduced in Tasmania. The government has estimated that the new MPES will remove 40,000 minor criminal matters from the courts per annum,<sup>384</sup> so cost savings could be used in making fining fairer. While reducing the number of fine defaulters imprisoned has been a consideration in implementing the MPES, the dominant purpose has been efficiency and cost benefits.<sup>385</sup> Fairness should now be addressed. A problem underlying fine enforcement is the intrinsic unfairness of our fining system. ‘Until this is remedied, no amount of tinkering with enforcement and alternative sanctions for default will address the issue properly’.<sup>386</sup>

3.9.20 In the meantime, the Institute recommends enactment of the English approach that requires courts to consider the offender’s financial circumstances whether this has the effect of increasing or reducing the amount of the fine. As in the UK, the courts should also be empowered to make a financial circumstances order, requiring the offender to provide the court with such financial details as it requests.<sup>387</sup>

### Recommendations

42. The Institute recommends that the *Sentencing Act 1997* (Tas) s 7(e) be amended to empower courts to fine an offender without recording a conviction. (3.9.6)

43. The Institute recommends that *Monetary Penalties Enforcement Act 2005* (Tas) be amended to omit the power of the Director of the Monetary Penalties Enforcement System to order suspension of an offender’s driver’s licence or vehicle registration for failure to comply with an enforcement order issued for fine default. (3.9.13)

44. The Institute recommends that the government establish a feasibility study to investigate how a day fine scheme could be introduced into Tasmania. (3.9.19)

45. Pending the introduction of unit fines, the Institute recommends that the *Sentencing Act 1997* (Tas), Part 6 be amended to insert a new provision:

- (a) requiring a court to inquire into an offender’s financial circumstances before fixing the amount of a fine;
- (b) providing the amount of the fine should reflect the seriousness of the offence;

<sup>384</sup> Parliament of Tasmania (2005), above n 352.

<sup>385</sup> The total cost of MPES is estimated to be \$6.6M: Parliament of Tasmania, Estimates Committee A, 20 June 2007.

<sup>386</sup> Kate Warner, ‘Sentencing Review 2006-2007’ (2007) 31 *Criminal Law Journal* 359 at 365.

<sup>387</sup> See *Criminal Justice Act 2003* (UK) ss 162, 164.

- (c) that in fixing the fine a court should take into account the offender's financial circumstances;
- (d) empowering the court to make a financial circumstances order, requiring the offender to provide the court with such financial details as it requests. (3.9.20)

### 3.10 Conditional release order (s 7(f) orders)

*3.10.1* Orders for the conditional release of offenders have their origins in the common law bond. In Tasmania the common law bond has been abolished by the *Sentencing Act 1997* (Tas) s 101. Instead, courts may, with or without recording a conviction, adjourn proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender.<sup>388</sup> Core conditions include the requirement to be of 'good behaviour' and to appear before the court if called on to do so during the period of the adjournment. In the sentencing hierarchy a conditional release order is less serious than a fine. If the offender observes the conditions of the undertaking, then, at the expiry of the adjournment period or upon the further hearing of the adjourned proceedings, the offender will be discharged or the charge will be dismissed, depending on whether a conviction has or has not been recorded.<sup>389</sup> Non-compliance with the conditions of the undertaking may expose the offender to being re-sentenced for the original offence as well as to being fined for the breach.<sup>390</sup> However, breach of the conditions of the order is not made an offence.<sup>391</sup> The imposition of conditions is not intended to provide the court with a supervisory function in relation to the offender. Rather it aims to encourage the offender's good behaviour by placing him or her on notice that he or she may be required to reappear before the court at any time during the period of the order. However, additional conditions may relate to participation in education or rehabilitation programs.

*3.10.2* This sentencing measure is used for about nine per cent of offences in the Magistrates Court<sup>392</sup> and, as one would expect, less often in the Supreme Court. From 2001-2006 conditional release orders accounted for 1.9 per cent of sentencing outcomes. No data was available on enforcement and breach of adjourned undertakings.

#### Response to the Issues Paper

*3.10.3* Only three submissions addressed conditional release orders. Both the Chief Justice and Tasmania Police submitted that breach of this order should not be an offence and in consultations with Community Corrections Launceston it was suggested that conditional release orders should be used more, particularly instead of some fines.

#### The Institute's view

*3.10.4* The Institute agrees that breach of a conditional release order should not constitute an offence. This accords with the current position. However, it is unsatisfactory that there is no data on outcomes of these orders so the extent to which orders are breached or followed-up is unknown. If conditional release orders are never followed-up and breaches never dealt with, it is pointless having such orders. Offenders may as well be dealt with by an absolute discharge or by recording a conviction only. Like the wholly suspended sentence of imprisonment, a conditional release order is a 'sword of Damocles' type of order. If the threat is an empty one this is likely to undermine confidence in the order as a credible sentencing option and lead to a reduction in its use. A conditional release order is a

<sup>388</sup> *Sentencing Act 1997* (Tas) s 7(f).

<sup>389</sup> *Sentencing Act 1997* (Tas) ss 60-61.

<sup>390</sup> *Sentencing Act 1997* (Tas) ss 60(4), 62(4)(c).

<sup>391</sup> Compare s 36 of the *Sentencing Act 1997* (Tas) (breach of a CSO is an offence) and s 42 of the *Sentencing Act 1997* (Tas) (breach of a probation order is an offence).

<sup>392</sup> Bartels' data for 2003-2004, above n 274.

useful sentencing option and is particularly useful in lieu of a fine when an offender lacks financial resources. In terms of its effectiveness there is some English evidence that they are an effective form of sentencing, attracting better than predicted reconviction rates.<sup>393</sup> To ensure that conditional release orders are a credible sentencing option, the Institute recommends that the Justice Department follow-up orders and report on breach rates annually. It also recommends that a reconviction study be done to ascertain the extent to which offenders have been of ‘good behaviour’ and the outcomes of these orders.

### Recommendations

46. The Institute recommends:

- that the Justice Department follow-up conditional release orders and report on breach rates annually;
- that a reconviction study be done to ascertain the outcomes of conditional release orders. (3.10.4)

## 3.11 Rehabilitation program orders and drug treatment orders

*3.11.1* Rehabilitation program orders for domestic violence offenders were not considered in the Institute’s Sentencing Issues Paper and drug treatment orders were not considered in any detail. The Institute makes no recommendations in relation to rehabilitation program orders but they are briefly discussed for the sake of completeness and to put the discussion of the other sentencing options in context.

### *Rehabilitation program orders*

*3.11.2* Rehabilitation program orders may be made by a court in respect of an offender convicted of a family violence offence.<sup>394</sup> A ‘family violence offence’ is ‘any offence the commission of which constitutes family violence’.<sup>395</sup> A rehabilitation program order requires an offender to participate in a structured treatment program designed to reduce the likelihood of re-offending.<sup>396</sup> The program offered by Community Corrections is the Family Violence Offender Intervention Program (FVOIP). It is a cognitive behavioural group-based intervention that targets the prime criminogenic need of violence propensity while addressing a range of other criminogenic needs such as substance and alcohol abuse. Community Corrections undertakes a family violence offender’s suitability to undertake the FVOIP and their risk of re-offending. Contravention of a rehabilitation program order is an offence.<sup>397</sup> These orders became available from 30 March 2005 as part of the Safe at Home program. No such orders have been made in the Supreme Court and the most recent Justice Department Annual Report does not record the number made in the Magistrates Court.

<sup>393</sup> Ashworth (2005), above n 3, 297 quoting the *Halliday Report*.

<sup>394</sup> *Sentencing Act 1997* (Tas) s 7(ea).

<sup>395</sup> The definition in the *Sentencing Act 1997* (Tas) s 4 refers to the *Family Violence Act 2004* (Tas) which in s 3 defines a family violence offence. Family violence is defined in s 7.

<sup>396</sup> *Sentencing Act 1997* (Tas) s 4.

<sup>397</sup> *Sentencing Act 1997* (Tas) s 54A.

### ***Drug treatment orders***

3.11.3 In the Issues Paper, one of the discussion points asked whether there was a need for a specialised order for offenders convicted of drug and drug-related offences. Few responses addressed this issue. The Legal Aid Commission of Tasmania submitted that it was not the lack of orders for offenders with drug issues that was the problem, it was the lack of programs for such offenders including residential programs.<sup>398</sup> Craig Mackie stated that frequently probation orders have specific conditions attached to target problems such as drug and alcohol issues but because of a lack of resourcing this is frequently not followed up. He asked, '[w]hat possible use is a supervision order with a condition for alcohol and drug counselling and treatment for a person, when there are no facilities available to facilitate it?'<sup>399</sup> He supported creating special drug treatment orders, but noted this would be worthless without a funding commitment. The Chief Justice thought it sufficient to attach a condition to a probation order for drug treatment but noted he was unaware how effective such conditions were. An audit conducted for the purposes of the Institute's Drug Court Project demonstrated that available drug treatment services were inadequate to service a drug court.<sup>400</sup>

3.11.4 A specialist drug court was suggested by the Legal Aid Commission of Tasmania.<sup>401</sup> In 2005 the Institute accepted a reference on the feasibility of a drug court pilot and embarked on the project with funding from the Law Foundation of Tasmania. However, when it became clear that the government had opted for a court mandated diversion project rather than a drug court, the results of the work were published as a research paper to help inform the development of the court mandated diversion model. An audit of drug treatment programs in the State was conducted for the Research Paper and concluded that existing programs were inadequate to service a drug court. Most services in Tasmania focus on brief interventions whereas offenders who receive a drug court order usually require a year or more of treatment.

3.11.5 In mid 2007 the pilot program for drug offenders called Court Mandated Diversion (CMD) for drug offenders was introduced. The program is funded under the Commonwealth's Illicit Drug Diversion Initiative (IDDI) and will operate on a State-wide basis until June 2008. There are three levels or tiers in the program. The first level is a bail diversion program which operates post plea and allows diversion to drug treatment for up to 12 weeks as a condition of bail. Court review is possible through additional mentions. At the second level, drug treatment can be made available in several ways. This includes as a condition of a suspended sentence or a probation order, or offenders on community service orders can be referred to drug treatment using the standard condition to attend 'other programs as directed by a probation officer'.<sup>402</sup> For second level drug treatment orders there is no continuing court involvement. Neither the first or second level has a legislative base.

3.11.6 The drug treatment order at the third level is supported by amendments to the *Sentencing Act* that are modelled on a provision in the Victorian *Sentencing Act 1991*. Section 7(ab) provides that if a court is constituted by a magistrate, it may record a conviction and make a drug treatment order. Such an order cannot be made unless the court would have sentenced the offender to a term of imprisonment were it not making the drug treatment order and it would not have suspended the sentence either in whole or in part.<sup>403</sup> A drug treatment order cannot be made in respect of a sexual offence or an offence involving the infliction of more than minor bodily harm.<sup>404</sup> A drug treatment order has a custodial part and a treatment and supervision part. The custodial part is the sentence of imprisonment that the court would have imposed if it had not made the drug treatment order. The offender is not required to serve the custodial part unless it is subsequently activated.<sup>405</sup> The treatment

<sup>398</sup> Legal Aid Commission of Tasmania, submission, 4 and 9.

<sup>399</sup> Craig Mackie, submission, 3.

<sup>400</sup> Tasmanian Law Reform Institute, *The Establishment of a Drug Court Pilot in Tasmania*, Research Paper No 2 (2006).

<sup>401</sup> Legal Aid Commission of Tasmania, submission, 4.

<sup>402</sup> *Sentencing Act 1997* (Tas) s 28(g).

<sup>403</sup> *Sentencing Act 1997* (Tas) s 27B(1)(c).

<sup>404</sup> *Sentencing Act 1997* (Tas) s 27B(1)(a).

<sup>405</sup> *Sentencing Act 1997* (Tas) s 27F.

and supervision part of the order consists of core and program conditions.<sup>406</sup> Core conditions include the requirement not to commit another imprisonable offence, to attend the court whenever it directs and to undergo treatment for illicit drug use as directed.<sup>407</sup> Program conditions, at least one of which must be attached, includes such things as a requirement to submit to drug testing.<sup>408</sup>

3.11.7 The Attorney-General was at pains to point out in his second reading speech that the amendments to the *Sentencing Act* introducing the power to make drug treatment orders do not create a drug court. However, it does incorporate many of the features of drug courts that operate in other jurisdictions.<sup>409</sup> A key similarity between drug treatment orders and a drug court is the provision for ongoing supervision of orders by the court and the capacity to impose a series of ongoing rewards and escalating sanctions depending on offender progress.<sup>410</sup> The explanatory notes to the Bill indicate that it is envisaged that initially offenders will be required to return to court weekly and that frequency will be progressively reduced as a reward during court reviews of progress. The CMD program has required a significant improvement in the availability of drug treatment services. It is a matter of some concern that funding for the program is in some doubt after June 2008 and at this stage no drug treatment orders can be made after 31 May.<sup>411</sup> Of equal concern is the issue of ongoing funding for treatment that supports suspended sentences, probation orders and community service orders. Having increased the capacity of non-government organisations to deliver drug treatment services and having expended over \$400,000 to develop programs and build up the capacity of treatment providers to deliver such services, it would be wasteful to fail to renew service contracts on the grounds that Commonwealth funding for a start-up pilot was no longer available irrespective of the outcome of the evaluation of CMD. The Institute recommends that if the evaluation of CMD proves promising, each of the three levels of the program should continue and drug treatment orders should also be made available to offenders convicted in the Supreme Court by referral to the Magistrates Court when appropriate. Absence of recourse to CMD can place a judge in a predicament when an offender has commenced treatment pursuant to an order in the Magistrates Court and then faces the Supreme Court in respect of concurrent offending.<sup>412</sup>

### Recommendations

47. The Institute recommends that if the evaluation of the Court Mandated Diversion of Drug Offenders program proves promising:

- each of the three levels of the program should continue; and
- the *Sentencing Act 1997* (Tas) should be amended to enable offenders convicted in the Supreme Court to be made subject to drug treatment orders. (3.11.7)

## 3.12 Breach of non-custodial orders

3.12.1 Breach of a community service order, breach of probation, and breach of a rehabilitation program order constitute an offence. The breach offence is not used for breach of a suspended sentence, a drug treatment order or for a conditional release order. It appears that the purpose of the breach offence is procedural rather than punitive. It provides a mechanism to allow the person to be brought back to the court in a speedy and effective manner and for time limits to be imposed within

<sup>406</sup> *Sentencing Act 1997* (Tas) s 27E(3).

<sup>407</sup> *Sentencing Act 1997* (Tas) s 27G.

<sup>408</sup> *Sentencing Act 1997* (Tas) s 27H(1)(a).

<sup>409</sup> Parliament of Tasmania, House of Assembly, The Attorney-General, Sentencing Amendment Bill 2007 (No 31), Second Reading, 4 July 2007.

<sup>410</sup> *Sentencing Act 1997* (Tas) ss 27K - 27M.

<sup>411</sup> Parliament of Tasmania (2007), above n 410.

<sup>412</sup> See for example *Tasmania v Hingston*, COPS, Blow J, 17 September 2007.

which action can be taken for breach. However, creating a breach offence has been criticised because it creates a triple jeopardy situation for offenders. They can be brought back to be dealt with for the original offence; they can be fined up to 10 penalty units or imprisoned for up to three months for the offence created by the breach of the order; and they can be dealt with for the offence which breached the order. For this reason Freiberg's Victorian Sentencing Review, recommended that breach of conditional orders should no longer be a criminal offence and that mechanisms be put in place to ensure that offenders can be expeditiously and effectively brought back before the courts without imposing unnecessary, time-consuming and complex procedures.<sup>413</sup>

### Responses to the Issues Paper

3.12.2 The Issues Paper asked whether breach offences should be abolished. Few submissions addressed this issue. The Legal Aid Commission of Tasmania was opposed to abolishing the breach offences on the grounds there should be some consequences of failure to comply with a court order. Craig Mackie expressed a similar view. Tasmania Police were in favour of abolishing breach offences for the triple jeopardy reasons outlined in the Issues Paper with the proviso that appropriate mechanisms are in place to bring offenders back to court if there is a failure to comply with the order.

### The Institute's views

3.12.3 The Institute is of the view that procedures in relation to breach of sentencing orders need to be radically overhauled. In relation to suspended sentences the failure to follow-up breaches of suspended sentences and probation orders has been highlighted. Bartels' examination of breach of suspended sentences found that action was only taken in five per cent of breaches of wholly suspended sentences. It seems likely that breaches of probation orders are rarely prosecuted and that action is rarely taken in respect of breaches of conditional discharge orders. From 2001 to 2007 it appears that there were just two cases in the Supreme Court that involved breach of a CSO and one case for breach of probation.<sup>414</sup> The Institute recommends that expeditious procedures be put in place to enable offenders to be brought back to court when necessary to ensure that sentencing orders are credible. It also recommends that for the triple jeopardy reasons outlined above, the offences of breach of community service, probation and rehabilitation orders be abolished and replaced with legislative provisions similar to those for breach of a suspended sentence (s 27) and breach of a conditional release order (s 62). Abolishing the breach offence does not mean that a breach of the order has no consequences. As is clear from the situation in Tasmania, the legislative breach machinery has little impact on the efficiency of follow-up. The administrative mechanisms are key and the Institute recommends that these be reviewed.

### Recommendations

48. The Institute recommends that:

- the offences of breach of a community service order, breach of a probation order and breach of a rehabilitation program order be abolished and replaced with breach provisions similar to those in s 27 of the *Sentencing Act 1997* (Tas);
- the procedures for follow-up and actioning breaches of community orders be radically overhauled.(3.12.3)

<sup>413</sup> Ibid, 118-119.

<sup>414</sup> There may have been more but they do not appear in the Supreme Court's sentencing database.

## Part 4

# Role of Victims

- (a) Consider whether the interests of victims are adequately dealt with in the sentencing process and to what extent the objective of section 3(h) [that of recognising the interests of victims] has been met.
- (b) In particular consider the efficacy of compensation orders and the victims' levy.

## 4.1 Victims in the criminal justice system

### *Introduction*

4.1.1 The role of victims in the criminal justice system has traditionally been a very limited one. A victim is not a party to criminal proceedings and is at most a witness. However, in recent decades attempts have been made to accommodate the interests of victims in the criminal justice system. The impetus for this trend came first from the victims' movement and more recently from the restorative justice movement. The victims' movement has focussed on welfare services and procedural rights for victims. In sentencing terms this includes the right to make submissions to sentencing and parole authorities and to receive compensation. Proponents of restorative justice generally seek more fundamental change and advocate a new approach to crime. Restorative justice has been described as 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future'.<sup>1</sup> Others have argued that this definition is too narrow and have defined restorative justice as 'every action that is primarily oriented towards doing justice by restoring the harm that has been done to the victim.'<sup>2</sup> The focus of restorative justice is not solely on victims. Equally important is both the reintegration of the offender into the community and accountability – enabling offenders to assume active responsibility for their actions. Some 'restorativists' prefer to see restorative justice as a form of diversion from the criminal justice system whilst others, such as Braithwaite and Pettit,<sup>3</sup> see it as a fully-fledged alternative to traditional retributive and rehabilitative approaches to crime. At a practical level, attempts have been made to accommodate restorative concepts such as conferencing, mediation and compensation within the conventional criminal justice system. Section 3(h) of the *Sentencing Act 1997* (Tas) provides that a purpose of the Act is to recognise the interests of victims. In his second reading speech the then Attorney General, Ray Groom MHA, claimed that the *Sentencing Act 1997* (Tas) promoted a focus on restorative justice and that the government was concerned to do all it could to protect the interests of victims. This part explores the extent to which the Act and the sentencing process recognises the interests of victims. The interests of victims are also considered in Part 5 (in the context of victim impact statements to the Parole Board) and Part 7 (in the context of explicitly including restoration as a sentencing goal in the *Sentencing Act 1997*).

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<sup>1</sup> Tony Marshall, *Restorative Justice: An Overview*, The Home Office (1999).

<sup>2</sup> Lode Walgrave, 'Extending the Victim Perspective Towards a Systematic Restorative Alternative' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice* (2000) 253.

<sup>3</sup> John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

## 4.2 Victim Impact Statements

4.2.1 The effect of the crime on the victim is relevant to the exercise of sentencing discretion.<sup>4</sup> The prosecution may inform the court of the impact of the crime or the court may be provided with a victim impact statement informing the court of the harm, loss or injury suffered by a victim as a result of the crime. Tasmania, in common with all states and territories except Queensland, has legislative provisions and statutory rules governing the use of victim impact statements.<sup>5</sup> Victim impact statements (VIS) are also used in other common law countries.<sup>6</sup> Section 81A of the *Sentencing Act 1997* (Tas) provides that if a court finds a person guilty of an indictable offence, a victim of that offence may furnish to the court a written statement that ‘gives particulars of any injury, loss or damage suffered by the victim as a direct consequence of the offence’ and ‘describes the effects on the victim of the commission of the offence.’ A victim includes a member of the immediate family of a deceased victim of the offence.<sup>7</sup> As with any pre-sentence information, the court must ensure that the offender has knowledge of it and the opportunity to challenge it.<sup>8</sup> If the court considers it appropriate, another person may furnish a VIS on the victim’s behalf.<sup>9</sup> If the victim so requests the court must allow the victim, the person who has supplied the statement or a nominated person, to read the VIS to the court.<sup>10</sup> There is provision for victims to amend or withdraw the statement at any time before it is read to or by the Court.<sup>11</sup> A judge or magistrate has the power to direct a victim not to read any part of a VIS considered to be irrelevant.<sup>12</sup>

4.2.2 The legislation envisages that a victim may prepare their own VIS or have someone do it on their behalf. The rules state that they may be either printed or handwritten.<sup>13</sup> Assistance in preparing a VIS is provided by the Victims of Crime Service, Victims Support Services and occasionally by sexual support services in Hobart, Launceston and on the north-west coast. Victims Support Services is a section of the Department of Justice. The Victims of Crime Service is a government funded service that, in addition to assistance with the preparation of victim impact statements, provides support for people attending court, counselling and referrals.<sup>14</sup> It has offices in Burnie, Devonport, Launceston and Hobart. Most reports are prepared with Victims Support Services who assist in the preparation of approximately 100 reports per year. In the Supreme Court VIS are commonly provided in cases of sexual offences, armed robbery and assaults. In the Magistrates Court they are occasionally provided in cases of assault and sexual offences. Although theoretically available for property offences, in practice they are only provided in cases of offences against the person.

4.2.3 VIS have been used in Australia for about a decade. They still have their critics who point to the following problems:

... they can raise a victim’s expectations about sentence, which may not be fulfilled; expose offenders to unfounded allegations by victims; lead sentencers to give disproportionate weight to the impact of the crime on the victim to the detriment of other relevant considerations; and skew an otherwise objective and dispassionate process by the introduction of emotional and possibly vengeful content.<sup>15</sup>

<sup>4</sup> This is subject to a number of technical sentencing rules: Kate Warner, *Sentencing in Tasmania* (2<sup>nd</sup> ed, 2002) 80-82, 87.

<sup>5</sup> See Australian Law Reform Commission (ALRC), *Same Crime, Same Time*, Report No 103 (2006) 14.8 note 10.

<sup>6</sup> *Victims Rights Act 2002* (NZ) ss 17-27; *Criminal Code*, RS 1985, c C-46, s 722. In the UK, Victim Personal Statements are governed by a Practice Direction by the Lord Chief Justice: *Practice Direction (Victim Personal Statements)* [2001] Cr App R (S) 482.

<sup>7</sup> *Sentencing Act 1997* (Tas) 81A.

<sup>8</sup> *Sentencing Act 1997* (Tas) s 81A(7); *Criminal Rules 2006* (Tas) r 4; *Justices Rules 2003* (Tas) r 54B.

<sup>9</sup> *Sentencing Act 1997* (Tas) s 81A(2A).

<sup>10</sup> *Sentencing Act 1997* (Tas) s 81A(4).

<sup>11</sup> *Criminal Rules 2006* (Tas) r 8, 9; *Justices Rules 2003* (Tas) r 54F, 54H.

<sup>12</sup> *Criminal Rules 2006* (Tas) r 10; *Justices Rules 2003* (Tas) r 54G.

<sup>13</sup> *Criminal Rules 2006* (Tas) r 11; *Justices Rules 2003* (Tas) r 54I(c).

<sup>14</sup> Lifeline is the current provider.

<sup>15</sup> ALRC (2006), above n 5, 14.10 (footnotes omitted).

4.2.4 Another objection to VIS is that they may lead to inconsistent sentences depending on whether a VIS is supplied or not and in instances where the victim asserts greater psychological harm than a more robust victim might.<sup>16</sup> Administrative concerns have focused on the likelihood that consideration of VIS during the sentencing process will overburden the justice system, prove costly and cause delays.<sup>17</sup>

4.2.5 Two aspects are particularly controversial. First, their use in the case of family members of homicide victims has been questioned because of concerns that consideration of such evidence could threaten the objectivity of the sentencing process and result in penalties reflecting the comparative worthiness of the deceased relative to other dead victims.<sup>18</sup> In New South Wales the Supreme Court has taken the view that, notwithstanding a statutory provision requiring courts to accept a VIS from the relatives of homicide victims, it is not a relevant factor to be taken into account in deciding penalty.<sup>19</sup> In contrast, in South Australia, Victoria and Western Australia courts are required by legislation to take account of a VIS submitted by a family member in the determination of penalty.<sup>20</sup> Courts in these states have differed as to how much weight should be given to this evidence.<sup>21</sup>

4.2.6 Secondly, whether a victim should be permitted to express an opinion about the sentence has been questioned. The Western Australian legislation expressly prohibits this,<sup>22</sup> but in the Northern Territory it is allowed.<sup>23</sup> Neither s 81A of the *Sentencing Act 1997* (Tas) nor the *Justices Rules 2003* (Tas) refer to the issue. Strictly speaking, s 81A relates to facts about the impact and effects of the offence and not to opinions as to the appropriate sentence. While courts in Tasmania have sometimes been prepared to give victims' wishes some weight, they are not determinative. The courts see their function as being to determine the wider interests of the community.<sup>24</sup> The Victims Support Service's guidance on VIS in its printed brochure and website states that a victim should not include an opinion on the sentence that the court should give in a VIS.<sup>25</sup>

### ***Responses to the Issues Paper***

4.2.7 The Issues Paper asked if there were any issues arising out of the legal recognition of victim impact statements that needed to be addressed. Responses were generally supportive of the use of VIS, seeing it as a valuable opportunity for victims to express their feelings about the crime.<sup>26</sup> A number of submissions focussed on concerns about the deficiencies in the legislation which have since been addressed. In particular, the failure to provide for a VIS to be supplied without it being read out in court and the inability of a victim to amend a VIS have been addressed in the *Sentencing Act 1997* (Tas) the *Justices Rules 2003* (Tas) and the *Criminal Rules 2006* (Tas).<sup>27</sup> It was also suggested that there should be a systematic way of preparing a VIS<sup>28</sup> or a template to ensure consistency in format

<sup>16</sup> Ibid, 14.11.

<sup>17</sup> Tracey Booth, 'Restoring Victims Voices: Victim Impact Statements in the Sentencing Process' (2005) 86 *Reform* 59, 60.

<sup>18</sup> Ibid; Tracey Booth, 'Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements' (2004) 15(3) *Current Issues in Criminal Justice* 253.

<sup>19</sup> *Previtera* (1997) 94 A Crim R 76; *R v Bollen* [1998] NSWSC 67.

<sup>20</sup> *Sentencing Act 1991* (Vic) s 5(2); *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1995* (WA) s 24.

<sup>21</sup> Booth (2004) above n 18, 254.

<sup>22</sup> *Sentencing Act 1995* (WA) s 25(2).

<sup>23</sup> *Sentencing Act 1995* (NT) s 106B(5A).

<sup>24</sup> See *F* (1998) 8 Tas R 88, 97-98 (Slicer J); *McGhee* Serial No 69/1994, 4 (Green CJ), 9 (Zeeman J).

<sup>25</sup> Victims Support Services, *Victim Impact Statements* (2007) <<http://www.justice.tas.gov.au/victims/vis>> at 20 November 2007; Victims Support Services, *Having Your Say Through A Victim Impact Statement in Tasmania* (2007) <[http://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0016/27232/Vic\\_Impact\\_bro\\_v3.pdf](http://www.justice.tas.gov.au/_data/assets/pdf_file/0016/27232/Vic_Impact_bro_v3.pdf)> at 20 November 2007.

<sup>26</sup> For example, see submissions of Kay Fisher; Jocelyn Freedman, Victims of Crime Service Hobart; Liz Tanton-Buchanan, The Victims of Crime Service, Launceston; Tasmania Police.

<sup>27</sup> For the power of a victim to amend VIS see: *Justices Rules 2003*(Tas) r 54F; *Criminal Rules 2006* (Tas) r 8; for the option to read the statement in court see *Justices Rules 2003* (Tas) r 54D; *Criminal Rules 2006* (Tas) r 6.

<sup>28</sup> Liz Tanton-Buchanan, The Victims of Crime Service, Launceston, submission.

and content.<sup>29</sup> The Rules allow the Chief Justice and the Chief Magistrate to approve a form for a VIS that may be used.<sup>30</sup> While this has not been done, the Victims Support Services brochure has a form that can be used to prepare a VIS.<sup>31</sup>

4.2.8 In response to the Issues Paper, the then Chief Justice submitted that the unproclaimed s 81A was too broad and would lead to delays in the sentencing process as potential victims are sought out and consulted. He argued that a more limited definition of victim should be adopted, one that did not include all crimes including burglary and stealing and all victims including banks, mortgagees and insurance companies.<sup>32</sup> Kay Fisher submitted that those assisting with the preparation of a VIS should make it clear to the victim that their statement will have little impact on the sentence imposed. Tasmania Police supported a more active role for victims. It was suggested that victims be given the opportunity to confront the offender either in a facilitated conference or by giving oral evidence about the impact of the crime. It was also suggested that a victim should have the opportunity to question the offender as part of the sentencing process. Tasmania Police suggested that,

For some victims, these options would give them closure and reduce the fear of an unknown offender. At the same time, the process would confront the offender with a more personalised appreciation of the impact of their wrongdoing.<sup>33</sup>

### ***The Institute's views***

4.2.9 The Institute is of the view that a VIS is a valuable tool in the sentencing process. It assists the court in assessing the effects of the crime on the victim. Providing victims with a voice in criminal proceedings and an opportunity to communicate to the court and the offender the ways in which the crime has impacted on them can be a therapeutic experience. Many of the problems and concerns in relation to VIS have either been addressed by the introduction of appropriate safeguards or answered by research. The then Chief Justice's concerns about delays and the broad definition of victim do not seem to have proved to have been realised. VIS do not appear to delay proceedings and are rarely, if ever, submitted in the case of burglary or other property offences. The Institute does not support Tasmania Police's suggestion for a more active role for victims at the sentencing stage (see above para 4.2.8). The fact a victim can read out a VIS and the possibility of victim offender mediation provides sufficient opportunity for the victim to "confront the offender". The suggestion that the victim be given the opportunity to question the offender as part of the sentencing process is, in the Institute's view inappropriate. An offender cannot be compelled to take the stand in a trial and should not be compelled do so in a sentencing hearing. To require this would conflict with a defendant's right to silence.

### **The value of VIS to victims**

4.2.10 The issue of whether submitting a VIS is a positive experience for victims has been explored in a number of research studies. No research has been conducted in Tasmania but studies elsewhere are instructive. A South Australian study found less than half of victims who provided VIS material stated they felt relieved or satisfied after providing the information. For the other half, providing VIS information made no difference and six per cent considered the experience made them feel worse. There was no evidence that VIS had an impact on sentencing outcomes.<sup>34</sup> Ashworth refers to English research which shows that most victims did not know the use to which their statement had been put

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<sup>29</sup> Tasmania Police, submission, 5.

<sup>30</sup> *Justices Rules 2003*(Tas) r 54 I(e) (Chief Magistrate); *Criminal Rules 2006* (Tas) r 11(d) (Chief Justice).

<sup>31</sup> Most forms are returned to the Victims Support Services where the form is printed and supplied to the prosecution and defence counsel.

<sup>32</sup> The Honourable Justice Cox, Chief Justice, submission, 4.

<sup>33</sup> Tasmania Police, submission, 6.

<sup>34</sup> Edna Erez, Leigh Roeger and Michael O'Connell, 'Victim Impact Statements in South Australia' (Paper presented at the International Victimology: 8<sup>th</sup> International Symposium, Canberra, 21 August 1994).

and few believed it had much effect on the charge or sentence although this had been the hope of many. He concludes that if some victims do feel better for the experience, there is the danger of raising expectations that can be disappointed.<sup>35</sup> Tracy Booth agrees that research studies in various jurisdictions including Australia, Canada, the United States and the United Kingdom reveal that VIS have no significant effects on sentencing outcomes;<sup>36</sup> and that victims, who think of their VIS in instrumental terms, are disappointed when their VIS do not impact on sentence. However, she argues that victims submit a VIS for a variety of reasons and not necessarily primarily for the purpose of influencing the penalty imposed.

**4.2.11** The impact of VIS on sentencing outcomes in Tasmania is unknown. Nor has any research been conducted on victims' expectations of, or satisfaction with, VIS. In Tasmania, it seems, victim counsellors are careful to inform victims that while the court will take their statement into account in assessing the impact of the crime on them, this will not necessarily affect the sentencing outcome. The international evidence suggests that there is a danger that those who do furnish a statement with the primary aim of influencing the penalty may be disappointed. It is therefore important, as Kay Fisher submitted, that it be made clear to victims that the VIS is only one factor that a court will consider when determining the sentence and that it may not necessarily change the sentence. As Booth argues, the focus should be on the expressive and communicative function of a VIS. Advice to victims should make it clear that the purpose of VIS is to give victims a voice, to enable them to communicate both with the court and the offender and to express their feelings about the effects of the crime on them. Sentencing remarks may create a second opportunity to exploit the expressive and communicative role of VIS. Booth states:

By acknowledgement of VIS and reference to the victim's words in the course of judgment, courts are able to communicate a message that is overtly responsive to the legitimate interests of victims and reflects our community's changing sensibilities in this context. The court communicates both a message of sympathy and clear recognition that these victims have been wronged. Recent research indicates that judges are taking the opportunity to refer to the victim in their sentencing remarks and that such developments are appreciated by victims.<sup>37</sup>

**4.2.12** The Institute recognises that providing a VIS and the court's use of it in sentencing comments to acknowledge the effects of the crime on the victim can have a positive impact on the victim.<sup>38</sup> The Court's use of a VIS can be both therapeutic and empowering for a victim. To ensure that victims do not see the primary purpose of VIS as affecting the sentencing outcome, and to avoid disappointing victims, the Institute recommends that the advice given by the prosecution, by the Victims Assistance Unit, Victims Services and Sexual Assault Services continue to make this point and that it be included in the Victims Assistance Unit's brochure.

## Secondary victims

**4.2.13** The Institute acknowledges that the issue of the use of VIS from family victims in homicide cases is in theory problematic. The Institute agrees that it is offensive to fundamental concepts of equality and justice to impose a harsher sentence upon an offender because of the relative value of the life lost.<sup>39</sup> However, it does not recommend that family victims be excluded from the definition of a

<sup>35</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed 2005), 355. A more recent evaluation of the Scottish pilot VIS scheme provides more positive findings with 61 per cent reporting that making a VIS made them feel better (38 per cent felt worse) and 86 per cent stating the decision to make a VIS had been the correct one: James Chalmers, Peter Duff and Fiona Leverick, 'Victim Impact Statements: Can Work, Do Work (For those who bother to make them)' [2007] *Criminal Law Review* 360, 378.

<sup>36</sup> Booth (2005), above n 17, 61. As Chalmers, Duff and Leverick (2007), above n 35, 363 (n 24) point out, this is hardly surprising, isolating the impact of VIS is always going to be difficult given the multitude of factors that are taken into account in imposing sentence.

<sup>37</sup> Booth (2005), above n 17, 61.

<sup>38</sup> Occasionally too this can assist the victim in accepting a verdict that is disappointing – see for example Crawford J's sentencing comments in *Tasmania v Pelikan*, 18 September 2007.

<sup>39</sup> *Inkson* (1996) 6 *Tas R* 1, 30 (Zeeman J).

victim for the purpose of VIS. Provided such victims are not led to believe that their statements will lead to different outcomes, for example a heavier penalty on the offender because the victim was so well loved and their death impacted so heavily on dependents and family, there is no difficulty. The focus should be on the communicative and symbolic function of a VIS as a means of allowing the criminal justice system to engage with the emotional issues stemming from victimisation.

4.2.14 While the Institute has concluded that VIS is a valuable sentencing tool, its use remains controversial. In the UK critics still argue that it a sweetener to increase victims' satisfaction with the criminal justice system, to con victims into thinking their interests are being looked after.<sup>40</sup> And in Australia some judges are sceptical of their utility.<sup>41</sup> The Institute recommends that research be conducted in this jurisdiction to examine the effectiveness of VIS as tool for the courts and for victims. Such research could provide important pointers to ways in which VIS could be improved.

### Victims' wishes

4.2.15 The Institute is aware that the issue of whether a court should have regard to a victim's wishes in relation to sentence is controversial.<sup>42</sup> However, in the context of VIS this is not a difficulty. Section 81A of the *Sentencing Act 1997* (Tas) does not authorise victims to include their views as to sentence in a VIS, and it is discouraged.<sup>43</sup> If a victim does include this in a statement it is deleted by the Victims' Assistance Unit before it is given to the parties and the court. In some rare cases a victim's wishes in relation to penalty may be conveyed to the court by defence counsel in the course of a plea in mitigation and the court will deal with it as the law provides. Generally, a victim's wishes are given little if any weight. Considerations of fairness and consistency support this.<sup>44</sup>

### Recommendations

49. The Institute supports the use of victim impact statements. They are a valuable tool in the sentencing process which assist the court in assessing the effects of the crime on the victim, and provide the victim with a voice in the sentencing process. The courts' use of VIS can be therapeutic and empowering for victims. To ensure that provision of a VIS provides a positive experience for victims, the Institute recommends that the advice given by the Victims Assistance Unit and other victim services assisting with VIS continue to ensure the focus is on the symbolic and communicative function of VIS rather than its impact on the sentencing outcome. It recommends that this be explained in the Victims Support Service's brochure. (4.2.9 – 4.2.12)

50. The Institute recommends retaining the right of the family victims in homicide cases to make a VIS. However, as in the previous recommendation, it recommends that advice to victims should make it clear that this is but one factor the court will consider in imposing sentence and that it cannot lead to the court putting a greater value on one life rather than another. (4.2.13)

51. The Institute recommends that research be conducted in this jurisdiction to examine the value of VIS to the courts and victims. (4.2.14)

<sup>40</sup> See Andrew Sanders, Rod Morgan and Ed Cape, 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Criminal Law Review* 447. For a critique of this article see Chalmers, Duff and Leverick (2007), above n 35.

<sup>41</sup> ALRC, (2006), above n 5, 14.13.

<sup>42</sup> See Warner (2002), above n 4, 87.

<sup>43</sup> See above, para 4.2.6 referring to the Victims Support Services' brochure.

<sup>44</sup> See Warner (2002), above n 4, 87.

## 4.3 Victim mediation

4.3.1 Section 84(1) of the *Sentencing Act 1997* (Tas) provides that before a court passes sentence on an offender it may, if the offender agrees, order a mediation report and adjourn the proceedings to enable the report to be prepared. A court may also receive such a report without having requested one.<sup>45</sup> A mediation report is a written or oral report by a mediator about any mediation or attempted mediation between the offender and a victim.<sup>46</sup> It is to report on ‘the attitude of the offender to mediation, to the victim and to the effect on the victim of the offence; and any agreement between the victim and the offender as to actions to be taken by the offender by way of reparation.’<sup>47</sup> The procedures as to disclosure and challenge are the same as for probation officers’ pre-sentence reports.<sup>48</sup>

4.3.2 Despite the existence of these provisions it does not seem that mediation reports or victim offender mediation is used in Tasmania at the pre-sentence stage of criminal proceedings. Victim offender mediation is a restorative justice measure that has been used in a number of jurisdictions in Australia over the last ten years or so. It has been carried out on an ad hoc basis by the Justice Department for a number of years, usually using external mediation services. Responsibility for co-ordination of this service now rests with the Victims Support Services. The program receives referrals in relation to prisoners rather than pre-sentence referrals. Before mediation occurs a formal process is undertaken to determine if the case is suitable for mediation using criteria which include the consent of the offender and the victim to the process, the reasonableness of the expectations of the parties and the safety of all involved.<sup>49</sup>

4.3.3 In the juvenile justice area, a similar restorative measure, the community conference or ‘family group conference’ has proved extremely popular. Most jurisdictions, including Tasmania, have now legislated for community conferences.<sup>50</sup> These conferences are primarily an alternative to court proceedings but they may also be ordered by a magistrate prior to sentencing a youth.<sup>51</sup> At the adult court level there has been less enthusiasm for restorative justice measures like conferencing or mediation, however, New South Wales has been running a promising pilot community conferencing program targeting young adults in two local courts since September 2005.<sup>52</sup>

### *Responses to the Issues Paper*

4.3.4 The Issues Paper sought to discover an answer to why there had been so few referrals for mediation reports and to explore whether there were resources and expertise to allow use to be made of victim offender mediation. The Justice Department mentioned a lack of resources as did Kay Fisher, a counsellor who had participated in some victim offender sessions.<sup>53</sup> The latter advocated greater use of victim offender mediation and emphasised the value of confronting the offender with the victim’s reactions to the crime. A worker with the Victims of Crime Service in Launceston estimated that only two-five per cent of victims would accept mediation because of both the stress involved with a mediation session and fear of the offender.<sup>54</sup> The Legal Aid Commission submitted

<sup>45</sup> *Sentencing Act 1997* (Tas) s 84(3).

<sup>46</sup> *Sentencing Act 1997* (Tas) s 85.

<sup>47</sup> *Sentencing Act 1997* (Tas) s 85.

<sup>48</sup> *Sentencing Act 1997* (Tas) s 87-88.

<sup>49</sup> See, Victims Support Services, *Victim/Offender Mediation* (2007) <<http://www.justice.tas.gov.au/victims/mediation>> at 19 November 2007.

<sup>50</sup> See, *Youth Justice Act 1997* (Tas) ss 13-20.

<sup>51</sup> *Youth Justice Act 1997* (Tas) s 37.

<sup>52</sup> See, Julie People and Lily Trimboli, *An Evaluation of the NSW Conferencing for Young Adults Program*, NSW Bureau of Crime Statistics and Research (2007).

<sup>53</sup> Department of Justice and Industrial Relations, submission, 17; Kay Fisher, submission, 2.

<sup>54</sup> Liz Tanton-Buchanan, Victims of Crime Service, Launceston Community Centre, Launceston.

that community conferencing for adult offenders may be more appropriate than victim offender mediation.

### *The Institute's view*

4.3.5 Victim offender mediation may well be a useful in a minority of cases. However, it has not had any acceptance as a pre-sentence measure. As a restorative measure it appears to have been overtaken by community conferencing which has a stronger restorative focus from the point of view of the offender and victim, and has the added advantage of incorporating the community. The Institute is attracted to the idea of exploring the use of community conferences for young adults. Using the experience gained in youth justice in Tasmania and with insights from the New South Wales pilot, it recommends running a pilot community conference program for young adults.

#### **Recommendation**

52. The Institute recommends a pilot community conferencing program for young adults modelled on both the New South Wales pilot and on Tasmania's youth justice experience with conferencing. (4.3.5)

## **4.4 Compensation orders**

4.4.1 One of the restorative justice measures the *Sentencing Act 1997* (Tas) introduced was mandatory compensation orders for some offences. The Attorney General noted in his second reading speech that compensation orders in criminal proceedings are often given low priority with claims for damages being adjourned indefinitely. The purpose of the new compensation order provisions was to give them greater priority. The Act requires that courts make compensation orders in all cases of burglary, stealing, robbery, arson and injury to property where there is evidence of loss, destruction or damage as a result of such an offence, irrespective of whether there is an application by the victim or the prosecutor.<sup>55</sup> In the case of other offences they are discretionary.<sup>56</sup> Additionally, s 43 gives compensation orders priority over fines where the offender has insufficient means for both orders to be made and s 68(9) frees the courts of the rules of evidence when assessing compensation in an attempt to make it easier and faster for courts to make an order. Whether the financial circumstances of the offender are relevant to the amount of an order is unclear. Where orders are compulsory, means would appear to be irrelevant.<sup>57</sup> A compensation order is an ancillary order. In other words it is an order in addition to sentence rather than a sentencing option in its own right. Compensation orders are enforceable in the same way as a civil judgment of the court making the order.<sup>58</sup> Alternatively, fine recovery procedures can be used because 'fine' is defined in s 4 of the Act to include compensation orders. In practice, compensation orders are only enforced in the same way as fines if they are imposed by the Magistrates Court. The recently proclaimed *Monetary Penalties Enforcement Act 2005* only applies to compensation orders made by the Magistrates Court by virtue of s 3, which defines a fine to include a compensation order made by the Magistrates Court.

4.4.2 An early study of the use of compensation orders under the *Sentencing Act 1997* (Tas) suggested that these provisions have failed to fulfil the promise of compensating victims of property crime.<sup>59</sup> Despite provisions requiring the courts to make orders in respect of convictions for some

<sup>55</sup> *Sentencing Act 1997* (Tas) s 68(1)(a).

<sup>56</sup> *Sentencing Act 1997* (Tas) s 68(1)(b).

<sup>57</sup> Warner (2002), above n 4, 141-142.

<sup>58</sup> *Sentencing Act 1997* (Tas) s 69.

<sup>59</sup> Kate Warner and Jenny Gawlik, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36(1) *The Australian and New Zealand Journal of Criminology* 60.

offences where there is evidence of loss, it appeared orders were not made in the majority of those cases, and of those made, very few were paid. In the year after the Act came into force compensation orders were made in 42 per cent of burglary, stealing and unlawfully injuring property cases in the Supreme Court, but in only eight per cent of burglary and/or stealing cases and 25 per cent of injury to property cases in Magistrates Court in the south of the State. Matters were adjourned indefinitely in the Supreme Court in 24 per cent of cases and no order was made in 14 per cent of cases. In the remaining cases loss was recovered or there was no loss. If the matter was adjourned, in both courts it was the responsibility of the victim to have the matter relisted. It was found that enforcement procedures differed between the Supreme Court and Magistrates Court. In the Supreme Court the Director of Public Prosecution (DPP) sends the offender a letter instructing him or her to pay the compensation order directly to the victim or through the victim's solicitor. As there was no follow-up and payment was not overseen by the Supreme Court, it was not known how often compensation orders were paid. For compensation orders made by Magistrates Court, recovery was pursued by the Fines Enforcement Unit. The study found very few compensation orders were paid. In the first year of mandatory orders only four per cent of burglary and or stealing compensation orders were fully paid and only 20 per cent of injury to property orders.

4.4.3 The study concluded that compulsory compensation orders have failed victims and are far from being a measure that has helped restore confidence in the criminal justice system, the false promise of compensation is probably even counterproductive. The Issues Paper suggested that mandatory compensation orders have failed to achieve reparation for victims for a number of reasons including a lack of resources devoted to enforcement, the futility of making orders in many cases when there is little prospect of the order being paid, the ambiguous status of compensation orders under the *Sentencing Act 1997* (Tas) and perhaps a cultural reluctance to embrace their use. There is no recent data on the use of mandatory compensation orders or their enforcement. However, the Institute examined their use in the Supreme Court in 2006 for the purposes of this Report and found that outcomes were similar to those reported in Warner and Gawlik's study: orders were made in 36 per cent of cases, adjourned sine die in 20 per cent of cases and no order was made in 17 per cent of cases.

**Table 10 Compensation Orders Made in the Supreme Court for Burglary, Stealing and Unlawfully Injuring Property**

Outcome	Number		Percentage of Total	
	1/8/98-31/7/99	1/1/06-31/12/06	1/8/98-31/7/99	1/1/06-31/12/06
Compensation order made	96	31	42%	36%
Order or assessment adjourned sine die	55	19	24%	22%
Loss recovered (so no order)	35	9	15%	10%
No Loss (so no order)	9	13	4%	15%
Loss but no order	16	14	7%	16%
No order or explanation	17	1	7%	1%
Total	228	87	100%	100%

## ***Responses to the Issues Paper***

### **Mandatory or discretionary?**

4.4.4 The Issues Paper sought responses to a number of questions, the first related to whether or not a compensation order should remain mandatory for property loss in cases of burglary, stealing, robbery, arson and injuring property.<sup>60</sup> Most respondents who addressed this issue were of the view that orders should not be mandatory. Jocelyn Freedman of the Victims of Crime Service submitted:

The introduction of victim compensation orders, whilst looking promising for victims and restorative justice, has been a huge let down for expectant victims of crime. Unless there is a distinct possibility of the victim actually receiving all or part of the ordered payment then it is doing more harm than good to order the offender to pay. Since the Act, the VOC Service has spent many hours providing information and support to victims who thought they would be automatically re-imbursed when the order was made.<sup>61</sup>

4.4.5 Tasmania Police and the Legal Aid Commission of Tasmania suggested that that they should not be compulsory but that, as in the UK, courts should be required to consider them where there has been loss, injury or damage and that where an order is not made, reasons should be given for not doing so.<sup>62</sup> Tasmania Police stated:

Victims are entitled to an explanation as to why a compensation order was not considered appropriate in their case, and requiring courts to provide reasons for not imposing orders may actually encourage the use of orders in appropriate cases.<sup>63</sup>

4.4.6 While not specifically saying he opposed the mandatory nature of compensation orders for property loss, the Director of Public Prosecutions said:

one might reasonably resist devoting resources to assessments of the quantum of compensation orders when the means of the offender and the mechanisms for enforcement are such that to do so appears to be an entirely pointless exercise.<sup>64</sup>

4.4.7 Only one respondent submitted that compensation orders should remain compulsory.<sup>65</sup> The then Chief Justice 'disputed the fact that few such orders are made, at least in the Supreme Court' as the Issues Paper claimed, but he did not specifically address the issue of whether they should be discretionary or compulsory.<sup>66</sup>

### **Issues relating to the making of compensation orders**

4.4.8 Currently, a compensation order is an ancillary order. In other words, an order which does not have a punitive purpose but is made in addition to a sentencing order in s 7 of the *Sentencing Act 1997* (Tas). The Issues Paper asked whether a compensation order should be a sentencing option in its own right. In South Australia, the ACT, New Zealand and the United Kingdom, a compensation order is a sentencing option in its own right.<sup>67</sup> The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>68</sup> states that governments should consider making restitution a sentencing option.<sup>69</sup> Only two respondents addressed the question whether compensation orders

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<sup>60</sup> In addition to the submissions mentioned below, Don Wing MLC, President of the Legislative Council and Kay Fisher supported making mandatory orders discretionary.

<sup>61</sup> Submission, 2.

<sup>62</sup> Tasmania Police, submission, 6; Legal Aid Commission of Tasmania, submission, 10.

<sup>63</sup> Tasmania Police, submission, 6.

<sup>64</sup> Submission, 2.

<sup>65</sup> Warwick Dunstan, submission, 1.

<sup>66</sup> The Honourable Justice Cox, Chief Justice, submission, 4.

<sup>67</sup> *Criminal Law (Sentencing Act) 1988* (SA); *Crimes (Sentencing) Act 2005* (ACT) ss 19, 20; *Sentencing Act 2002* (NZ) s 12.

<sup>68</sup> For the legal status of this Charter in Tasmania see para 4.6.2.

<sup>69</sup> *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> Plen mtg, [9], UN Doc A/Res/40/34 (1985).

should be made a sentencing option in their own right – the then Chief Justice who opposed the suggestion and the Legal Aid Commission of Tasmania which supported it.

4.4.9 The Issues Paper also asked whether means should be relevant to the making of a compensation order. As the Issues Paper explained, it is unclear whether means are relevant in assessing the amount of compensation under s 68 of the *Sentencing Act 1997* (Tas). There are arguments pointing in both directions.<sup>70</sup> Only two respondents addressed this issue and both submitted that means should be relevant to the amount of compensation ordered.<sup>71</sup>

4.4.10 The Issues Paper addressed the relevance of a compensation order to sentencing orders other than fines. Section 43 of the *Sentencing Act 1997* (Tas) gives a compensation order priority over a fine if the offender has insufficient means to pay both. However, its relationship with other penalties is unclear. As an ancillary order it could be argued that it should not displace punishment and its relevance should be limited to providing evidence of remorse. Conversely, it could be argued that in the absence of a fetter on the legislative discretion to take a compensation order into account, the courts should be free to do so. None of the submissions addressed this issue.

4.4.11 The Issues Paper also asked whether additional resources should be given to both police and prosecutors to deal with claims. The Director of Public Prosecutions, Tasmania Police and the Legal Aid Commission of Tasmania recommended this. The then Chief Justice suggested that more attention should be given to their prompt assessment. The DPP disputed the suggestion in the Issues Paper that courts and prosecutors had not done all they could to make compensation orders more successful because of ambivalence towards compensation orders and a cultural resistance to dealing with matters outside their traditional role. He said:

Legislation concerning Victim Impact Statements and Compensation Orders perhaps looked good to legislators when enacted. (Indeed, who would speak against such measures?) However, no funding was provided to enable these to be adequately attended to. This is not, as the [Issues] Paper wrongly suggests, a matter of ‘cultural resistance’...<sup>72</sup>

4.4.12 Tasmania Police submitted:

If required, additional resources should be made available to police/prosecutors to deal with claims. Victims should not have to pursue the order themselves.

## **Enforcement of orders**

4.4.13 The Issues Paper asked:

- Should compensation orders be enforced in the same way as fines?
- What measures could improve enforcement of compensation orders?

4.4.14 The then Chief Justice submitted that more attention should be given to prompt enforcement.<sup>73</sup> Tasmania Police asserted that courts should oversee the payment of compensation orders and they should be enforced in the same manner as fines.<sup>74</sup> The Legal Aid Commission of Tasmania also considered they should be enforced like fines.<sup>75</sup> Michael Hodgman submitted that:

<sup>70</sup> Warner (2002), above n 4, 141-142.

<sup>71</sup> Legal Aid Commission of Tasmania, submission, 11; Jocelyn Freedman, submission, 2.

<sup>72</sup> Director of Public Prosecutions, submission, 2.

<sup>73</sup> The Honourable Justice Cox, Chief Justice, submission, 4.

<sup>74</sup> Tasmania Police, submission, 6.

<sup>75</sup> Legal Aid Commission of Tasmania, submission, 11.

... the present poor level of enforcement of compensation orders needs serious attention and we would support any appropriate changes to improve the present system.<sup>76</sup>

4.4.15 The DPP suggested that the means of the offender and ineffective mechanisms for enforcement appear to make devoting effort to assessments pointless.<sup>77</sup>

### ***The Institute's views***

#### **Mandatory or discretionary?**

4.4.16 The purpose of the new compensation order provisions in the *Sentencing Act 1997* (Tas) was to give compensation orders greater priority.<sup>78</sup> The Institute endorses this sentiment and agrees with the submission of the former Chief Justice that compensation orders are 'a convenient way of giving summary judgment if sufficient evidence is available of value'.<sup>79</sup> However, examination of the practical operation of compulsory compensation orders in the *Sentencing Act 1997* (Tas) suggests 'that they are mere tokenism, exploitation of a popular cause, and yet another political placebo for crime victims'.<sup>80</sup> It also shows that it is unwise to just deposit a restorative measure into a system which is predominantly about punishment and expect it to work. Moreover, provisions for mandatory compensation orders are unrealistic and present false hope for victims. As Jocelyn Freedman submitted, 'they can do more harm than good' by increasing victims' disillusionment and disappointment with the criminal justice system.<sup>81</sup> However, the Institute recommends that rather than just making a compensation order discretionary, the *Sentencing Act 1997* (Tas) should require that in every case where it appears to the court that another person has suffered injury, loss, destruction or damage as a result of the offence, the court must consider whether a compensation order should be made and if one is not made, the court has a duty to give reasons for not doing so. This follows the English position.<sup>82</sup> The Institute considers a more realistic approach is to require courts to consider making an order rather than require them to do so. This should prove to be a more effective means of reinforcing recognition of the harm caused to victims by criminal offences than mandatory orders. It could be argued that there is no need to require reasons for not making an order because if orders are discretionary and one is applied for there is a common law requirement to give reasons if no order is made. The counter-argument to this is that if courts are to be required to consider making a compensation order as part of the penalty, which is the next recommendation of the Institute, the making of a compensation order is not dependent on an application for one. It follows that requiring reasons for no order, in a case of injury, loss destruction or damage as a result of the offence, will increase the focus on victims and so further the objective in s 3(h) of the *Sentencing Act 1997* of recognising their interests.

#### **A sentencing option in its own right?**

4.4.17 The Australian Law Reform Commission (ALRC) has recently considered this issue and recommended against making reparation (the federal legislation's term for compensation) a sentencing option. In the Commission's view a reparation order is compensatory rather than punitive and so should not be a sentencing option in its own right. Both the Law Reform Committee of the Parliament of Victoria<sup>83</sup> and the New South Wales Law Reform Commission<sup>84</sup> have recommended that

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<sup>76</sup> Hon Michael Hodgman, Shadow Attorney-General, submission, 4.

<sup>77</sup> Director of Public Prosecutions, submission, 2.

<sup>78</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 13 August 1997, (the Honourable Ray Groom, Attorney General).

<sup>79</sup> The Honourable Justice Cox, Chief Justice, submission, 4.

<sup>80</sup> Warner and Gawlik (2003), above n 59, 73.

<sup>81</sup> Jocelyn Freedman, submission.

<sup>82</sup> *Powers of Criminal Courts (Sentencing) Act 2000* (UK) ss 130 -134.

<sup>83</sup> Law Reform Committee, Parliament of Victoria, *Restitution for Victims of Crime: Final Report* (1994) xviii.

<sup>84</sup> New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) [13.2.].

compensation orders should retain their ancillary status. The Institute sees some force in these arguments but considers there are advantages in making a compensation order an independent order which could be either the central feature of the sentence or more in the nature of an ancillary order in addition to the punishment contained in the principal order (imprisonment or a fine). It would be the central feature when the only order such as when it takes priority over a fine or when it accompanies an adjourned undertaking order made by the court under s 7(g) of the *Sentencing Act 1997*. If the criminal justice system is to be responsive to victims then orders should not necessarily be purely punitive but reparative and restorative as well. Moreover, it is realistic to acknowledge that a compensation order can be punitive. While it is more in the nature of a civil order, it does have punitive elements. Not only does it require the offender to pay money to the victim, if the offender fails to do so, payment can be enforced in the same manner as a fine. The ALRC argued that 'it is not appropriate that an entirely different enforcement regime should apply for victims of crime seeking reparation through the criminal justice system when compared with an applicant seeking reparation through civil litigation'.<sup>85</sup> The counter-argument is that in many jurisdictions including Tasmania, compensation orders already have the criminal characteristic of being enforceable in the same manner as fines.

4.4.18 The Institute therefore recommends that compensation orders should no longer be merely ancillary orders but included in the list of sentencing orders in s 7 of the *Sentencing Act 1997* (Tas). It would automatically follow that the making of a compensation order would be relevant to the sentencing discretion, but this would not deflect the court from imposing a custodial sentence or a community service order if that is what the offence justifies. In other words, it would not infringe the principle of equality before the law by permitting wealthy offenders to escape a prison sentence. The Institute has considered whether at the same time the court should retain its discretion to make a compensation order as an ancillary order which is not part of the sentence. In an appropriate case the court would refuse to make an order as part of the sentence stating that the matter is better dealt with as an ancillary matter which would be adjourned for compensation to be assessed. However, having two kinds of compensation order could well lead to confusion and for this reason the Institute has rejected this. The best interests of victims would be better served by embedding the notion of a compensation order as a sole or principal aspect of a sentence.

### **The relevance of means**

4.4.19 As noted above, the legal position in relation to the relevance of an offender's means is unclear under s 68 of the *Sentencing Act 1997* (Tas). In keeping with the notion of a compensation order as a sentencing option in its own right and not simply a civil remedy provided by criminal courts, the Institute recommends that means be relevant to the amount of a compensation order. The ALRC has noted that there is a tension between the desire to recognise the civil rights of victims of crime in the sentencing process and the desire to avoid making futile orders or imposing crushing financial burdens on offenders, a tension the ALRC did not believe to be best resolved by taking means into account. In the view of the ALRC:

A central purpose of the power to make reparation orders is to ensure that victims of crime receive adequate compensation for the loss they have suffered as a result of an offence. The purpose is not effectively achieved if the financial circumstances of an offender are taken into account so as to reduce the quantum of the compensation to be paid to a victim. It is not desirable that victims of crime are awarded less compensation than civil litigants because of the financial circumstances of the offender.<sup>86</sup>

4.4.20 The ALRC's argument has validity if the compensation order is viewed as an ancillary order providing a civil remedy. But it loses its force if a compensation order is viewed as a sentencing option. The victim's civil remedies remain, with the *Sentencing Act 1997* s 68(8) providing that the right to bring civil proceedings is unaffected. The point that it is unfair to victims to reduce the amount

<sup>85</sup> ALRC (2006), above n 5, 8.21.

<sup>86</sup> *Ibid*, 8.34.

of compensation on the basis of the offender's means can also be countered by the point made by Ashworth that in reality very few victims sue their offenders; therefore, in practice, the compensation order does transfer from the offender to the victim money which the offender would not otherwise have to have paid and which the victim would not have otherwise received.<sup>87</sup>

### More resources?

4.4.21 Based on the study of compensation orders, the Issues Paper suggested that neither courts nor prosecutors had done all they could to make compensation orders more successful. Greater efforts could be made to adduce evidence of loss at the sentencing stage as part of the normal information supplied to the court. In cases where there is insufficient evidence of loss and the imposition of a compensation order would not be a futile exercise because of the offender's inability to pay, the courts could adjourn the matter to a definite date with a request that the prosecutor supply details of the loss.<sup>88</sup> The Institute's recommendation to abolish mandatory orders would allow greater selectivity in imposing orders and may encourage greater efforts to pursue orders in cases where it is not a pointless exercise. Nevertheless, adequate resources need to be provided to prosecutors to enable this to be done. The Institute recommends a review of the administrative procedures and resources associated with the making of compensation orders to enable them to be 'adequately attended to'.<sup>89</sup>

### Simple cases only?

4.4.22 The Issues Paper did not address the issue of whether compensation orders should be available in simple cases only. However, the issue of orders in cases of personal injuries was raised by the Director of Public Prosecutions. He expressed disagreement with a Supreme Court decision which ruled that orders only be made in the simplest cases, a decision that he said 'seems to practically rule out personal injuries'.<sup>90</sup> A related issue is whether an order could be made in respect of pain and suffering and the psychiatric consequences of the offence in addition to outgoings such as medical expenses arising from an injury. The words in s 68 of the *Sentencing Act 1997* (Tas) 'injury, loss, destruction or damage as a result of the offence' would appear to be wide enough to cover pain and suffering and other kinds of non-economic loss. However, in *R v Monks*,<sup>91</sup> which appears to be the decision referred to by the DPP, Evans J refused an application made by the victim for a compensation order for a psychiatric condition alleged to have resulted from sexual abuse committed between 11 and 19 years earlier when the victim was between five and 13 years of age. Evans J said:

The general purpose of the legislation is to provide a summary and inexpensive method of compensating a victim for personal injuries or property damage. In appropriate cases, the legislation provides a convenient means for a victim to avoid instituting separate civil proceedings to recover damages. The legislation is not intended to cater for claims involving complicated or extensive inquiry or investigation...<sup>92</sup>

4.4.23 The application was dismissed on grounds which included the fact that the claim for compensation was particularly complicated and difficult and the available evidence was insufficient to provide any foundation upon which the court could assess the claim.

4.4.24 The Institute agrees that it is appropriate that compensation orders should be limited to clear and simple cases and that it is a proper exercise of discretion to refuse to make an order where a complicated or extensive enquiry is necessary to ascertain the injury or loss, causation or the amount of the loss.<sup>93</sup> However, 'the clear case principle' does not mean that orders cannot be made in cases of

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<sup>87</sup> See Ashworth (2005), above n 35, 299.

<sup>88</sup> Tasmanian Law Reform Institute, *Sentencing*, Issues Paper No 2 (2002) 98.

<sup>89</sup> Director of Public Prosecutions, submission, 2.

<sup>90</sup> Ibid.

<sup>91</sup> [2001] TASSC 41.

<sup>92</sup> *R v Monks* [2001] TASSC 41, [11].

<sup>93</sup> Warner (2002), above n 4, 141.

personal injury. If the material presented to the court (see *Sentencing Act 1997* (Tas) s 68(6)) sufficiently demonstrates the pain and suffering experienced by the victim, including distress and anxiety, then the order should include an amount for this as well as including expenses reasonably incurred for counselling and medical expenses. While some jurisdictions make this explicit in the legislation,<sup>94</sup> the Institute does not see the need to do so.

### **Combination orders and compensation as a condition of a sentencing option**

4.4.25 In Part 3 the Institute considered combination orders and argued that sanction stacking can have undesirable consequences. It therefore recommended that, rather than combining suspended sentences, community service and probation orders, community service or supervision be made a condition of the primary order. However, the same objections do not apply to combining suspended sentences, community service orders or probation with a fine if this is appropriate. Nor is there a problem with combining a compensation order with other sentencing orders such as a suspended sentence, a community service order or a probation order to add a reparative element to a primarily punitive, denunciatory or rehabilitative sentence. A compensation order could also be combined with a conditional release order. The question arises whether a compensation order could in some cases be made a condition of a sentencing order. For example, would it encourage the offender to pay compensation if it were made a condition of a suspended sentence or a conditional release order and at the same time add some punitive bite to the order? The ALRC has recently recommended that federal sentencing legislation should prohibit a court from making payment of compensation a condition of a conditional release order or a wholly or partially suspended sentence.<sup>95</sup> It argued it was incongruous to enforce reparation orders that are attached as conditions of some sentencing orders through breach procedures in the *Crimes Act 1914* (Cth) when other reparation orders are ancillary to the sentencing process and are enforced as civil debts:

The ALRC does not consider it desirable to use the criminal justice system to enforce payment of a reparation order by placing offenders at risk of being sentenced for failure to make reparation. To require a federal offender to comply with a reparation order as a condition of his or her sentence is to create an undesirable and confusing amalgam of criminal and civil procedures, which should be avoided.<sup>96</sup>

4.4.26 The Institute has recommended that a compensation order be an independent sentencing order that is enforceable in the same way as a fine. It therefore differs in nature from the federal reparation order. To make it a condition of another order is another means of strengthening the reparative element of sentencing orders in accordance with a recognised need to acknowledge that the criminal justice system no longer ignores victims. For this reason the Institute is of the view that compensation can be a possible condition of a suspended sentence, a community service order or a probation order (see para 3.3.34).

### **Enforcement of orders**

4.4.27 As noted above, (para 4.4.2), the mechanisms for enforcement differ depending on which court imposes the compensation order. In the case of Supreme Court orders, which could be – but are not – enforced in the same manner as fines, the proportion that are paid is unknown. It is left to the victim to follow-up payment. Warner and Gawlik's study of mandatory compensation orders made in the two years after the *Sentencing Act 1997* (Tas) was proclaimed found that fine enforcement procedures were used to enforce orders made in the Magistrates Court. However, no more than 21 per cent of orders were fully paid in cases of damage to property and eight per cent in cases of burglary

<sup>94</sup> For example, *Sentencing Act 1991* (Vic) which makes separate provision for personal injuries orders (s 85B) and compensation for property loss (s 86).

<sup>95</sup> ALRC (2006), above n 5, 247.

<sup>96</sup> *Ibid*, 8.25.

and stealing.<sup>97</sup> Whether the situation remains the same is unknown but could be investigated by the Justice Department as recovery of compensation orders is recorded by the court. The Institute agrees with Tasmania Police and the Legal Aid Commission of Tasmania that compensation orders should be enforced in the same manner as fines. There appears to be no logical reason to differentiate between Supreme Court orders and Magistrates Court orders. If compensation orders become a sentencing option rather than an ancillary order and means are relevant to the amount of the order, pursuing recovery in the same manner as a fine is perfectly logical.

4.4.28 Although payment of compensation orders imposed in the Magistrates Court is pursued by the Fines Enforcement Unit, the indications are that the recovery rate is poor. This may be improved by abolishing mandatory orders and making means relevant so that futile orders and those that impose a crushing burden on the offender are avoided. The new Monetary Penalties Enforcement Service (MPES) aims to increase the collection rate of monetary penalties and this could impact on the payment of compensation orders. The Institute recommends that the way in which the Director of the MPES will exercise administrative powers in relation to compensation orders be reviewed to ensure that orders are dealt with in a way that gives the victim the best opportunity of recovering the amount of the order.

### Recommendations

53. The Institute is of the view that the interests of victims would be better served by making some fundamental changes to compensation orders including making a compensation order a sentencing option in its own right.

54. The Institute recommends that the *Sentencing Act 1997* (Tas) s 68(1) be amended omitting the requirement that compensation orders *must be made* for injury loss, destruction or damage if the offence is burglary, stealing, robbery, arson or injury to property. Instead courts should be required *to consider* making a compensation order in cases where injury, loss, destruction or damage has been caused by the offence and where such an order is not made, give reasons for not doing so. This requirement should be inserted in s 8A of the Act. (4.4.16)

55. The Institute recommends that the option of making a compensation order should be included in the list of sentencing orders in s 7 of the *Sentencing Act 1997* (Tas) rather than as an ancillary order in Part 9. The provision should state [a court may] ‘with or without recording a conviction make a compensation order for injury, loss, destruction or damage suffered by a person as a result of the offence’. (The provisions relating to compensation orders in Part 9 will have to be relocated). (4.4.17)

56. The Institute recommends that the *Sentencing Act 1997* (Tas) be amended to provide that in determining the amount of a compensation order the court may take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.<sup>98</sup> (4.4.18 - 4.4.19)

57. The Institute recommends a review of the administrative procedures and resources associated with the making of compensation orders to enable them to be ‘adequately attended to’.<sup>99</sup> (4.4.20)

58. The Institute recommends that courts be empowered to make a compensation order in addition to imprisonment, community service order or a fine (this will require amendments to s 8 of the Act). It also recommends that courts be given the discretion to make compensation a condition of a suspended sentence, a home detention order, a community service order or a probation order. (4.4.16)

<sup>97</sup> Warner and Gawlik (2003), above n 59, 64.

<sup>98</sup> For a similar provision see *Sentencing Act 1991* (Vic) s 86(2). See also *Criminal Law (Sentencing) Act 1988* (SA) s 53(3).

<sup>99</sup> Director of Public Prosecutions, submission, 2.

59. The Institute recommends that payment of compensation orders be enforced in the same manner as fines. It therefore recommends that:

- This be clarified in (the relocated) s 69 of the *Sentencing Act 1997* (Tas) (enforcement as a judgment debt) by adding a provision that enforcing the fine in this way does not preclude action being taken under s 47 of the *Sentencing Act 1997* (Tas) for fine default;
- That the definition of ‘fine’ in s 3 of the *Monetary Penalties Enforcement Act 2005* (Tas) be amended to include ‘or the Supreme Court’ after the words ‘Magistrates Court’. (4.4.1)

## 4.5 Compensation levies

4.5.1 In Tasmania, as in other jurisdictions, convicted offenders are required to pay compensation levies which are used to help fund awards made under the Criminal Injuries Compensation Scheme. This is a scheme under which persons who suffers personal injuries as a result of criminal conduct may obtain some compensation. A person convicted or found guilty of a ‘serious offence’ must pay a compensation levy.<sup>100</sup> A ‘serious offence’ includes crimes under the Code, drug offences, some offences under the *Police Offences Act 1935* including assault, injury to property and motor vehicle stealing, dangerous and negligent driving and all drink driving offences. The levy is \$50 for convictions in the Supreme Court and \$20 for convictions in the Magistrates Court and it is payable in respect of each conviction. If the total amount of compensation levies exceeds the ‘combined limit’ (currently \$500) the court has a discretion to reduce the amount to the combined limit in circumstances of financial hardship. Compensation levies are enforced in the same manner as fines. In some jurisdictions prisoners are required to satisfy levies out of prison earnings, however in Tasmania orders are made payable on release from prison.<sup>101</sup>

4.5.2 At the time levies were introduced they were controversial. It was argued for example that it was unfair for the cost of criminal injuries compensation to be borne by delinquent drivers, most of whom bear no responsibility for criminal injuries. It has also been argued that the levies increase the burden borne by poorer offenders and may compound problems of imprisonment of offenders for fine default.<sup>102</sup> Sumner countered that the reality is that most offenders do not have the means to make restitution, and given that the state must fill the gap, it is more equitable for offenders as a class to make a contribution to victims as a class than for the cost to fall on the whole community.<sup>103</sup>

4.5.3 The Institute was asked to explore the efficacy of compensation levies. As their purpose is to help fund criminal injury compensation awards this would require data on the amount recovered from levies which goes towards criminal injuries compensation, the amount that is ordered but not recovered and the costs of recovery. Some \$200,000 is recovered from compensation levies per annum but it is not known the amount ordered but not recovered. Nor are the costs of recovering the amount paid known. This data was not available from the Fines Enforcement Unit. It is likely that levies, like fines, are frequently unpaid.

### *Responses to the Issues Paper*

4.5.4 The Issues Paper specifically sought responses to two questions relating to compensation levies:

- Are compensation levies producing hardship for offenders?

<sup>100</sup> *Victims of Crime Compensation Act 1994* (Tas).

<sup>101</sup> *Victims of Crime Compensation Act 1994* (Tas) s 7(2)(b).

<sup>102</sup> Peter Grabosky, ‘Victims’ in George Zdenkowski, Mark Richardson and Chris Ronalds (eds), *The Criminal Injustice System* (1987, vol 2) 143, 149.

<sup>103</sup> Christopher Sumner, ‘Victim Participation in the Criminal Justice System’ (1987) 20 *Australian New Zealand Journal of Criminology* 195, 214.

- Are they an economic means of helping to compensate victims?

4.5.5 The Institute received little assistance on these matters. The Legal Aid Commission of Tasmania expressed the view that they do cause hardship to offenders. Tasmania Police supported the retention of the levies as a means of assisting funding awards under the Criminal Injuries Compensation Scheme. However, the then Chief Justice made some pertinent criticisms of compensation levies. He asserted:

There is a lack of logic in the Act's approach. It always seems absurd when passing sentence on a murderer to order the payment of a \$50 levy, when the next case may be a multi-count indictment for attempting to pass valueless cheques and require the imposition of a \$50 levy on each of 20 counts.

The discretion in the Court to cap the levy at \$500 is not sufficiently flexible. There should be a range of the amount of the levy, with a wide discretion in the Court to impose a levy commensurate with the gravity of the offence and/or the degree of harm caused. The means of the offender should likewise be a factor. Perhaps a range of \$50 to \$1000 with an unfettered discretion would be most appropriate.<sup>104</sup>

### ***The Institute's views***

4.5.6 The Institute agrees that levies are a useful means of funding criminal injuries compensation. Funding for the scheme comes from Consolidated Revenue and it is reasonable that funding from offender levies reduce the burden on the innocent law abiding citizen. However, as the then Chief Justice pointed out, the Institute also agrees that it is illogical to order a murderer to pay a levy of \$50 but a fraudster to pay \$50 for each offence. The Institute also agrees with his suggestion that a cap of \$500 may not be sufficiently flexible. However, it is less convinced that the amount of the levy should be within a defined range with an unfettered discretion to be exercised having regard to the gravity of the offence, degree of harm caused and the means of the offender. The levy is not about compensation or punishment but in effect a revenue raising device which should be easily calculated. There should be no attempt to adjust it according to means, harm caused or offence severity. Instead flat rates for a sentence irrespective of the number offences should be prescribed with scales based on the most serious conviction. This could be set at \$200 for crimes against the person, \$100 for indictable property offences and summary offences against the person, and \$50 for other summary offences. While it is noted above that it is likely that many offenders do not pay compensation levies, some do and this provides a useful source of funds for criminal injuries. The Institute recommends that increasing the amount could assist in meeting the State's obligations under this scheme and that the recommended scales are more logical and fair than the current levies. South Australia has recently doubled its compensation levies to increase the revenue for criminal injuries compensation. It also imposes a levy of \$20 for expiated offences, which are administrative penalties applying to infringement notices. These amounts are quarantined and must be paid into the criminal injuries compensation fund. The Institute also recommends that a levy be imposed on infringement notices as well as on court-imposed sentences as is done in South Australia.

4.5.7 The Institute has considered the issue of time for payment. Section 7 of the *Victims of Crime Compensation Act 1994* (Tas) provides that payment of the levy is to be ordered to be paid forthwith, within a specified period or by instalments and that the order may be made so as to apply from the date of conviction or, if the offender has been sentenced to a term immediate imprisonment, from the date of release. Payment of a levy so long after the offence seems absurd in the case of a crime like murder when an offender may not be released for more than 20 years. It is recommended that there be a standard period for payment, namely 14 days from conviction or release from custody, with a discretion to the judicial officer to otherwise order.

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<sup>104</sup> The Honourable Justice Cox, Chief Justice, submission, 4.

4.5.8 The Institute is aware that victims sometimes misconstrue compensation levies and see the levy as in some way representing compensation for injury or damage suffered. It therefore recommends that the nature of the levy be explained in the Victims Support Services brochure for victims.

### Recommendations

60. To increase the amount that compensation levies contribute to the criminal injuries compensation fund that the *Victims of Crime Compensation Act 1994* (Tas) be amended to adopt a scale which increases the amount payable and better reflects the seriousness of the offence. (4.5.6)

61. That a levy be imposed on infringement notices as well as on court imposed sentences as is done in South Australia. (4.5.6)

62. That the time for payment for levies be a standard 14 days from conviction or release from prison with a discretion for the court to otherwise order. (4.5.7)

63. That the nature of the compensation levy be explained in the Victims Support Services brochure for victims to counter any misperception that the levy represents compensation for their injury or loss. (4.5.8)

## 4.6 The Victims' Register

4.6.1 The United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* was adopted by the General Assembly in 1985.<sup>105</sup> It provides that victims should be informed of the 'scope, timing and progress of the disposition of their cases, especially where serious crimes are involved and where they have requested such information'.<sup>106</sup> The Charter has been adopted by some Australian states but has not formally been adopted by the Tasmanian Parliament. However, an attempt was made to enact a Charter of Victims Rights which included the rights of victims to be advised on request of the outcome of all criminal proceedings in relation to the crime and be fully appraised of any sentence imposed and its implications. It also included the right to be notified on request of the offender's release from custody in cases where the offender has been imprisoned and the crime involved sexual assault or other personal violence.

4.6.2 Despite the absence of a statutory obligation to keep victims informed about the progress of a case, sentencing outcomes and release dates, Victims Support Services do provide such information. Victims Support Services (as the Victims Assistance Unit) commenced operation on 1 July 2001, and its first priority was the establishment of a Victims' Register to enable victims to be advised of the offenders' location, length of sentence, security classification and release dates. The plan was for the Register to be implemented in discrete stages with stage one including information on offenders currently held within the prison system. Where the Parole Board is considering the parole of an offender, and when it has decided to release an offender, amendments to the *Corrections Act 1997* (Tas) now provide a mechanism for informing the victim of this and of the right to provide a statement (see discussion below in Part 5 at 5.5.1). In early 2002, considerable controversy surrounded the imminent release from custody to parole of an offender convicted of manslaughter and rape. The mother of the victim had not been notified of this and was considerably distressed by the news. Presumably she was not notified because she had not requested notification nor been notified that she

<sup>105</sup> United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> Plen mtg, UN Doc A/Res/40/34 (1985).

<sup>106</sup> United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> Plen mtg, [6], UN Doc A/Res/40/34 (1985).

had the opportunity to request notification. There have been other incidents of victims first learning of the release of an offender by seeing them in public.

4.6.3 In the responses to the Issues Paper, Tasmania Police predicted that initial problems experienced with the Victims' Register may be resolved when its existence becomes more widely known. It endorsed the existence of the Register and stressed the importance of ensuring the notification procedures are effective.<sup>107</sup> Michael Hodgman, MHA, submitted that the Victims Assistance Unit (now Victims Support Services) should be more adequately resourced<sup>108</sup> and Don Wing, MLC, submitted that victims should be kept adequately informed about the process and outcome of proceedings and of the intention to release a prisoner in cases where a victim would suffer trauma by unexpectedly meeting in the community a recently released prisoner.<sup>109</sup>

4.6.4 The Victims Register is now well established. It is an automated database that enables registered victims to be provided information about:

- the sentence imposed by the court;
- the location of the offender at the time of registration, and any subsequent transfers;
- the offender's security classification at the time of registration, and any classification changes;
- the offender's release eligibility dates;
- the result of any leave applications;
- any parole applications by the offender;
- outcomes of parole hearings;
- if the offender escapes from custody;
- if the offender dies in custody.

4.6.5 The Director of Public Prosecutions informs Victims Support Services of the names of victims of crime and the victims are then contacted. In cases of murder, rape and serious assaults Victim Support Services seek out victims. Police prosecutors notify Victims Support Services in cases in which victims express a wish to be included on the Register. Links to information about the Victims Register and registration forms are available through the Legal Aid Commission of Tasmania and the Justice Department's Victims Support Services website.<sup>110</sup> In addition, Victims Support Services advertise the existence of the Register annually. Currently there are 469 victims entered on the Register. This is the highest per capita take up rate in Australia.<sup>111</sup> The Institute commends the creation of the Register and the take-up rate achieved by Victims Support Services. It notes that the ability of the service to inform victims of such matters as the date of release of an offender depends on victims informing Victims Support Services of any change of address.

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<sup>107</sup> Tasmania Police, submission, 7.

<sup>108</sup> Michael Hodgman, Shadow Attorney-General, submission, 4.

<sup>109</sup> Don Wing, President, Legislative Council, submission, 1.

<sup>110</sup> Legal Aid Commission, *Legal Aid Commission Web Site* (2007) <<http://www.legalaid.tas.gov.au/>> at 20 November 2007; Victims Support Services, *Victims Support Services Web Site* (2007) <<http://www.justice.tas.gov.au/victims>> at 20 November 2007.

<sup>111</sup> Debra Raabe, Manager, Victims Support Services, personal communication, 23 November 2007.

## Part 5

# Parole

- (a) Consider and comment upon the legislative requirement that judges and magistrates state the non-parole period.
- (b) Consider the length of the minimum non-parole period.
- (c) Consider and comment upon the legislative requirement that the Parole Board take into account a Victim Impact Statement (VIS) provided to it and not make a decision until a victim whose name has been entered on the Victims' Register has been given an opportunity to make a VIS.
- (d) Consider and comment upon the legislative requirement that the Parole Board publish its decisions.

## 5.1 Parole background

### *Background to the terms of reference*

5.1.1 In April 2002, following controversy surrounding the Parole Board's decision to release Gerald Wayne Hyland, a taxi driver serving a sentence for the manslaughter and rape of a young woman passenger, the Attorney-General wrote to the Law Reform Institute foreshadowing amendments to parole legislation to require the courts to specify the non-parole period when passing sentence, and to require the Parole Board to publish its decisions and to take into account any Victim Impact Statements before making a decision as to parole release. The letter invited the Law Reform Institute to extend the sentencing reference to include consideration of these changes and any other recommendations in relation to parole. The Institute accepted the extension of the terms of reference in the above terms.

### *What is parole?*

5.1.2 Parole is a system of early, supervised release. Three purposes of parole are commonly mentioned. First, and primarily, it is designed to protect the community by reducing the risk of re-offending. It can achieve this in a number of ways: by prompting prisoners to participate in rehabilitation programs; by managing reintegration into society through supervision and conditions which, if breached, can result in return to prison; and by identifying and differently managing high risk offenders. Secondly, it provides an incentive for prisoners to behave better in prison. The importance of the incentive for better inmate behaviour was enhanced in this State by the drastic curtailment of remissions from one-third of an offender's sentence to a maximum of three months in 1993. A third purpose is that parole saves money by freeing up prison places through the early release of prisoners.

## ***Models of parole***

5.1.3 There are different models of parole. Release on parole may be automatic after a non-parole period (the minimum term of imprisonment) has been served or release may be a discretionary matter determined by an administrative body such as a parole board. The non-parole period may be fixed by statute or by the court. If fixed by the court there may be a statutory minimum non-parole period. This minimum period may vary depending on the type of offence. The model adopted in Tasmania when parole was introduced in 1975 was for the statute to state the non-parole term and for parole release decisions to be made by the Parole Board. In other words, parole release in Tasmania is not automatic – it is a matter for the Parole Board.<sup>1</sup> At first, the courts had no role in relation to parole. Amendments in 1987 gave the courts the power to extend the statutory non-parole period and to order that a prisoner not be released on parole with respect to a sentence. This was the model incorporated into the *Sentencing Act 1997* (Tas) and the *Corrections Act 1997* (Tas). By virtue of amendments to the *Sentencing Act 1997* (Tas) in 2002, a failure by the court to specify a non-parole period makes an offender ineligible for parole.<sup>2</sup>

5.1.4 For prisoners other than those sentenced to life imprisonment and offenders declared to be dangerous criminals, s 68(1) of the *Corrections Act 1997* (Tas) specifies a statutory non-parole period of one-half of the sentence. An offender cannot be released on parole before the completion of one half of the sentence or six months whichever is the greater, unless in the opinion of the Board, there are exceptional circumstances.<sup>3</sup> By virtue of s 17(2) of the *Sentencing Act 1997* (Tas), a longer period may be ordered by the sentencing court or it may order that the offender is not eligible for parole. Section 17(3A) now provides that where a court does not make an order under s 17(2) specifying the non-parole period, the offender is not eligible for parole in respect of that sentence.<sup>4</sup> Judicial officers are now required by s 17(7) to give reasons if they make an order under s 17(2), that is, if they order that an offender is not eligible for parole or not eligible before the expiry of such period as is specified. Failure to state the non-parole period is by reason of s 17(3A), in effect, a denial of the possibility of parole but, if no order is made under s 17(2) and in effect parole is denied, the Act does not require reasons to be given. This suggests that the intention of s 17(7) was to require a judge to give reasons for setting a non-parole period rather than for declining to do so.<sup>5</sup>

5.1.5 Parole for federal offenders is rather different. The *Crimes Act 1914* (Cth) s 19AB(1) requires a court, which sentences an offender to a sentence longer than three years imprisonment, to set a non-parole period unless it decides that it is inappropriate to do so. Parole is granted automatically for sentences less than 10 years if a non-parole period has been set.<sup>6</sup> If the sentence is for 10 years or longer and a non-parole period has been set, release is determined by the Attorney-General.<sup>7</sup> This power to determine release has been delegated to senior officers of the Attorney-General's Department and it is assisted by advice from a Parole Panel.

## ***Reforming parole***

5.1.6 Parole has an important role in the criminal justice system but it is a controversial one. In the 1980s, the anti-parole movement was particularly strong and in some jurisdictions parole, or at least discretionary parole, was abolished. Criticisms focussed on the difficulty of predicting post release

<sup>1</sup> In some jurisdictions, parole is automatic. For example in New South Wales parole release is automatic for prisoners serving less than three years and in South Australia it is automatic where an offender is sentenced to less than five years: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Correctional Services Act 1982* (SA) s 66.

<sup>2</sup> *Sentencing Act 1997* (Tas) s 17 (3A).

<sup>3</sup> *Corrections Act 1997* (Tas) s 70.

<sup>4</sup> *Sentencing Act 1997* (Tas) s 17(3A), (6). The amendments were effective from 1 October 2002.

<sup>5</sup> See Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2002, 34-96 (Dr Peter Patmore, Attorney General).

<sup>6</sup> *Crimes Act 1914* (Cth) s 19AL(1). While s 19AL(1)(b) would seem to give the Attorney a discretion as to release date, it would seem parole is granted automatically: Australian Law Reform Commission, *Same Crime, Same Time, Sentencing Federal Offenders*, Report No 103 (2006) 23.56.

<sup>7</sup> *Crimes Act 1914* (Cth) s 19AL(2).

behaviour, the lack of evidence of any beneficial effects of supervision and the charade of fixing a sentence, which is subverted by early release. In a number of jurisdictions this last criticism was addressed by requiring courts to set or state the minimum period that the prisoner was required to serve before being eligible for release. In other jurisdictions the first criticism was addressed by abolishing discretionary parole. However, whilst recognising its imperfections, Australian reviews have tended to favour retention of parole on the ground that it does serve useful functions. Most recently the Australian Law Reform Commission has recommended that automatic parole be abolished for federal offenders and replaced with discretionary parole.<sup>8</sup> In New Zealand the Law Commission reviewed parole and has recommended retaining discretionary parole release with some changes to its structure and to eligibility.<sup>9</sup>

5.1.7 The economic benefits of parole are clear. It reduces the prison population and the costs of supervision are less than the costs of incarceration. It can be argued it offers offenders an incentive to rehabilitate. Even if participation in prison programs is not entirely genuine but is motivated by a desire to impress the parole board, prisoners may gain something from it. Whether it works in terms of reducing reconviction rates has sometimes been doubted. The New Zealand Law Commission's review of the evidence concludes that there is 'some, albeit slender and equivocal evidence that parole may have a beneficial effect upon recidivism'.<sup>10</sup> It referred to Stephen Shute's review of the UK evidence spanning several decades,<sup>11</sup> which revealed a clear trend that parolees are, on average, less likely to be reconvicted than non-parolees, at least in the short term. The reason for this is less clear. It could be due to selection effects or the benefits of supervision. Shute concludes:

After thirty-five years of research, can it now be said with confidence that parole either does or does not have a beneficial effect on recidivism? Sadly, at least as far as England and Wales are concerned, the answer is no.<sup>12</sup>

5.1.8 From reviews of the North American research, the New Zealand Law Commission draws a similar conclusion:

In Joan Petersilia's discussion of comparable Canadian and American literature, the positive correlation between parole and lower (or later) recidivism is clear; the reasons again remain largely a matter for speculation.<sup>13</sup>

5.1.9 A more recent large US study of 38,624 prisoners released from 15 states examining the effect on re-arrest rates of parole supervision found discretionary parolees were less likely to be arrested but mandatory parolees fared no better than prisoners released without supervision and in some cases fared worse.<sup>14</sup> It was suggested that differences could well be due to the factors other than supervision, but not that supervision has no effect on recidivism. Rather it was suggested that certain prisoners benefit more from supervision following screening by a parole board than others. A New Zealand study by Mark Brown cited by the Law Commission compared inmates released on parole with inmates released automatically to supervision and found parole appeared to postpone reconviction and re-imprisonment but did not terminate it.<sup>15</sup>

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<sup>8</sup> ALRC, above n 6, 586-589.

<sup>9</sup> New Zealand Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006).

<sup>10</sup> *Ibid*, 54.

<sup>11</sup> *Ibid*; Stephen Shute, 'Does Parole Work? The Empirical Evidence from England and Wales' (2004) 2 *Ohio State Journal of Criminal Law* 315.

<sup>12</sup> *Ibid*, 321.

<sup>13</sup> New Zealand Law Commission (2006), above n 9, 55.

<sup>14</sup> Amy Solomon, Vera Kachnowski and Avi Bhati, *Does Parole Work? Analysing the Impact of Postprison Supervision on Rearrest Outcomes* (2005).

<sup>15</sup> *Ibid*, 56.

## ***Responses to the Issues Paper***

5.1.10 The Issues Paper did not canvass the possibility of abolishing parole but asked for suggestions for change in relation to its legislative framework. A number of respondents expressed support for discretionary parole.<sup>16</sup> The former Chief Justice, Justice Cox, said ‘[f]ew would argue that parole is not a worthwhile system’.<sup>17</sup> Justice Underwood, as he was then, said, ‘I believe that early release on parole is a useful tool and should be retained. It helps maintain discipline in the prison and it helps integrate prisoners back into society’.<sup>18</sup>

### ***The Institute’s view***

5.1.11 The Institute agrees with the New Zealand Law Commission that although it cannot confidently be claimed that parole prevents recidivism, we should not be hasty about abolishing a system when the evidence is marginally positive.<sup>19</sup> It is appropriate that public protection and risk factors play a part in determining whether an offender can be released before the end of a sentence and it is realistic to make such a decision at a time closer to release rather than at the time of sentence. The Institute considers a model which provides for a statutory minimum non-parole period with a judicial discretion to increase the non-parole period or refuse parole is appropriate. Rather than automatic release, it supports a model that allows for parole release decisions to be made by a parole board. Discretionary parole provides an incentive to address offending behaviour by participating in rehabilitation programs, it assists with managing offenders in custody by providing an incentive for good behaviour and encourages offenders to develop post-release plans. The Tasmanian model provides an appropriate balance between judicial input into the parole eligibility date based on the gravity of the offence and culpability of the offender and the offender’s antecedents,<sup>20</sup> and discretionary release by a Board which offers the flexibility of identifying and differentially managing high risk offenders at the time of release.<sup>21</sup>

### **Recommendation**

64. The Institute supports the current parole model in which parliament sets the minimum non-parole period, the court determines the parole eligibility date and the Parole Board determines the date of release for parole eligible offenders. (5.1.11)

## **5.2 Stating the non-parole period as part of the sentence**

5.2.1 Prior to the 2002 amendments it was quite rare for courts either to make an order that the offender not be eligible for parole or to extend the statutory non-parole period. The accepted view was that the *prima facie* position is that a person is eligible for parole at the end of half of the sentence. As Green CJ stated:

In my view the scheme of the *Parole Act* justifies the conclusion that *prima facie* a person who has been sentenced to a term of imprisonment is eligible for parole at the expiration of the period fixed by the Act and that the power to limit his eligibility for parole conferred by

<sup>16</sup> The Criminal Law Subcommittee of the Law Society, submission, 5; Kay Fisher, then Parole Board Member, submission, 2; Michael Hodgman, Shadow Attorney-General, submission, 5. Many others made submissions in relation to parole which implied support for its preservation.

<sup>17</sup> The Honourable Justice Cox, Chief Justice, submission, 5.

<sup>18</sup> The Honourable Justice Underwood, submission, 2.

<sup>19</sup> New Zealand Law Commission, above n 9, 56.

<sup>20</sup> As required by the *Sentencing Act 1997* (Tas) s 17(4).

<sup>21</sup> The *Corrections Act 1997* (Tas) s 72(4) requires the Board to take into account a number of factors, the first two are the likelihood of re-offending and the protection of the public.

s 12B should only be exercised when the judge imposing sentence is affirmatively satisfied that there exists sufficient reason why the accused should be deprived of his right to have the Parole Board consider his release on parole. I do not understand counsel for the applicant or the respondent to be arguing to the contrary of the substance of those propositions.

The provisions of s 12B(1)(a), (b) and (c) of the *Parole Act 1975* do not on their face limit the factors to which a judge may have regard when he is exercising the discretion conferred by that section but in my view nothing in the Act would suggest that Parliament was intending that a judge should take into account considerations which are not relevant to what are generally accepted as the principles and purposes of sentencing. In my view therefore in exercising his discretion under s 12B a judge should have regard to the factors specified in s 12B(1)(a), (b) and (c) read in the light of the established principles and objectives of sentencing.<sup>22</sup>

5.2.2 Section 12B(1) of the *Parole Act 1975* (Tas) was in substance re-enacted in s 17 of the *Sentencing Act 1997* (Tas) and the approach that *prima facie* a person should be eligible for parole at the half way point of the sentence continued.

### ***The impact of the requirement to state the non-parole period***

5.2.3 It is clear that the primary purpose of requiring the judge to state a non-parole period was to address the criticism that parole makes the court's announced sentence a charade. Because of the impact of parole release on sentence length, the time served by a prisoner may bear little relationship to the sentence imposed by the court. A consequent lack of transparency about what a sentence actually means tends to undermine public confidence in the criminal justice system. 'Truth in sentencing' requires courts to state what a sentence really means. In his second reading speech, the then Attorney-General asserted:

With these amendments, it will be the sentencing court which determines in an open, public and accountable way, the actual time a person must spend in prison prior to being eligible for parole. The situation will contrast with the process currently followed where it is left to the Parole Board to decide, in many cases where years have elapsed since the crime was committed. This will ensure that there will be no doubt in the public's mind about the actual time that must be spent in prison before a prisoner may be considered for release on parole.<sup>23</sup>

5.2.4 Requiring courts to articulate the parole component of a sentence satisfies the demand for truth in sentencing. It is a worthwhile reform which addresses the desirable criterion that sentencing be a transparent process. The Attorney-General's second reading speech does not clearly indicate if the amendments to s 17 were intended to do more than to make the sentencing process transparent in order to increase community faith in the system.<sup>24</sup> His words could be interpreted as indicating a greater role for offence seriousness and culpability in determining parole release as these matters are likely to be more vivid at the time of sentence than the time of eligibility for release. Prompting courts to consider the non-parole period in each case suggests that a greater role for the courts was envisaged in determining parole eligibility. Furthermore, the fact that the default position of a failure to specify a non-parole period changed from release after the half way point to no parole eligibility suggests that the *prima facie* position was no longer eligibility at the expiration of the minimum statutory period. However, the Attorney-General acknowledged that it was unclear whether the amendments would lead

<sup>22</sup> Gill Serial No 34/1990 1-2, 7-8 (Crawford J); Adams Serial No 41/1998 (Crawford J).

<sup>23</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2002, 34-96 (Dr Peter Patmore, Attorney General), where he said where the court does exercise its power to state a non-parole period it must give reasons.

<sup>24</sup> Ibid.

to a change in practice when he said, ‘[t]he interesting point that we do not know at the moment is how judges will respond with their non-parole periods.’<sup>25</sup>

5.2.5 The post-amendment approach to the non-parole periods was adverted to in *Balmer v The Queen* where the Court of Criminal Appeal made it clear that the *prima facie* position that a person is eligible for parole after six months or half of the sentence no longer applies:

The question is not, as counsel for the appellant’s submission suggests, was there anything in the material before the learned sentencing judge that required deviation from an order making the appellant eligible to apply for parole after the service of one-half of the sentence? The question is, on the material before the learned sentencing judge, was it appropriate to order that the appellant be eligible to apply for parole, and if so, should he be eligible to do so.<sup>26</sup>

5.2.6 Rohan Foon’s study of the impact of the 2002 parole amendments on judges’ sentencing practice confirms that judges responded by extending the non parole period beyond the minimum period much more often than they had done prior to the amendments.<sup>27</sup>

**Table 11: Non-parole periods for offenders sentenced to over 9 months imprisonment**

	pre- amendment period 1/10/00 to 30/9/02		post amendment period 1 1/10/02 to 30/09/04		post amendment period 2 1/10/04 to 30/09/06	
	No	%	No	%	No	%
min non-parole period	185	89	86	37	61	30
extended non-parole period	19	9	100	43	96	47
no parole eligibility	4	2	48	21	49	24
Total	208	100	234	100	206	100

5.2.7 Table 11 shows that before the 2002 amendments 89 per cent of sentenced offenders were eligible parole release after the minimum statutory non-parole period. This had reduced to 37 per cent in the two year period after the amendment and to 30 per cent in the next two year period. In other words, prior to the amendments only nine per cent of offenders had their statutory non-parole period extended by the sentencing judge whereas since the amendments it has been more usual to extend the non-parole period than not to. It also shows that it was rare for an offender to be denied a parole eligibility date before the 2002 amendments. Now it is much more common with 21 per cent and 24 per cent of sentences over nine months in the two periods after the amendment having no parole eligibility date.

5.2.8 Foon also found that the average operative sentence (the period of a sentence that is not suspended) remained almost the same for the two periods (see Fig 23),<sup>28</sup> but the average non-parole period increased (see Fig 24). He found average non-parole periods as a percentage of the operative sentence increased for all crime types after the amendments. These findings were confirmed by analysis of data for the next two years.

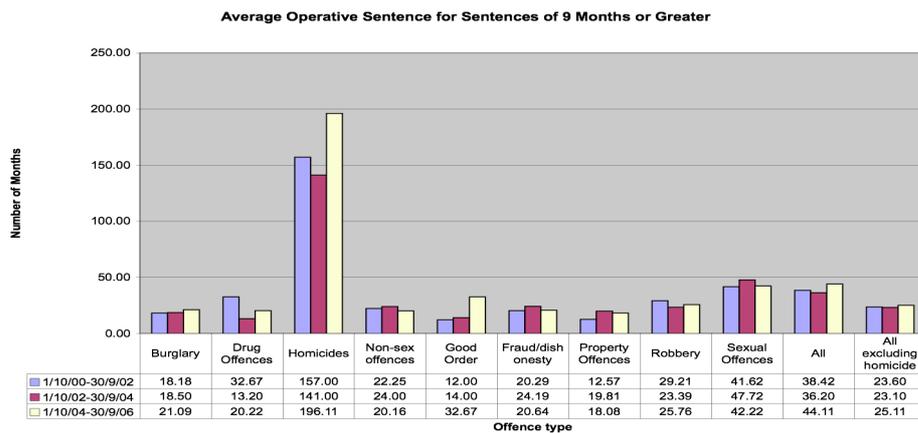
<sup>25</sup> Ibid, in Committee.

<sup>26</sup> [2006] TASSC 97, [22] (Evans and Tennant J); See also *Duggan v The Queen* [2007] TASSC 23, [79] (Tennant J).

<sup>27</sup> Rohan Foon, *Truth in Sentencing and the Sentencing Amendment Act 2002 (Tas): Its Impact and Effect on the Determination of Non-Parole Periods in Tasmania* (Supervised Research Elective, University of Tasmania, 2004). The data have been updated for this report.

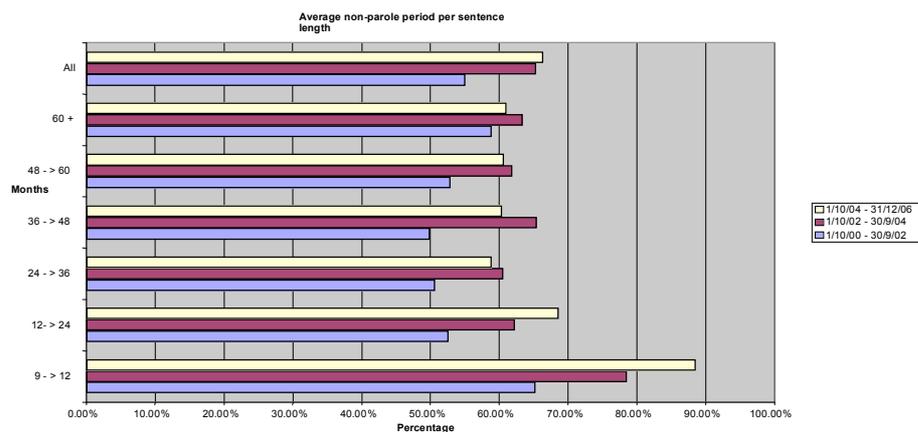
<sup>28</sup> Excluding homicide where the base rate is low and so the average fluctuates.

**Fig 23: Average operative sentence for sentences of 9 months and more**



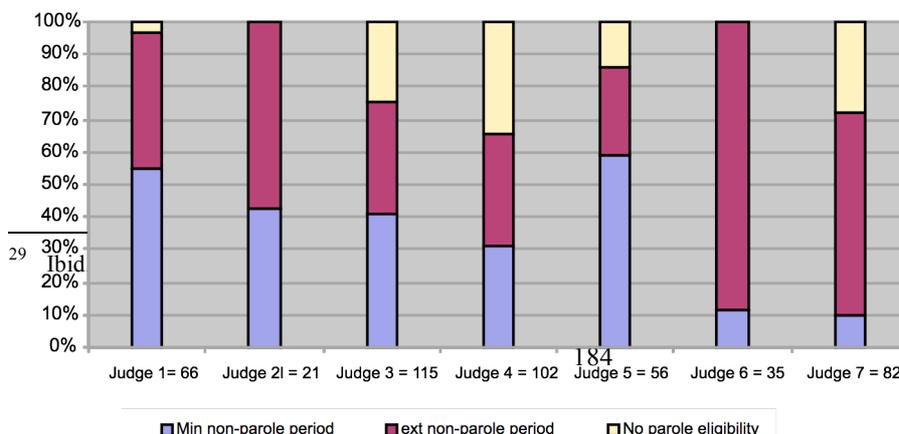
5.2.9 Increases in the average non-parole period as a percentage of operative sentences were found to be particularly evident in the case of lower range sentences (see Fig 24). As Foon suggested, this demonstrates that courts are more inclined to deny parole in cases where the benefits of parole are restricted by the shortness of the parole period. The amendments have had less effect in cases of lengthy sentences where judges were more likely to turn their minds to setting a non-parole period in order to give effect to the gravity of the offence.<sup>29</sup>

**Fig 24: Average non-parole periods by sentence length**



5.2.10 Foon found that in the period before the amendments, judges were consistent in setting non-parole periods. Average non-parole periods ranged from 54 per cent to 57 per cent of the operative sentence and the minimum non-parole period was set in 85 to 97 per cent of cases. Sentencing data since the amendments have been analysed to see if the trend to extend non-parole periods has been consistent between the judges.

**Table 12: Non-parole period as a percentage of operative sentence by judge, 2002-2006**



<sup>29</sup> Ibid

5.2.11 This table demonstrates considerable differences between the judges with Judge 7 imposing the minimum period in just 10 per cent of cases compared with Judge 1 who imposed the minimum in 55 per cent of cases. Some judges did not ever deny parole in this period (Judges 2 and 6) but Judge 4 denied parole in 34 per cent of cases and Judge 7 did so in 28 per cent of cases.

5.2.12 To sum up, as well as addressing the issue of truth in sentencing by requiring a sentence to say what it means, it is clear that the 2002 amendments requiring a judge to state the non-parole period if an offender was eligible for parole release have had an impact on the *prima facie* position of parole eligibility after serving the minimum statutory non-parole period. The presumption in favour of a non-parole period of half the sentence has gone and non-parole periods have increased as a percentage of the operative sentence. Whether this has had an impact on time served is unknown, but in theory at least, it could have led to increases.

### ***Responses to the Issues Paper***

5.2.13 The Issues Paper supported the requirement for judges to state any parole eligibility date in court on the grounds that stating only the nominal sentence in open court does nothing to inform the victim, the offender and the general public about what the sentence means in practice. However, it questioned whether it was appropriate to reverse the *prima facie* presumption that a person should be eligible for parole after serving half of the sentence or six months – whichever is the longer.

5.2.14 Few respondents addressed the 2002 amendments. However, Underwood J (as he then was) commented:

So far as I am aware, the position with respect to non-parole periods prior to the very recent changes to the *Sentencing Act 1997* s 17, worked perfectly well. I understand that the legislative change was the result of widespread and ill-informed public opinion concerning the release on parole of a prisoner who as convicted of manslaughter, not murder of a young woman.<sup>30</sup>

5.2.15 The Honourable Don Wing MLC was concerned that the amendments could result in the situation of a judge forgetting to specify a non-parole period even though he or she had no intention of requiring the offender to serve the full term of the sentence. He favoured the pre-amendment position of eligibility at the half way point if the judge made no order.<sup>31</sup> The then Chief Justice, Justice Cox, had a similar concern and did not consider the 2002 amendments appropriately addressed the situation of courts giving adequate consideration to the possibility of extending a non-parole period, noting that a judge's failure to make an order and a failure to advert to that fact, would be likely to result in appellate review. His solution to a repetition of the *Hyland* situation<sup>32</sup> was to introduce a sliding scale of parole eligibility based on length of sentence.<sup>33</sup> Tasmania Police agreed with the requirement for a judge to state the non-parole period of a sentence but was of the view that if the judge made no special order the period should be 75 per cent of the sentence rather than no eligibility.<sup>34</sup>

<sup>30</sup> The Honourable Justice Underwood, submission, 2.

<sup>31</sup> Don Wing, President of the Legislative Council, submission, 2.

<sup>32</sup> *Hyland* was a taxi driver convicted of rape and manslaughter of his passenger. He unsuccessfully appealed a sentence of 16 years (*Hyland* Serial No A82/1996). No non-parole period was specified by the trial judge and his release on parole attracted much media attention: see above para 5.1.1. In his submission, the Chief Justice said he suspected insufficient consideration was given to the possibility of extending the parole period: The Honourable Justice Cox, Chief Justice, submission, 5.

<sup>33</sup> The Honourable Justice Cox, Chief Justice, submission, 5.

<sup>34</sup> Tasmania Police, submission, 10.

### *The Institute's view*

5.2.16 The Institute supports the requirement for a judge or magistrate to stipulate the non-parole period at the time of sentence on the grounds that a failure to do so confuses the public and the victim about what the sentence means in practice and attracts criticism which can be avoided by a more transparent approach. On the face of it, an inadvertent failure to address the issue of a parole eligibility date could lead to difficulties. However, the Institute has no evidence that this has proved to be a problem.<sup>35</sup> In any event, Crown counsel could draw a judge's attention to the matter or the matter could be corrected by an application to correct the sentence under s 94 of the *Sentencing Act 1997*.

5.2.17 It is now accepted that the amendments to s 17 of the *Sentencing Act 1997* (Tas) have altered the *prima facie* position that a person is eligible to apply for parole after the minimum statutory period unless there is reason to deprive the offender of this right. The Institute has no particular difficulty with this in theory. However, there are a number of concerns with s 17. First, it has led to disparity between the judges in its application. It does not necessarily follow that it has led to inconsistent outcomes between offenders because release is determined by the Board in all cases except those where no non-parole period is set. The Institute is concerned that transparency has come at the cost of inconsistency between judges in the way in which they approach fixing the non-parole period. A possible solution is to re-instate the *prima facie* right of a prisoner to apply for parole after half the sentence has been served by inserting in s 17 a provision to the effect that the court shall state a period that is one-half of the period of the sentence unless it is satisfied that the circumstances it is required to consider in s 17(4) require an extension of that period or a no non-parole period to be set.

5.2.18 Secondly, s 17 is rather clumsily drafted and this is highlighted when the requirement of reasons in 17(7) is considered. It seems incongruous to require reasons when a judge orders that an offender is not eligible for parole but not to require reasons when parole is denied because no non-parole period is set. It would appear from the Attorney-General's second reading speech that the intention could have been to require reasons when offenders were given a non-parole period. Examination of all 2006 prison sentences of more than nine months revealed that reasons for setting a parole period or refusing parole were usually stated clearly. In other cases, no clear reasons were given but they could possibly be inferred from sentencing remarks. And there were cases where parole was not mentioned although these were usually operative sentences of fewer than 15 months. That there is some confusion in relation to the need to give reasons is not surprising.<sup>36</sup> While there is no statutory obligation to give reasons for refusing to fix a parole period where parole is not mentioned, the Institute is of the view that reasons should be given where sentences exceed 12 months. The Board does not consider it necessary to require reasons for denying parole for shorter sentences. In the case of a sentence of nine months, for example, an offender would normally be released unconditionally after six months because of remissions, so it is only for sentences in excess of nine months that parole is relevant in practice. It is barely relevant for sentences of up to 12 months because although an offender with a 12 month sentence may be released after six months on parole, they will be released conditionally and the supervision period is likely to extend beyond their earliest unconditional release date.<sup>37</sup> It is therefore recommended that s 17(7) be amended so that it requires reasons to be given for specifying a non-parole period and for denying parole for all sentences of imprisonment in excess of 12 months. The Institute also questions the need for there to be two ways of denying parole, namely stating that the offender is not eligible for parole and by not commenting on parole. A more transparent approach is for the judge to be required to make an order under s 17(2) if the offender is

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<sup>35</sup> A search of our Supreme Court sentencing database revealed that there were 20 cases of sentences in excess of nine months in which parole was not mentioned but most of these were sentences of 12 months or less with just six longer sentences where parole was not mentioned and therefore the offender was ineligible.

<sup>36</sup> In *Wisniewski v The Queen* [2007] TASSC 25 an appeal against sentence was allowed on the grounds that stating a non-parole period of three years in the sentence of four years made the sentencing manifestly excessive. Justice Slicer at [38] also stated that the failure of the sentencing judge to provide reasons provided a basis for upholding the appeal.

<sup>37</sup> See *Corrections Act 1997* s 75 which allows the parole period to extend beyond the full term of the sentence.

not to be eligible for parole. The Institute therefore recommends that s 17(2) be amended to provide that a court *must* make an order under para (a) or (b).

### Recommendations

65. In the light of the inconsistencies that have emerged between judges in sentencing practices relating to the extension of non-parole periods and the denial of parole eligibility, the Institute recommends that s 17 be amended to include a requirement that the court state a period that is equal to the statutory non-parole period unless it is satisfied having regard to the circumstances that it is required to consider in s 17(4) that an extension of that period is necessary or parole should be denied. (5.2.17)

66. It is recommended that s 17(7) be amended so that when a sentence of more than 12 months imprisonment is imposed and an order is made under s 17(2)(a) that an offender is not eligible for parole or an order is made under s 17(2)(b) setting a non-parole period, reasons for such an order are given. (5.2.18)

67. It is recommended that a court be required to state that an offender is not eligible for parole when parole eligibility is denied by requiring a court to make an order under s 17(2)(a) or (b). (5.2.18)

## 5.3 What should the minimum non-parole period be?

### *Non-parole periods elsewhere in Australia*

5.3.1 When parole was first introduced in Tasmania by the *Parole Act 1975*, the statutory non-parole period was one-third of the sentence or six months, whichever was the greater. This was later extended to one-half of the sentence. Just as models of parole vary between jurisdictions, so do minimum non-parole periods. In some jurisdictions there are variable minimum non-parole periods depending on sentence length. For example in Western Australia, the minimum non-parole period is one half of the sentence for sentences up to four years, and for sentences in excess of four years a prisoner is eligible for parole when two years of the prison term remains to be served.<sup>38</sup> In a number of jurisdictions the variability of the minimum non-parole period depends on the type of the offence. In Queensland, prisoners serving a term of imprisonment for a ‘serious violent offence’ are not eligible for release on parole until the prisoner has served 80 per cent of the term of imprisonment but other prisoners are eligible after half of the term of imprisonment.<sup>39</sup> In South Australia a ‘serious offence against the person’ attracts a minimum non-parole period of four fifths of the sentence unless there are special circumstances.<sup>40</sup> In the case of other offences the court has a discretion to fix a non-parole period of any length.<sup>41</sup> In the Northern Territory, courts are required to specify a minimum non-parole period for offenders sentenced for 12 months or longer of not less than 50 per cent of the sentence but for certain sexual offences and offences against persons under 16 years of age the minimum period is 70 per cent.<sup>42</sup> In New South Wales, the balance of the term required to be served must not exceed one third of the non-parole period, ‘unless the court decides there are special circumstances for it being more’.<sup>43</sup> Release is automatic for sentences of three years or less.<sup>44</sup> New South Wales has also

<sup>38</sup> *Sentencing Act 1993* (WA) s 93; *Sentencing Administration Act 2003* (WA) Part 3 s 22 (sentences less than 12 months).

<sup>39</sup> *Corrective Services Act 2006* (Qld) ss 182(2), 184(2).

<sup>40</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ba).

<sup>41</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 32 (There isn’t a section saying there is any general minimum non-parole period – this section states that the court must set one and makes note of a couple of limits to it (like for murder and serious offenders).

<sup>42</sup> *Sentencing Act 1995* (NT) ss 53-55A.

<sup>43</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44 and 46.

introduced legislative standard non-parole periods which are fixed by statute for some offences to further structure and guide judicial discretion.<sup>45</sup> Victoria has a different model. There is no statutory minimum proportion of the sentence that must be served and the relationship between the sentence and the non-parole period is governed by case law. This does not specify a ratio between the head sentence and the non-parole period. Two thirds of the head sentence is common but does not provide a fixed standard.<sup>46</sup> A glance at sentencing data for Victoria suggests that non-parole periods tend to be upwards of one-half of the sentence, averaging around 60 per cent.<sup>47</sup>

### *International examples*

5.3.2 In the United Kingdom, the *Criminal Justice Act 2003* introduced radical changes to early release. The work of the Parole Board is now limited to dealing with offenders serving 'dangerousness' sentences (sexual and violent offenders who have been assessed as dangerous) where release is determined by assessments of risk.<sup>48</sup> All other prisoners serving determinate sentences of 12 months or longer are automatically released after serving half of the sentence on licence. Courts have the power to recommend licence conditions but the precise terms of the licence are set by the Home Office on the advice of the Prison Governor and from the National Offender Management Service.<sup>49</sup> Under New Zealand's *Parole Act 2002* most offenders serving sentences of two years or more were eligible for parole after serving one-third of their term. The only exceptions were offenders convicted of murder with aggravated circumstances and dangerous offenders subjected to an indeterminate sentence.<sup>50</sup> However, the New Zealand Law Commission recommended increasing the proportion of time served before being eligible for parole.<sup>51</sup> This has been implemented and for long term sentences the statutory non-parole period is now 12 months or two thirds of the sentence whichever is the longer and for short term sentences it is two thirds.<sup>52</sup>

5.3.3 In Canada, for offenders sentenced to sentences of two years or more the statutory non-parole period is one-third of the sentence, although a judge may increase the non-parole period from one-third to one-half for offenders convicted of sexual offences, offences of violence and drug offences.<sup>53</sup> Offenders sentenced to less than two years imprisonment are subject to the jurisdiction of the province. In Ontario, for example, an offender sentenced to less than two years may be released after one-third of the sentence.<sup>54</sup>

### *Should the statutory non-parole period be extended in Tasmania?*

5.3.4 Before the government's 2002 amendments to the *Sentencing Act 1997* (Tas) were debated, the Opposition introduced a private members Bill to increase the non-parole period to two-thirds of the sentence. This was opposed by the Government and defeated, as was an amendment to the government's Sentencing Amendment Bill. However, it remained Liberal Party policy for the July 2002 election but appears now to have been abandoned. At the time, the Opposition supported the

<sup>44</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

<sup>45</sup> Considered below at para 5.3.12

<sup>46</sup> *Demarco* [1999] VSCA 69.

<sup>47</sup> Victorian Sentencing Advisory Council, *Sentencing Snapshots* (2007) <<http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/Home/Sentencing+Statistics/Sentencing+Snapshots/>> at 7 December 2007.

<sup>48</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed 2005), 282.

<sup>49</sup> *Ibid.*

<sup>50</sup> Geoff Hall, *The Sentencing Act 2002 – New Bottle, Same Wine?* (2002) Law Talk <<http://www.nz-lawsoc.org.nz/lawtalk/583hall.htm>> at 5 December 2007.

<sup>51</sup> Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 11.

<sup>52</sup> *Sentencing Amendment Act 2007* (NZ).

<sup>53</sup> *Corrections and Conditional Release Act*, RSC 1992 c20, s 120.

<sup>54</sup> Ontario Parole and Earned Release Board, *Parole Eligibility* (2004) <[http://www.operb.gov.on.ca/english/parole\\_elig.htm](http://www.operb.gov.on.ca/english/parole_elig.htm)> at 7 December 2007.

increase of the non-parole period on the grounds that this was what the community wanted as evidenced by the ‘very strong community concern about soft treatment of criminals and then their release when they have only served half of their sentence.’<sup>55</sup> In contrast, the Greens strongly opposed any extension of the non-parole period and vigorously defended the parole system.<sup>56</sup>

5.3.5 In the Issues Paper it was pointed out that arguments in favour of extending the non-parole period – the need to address community concern that sentencing is too soft and that serving only half of the sentence will undermine deterrence and be inadequate denunciation – can be answered by the discussion in Part 2. In other words, the available evidence suggests that increasing the severity of sentences will not alter the widespread view that sentences are too lenient, and that increasing sentence length is not an effective strategy to reduce crime. The issue of public concern with lenient sentences is discussed further in Part 7.

### ***Responses to the Issues Paper***

5.3.6 A number of responses to the Issues Paper supported increasing the statutory non-parole period. Increasing it to 75 per cent of the sentence was supported by three respondents.<sup>57</sup> The Police Association of Tasmania (PAT) submitted:

With regard to parole, PAT has a policy whereby it believes the sentence of the court should substantially prevail with the scope for early release limited to 25% of the sentence, including time for remission. Our view is based on the desire for punishment to reflect the seriousness of the crime and the fact this is best assessed at the time by the court.<sup>58</sup>

5.3.7 On behalf of the Liberal Party, Michael Hodgman argued in support of extending the non-parole period, although it should be noted that the Liberal Party has since abandoned this policy.<sup>59</sup>

5.3.8 The Legal Aid Commission of Tasmania supported increasing the non-parole period to two thirds of the sentence.<sup>60</sup> Kay Fisher supported the current 50 per cent non-parole period as the general rule but suggested that it be increased to 75 per cent for sentences of more than four years on the grounds ‘it would perhaps be more palatable from a victim perspective’ and ‘as a Parole Board member it is challenging to grant such a long period of parole for such a serious crime’.<sup>61</sup> The then Chief Justice suggested a sliding scale:

If Parliament wishes to take the initiative in preventing a repetition of the Hyland situation, some consideration could be given to a sliding scale or parole eligibility, eg a minimum of 50 per cent for sentences not exceeding 5 years, up to 75 per cent minimum for those of or exceeding 20 years. In that way the element of ‘nature and circumstances of the offence’ could be more readily factored into the sentencing process.<sup>62</sup>

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<sup>55</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 22 May 2002, 50-111 (Mr Hodgman, Shadow Attorney-General).

<sup>56</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2002, 34-96 (Ms Pegg Putt).

<sup>57</sup> Submissions of Warwick Dunstan, the Police Association of Tasmania and Michael Hodgman (MHA, Shadow Attorney-General).

<sup>58</sup> Police Association of Tasmania, submission, 5.

<sup>59</sup> The Hon Michael Hodgman, personal communication, December 2007.

<sup>60</sup> Legal Aid Commission of Tasmania, submission, 13.

<sup>61</sup> Kay Fisher, member of the Parole Board, submission, 2.

<sup>62</sup> The Honourable Justice Cox, Chief Justice, submission, 5.

5.3.9 However, a number of other submissions, including that of Justice Underwood, as he then was, supported parole without suggesting an increase in the statutory non-parole period.<sup>63</sup> The Honourable Don Wing MLC, expressly supported retaining the 50 per cent non-parole period.<sup>64</sup>

### *The Institute's views*

5.3.10 The Institute acknowledges that there is some support for increasing the statutory non-parole period from 50 per cent of the sentence and that a number of other jurisdictions have done so or have introduced variable proportions depending on offence type or sentence length. The grounds for doing so are that to allow a prisoner to be released after just half the sentence has been served makes a mockery of the sentence pronounced in court, undermines denunciation and deterrence and reinforces the public perception that the system is too lenient towards criminals. In the Institute's view the anger and frustration of victims and others who believe that sentences do not mean what they say is addressed by the judge pronouncing both the head sentence and the non-parole period when a sentence is imposed thereby making it clear that the offender will be eligible for release on parole after serving the non-parole period. It still could be argued that a statutory non-parole period of 50 per cent of the sentence gives insufficient recognition to the nature and gravity of the offence in determining the time in prison an offender must serve. However, such a position fails to acknowledge that prisoners released on parole are not released unconditionally. They remain under a prison sentence<sup>65</sup> and if parole is revoked they are normally required to serve the remainder of the sentence which was unserved at the time of release with no credit for 'clean street time'.<sup>66</sup> This is not always the case in jurisdictions that have a longer statutory minimum non-parole period.

5.3.11 The Institute's view is that requiring a judge to address the non-parole period in every case (because a failure to do so will deny the offender eligibility for parole release) sufficiently addresses concerns that a statutory non-parole period of one half of the sentence fails to recognise the gravity of offence. If the judge is of the view that the nature and circumstances of the offence warrant increasing the non-parole period, this can be done. The Institute considers a judge's discretion should not be constrained by increasing a minimum period which in any event is an arbitrary proportion of the sentence. Extensions of the non-parole period for long sentences or for certain kinds of offences are objectionable for the same reason, namely justice is better served by leaving the matter to the discretion of the judge. There will be cases where offenders who are sentenced to long sentences, even offenders who are convicted of violent offences can be appropriately released into the community at the half way point. They will still be 'under sentence',<sup>67</sup> subject to constraints on their freedom and supervision and parole conditions may assist in their rehabilitation and reintegration back into the community.

5.3.12 The Institute notes that some jurisdictions, such as Victoria, have managed perfectly well without any minimum statutory non-parole period at all. It also notes that generally, where statutory non-parole periods have been increased, this has not been done with the aim of increasing the *length* of prison sentences. The primary aim has been to promote truth in sentencing by ensuring that prisoners spend a greater *proportion* of the pronounced sentence in prison. This has meant that adjustments have to be made to sentences imposed to decrease their length. In New Zealand, where the Law Commission has recommended increasing the statutory non-parole period from one-third to two-thirds, it was also recommended that sentences be reduced by around 25 per cent and that this be achieved by sentencing guidelines drafted by a Sentencing Council. Clearly, increasing the statutory non-parole period is a complex matter. For reasons outlined in Part 2, increasing the sentence length of

<sup>63</sup> The Honourable Justice Underwood, submission, 2; the Criminal Law Subcommittee of the Law Society expressed support for parole and stating the non-parole period at sentence but made no mention of a need to increase the non-parole period.

<sup>64</sup> Mr Don Wing, MLC, President, Legislative Council, submission, 2.

<sup>65</sup> *Corrections Act 1997* (Tas) s 78(1).

<sup>66</sup> *Corrections Act 1997* (Tas) ss 76, 79(5).

<sup>67</sup> *Corrections Act 1997* (Tas) s 79(5)(a).

prison sentences is not supported by the Institute. Increasing the statutory non-parole period should not be done without adjusting sentences downwards. In any event, the Institute does not see any need to increase the statutory non-parole period. Nor does the Institute favour the introduction of the New South Wales initiative of standard non-parole periods (see 5.3.1), an issue considered further in Part 6.

### **Recommendation**

68. The Institute does not recommend increasing the statutory non-parole period in the *Corrections Act 1997* (Tas) s 68(1) and the *Sentencing Act 1997* (Tas) s 17(3) beyond half of the period of the operative sentence.<sup>68</sup> (5.3.10 – 5.3.12)

## **5.4 Victim statements**

5.4.1 Amendments to the *Corrections Act 1997* (Tas) s 72, provide a mechanism for informing victims of an offence that the release of the offender is to be considered by the Board and that they may provide a written statement to the Board. Victims whose names appear on the Victims Register managed by the Victims Support Services (see para 4.6.2) are invited to provide a victim statement. Section 72(4)(ka) requires any victim statement provided to the Board to be considered along with the other listed matters (the likelihood of the prisoner re-offending, the protection of the public, the rehabilitation of the prisoner, the likelihood of the prisoner complying with the conditions, the circumstances and gravity of the offence or offences etc).

5.4.2 A victim statement is defined as a,

written statement that –

- (i) gives particulars of any injury, loss or damage suffered by the victim as a direct result of the offence; and
- (ii) describes the effects on the victim of the commission of the offence.<sup>69</sup>

5.4.3 This definition is almost identical to the description of a victim impact statement (VIS) in the *Sentencing Act 1997* (Tas) s 81A(2A) referring to the statements which may be provided by victims to the court prior to sentence under the *Sentencing Act 1997* (Tas), s 81A.

5.4.4 The Issues Paper suggested that the provision of a VIS to the Parole Board in the terms of s 72B is inappropriate and incompatible with the basis of parole decisions and the purposes of parole. Parole is not a re-sentencing exercise. It is not up to the Board to determine if the prisoner has been punished adequately for the offence. The quantum of punishment is a matter for the courts. The function of the Parole Board is to determine if it is in the public interest to release the offender on parole. This is a matter of determining the risk of re-offending and of deciding whether parole will assist in preventing the offender from committing further offences. The nature and seriousness of the offence are relevant to this and it follows that it is appropriate for the Board to consider the sentencing remarks and other information in relation to the offence. Victim impact should only be relevant in so far as offence seriousness bears on the risk of re-offending. However, a victim's statement may be relevant to the Board to inform it of the victim's feelings about the release of the offender. It may be that the victim has real fears in relation to the offender's release. It is possible that the victim has been harassed by the prisoner or received threats. These and other matters related to the risk of re-offending are relevant matters for the Board in deciding upon release and the conditions of release. Victims can also be advised about whom to contact in the event of problems arising in relation to the offender. In

<sup>68</sup> Operative sentence is the term used in the *Corrections Act 1997* (see definition in s 3) – it means the period of imprisonment that is not suspended.

<sup>69</sup> *Corrections Act 1997* (Tas) s 72(2B).

other words, what is most relevant to the Board is any material that relates to the risk of re-offending and how the offender should be managed on release.

5.4.5 The Issues Paper suggested that the provisions relating to providing victim statements to the Parole Board are misleading. It argued that it is appropriate that victims convey their feelings about parole release to the Board and it is appropriate that measures be adopted to alleviate victim concerns. But it is not appropriate that victims be given the impression that they can prevent parole release because they believe the offender has not been punished enough. The Institute proposed that the *Corrections Act 1997* (Tas) s 72(2B)(b) and s 72(4) should be amended to reflect the kind of information about protection of victims that would be useful to both the Board and victims.

### ***Responses to the Issues Paper***

5.4.6 The Issues Paper sought responses to the Institute's preliminary view of the need to amend the *Corrections Act 1997*(Tas) s 72(2)(b) as to the content of victim statements to avoid suggesting to victims that parole is a re-sentencing exercise. Few respondents addressed this issue but support was expressed for victim statements by some respondents and no problem was seen with the statements focusing on victim impact even in cases when no VIS had been supplied to the sentencing court.<sup>70</sup>

### ***The Institute's views***

5.4.7 The concern of the Institute that providing victim statements to the Board that focus on victim impact cause victims to believe that parole is a re-sentencing exercise that allows the Board to deny parole on the basis of past or ongoing impact of the offence on the victim does not seem to have created problems in practice. This may in part be due to the advice given to victims about the use the Board makes of victim statements. The last published annual report of the Parole Board states:

As stated in previous reports 'the Board does not lose sight of the impact of the crime in the community and personal level'[sic], but recognises also that the views of victims are but only one of the factors the Board must have regard to.

The Board considers it would be wrong and contrary to the requirements of the Act to refuse parole because of the objection of a victim or relative, such objections are relevant in the overall decision making process and are certainly relevant to the sort of conditions that would be imposed on any parole order that might be made. For instance the Board almost always imposes limits on the freedom of movement of parolees in order to eliminate or at least reduce the risk of the prisoner coming into contact with a victim of his criminal behaviour.<sup>71</sup>

5.4.8 Published reasons for decision also provide the opportunity for the Board to explain the role of victim statements. For example in giving reasons for granting parole in a recent application in which family members of the deceased victim strongly opposed the application, the Board concluded its reasons for doing so in the following way:

The Board has carefully considered the Applicant's application for parole and the material provided to it. The Board has carefully weighed the statements provided by the deceased's family members and their objection to her being granted parole, however, the wishes of the deceased's family members are only one factor that the Board takes into account. On

<sup>70</sup> Submissions of Tasmania Police, Warwick Dunstan, Kay Fisher, Legal Aid Commission of Tasmania.

<sup>71</sup> Parole Board of Tasmania, Annual Report of the Parole Board of Tasmania for the Year Ended 30<sup>th</sup> June 2005 (2005) 4-5.

balance the Board is of the view that the Applicant meets the statutory criteria to be granted parole and it is appropriate that the Applicant be afforded the privilege of parole.<sup>72</sup>

5.4.9 The Institute acknowledges that both what the victim is told by Victim Support Services or the Victims of Crime Service and what the Parole Board says in its reasons are likely to mean much more to victims than the terms of s 72(2B) of the *Corrections Act 1997* (Tas). It also acknowledges the importance of symbolic reasons for providing information about victim impact as well as instrumental reasons (as discussed above at para 4.2.11). Nevertheless, it recommends that s 72(2B)(b) be amended to better reflect the role of the statement in a Board's deliberations by adding an additional subparagraph referring to the 'matters relevant to the risk of the offender re-offending and the sorts of conditions which should be imposed on any parole order in relation to contact with the prisoner.'

### Recommendation

69. The Institute recommends that the *Corrections Act 1997*(Tas) s 72(2B)(b) be amended to better reflect the role of the victim statement in a Board's deliberations by adding an additional subparagraph referring to the 'matters relevant to the risk of the offender re-offending and the sorts of conditions which should be imposed on any parole order in relation to contact with the prisoner.' (5.4.7- 5.4.9)

## 5.5 Publishing Parole Board decisions and open hearings

### *Publishing reasons*

5.5.1 The *Corrections Act 1997* (Tas) requires the Board to give notice of parole orders and reasons for its decisions in various circumstances. If it makes an order that an offender be released on parole, s 72(7)(a) requires that it give notice of this to the prisoner and s 72(7)(b) provides that it must publish its reasons for the order and give a copy to any victim who has made a statement under s 72(2)(b). The Board is also authorised (by s 72(7A)) to delete any material that relates to the privacy of the prisoner or of any other person if the Board is of the opinion that it is in the interests of the prisoner or any other person to do so. If it defers a decision it must let the prisoner know in writing and when it refuses parole it must also give reasons to the prisoner.<sup>73</sup> If it is in the interests of the prisoner, any other person or the public to withhold any or all reasons from the prisoner the Board may withhold those reasons.<sup>74</sup> Notifying a registered victim who has provided the Board with a statement under s 72(2C) of release date was to avoid families of deceased victims being confronted with the released offender before they had any knowledge of their release.<sup>75</sup> The protocols and procedures for this appear to be working well.

5.5.2 Section 72(7)(b) clearly requires the Board to publish its reasons for granting parole. This does not appear to have been done in all cases. It appears that the Board grants parole in between 50 and 100 hundred cases each year<sup>76</sup> but until 2006 at least, published decisions in less than 20 cases. The reason for this is unclear. Possibly exactly what was meant by publishing reasons was unclear. In the Issues Paper the Institute commended the introduction of a requirement to publish reasons on the grounds that this improves transparency and accountability of the criminal justice system. Many

<sup>72</sup> Parole Board Decision of Anne Maree Kibbey (2007) <[http://www.justice.tas.gov.au/paroleboard/decisions\\_2007/kibbey,\\_anne\\_maree](http://www.justice.tas.gov.au/paroleboard/decisions_2007/kibbey,_anne_maree)> at 7 December 2007.

<sup>73</sup> *Corrections Act 1997* (Tas) s 77(8).

<sup>74</sup> *Corrections Act 1997* (Tas) s 77(9).

<sup>75</sup> Instances of this were referred to in the debate on the 2002 amendments: Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2002, 34-96 (Mr Michael Hodgman, Shadow Attorney-General).

<sup>76</sup> Parole Board of Tasmania, above n 72, 9.

responses to the Issues Paper commended this initiative.<sup>77</sup> One respondent dissented from this view. The Honourable Don Wing, MLC, President of the Legislative Council referred to extensive publicity given to the release on parole of a prisoner who had been sentenced for a crime of dishonesty. He continued:

This meant that he was required to be reintegrated into the community amidst a blaze of publicity. This caused renewed distress to him and even, more importantly, his wife and children who were still attending school. In view of this experience and having reflected on the matter as a result of this, I do not consider this to be in the interests of the community and certainly not in the interests of the family of the former prisoner. It must be difficult enough for prisoners to make the transition back into society without having their crime and prison circumstances glaringly featured in the media at the time of their release.<sup>78</sup>

5.5.3 The Institute respects this view and acknowledges that publishing decisions can adversely impact on offenders and their families. However, parolees are still technically serving a prison sentence. Early release on parole remains controversial in the public view. Accordingly, in the interests of transparency and improving confidence in decision-making, the Institute's view is that decisions should be published.

### ***Open hearings?***

5.5.4 Another way of ensuring accountability and transparency of Parole Board decisions would be to make Parole Board hearings open to the public. This is the situation in New South Wales. Hearings are not open to the public in any other state or territory. The Issues Paper sought responses in relation to this matter. Responses were divided. Those who supported making Parole Board hearings open to the public<sup>79</sup> generally did so citing reasons of transparency and improving confidence in decision-making. Opponents of public hearings included the Mr Justice Cox, the then Chief Justice, the Honourable Don Wing MLC, and Kay Fisher, who was then a member of the Parole Board. Kay Fisher was concerned that opening the hearings to the public would increase legal formalities, prolong hearings and unduly restrict the matters that could be considered by the Board.<sup>80</sup> Don Wing's reasons for opposition to public hearing echoed his concerns with publishing reasons. He said:

I am opposed to parole hearings being open to the public because this would revive all the negative aspects of a crime and a prisoner's imprisonment at a time when it is important for prisoners to be successfully reintegrated into society in their own interests, in the interests of their family, especially children, and in the interest of the community.<sup>81</sup>

5.5.5 The Institute is of the view that opening parole board procedures is not justified. It agrees that this would increase formalities, prolong hearings and would not assist in the resettlement of offenders. The interests of transparency and improving public confidence in parole would be better served by publishing reasons for granting parole.

5.5.6 A number of submissions also referred to a lack of resources provided to the Board and consequential administrative difficulties. The Justice Department conducted a review of the administration of Parole Board processes in late 2007. No doubt these matters will be addressed in that review.

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<sup>77</sup> Legal Aid Commission of Tasmania, submission, 14; Submissions of Dr Bryan Walpole; Dianne Jackson; The Honourable Justice Cox, Chief Justice, 5; Tasmania Police; Community Corrections Hobart, consultation, 14 September 2002.

<sup>78</sup> Submission, 2.

<sup>79</sup> Tasmania Police, submission 10; Dianne Jackson, submission, 2; Dr Bryan Walpole, submission, 1.

<sup>80</sup> Kay Fisher, submission, 3.

<sup>81</sup> Don Wing MLC, President of the Legislative Council, submission, 2.

**Recommendations**

70. The Institute recommends that Parole Board decisions should be published on the Parole Board's website. (5.5.3)

71. It does not recommend that Parole Board hearings should be open to the public for the reasons given in para 5.5.5.

## Part 6

# Sexual Offenders

Consider whether the protection of society requires legislative change to the *Sentencing Act 1997* (Tas) and the *Youth Justice Act 1997* (Tas) in relation to sentencing sexual offenders.

## 6.1 Introduction

### *Background to the terms of reference*

6.1.1 At the request of the Attorney-General, in December 2006 the terms of reference of the sentencing project were amended to include consideration of whether the protection of society requires legislative change to *Sentencing Act 1997* (Tas) and the *Youth Justice Act 1997* (Tas) in relation to sentencing sexual offenders. This was precipitated by a public outcry following a sentence imposed upon a youth who pleaded guilty to the rape and associated assaults of two elderly women in the course of separate burglaries on the North West Coast.<sup>1</sup> The youth was 15 years old when he committed the first rape and 16 at the time of the second rape. He was sentenced to five years imprisonment with half of that sentence suspended on conditions that included a probation order and assessment and treatment for alcohol and drug dependency. The sentencing judge indicated that a mature offender would be likely to receive a sentence of eight years imprisonment for these crimes. The case was widely reported in the three daily Tasmanian newspapers and the media coverage continued throughout 2007.<sup>2</sup> Comments invariably condemned the sentences as inadequate and called upon the legal system to get tough on offenders.<sup>3</sup> It was also suggested that youth should not be a mitigating factor in cases of rape.<sup>4</sup>

6.1.2 Two further cases of rape attracted media criticisms for leniency in early 2007. A sentence of two years imprisonment imposed on a man who pleaded guilty to the rape of his pregnant ex-partner<sup>5</sup> was appealed by the Director of Public Prosecutions on the ground that the sentence was manifestly inadequate. In his submission to the Court of Criminal Appeal the Director stated that ‘sentences for single rape counts were on the slide over the past 15 years’. He argued ‘the rape deserved a greater sentence given that the victim was pregnant, made a prisoner in her own home, had suffered psychologically, her daughter was nearby and the attack was violent and degrading’.<sup>6</sup> The Court of Criminal Appeal allowed the appeal and substituted a sentence of three years on the grounds that the sentence of two years was manifestly inadequate. Crawford J commented:

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<sup>1</sup> *Tasmania v ALR*, Crawford J, 21 November 2006. He also pleaded guilty to additional counts of burglary and stealing and so the sentence was imposed in respect of five counts of aggravated burglary, five of stealing, two of rape, one of aggravated sexual assault and two of aggravated assault.

<sup>2</sup> An online search revealed 26 articles, editorial comment and letters to the editor published in the *Advocate*, the *Examiner* and the *Mercury* discussing the case until the end of December 2007.

<sup>3</sup> Those critical of the sentence included David Foster, Brant Webb, and politicians Brett Whiteley and Norma Jamieson.

<sup>4</sup> This was suggested by a rape victim commenting on the inadequacy of ALR’s sentence: ‘Rape victim seeks longer sentences’ *The Advocate* (Burnie), 2 December 2006.

<sup>5</sup> *Tasmania v KLP*, Tennent J, 22 February 2007.

<sup>6</sup> Chris Pippas, ‘Rape Terms “Too Light” Prosecutor Questions Courts’ Softer Stance’, *The Advocate* (Burnie), 23 May 2007.

Undoubtedly, the sentence of two years imprisonment was a low one for the crime of rape. In most cases the sentence should be much more severe. It is commonly, as it was here, a crime of violence, domination and degradation and it usually causes great psychological trauma to the victim. It requires a substantial sentence of imprisonment in most cases. Leniency may be extended in exceptional circumstance, but there were none in this case.<sup>7</sup>

6.1.3 On 2 March 2007, Andrew Denis Dare was sentenced on a plea of guilty to five years imprisonment with a minimum of three years for prolonged sexual attack on a woman committed after he had broken into her home.<sup>8</sup> He was also placed on the sex offender register for a period of 10 years. Again, the sentence was attacked in the newspapers because it was too lenient<sup>9</sup> Throughout 2007 the Advocate conducted a campaign for tougher sentences of sex offenders, asserting that the region and the newspaper were growing progressively angrier over a string of light sentences for rape offenders. In addition to the cases above, all of which occurred on the North West Coast, a number of other cases attracted criticism including a sentence of two years imposed on a priest for maintaining a relationship with one of his students<sup>10</sup> and a sentence of four years and six months imposed on a Devonport man for maintaining a relationship with a young person.<sup>11</sup> In support of the need for harsher sentencing for sexual offenders, the Advocate published an article claiming that ‘Tasmania is soft on crime’ on the basis of Australian Bureau of Statistics (ABS) figures showing ‘about half the people being convicted in the Tasmanian Supreme Court do not serve jail time afterwards’.<sup>12</sup>

6.1.4 In March 2007 the Examiner published the results of an Internet poll that showed that 86 per cent of respondents answered yes to the question ‘do you believe courts are too lenient when sentencing convicted criminals?’<sup>13</sup> This was repeated in December 2007 with 88 per cent of respondents stating that they believed courts to be too lenient.<sup>14</sup> There was also media coverage of a meeting between the Police Association and the Attorney-General with the Police Association reported as saying that ‘it now expects “outcomes” on apparent lenient court sentencing, following its meeting with Attorney-General Steve Kons, who it seems was receptive to its calls for urgent law reforms’.<sup>15</sup> From the report of the meeting it would appear that the primary concern of the Police Association was with lenient rape sentences rather than leniency generally. In June 2007 at the request of the Attorney-General, the Chief Justice hosted sentencing forums in Burnie and Devonport to which people who had written letters to the Advocate, community leaders and journalists were invited. Participants at each forum were invited to consider what sentence they would hand down to a sex offender and a burglar and thief.<sup>16</sup> The Chief Justice would have sentenced the burglar more harshly than some of the participants but the suggested sentences for the sex offender were not reported.

### ***The Institute’s approach to the terms of reference***

6.1.5 It is clear that the Attorney-General was prompted to refer the issue of the sentencing of sexual offenders to the Institute by the media criticism which followed the sentence imposed on the youth for rape of the two elderly women on the North-West coast. Pressure on the then Attorney-General, Steve Kons, from some quarters to introduce harsher penalties for sexual offenders continued throughout 2007. He is to be commended for not bowing to this pressure and for referring the matter

<sup>7</sup> *DPP v P* [2007] TASSC 51, [16] (Crawford J); Slicer and Evans JJ agreed with Crawford J’s reasons.

<sup>8</sup> *Tasmania v ADD*, Tennent J, 2 March 2007. The sentence was imposed for nine offences including robbery and aggravated sexual assault – in addition to raping her he had sexually assaulted her and tied her up.

<sup>9</sup> Luke Sayer, ‘Five years for rape, Sentence angers Police, Victims’, *The Mercury* (Hobart), 3 March 2007, 3; Angus Livingstone, ‘Rapist Could be Out in Three Years’ *The Advocate*, 3 March 2007, 6-7.

<sup>10</sup> Chris Pippas, ‘Marist Priest Gets Just One Year. Ferguson Sentence Shock’ *The Advocate* (Burnie), 16 May 2007.

<sup>11</sup> Amber Wilson, ‘No Justice for Girl: Family Sex Offender Sentence Four and a Half Years in Jail’ *The Advocate* (Burnie), 18 October 2007.

<sup>12</sup> Sean Ford, ‘We’re Soft on Crime’ *The Advocate* (Burnie), 24 April 2007, 1.

<sup>13</sup> ‘Internet Poll’ *The Examiner* (Launceston), March 2006, 2.

<sup>14</sup> ‘Internet Poll’ *The Examiner* (Launceston), 15 December 2007, 2.

<sup>15</sup> Chris Pippas, ‘Police Positive after Talks on Sentencing’ *The Advocate* (Burnie), 13 April 2007.

<sup>16</sup> Sean Ford, ‘Minimum Terms not the Answer’, *The Advocate* (Burnie), 6 June 2007.

to the Tasmanian Law Reform Institute for an informed and considered response and then patiently waiting for this Report.

6.1.6 The Institute has approached the issue referred to it by the Attorney-General in four steps: First, by attempting to address the general question of whether current sentencing practices for rape and sexual offences in Tasmania are appropriate; secondly, by asking whether the protection of society justifies special measures for sex offenders; thirdly, by reviewing sentencing legislation in other jurisdictions which aims to both protect society against sex offenders and to improve public confidence in the criminal justice system's response to sex offending; and finally, the Institute outlines an approach to address the criticism from some quarters that sentences for sex offenders are too lenient.

## 6.2 Are current sentencing practices for rape and sexual offences appropriate?

6.2.1 In Part 1 of this Report the sentencing patterns from 1978 to 2006 for the most common crimes were discussed. Whilst sentences for rape are invariably custodial,<sup>17</sup> it was shown that the median sentence for one and two counts has decreased over this time. As explained in Part 1, it could be argued that the differences from the earlier period (1978-1989) when the median sentence for one count of rape was four years does not necessarily mean that sentencing for rape has become more lenient. Changes in the definition of rape in 1987 mean that rape now covers a wider range of penetrative sexual assaults than was the case in the earlier period. However, the trend has continued to go downwards in the last five years particularly for single count sentences and global sentences for two counts.<sup>18</sup> The median sentence for one count of rape is now close to two years (25.5 months) and is three years six months for two counts. This does suggest that sentencing for rape has become more lenient. However, as Table 2 in Appendix A shows, sentences for other sexual offences such as sexual intercourse with a young person and maintaining a sexual relationship with a young person have tended to increase rather than reduce in severity.

**Table 13: Rape Custodial Sentences (Single-count) 1978-2006**

Year	No.	Min.	Med.	Max.	% Cust.
1978-1989	27	18	48	84	100
1990-2000	27	6	36	96	100
2001-2006*	14	6	25.5	60	100

\* The numbers in this table do not match those in Table 2, Appendix A because this table includes data for the whole of 2006.

**Table 14: Rape Custodial Sentences (Multiple counts) 1978-2006**

Year/Counts	No.	Min.	Med.	Max.
<b>1978-1989</b>				
2 counts	17	30	60	96
3-4 counts	10	30	48	72
5 & more counts	8	48	72	240
<b>1990-2000</b>				
2 counts	21	9	45	120
3-4 counts	18	27	60	84
5 & more counts	23	36	84	144

<sup>17</sup> No non-custodial sentences for rape were imposed in the period 1978 to 2006.

<sup>18</sup> The counting rules for global sentences in this data included sentences for multiple counts that include at least one count of rape. So two counts could be one of rape and one of indecent assault or two of rape.

2001-2006*				
2 counts	10	30	42	84
3-4 counts	3	42	60	66
5 & more counts	9	48	72	120

\* The numbers in this table do not match those in Table 2 , Appendix A because this table includes data for the whole of 2006.

6.2.2 Examining sentencing data for rape for the last five years may not give a true picture of sentencing patterns for rape for multiple counts because the numbers are small. For this reason it is more appropriate to look also at patterns based on the last 10 years (1997-2006).

**Table 15: Rape Custodial Sentences (Single Count) 1997-2006**

Year	No.	Min.	Med.	Max.
1997-2006	20	6	30	60

**Table 16: Rape Custodial Sentences (Global) 1997-2006**

Counts	No.	Min.	Med.	Max.
2	19	24	48	84
3 & 4	14	27	57	90
5 & <	15	36	72	120

6.2.3 In the light of the context of the Attorney-General's request to the Institute to examine possible legislative changes in relation to the sentencing of sexual offenders, it is interesting to examine the three controversial sentences for rape in late 2006 and early 2007 against the background of sentencing practices in Tasmania. As Table 17 shows, global sentences for five or more offences which include rape as the most serious crime range from 36 months (three years) to 120 months (10 years) with a median of six years. Both *ALR's* and *Dare's* five-year sentences are clearly within this range, although they are below the median sentence. *ALR's* crimes were particularly serious as there were two victims, both elderly. Half of his sentence was suspended. On the face of it, this may appear to be a lenient sentence. However, two factors should be noted. First, no non-parole period was set so this meant that in terms of parole eligibility, the sentence was equivalent to an immediate sentence of five years imprisonment with a the minimum non-parole period of half of the sentence. Secondly, the offender was aged 15 and 16 at the time of the offences and the judge made it clear that had he been an adult, he would have been sentenced to a sentence of eight years imprisonment. Special considerations apply in relation to sentencing youthful offenders, even when the crime is as serious as rape. Sentencing guidance from the Court of Criminal Appeal suggests that it was appropriate for the sentencing judge to impose a much shorter sentence on *ALR* because of his youth and that partial suspension of it was also appropriate. In *George v The Queen*<sup>19</sup> the Court of Criminal Appeal explained how courts should approach sentencing youthful offenders for rape. Cox J said, '[v]ery different considerations determine the appropriate range for offenders in the age group of the defendant.' The Court made it clear that rehabilitation is of primary importance in such a case, general deterrence is of less importance, denunciation more muted and just deserts considerations are satisfied by a less severe sentence.

6.2.4 In a letter to the victim's relatives, the Director of Public Prosecutions nominated the offenders' youth and the fact that no non-parole period was set (making the sentence equivalent to a five year sentence with the minimum non-parole period) as reasons why he had chosen not to appeal. The Institute's view is that *ALR's* sentence was within range and that it is appropriate for different considerations to apply in the case of juvenile offenders.

<sup>19</sup> [1986] Tas R 49, 64 (Cox J), see also Cosgrove J and Nettlefold J; remarks approved by Crawford, Zeeman and Slicer JJ in *Stonehouse* Serial No A90/1993, 3.

6.2.5 Assuming that the sentences *Dare's case* and the Court of Criminal Appeal's three-year sentence in *KJP* are within the range of sentences set by the Supreme Court and the Court of Criminal Appeal, the question whether the current sentencing range of sentences is appropriate remains. This question is not susceptible to an easy answer. Public opinion appears to suggest that sentences for rape and sexual offences are too lenient. A national survey in the mid 1990s indicated that respondents considered sentencing for rape to be too lenient compared to other crimes.<sup>20</sup> And polls and surveys since consistently report that the public think sentences are too lenient. However, there are many problems with media polls and surveys, not the least being that, in this context, it is unlikely that respondents have a clear enough idea of the reality of sentencing practices to be in a position to give informed judgment on the question. The issue of gauging informed public opinion or public judgment rather than the top-of-the-head responses to media polls and representative surveys will be discussed in more detail in Part 7. It is sufficient to say here that polls such as the Examiner's of March and December 2007 do not assist in answering the question of whether sentencing practices for rape and sexual offences in Tasmania are appropriate or too lenient. In the context of simulated sentencing exercises or surveys using vignettes, the public's view tends to be close to that of the judge. In Lovegrove's recent sentencing study, for example, the groups that were given the sex offence vignette suggested a median sentence that was less than the judge's sentence.<sup>21</sup> In contrast, preliminary findings from the University of Tasmania jury sentencing study shows that while jurors' sentences were more lenient than the judges' sentences overall, for sex offences they were more severe.

6.2.6 One way of attempting to assess the appropriateness of current sentencing ranges for rape and sexual offences in Tasmania could be to compare sentencing practices across jurisdictions. However, there are problems with interjurisdictional comparisons. First, the definition of sexual offences varies between jurisdictions. Rape in Tasmania has a narrower definition than rape in Victoria, and in New South Wales 'rape' is covered by three crimes – aggravated sexual assault, aggravated sexual assault in company and sexual assault. Secondly, sentencing practices differ and the Tasmanian practice of imposing global or general sentences for multiple counts is unknown in many other jurisdictions. Thirdly, provisions for early release differ. Such things as automatic parole or back end home detention may mean that there are differences in the proportion of the full term of the sentence that is actually served. And finally, there is difficulty in obtaining comparable data. Nevertheless, a cross-jurisdictional comparison which includes another serious crime could shed some light on the issue. Robbery<sup>22</sup> was chosen as the comparator crime and the measures of sentencing severity selected were the maximum penalties and the proportion of offenders sentenced to full-time imprisonment (including partly-suspended sentences). A comparator crime is useful because it enables a comparison of sentencing differentials between different crimes as well as a raw comparison of penalty severity. In other words it indicates an offence's position on the penalty scale relative to other offences.

**Table 17 Range of statutory maximum penalties for sexual assault<sup>23</sup>**

Jurisdiction	Statutory maximum
Tasmania	21 years
New South Wales	14 years – Natural Life
Victoria	25 years
Queensland	Life
South Australia	Life
Western Australia	14 years – 20 years
New Zealand	20 years

<sup>20</sup> Jenny Barga and Elaine Fishwick (1995) *Sexual Assault Law Reform: A National Perspective*, Canberra, Office of the Status of Women, 108-109.

<sup>21</sup> Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] *Criminal Law Review* 769.

<sup>22</sup> Robbery is stealing from a person accompanied by violence or threats of violence.

<sup>23</sup> Source: Judicial Commission of New South Wales (2007) *Full-time imprisonment in New South Wales and Other Jurisdictions: A National And International Comparison*, Monograph 29, 15 with the addition of Tasmania and with the US deleted.

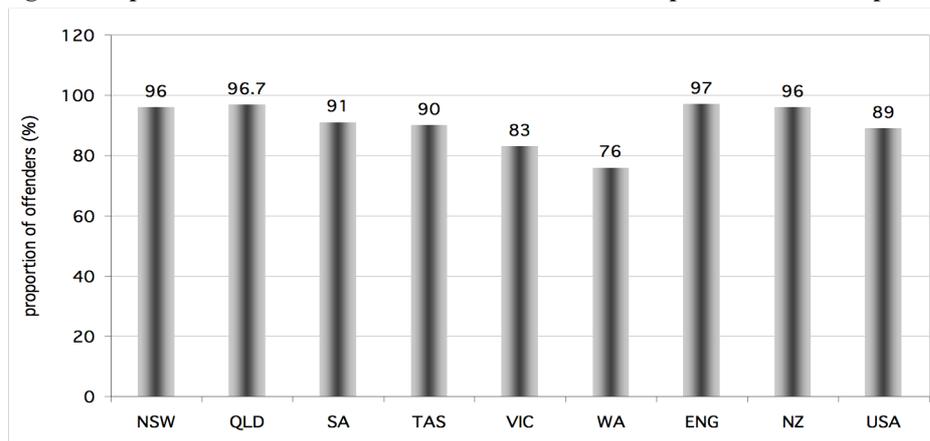
England	Life
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6.2.7 The maximum penalty for an offence is an indication of how seriously the offence is viewed by Parliament and increases in the maximum penalty have been interpreted by the courts as evidence of Parliament's intention that the offence should attract a heavier penalty than in the past.<sup>24</sup> In cross-jurisdictional comparisons, maximum penalties have been used as a measure of sentencing severity. However, in Tasmania with all indictable offences except murder and treason attracting a maximum penalty of 21 years, the Code gives no indication of the relative seriousness of indictable offences.

**Table 18: Range of statutory maximum penalties for robbery<sup>25</sup>**

Jurisdiction	Statutory maximum
Tasmania	21 years
New South Wales	14 years – 25 years
Victoria	15 years - 25 years
Queensland	14 years - Life
South Australia	15 years - Life
Western Australia	14 years – Life
New Zealand	10 years – 14 years
England	Life

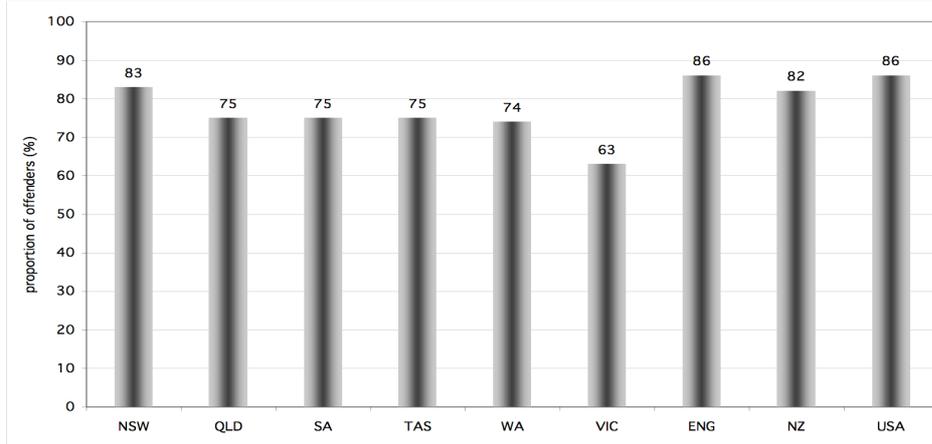
**Fig 25: Proportion of offenders sentenced to immediate imprisonment for rape**



6.2.8 In Tasmania 90 per cent of offenders sentenced for rape received a sentence of immediate imprisonment. In comparison with other Australian jurisdictions this is a smaller proportion than in New South Wales and Queensland but significantly higher than Victoria, and Western Australia. In England where the definition of rape is the same as in Tasmania, the proportion of offenders sentenced to immediate imprisonment for rape is 97 per cent.

<sup>24</sup> *Baumer v The Queen* (1988) 166 CLR 51, 56.

<sup>25</sup> Source: Judicial Commission of New South Wales (2007) *Full-time imprisonment in New South Wales and other jurisdictions: A national and international comparison*, Monograph 29, 15 with the addition of Tasmania.

**Fig 26: Proportion of offenders sentenced to immediate imprisonment for robbery**

6.2.9 In Tasmania, 75 per cent of offenders sentenced for robbery received a sentence of immediate imprisonment. The Tasmanian imprisonment rate is comparable to Queensland, South Australia and Western Australia, higher than Victoria but lower than New South Wales.

**Table 19: Average sentences for rape**

Jurisdiction	Average
Tasmania	50.6 months
New South Wales	75.4 months
Queensland	80.8 months
Victoria	79.9 months
England	83.4 months

Data sources: See Appendix B.

**Table 20: Average sentences for robbery Higher Courts (all)**

Jurisdiction	Average
Tasmania	21.8 months
New South Wales	48.3 months
Queensland	47.7 months
Victoria	49.8 months
England	45 months

Data sources: See Appendix B.

6.2.10 In comparing average sentences for rape and robbery it is necessary to look also at the percentage of custodial sentences. Jurisdictions which send a smaller proportion of offenders to prison would be expected to have more serious offenders in the custodial category. Therefore it could not be said that if the average prison sentence is longer that the sentences are more severe in that jurisdiction. With this in mind, the fact that average sentences for rape are less in Tasmania than in New South Wales and Queensland (jurisdictions with a higher proportion of sentences of immediate imprisonment for this crime), suggests that sentences for rape are more lenient in Tasmania than in these states. However, the fact that the average sentence for rape is longer in Victoria than Tasmania has to be offset against the lower imprisonment rate.

6.2.11 As explained in para 6.2.6, relativities with other crimes is another way of comparing sentencing. A comparison of the average sentences for rape and robbery show that Tasmania sentences rape the most severely in comparison with robbery in the jurisdictions displayed in Tables 20 and 21 with an average sentence for rape that is more than double the average robbery sentence. In New South Wales, for example, average rape sentences are considerably less than double robbery

sentences. To put this in another way, the average robbery sentence in Tasmania is only 43 per cent of the average rape sentence whereas in New South Wales it is 64 per cent of the average rape sentence.

### *The Institute's view*

6.2.12 Trying to determine if current sentencing practices for rape and sexual offences in Tasmania are appropriate is difficult. Relying on public outcry or media criticism of isolated cases is an unreliable guide of informed public opinion. Examining the sentencing ranges for a particular offence is an advance on this but there are problems in deciding what is an appropriate range of sentences for any particular offence. Deciding an appropriate sentencing range for rape in particular is difficult because doing so requires an intuitive judgment about what rape is worth and what rape is worth in comparison with other crimes. In theory, comparisons with average sentences imposed in other jurisdictions could assist but this can be misleading because of the many differences between jurisdictions in custodial sentences, release practices and counting rules for sentencing statistics. Moreover, on some measures the sentence may be more severe and on others less severe. The Institute is unable to answer the question whether current sentencing practices for rape and sexual offences are too lenient. Examining the median sentence for one and two counts of rape suggests that sentences have become more lenient. The Institute suggests that what is an appropriate sentencing level for rape and other sexual offences is an issue that needs further consideration. This could be done in a number of ways. It could be made a focus of investigation in the University of Tasmania's jury sentencing study which is exploring the use of jurors as a means of ascertaining informed public opinion (see para 7.1.27 below for more detail about this study) As outlined above (see para 6.2.5), early results from this study indicate that while the majority of jurors who participated in the study suggested a sentence that was lower than judge's sentence, in the case of sex offenders they were significantly more likely to impose a sentence that was more severe than the judge's sentence.<sup>26</sup> This should be supplemented by further research by way of either a deliberative poll or focus groups similar to those used by Lovegrove. Consideration could be given to including a range of participants in focus groups, such as victim representatives, lawyers, and other experts with an interest in the issue. Another Australian study will soon present opportunities to obtain informed public opinion about sentencing in Tasmania. This sentencing project, which is funded by the Australian Research Council, proposes to use both representative surveys with sentencing vignettes and focus groups to elicit public opinion about sentencing issues.<sup>27</sup> In Part 7 it is suggested that efforts be made to include Tasmania in the later stages of the study. The issue of how the government should respond if further research does show that informed public judgment suggests sentences for sex offences are too lenient will be discussed in the final section of this Part.

6.2.13 As indicated in the discussion of the case of *ALR* above (see paras 6.2.3-6.2.4) the Institute rejects the suggestion that that youth should cease to be a mitigating factor.<sup>28</sup> All Australian jurisdictions have accepted that special considerations apply in the sentencing of youthful offenders, even in cases as serious as rape.<sup>29</sup> The special approach to the sentencing of children is based upon public interest as well as mercy. As Murray J explained in *R v T (a Child)*:

Relevantly to the issues raised in this appeal, I turn now to the position of the child offender, who has always been regarded by the criminal law as being in the special position that the paramount consideration in sentencing, or otherwise disposing of the case of a convicted child, will be to find the solution best calculated to aid the rehabilitation of the child, not only in mercy, having regard to the offender's youth, but also for the pragmatic

<sup>26</sup> Kate Warner, Julia Davis, M Walter and Rebecca Bradfield, 'Talking to Juries About Punishment: Investigating a New Way to Gauge Public Opinion and Inform the Public' (Paper presented at the 2008 Supreme and Federal Courts Conference, Sydney, 19 January 2008).

<sup>27</sup> Geraldine Mackenzie, David Indermaur, Roderic Broadhurst, Kate Warner, Lynne Roberts and Nigel Stobbs, 'Sentencing and Public Confidence: Public Perceptions and the Role of the Public in Sentencing Practice and Policy', ARC Discovery Grant No 2008-210.

<sup>28</sup> This was suggested by a rape victim commenting on the inadequacy of ALR's sentence: 'Rape victim seeks longer sentences' *The Advocate* (Burnie), 2 December 2006.

<sup>29</sup> See Laws of Australia, 12.2 paras [70] – [79].

reason that to so treat a young offender is regarded as being most likely in the long term to aid the protection of the community by preventing recidivism.<sup>30</sup>

6.2.14 The Institute also supports the existing arrangements for determining where sentences of imprisonment are served. In the case of *ALR*, one of the complaints of the victims' families was that *ALR* had served his sentence at Ashley and not 'hard time' at Risdon.<sup>31</sup> Traditionally, selecting the place of detention for an offender is an executive function. When the Supreme Court is sentencing a juvenile offender it has the power to impose a detention order instead of a sentence of imprisonment.<sup>32</sup> If a sentence of imprisonment is imposed, where it is served is a matter for the Director of Corrective Services.<sup>33</sup> In practice, offenders under the age of 18 sentenced to imprisonment are transferred to the Ashley Youth Detention Centre. The Institute supports this approach. It is appropriate that youthful offenders be detained with other youth rather than with adult offenders.

### Recommendations

72. The Institute recommends that the issue of whether current sentencing practices for sexual offences are appropriate should be further investigated by using a range of methods including specially designed focus groups and deliberative polls to build upon current research studies that are investigating this issue. (6.2.12)

73. The Institute recommends retaining the common law principles in relation to the sentencing of juvenile offenders and does not recommend altering the current position which allows the Director of Corrective Services to transfer juvenile offenders to Ashley Detention Centre. (6.2.13 – 6.2.14)

## 6.3 Does the protection of society justify special measures for sex offenders?

6.3.1 Because the sentencing of sexual offences seems to give rise to particular public concern, the issue of whether this category of offending should attract a special legislative response will be considered. First, however, the existing special measures for sex offenders in Tasmania will be described.

### *Existing special measures for sex offenders in Tasmania*

6.3.2 Currently there are two special sentencing measures that apply to sex offenders in Tasmania, namely sex offender registration orders and dangerous offender declarations.

#### **Sex offender registration orders**

6.3.3 In December 2005, Tasmania became the sixth Australian jurisdiction to enact offender-reporting legislation with the passing of the *Community Protection (Offender Reporting) Act 2005* (Tas). The legislation commenced on 1 March 2006. The preamble to the Act states that its purpose is to reduce the likelihood of reoffending and to facilitate the investigation of any future offences a registered offender may commit. The genesis of national Australian offender reporting legislation seems to have been a meeting of the Australian Police Ministers' Council in 2003. The Australian National Child Offender Register (ANCOR) was launched in September 2004 and it was envisaged

<sup>30</sup> (1993) 67 A Crim R 272, 279.

<sup>31</sup> Sean Ford, 'Rapist freed before review Elderly victims' families want tougher laws' *The Advocate* (Burnie), 20 December 2007, 3.

<sup>32</sup> *Youth Justice Act 1997* (Tas) s 107.

<sup>33</sup> *Corrections Act 1977* (Tas) s 38.

that all states and territories would pass legislation in line with a common model to require people convicted of sexual or other serious offences against children to register with police and provide details such as club memberships and travel plans. The *Community Protection (Offender Reporting) Act 2005* (Tas) fulfils Tasmania's commitment to ANCOR. It provided for the creation of a Community Protection Offender Register containing specified personal details of particular offenders. The Act follows the approach in Victoria and Western Australia by targeting sex offenders in general rather than child sex offenders only.

6.3.4 There are a number of mechanisms for including sex offenders on the register. The primary mechanism is an order of a court at sentence. Section 6 of the *Community Protection (Offender Reporting) Act 2005* (Tas) requires a court which is sentencing an offender for a reportable offence to make an order directing that the name of the offender be placed on the Community Protection Offender Register, 'unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future'. Reportable offences are listed in three Classes/Schedules and include a range of offences from possessing child exploitation material to aggravated sexual assault and rape. The order requires the offender to comply with the reporting obligations under the Act for a period of time that is at the discretion of the court, with maxima from eight years to life depending on the class of the reportable offence. The reporting obligations require the offender to report to the registrar within seven days of the order being made and to provide the required personal details. A court may also make an order directing registration and compliance with reporting obligations in respect of an offender who is sentenced for a non-reportable offence if the court is satisfied that the person poses a risk of committing a reportable offence in the future.

6.3.5 An offender who is subject to reporting obligations must provide the Registrar with a list of personal details, including address, names of children with whom he or she has regular unsupervised contact, name and place of employment, including voluntary work and practical training, club or organisation membership or affiliation if children participate, and vehicle registration details.<sup>34</sup> Any changes in personal details must be notified within seven days, interstate travel must be notified at least seven days before departure and annual reports must be made to the Registrar by each reportable offender. Failure to comply with reporting obligations is an offence punishable by a fine or imprisonment for a term not exceeding six months.<sup>35</sup>

### **Dangerous offender declarations**

6.3.6 The principle of proportionality is a central principle of sentencing. It requires that punishment should be proportionate to the offence committed taking into account harm and culpability. In the words of the Court of Criminal Appeal:<sup>36</sup>

The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.

6.3.7 In Tasmania, a dangerous offender declaration under the *Sentencing Act 1997* (Tas) s 19 is a statutory exception to the principle of proportionality. Such offenders receive an indeterminate sentence if it is warranted for the protection of the public. In other words, in addition to receiving a fixed term of imprisonment, an offender declared a dangerous criminal cannot be released from custody until the declaration is discharged. To be declared a violent offender, the offender must have been convicted of a crime 'involving violence or an element of violence' and have at least one previous conviction for a crime involving an element of violence. Applications for a declaration are generally made at the sentencing hearing following a plea or finding of guilty. However, a judge before whom an offender was convicted can entertain such an application at any time during the

<sup>34</sup> *Community Protection (Offender Reporting) Act 2005* (Tas), s 17.

<sup>35</sup> *Community Protection (Offender Reporting) Act 2005* (Tas), s 33.

<sup>36</sup> *Read* (1994) 3 Tas R 387, 395.

offender's sentence.<sup>37</sup> The Court of Criminal Appeal has decided that both rape and indecent assault intrinsically involve violence for the purposes of s 19 and it is not necessary to examine the details or circumstances of the crime to determine this.<sup>38</sup> The Court has also made it clear,<sup>39</sup> following the observations of the High Court in *Chester v Queen*,<sup>40</sup> that the power to direct preventive detention should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm.

6.3.8 In summary, sexual offenders who are declared dangerous because they are a continuing danger to the community are held in custody until the court is satisfied that they no longer constitute a danger. Similar provisions empowering courts to sentence a violent or sexual offender to an indefinite term of imprisonment apply in most Australian jurisdictions.<sup>41</sup> In recent years, in addition to indeterminate sentences, various preventive detention measures have been introduced in some jurisdictions to address public concern about the danger posed by released sex offenders. These will be considered below. However, in the Institute's view, a very persuasive argument for creating further exceptions to the principle of proportionality is needed. If sentencing policy is to be evidence-based, the question of whether sex offenders pose a greater risk of recidivism than other offenders justifying such differential treatment must be addressed.

### ***What do recidivism studies tell us about sex offenders?***

6.3.9 Targeting sex offenders for special measures is frequently justified on the basis of the high rates of recidivism of this group of offenders and of child sex offenders in particular.<sup>42</sup> However, international research suggests sex offenders recidivate less than drug, property and burglary offenders and their recidivism relates more to general and violent offences than to sexual offences. Moreover, child molesters do not recidivate more than other sex offenders. While any study of recidivism of sexual offenders is likely to represent an undercount of offending behaviour because sexual offending has very low rates of reporting to the police, research based on self-reports as well as official reports consistently shows that sex offenders have lower rates of recidivism than other kinds of offenders.<sup>43</sup> It is not clear why rates of sexual recidivism are low – it could relate to non-detection, to lack of opportunity or to rehabilitation. However, reviewers are generally agreed that the studies give a reasonable, although conservative estimate of sexual recidivism of apprehended offenders relative to other types of offenders.<sup>44</sup> It is also a consistent finding that different types of sex offenders recidivate at different rates. For example, an often cited meta-analysis of 61 recidivism studies covering six countries revealed that just over 13 per cent of sexual offenders were known to have recidivated sexually, with an average of 19 per cent for rapists and 13 per cent for child molesters.<sup>45</sup> Gelb has reviewed the handful of recidivism studies conducted in Australia and concluded that the results are

<sup>37</sup> *Director of Public Prosecutions v Phillips* [2006] TASSC 81.

<sup>38</sup> *Evans* (1999) 8 Tas R 325.

<sup>39</sup> *Read* (1994) 3 Tas R 387, 395.

<sup>40</sup> (1988) 165 CLR 611, 619; see also *McGarry v The Queen* (2001) 207 CLR 121.

<sup>41</sup> *Sentencing Act 1991* (Vic) s 18A (serious offences including murder, rape and sexual offences against children); *Penalties and Sentences Act 1992* (Qld) s 163 (violent offender); *Criminal Law Amendment Act 1945* (Qld) s 23 (sex offender); *Criminal Law (Sentencing) Act 1988* (SA) s 23 (sex offender); *Sentencing Act 1995* (NT) s 65 (violent offenders); *Sentencing Act 1995* (WA) s 98. For a convenient summary of these provisions see Bernadette McSherry, Patrick Keyzer and Arie Freiberg, *Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development*, Report to the Criminology Research Council, December 2006, 18-22.

<sup>42</sup> See for example a discussion of the debate on the introduction of the *Serious Sex Offenders Monitoring Act 2005* (Vic) discussed in Kate Warner, 'Sentencing Review 2004-2005' (2005) 29(6) *Criminal Law Journal* 355.

<sup>43</sup> Karen Gelb, *Recidivism of Sex Offenders*, Research Paper, Sentencing Advisory Council, 2007, 21.

<sup>44</sup> Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy*, Australian Institute of Criminology, 2004, 37; D J West, 'The Sex Crime Situation: Deterioration More Apparent Than Real' (2000) 8 *European Journal on Criminal Policy and Research* 399; Gelb (2007), *ibid*, 21.

<sup>45</sup> R Karl Hanson and Monique Bussiere, 'Predicting relapse: A meta-analysis of sexual offender recidivism studies' (1998) 66 *Journal of Consulting and Clinical Psychology* 348.

consistent with the international research literature.<sup>46</sup> This is supported by Lievore's review of Australian and international studies.<sup>47</sup>

6.3.10 The research evidence suggests that special provisions targeting sex offenders cannot be justified on the grounds that sex offenders are more likely to re-offend than other categories of offenders. There is no evidence that this is so. However, sex offending has serious if not devastating consequences for victims and its incidence and impact needs to be addressed. But because sex offending, particularly sex offending involving children is such an emotive subject, special care needs to be taken that such offenders are not seen as forfeiting their rights to be protected by fundamental principles of law and human rights. Law-makers have a particular responsibility in this area because of the popular support for harsh measures for such offenders and the unpopular and possibly electorally damaging consequences of a principled stance on the issue.

## 6.4 Sentencing Options for Sex Offenders

6.4.1 In this section the Institute canvasses a number of sentencing options for sex offenders that have been introduced in other jurisdictions. It includes a discussion of post-sentence options such as post-sentence preventive detention and supervision which are perhaps strictly-speaking neither a sentencing option, nor punitive in intent, nor necessarily criminal in nature. However, they are relevant to the terms of reference.

### *Mandatory minimum penalties*

6.4.2 Mandatory minimum penalties, such as three strikes laws are one way legislatures have responded to public criticisms that sentences are too lenient and judges are out of touch with public attitudes to crime. For the last decades of the twentieth century, mandatory sentencing laws were the most popular new sentencing initiative in the United States with mandatory penalties applying to aggravated rape, drug offences, offences involving firearms and repeat offenders. Other countries soon followed, including the United Kingdom and Canada.<sup>48</sup> In Australia, the Northern Territory and Western Australia enacted controversial mandatory penalties in the 1990s. The Northern Territory mandatory sentencing legislation for adult and juvenile property offenders was repealed by the incoming Labor Government in 2001, but the mandatory penalties for adults convicted of violent and sex offences remain.<sup>49</sup> Section 78BB of the *Sentencing Act* (NT) provides that where a court finds an offender guilty of a wide range of sexual offences the court must record a conviction and must order that the offender serve an actual term of imprisonment or a term of imprisonment that is partly suspended. No minimum period of imprisonment is prescribed. In South Australia a 20 year mandatory minimum period for murder has been prescribed.<sup>50</sup>

6.4.3 Politicians frequently promise mandatory penalties if elected to government. In Queensland in 2006 the Opposition Leader introduced into Parliament the *Offenders (Serious Sexual Offences Minimum Imprisonment and Rehabilitation) Bill*. The Bill imposed minimum terms for those convicted of serious sex offences and also sought to ensure that offenders could not be released from prison until they had completed a rehabilitation program. The government opposed the Bill and it was defeated.<sup>51</sup> In the debate in Tasmania in 2007, calls for a legislative response to the perceived leniency of rape sentencing apparently included the suggestion of mandatory minimum penalties. And most

<sup>46</sup> Gelb (2007), above n 43, 22.

<sup>47</sup> Lievore (2004), above n 44.

<sup>48</sup> Andrew Ashworth, *Sentencing and Criminal Justice*, (4<sup>th</sup> ed, 2005) 206-209; Julian Roberts, Public Opinion and Mandatory Sentencing, A Review of International Findings (2003) 30 *Criminal Justice & Behaviour* 483, 485.

<sup>49</sup> *Sentencing Act* (NT) ss 78BA, 78BB.

<sup>50</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).

<sup>51</sup> Queensland Parliament, 30 March 2006 and 9 August 2006.

recently the Weekend Australian has reported that Crime Victim Support Association spokesman Noel McNamara called for standard minimum sentences of 50 per cent of the maximum sentence for sex offenders in Victoria.<sup>52</sup>

### Criticisms of mandatory minimum penalties

6.4.4 While advocates of mandatory sentences argue that such schemes reduce unduly lenient sentences and create consistency by reducing discretion, there is a range of criticisms of mandatory penalties. First, it is argued they lead to injustice because of their inflexibility. There will inevitably be penalties in individual cases that most agree are too severe.<sup>53</sup> Secondly, evaluations of mandatory sentencing regimes show that judges and prosecutors devise ways to circumvent their application. In other words, mandatory penalties redistribute discretion so that the (less visible) decisions by the police and prosecuting authorities become increasingly important. Thirdly, critics such as Tonry argue that there is little basis for believing they have any deterrent effect on rates of serious crime but they do increase public expenditure by increasing trial rates and case processing times. As the ALRC has pointed out, many commentators have argued that mandatory sentences contravene a number of international human rights standards including the principle of proportionality and the requirement that sentences should be reviewable by a higher court. In their application to juvenile offenders mandatory sentences are particularly controversial and contravene the requirement that detention of young people should be a last resort and only ever for the shortest time appropriate.<sup>54</sup>

### The Institute's views

6.4.5 The Institute is of the view that mandatory minimum penalties for rape or sexual offences are inappropriate. They displace discretion, distort the judicial role, lead to injustice in individual cases and there is no evidence they are an effective deterrent. The Institute is aware that elected officials want to reassure the public generally that their concerns have been listened to and acted upon. There is a need to respond to public views about sentencing for sex offenders, but first, informed public opinion or public judgment on these issues needs to be ascertained. If informed public opinion suggests sentences are too lenient for sex offences, mandatory minimum penalties would be one means of increasing the sentencing severity. But it is the wrong response. In Tasmania, in the years 2001 to 2006, there have been only five sentences imposed for rape which have not involved an immediate term of imprisonment. Factors such as the youth of the offender, intellectual impairment and other extenuating circumstances were relied upon by the sentencing judge to justify not imposing an immediate sentence of imprisonment in each case. To deny judges the flexibility to impose a wholly suspended sentence in such cases would be likely to lead to grave injustice.<sup>55</sup>

## Recommendation

74. The Institute opposes the use of mandatory minimum penalties for sex offenders. (6.4.5)

<sup>52</sup> M Davis, 'Brumby Backs Attack on Rape Case Judges Words', *Weekend Australian* (Sydney), 19-20 January 2008, 7.

<sup>53</sup> Australian Law Reform Commission, *Same Crime Same Time*, Report No 103 (2006) 540.

<sup>54</sup> *Ibid.*

<sup>55</sup> Three cases in which wholly suspended sentences were imposed are referred to in Part 3 (see para 3.3.2-3.3.4); in the other two cases non custodial sentences were imposed: in *B* (Evans J, 30 July 2002) a section 7(f) order was made in respect of a 15 year-old deaf mute boy who attempted to rape a 16 year old girl on a commonly used beach; in *LM* (Cox CJ, 26 September 2001) a section 7(f) order and a probation order was imposed for three years on a youth who was immature and socially ill-adjusted who anally raped his 14 year-old brother and then attempted to do so again two years later but was discovered.

### ***Mandatory minimum non-parole periods***

6.4.6 Mandatory minimum non-parole periods were introduced in New South Wales in 2002<sup>56</sup> initially applying to some 21 serious offences committed after 1 February 2003 including murder, a range of sexual offences, acts involving injury to the police, car jacking, some drug offences and unauthorised possession of firearms. ‘Standard non-parole period’ is defined as the ‘non-parole period for an offence in the middle range of objective seriousness’.<sup>57</sup> The court is to set the standard non-parole period as the non-parole period for the offence unless for any of the reasons referred to in s 21A of the Act the period should be longer or shorter.<sup>58</sup> The purpose of the standard non-parole period legislation was said to be promoting consistency and transparency in sentencing by identifying a reference point in addition to the maximum penalty to guide sentencing discretion and promote public understanding of the sentencing process.<sup>59</sup>

6.4.7 In his second reading speech, the Attorney-General said that the standard non-parole periods had been set taking into account the seriousness of the offence, the maximum penalty and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales.<sup>60</sup> However, one of the main objections to the scheme was that it amounted to a significant increase in sentencing tariffs and that the periods were selected without consultation and on unarticulated criteria.<sup>61</sup> Compared with the average non-parole periods imposed prior to the scheme, the standard minima ranged from a 25 per cent increase in the case of murder to a more than 300 per cent increase in the case of aggravated sexual assault. The leading decision on standard non-parole periods is *R v Way*<sup>62</sup> in which the Court of Criminal Appeal indicated that standard non-parole periods were intended for a middle-range case where the offender was convicted after trial, and guidance was given on what is ‘in the middle range of objective seriousness’.

### **The Institute’s view**

6.4.8 Standard non-parole periods for sexual offences could be one way of addressing the perception of lenient sentencing for sex offences and the apparent decline in sentencing severity for one and two counts of rape. It could also be argued that it would improve transparency and public confidence in the criminal justice system by giving some legislative indication of what the sentence may be in a jurisdiction where there is in effect no guidance from the maximum penalty. However, this is not an approach the Institute recommends. While research shows that public knowledge of sentencing practices is woeful and that the public consistently underestimate the severity of sentencing practices, there is no reason to believe that specifying standard non-parole periods in legislation will have any impact on improving public understanding of, and public confidence in, sentencing practices. Secondly, while standard non-parole periods are not strictly mandatory penalties, if they are a starting point with room to move upwards or downwards, they nevertheless restrict judicial discretion and can lead to injustice in individual cases. Thirdly, even if only used for sexual offences, there will be problems in determining what should be the standard non-parole period for rape, aggravated sexual assault, indecent assault, maintaining a sexual relationship with a young person etc. Should it be based on current sentencing practices and, if not, how should it be determined? There are also difficulties in relation to sentences for multiple offences. In Tasmania multiple offences are usually dealt with by means of a global sentence and it is not clear how this could be accommodated in a standard non-parole period table. Finally, the offence of maintaining a sexual relationship can cover such a wide range of offending, from three instances of indecent assault to multiple counts of rape, that a standard

<sup>56</sup> *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

<sup>57</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54A.

<sup>58</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54B(2).

<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 2002, (Robert Debus, Attorney General).

<sup>60</sup> *Ibid.*

<sup>61</sup> David Brown, ‘The Politics of Law and Order’ (2002) 40 *Law Society Journal* 64.

<sup>62</sup> (2004) 60 NSW 168.

non-parole period for such an offence would require so many departures from the standard that it would be meaningless and no more helpful than current sentencing statistics.

### **Recommendation**

75. The Institute does not recommend the introduction of standard non-parole periods for sex offences. (6.4.8)

## ***Longer than proportionate sentence provisions and indefinite sentences for sex offenders***

### **Longer than proportionate sentences**

6.4.9 In Victoria, if a person is a serious sexual offender or a serious violent offender, the court *must* give priority to the protection of the community and *may* impose a sentence that is longer than that which is proportionate to the gravity of the offence.<sup>63</sup> A serious sexual offender is a person who has been convicted of either two or more sexual offences, for which he or she has been sentenced to a term of imprisonment, or one sexual offence and one violent offence arising out of the one course of conduct for which he or she has been sentenced to a term of imprisonment.<sup>64</sup> A serious violent offender is a person who has committed one serious violent offence such as murder, intentionally causing serious injury, causing a very serious disease or threats to kill, for which he or she has been sentenced to a term of imprisonment.<sup>65</sup>

6.4.10 South Australia has a serious repeat offender scheme which allows a sentence to be disproportionate to the gravity of the offence if a person is declared to be a serious repeat offender.<sup>66</sup> The trigger condition is the conviction of three serious offences committed on at least three separate occasions or, in the case of child sex offences, two convictions on separate occasions. As well as relieving the court of the need to ensure the sentence is proportionate to the offence, a declaration means that any non-parole period must be at least four fifths of the length of the sentence.

### **Indefinite sentences for sex offenders**

6.4.11 Queensland and South Australia have special provisions for the indefinite detention of sex offenders. The Queensland provisions allow a convicted sex offender to be detained indefinitely where there is evidence from two medical practitioners, one of whom must be a psychiatrist, that the offender is incapable of exercising proper control over his or her sexual instincts and that this incapacity can be cured by continued treatment.<sup>67</sup> The South Australian provisions are similar but were extended in 2005 to offenders unwilling to control their sexual instincts.<sup>68</sup> Both schemes allow for applications to be made at the time of sentence and during the sentence, although the option of doing so during the sentence has not yet been exercised.<sup>69</sup>

<sup>63</sup> *Sentencing Act 1991* (Vic) s 6D.

<sup>64</sup> *Sentencing Act 1991* (Vic) s 6B(2).

<sup>65</sup> *Sentencing Act 1991* (Vic) s 6B(1).

<sup>66</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 20B.

<sup>67</sup> *Criminal Law Amendment Act 1945* (Qld).

<sup>68</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 23.

<sup>69</sup> McSherry, Keyzer and Freiberg (2006), above n 41, 22.

## The Institute's views

6.4.12 The Institute does not support either enacting provisions to allow courts to impose longer than proportionate sentences for sex offenders or the introduction of indeterminate sentences specifically for sex offenders. Tasmania already has dangerous offender provisions which allow courts to impose a disproportionate sentence to protect the public which is indeterminate. Whether this should be modified in any way will be considered after provisions for post-sentence supervision and detention orders are discussed.

### *Post-sentence preventive detention and supervision*

6.4.13 Concern with how to manage the small number of high risk offenders whose term in prison is about to end has led some Australian states to introduce legislation to enable offenders to be supervised in the community or held in further detention after their sentence has ended.

### **Post sentence detention orders**

6.4.14 Post-sentence detention involves detention of offenders after they have served their full sentence. Queensland was the first jurisdiction in Australia to introduce such a scheme and New South Wales and Western Australia have followed. These schemes aim to protect the community and to provide continuing control and treatment of the offender.<sup>70</sup> Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* was introduced in response to public concern about the release of a prisoner, Denis Ferguson, in January 2003 after he had completed a 14-year sentence for kidnapping and sexually abusing three children.<sup>71</sup> It was reported that Ferguson had refused to take part in rehabilitation programs and had boasted how he would have sex with children once he was released. The Act empowered the Attorney-General to apply to the Supreme Court for an order for the continued detention of a prisoner serving a period of imprisonment for a 'serious sexual offence'. This is defined as an offence of a sexual nature that either involves violence or is against children. Under the Act the application for a continuing detention order must be made during the last six months of the prisoner's period of imprisonment.<sup>72</sup> The court can then order that the prisoner undergo a risk assessment order, which authorises two psychiatrists to examine the prisoner and prepare a report on the level of risk posed by the prisoner in the event that he is released.<sup>73</sup> At a subsequent hearing the court then assesses the prisoner's risk of re-offending and may impose either a continuing detention order or a supervision order.<sup>74</sup> The court must be satisfied 'by acceptable, cogent evidence ... to a high degree of probability' that the prisoner would pose a serious danger to the community if the orders were not made. Continuing detention orders are to be reviewed at least every 12 months by the Supreme Court.<sup>75</sup>

6.4.15 In 2006 Western Australia and New South Wales enacted similar legislation, namely, the *Dangerous Sexual Offenders Act 2006* (WA) and the *Crime (Serious Offenders) Act 2006* (NSW). There are some differences between the three schemes. For example, under the Queensland and Western Australian schemes continued detention orders are indefinite but in New South Wales a continuing detention order expires at the end of a specified period, or if not specified, at the end of five years. This does not prevent an application for subsequent orders being made. Secondly, the proceedings in the Queensland and New South Wales schemes are civil in nature.<sup>76</sup> In contrast, the

<sup>70</sup> See *ibid*, 29-35 for a detailed description of these schemes.

<sup>71</sup> ABC Online PM, *Queensland Looks at Laws as Paedophile Released* (2003) <<http://www.abc.net.au/pm>> at 29 October 2003.

<sup>72</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 5.

<sup>73</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 8.

<sup>74</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13.

<sup>75</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 27.

<sup>76</sup> The New South Wales Act specifically provides this; the High Court decision in *Fardon v The Attorney-General (Qld)* (2004) 210 ALR 50 was based on the premise the Queensland procedures were civil in nature: McSherry, Keyzer and Freiberg (2006), above n 41, 33.

Western Australian *Dangerous Sexual Offenders Act 2006* s 40 makes it clear the proceedings are criminal in nature. Whether the proceedings are civil or criminal changes the way in which proceedings are conducted, for example the way in which evidence is gathered and led.<sup>77</sup>

6.4.16 The Queensland legislation was challenged before the High Court in *Fardon v The Attorney-General (Qld)*<sup>78</sup> on the basis that it conferred a power on the Supreme Court of Queensland which was incompatible with its integrity as a court. The challenge failed and a majority of the Court held that the legislation was constitutionally valid on the basis that its primary purpose was not punishment but community protection.

### Post sentence supervision orders

6.4.17 Rather than allowing extension of detention, these orders extend the period of supervision in the community beyond the expiry of the sentence. In recent years, five Australian states have introduced schemes which enable post-sentence supervision of sex offenders in the community. In Queensland, Western Australia and New South Wales the orders complement continued detention orders – if the court decides that the offender is a serious danger to the community then the court must decide whether adequate protection would be provided by an extended supervision order or that a detention order is necessary.

6.4.18 Victoria's *Serious Sex Offenders Monitoring Act 2005* (Vic) with its regime for the extended supervision of high-risk child-sex offenders beyond the terms of their sentence commenced on 26 May 2005. It seems the immediate catalyst for this legislation was a series of newspaper articles and media hype about the possible release from prison of a prisoner designated 'Mr Baldy',<sup>79</sup> whose sentence of 14 years for the rape and indecent assault of two boys aged nine and six was nearing its end.<sup>80</sup> The first of these offences had been committed within a month of his release from a prison after serving a term for multiple child sex offences.

6.4.19 Unlike the Queensland, Western Australian and New South Wales schemes, the Victorian Act is limited to extending supervision in the community. The scheme applies to offenders who have been sentenced to imprisonment for a wide range of sexual offences against children. It allows the Secretary of the Department of Justice to apply to the court which sentenced the offender for an 'extended supervision order'. The application must be made while the sentence is being served. It must be supported by at least one assessment report from a psychologist, psychiatrist or other prescribed health service provider who has conducted an assessment of the likelihood of reoffending.<sup>81</sup> The court is empowered to make an order if satisfied to a high degree of probability that the offender is likely to commit a relevant offence after his or her sentence is completed if an order is not made.<sup>82</sup> The orders apply for an initial period of up to 15 years and can be renewed for additional periods of up to 15 years.<sup>83</sup> Core conditions of the order are: that the offender not commit another relevant offence, requirements as to attendance for supervision and treatment as directed, the need for consent to move residence, and to notify any change in employment.<sup>84</sup> Supervision is provided by the Adult Parole Board which may also give directions as to place of residence, impose curfews and impose other restrictions on employment, movement and activities.<sup>85</sup> Any concern that the scheme may result in shorter sentences because of the existence of post release supervision orders is addressed by an

<sup>77</sup> Ibid.

<sup>78</sup> (2004) 210 ALR 50

<sup>79</sup> McIntosh A, *Victorian Parliamentary Hansard*, Sex Offenders Monitoring Bill, Second Reading Debate, 23 February 2005, Legislative Assembly.

<sup>80</sup> The sentence had been increased by the Court of Criminal Appeal: *Brian Keith Jones*, unreported, CCA Vic, 26 March 1993. He was called Mr Baldy because he had shaved the heads of at least some of his victims.

<sup>81</sup> *Serious Sex Offenders Monitoring Act 2005*, ss 6, 7, 8.

<sup>82</sup> *Serious Sex Offenders Monitoring Act 2005*, s 11.

<sup>83</sup> *Serious Sex Offenders Monitoring Act 2005*, ss 14, 24.

<sup>84</sup> *Serious Sex Offenders Monitoring Act 2005*, s 15.

<sup>85</sup> *Serious Sex Offenders Monitoring Act 2005*, s 16.

amendment to the *Sentencing Act 1991* (Vic), which provides that the fact that an offender is or may be under the monitoring program after release is not to be taken into account at the time of sentencing.<sup>86</sup> As at July 2006, nine extended supervision orders had been granted by the Courts. Only a minority contested the application for an order in court.<sup>87</sup>

### Criticisms of preventive detention and supervision

6.4.20 There are a range of criticisms of post release preventive detention and supervision orders. The objection that they target sex offenders on the erroneous assumption that they have a higher risk of re-offending than other types of offenders can be countered by arguing that these schemes target selected high risk sex offenders only. But there are other objections including that they infringe a number of human rights and fundamental legal principles. Problems with unreliability of risk assessment are also raised. The following paragraphs give an overview of these criticisms.

#### The principle of proportionality

6.4.21 It is a ‘basic principle of sentencing law that a sentence ... imposed by a court must not exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.’<sup>88</sup> This does not mean that protection of the public is irrelevant in determining a sentence but, as a majority of the High Court explained in *Veen v The Queen (No 2)*,<sup>89</sup> there is a difference between merely inflating a sentence for the purposes preventive detention which is impermissible, and exercising the sentencing discretion having regard to the protection of society among other factors, which is permissible. A sentence of indeterminate length such as a life sentence may be justified on the basis it is proportionate to the seriousness of the offence. But if the seriousness of the offence and the culpability of the offender do not justify such a sentence, the principle of proportionality forbids such a sentence being imposed because it is necessary to protect the public. Post-sentence preventive detention and supervision orders are based on what the offender might do in the future and not on what the offender has done in the past and therefore can offend against the principle of proportionality.<sup>90</sup>

#### The principle of finality in sentencing

6.4.22 This principle provides that an offender should be released at the end of his or her sentence without the sentence being subsequently extended (other than by an appeal). This could perhaps be viewed as a version of the aspect of the rule of law principle that there should be no punishment without law, which requires that once a sentence has been served, offenders are entitled to their freedom. An offender subject to an indeterminate term (such as life imprisonment of a dangerous offender declaration) knows at the outset that the term is indeterminate and may at least know the pre-parole period or when an application can be made to review the term. In contrast, post-sentence preventive schemes lead to uncertainty as to how long an offender must remain in prison after the sentence has expired.

#### Double punishment

6.4.23 An objection to post sentence preventive detention regimes is that they offend the double punishment limb of the double jeopardy rule. Article 14(7) of the *International Covenant on Civil and Political Rights* provides that ‘no-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal

<sup>86</sup> *Sentencing Act 1991*, s 5(2BA).

<sup>87</sup> Bernadette McSherry, *High-Risk Offenders: Continued Detention And Supervision Options*, Sentencing Advisory Council, 2006.

<sup>88</sup> *Hoare v The Queen* (1989) 167 CLR 348, 345.

<sup>89</sup> (1988) 164 CLR 465, 472-475.

<sup>90</sup> McSherry, Keyzer and Freiberg (2006), above n 41, 79-80; Kate Warner, ‘Sentencing Review 2002-2003’ (2003) 27 *Criminal Law Journal* 325, 338.

procedure of each country'. Both legislation and common law provide that the double jeopardy rule applies to punishment as well as the determination of guilt.<sup>91</sup> The double punishment rule generally applies to prevent an offender being punished twice for overlapping elements of two or more offences.<sup>92</sup> This is also relevant in the context of post sentence preventive detention. Having been sentenced once, for an order to be made extending detention or providing for supervision beyond the end of the sentence could be said to amount to double punishment for the same conduct.

### Problems of prediction

6.4.24 Preventive detention schemes rely on assessments of risk, the fallibility of which is well documented in the criminological literature.<sup>93</sup> Risk assessments may be either clinical assessments of risk based on the judgment of experienced diagnosticians or actuarial assessments based on selected characteristics of the offender. Clinical assessments have long been shown to over predict risk with large numbers of false positives.<sup>94</sup> Successful predictions rates of only one third are common. Whilst it appears that actuarial methods of prediction are superior to clinical methods,<sup>95</sup> this method still has serious problems. As McSherry, Keyzer and Freiberg explain:

A difficulty of actuarial methods alone is that they are based on determining whether an individual offender has the same characteristics or risk factors as a 'typical' kind of offender. Risk assessments can classify an individual within a group – as 'high risk', 'medium risk' or 'low risk' – but they cannot say where in this group a given person lies and therefore cannot identify the precise risk an individual poses. Assigning risk to an individual offender based on the characteristics of a group can therefore lead to inaccurate assessments.<sup>96</sup>

Combining the two approaches may achieve better results, but still creates ample opportunities for error.<sup>97</sup>

### The arguments in favour of preventive detention and supervision

6.4.25 There are counter-arguments to the criticisms of preventive detention and supervision orders. It can be argued that preventive detention (or supervision) is not *punishment* and it follows therefore that it involves neither disproportionate punishment nor double punishment.<sup>98</sup> It can also be argued that preventive detention and supervision regimes apply only to offenders who have been convicted of serious offences and who have not only already caused a level of grievous harm but are at risk of causing further harm. In such circumstances exceptions to rules such as proportionality, double punishment and the finality rule are justified to protect the public. Similarly, problems of unreliable predictions of re-offending can be countered with the argument that assessments may never get to the point of predicting future behaviour with complete accuracy. However, if preventive detention schemes are used sparingly when a past offender has all the traits that actuarial and clinical assessments predict as presenting a high risk of re-offending – the offender may even assert that they will re-offend – then concerns about over-prediction are diminished.

### The Institute's view

6.4.26 The post sentence preventive detention and supervision schemes are probably constitutionally valid. However, they conflict with long established and widely accepted principles such as proportionality, the finality rule and the prohibition on double punishment. Whether they are

<sup>91</sup> *Pearce v The Queen* (1998) 194 CLR 610; *Acts Interpretation Act 1931* (Tas) s 32.

<sup>92</sup> *Pearce v The Queen* (1998) 194 CLR 610.

<sup>93</sup> McSherry, Keyzer and Freiberg (2006), above n 41, 12-14.

<sup>94</sup> A false positive is a prediction of re-offending that is wrong.

<sup>95</sup> Ashworth (2005), above n 48, 215.

<sup>96</sup> McSherry, Keyzer and Freiberg (2006), above n 41, 13, references omitted.

<sup>97</sup> *Ibid.*

<sup>98</sup> See McSherry, Keyzer and Freiberg (2006), above n 41, 79-84 for a more detailed exposition of this argument.

punitive or preventive in purpose, the reality is that they will be experienced by the offender, who is subject to them, as punishment. The Institute acknowledges that it is possible to argue that the greater good of protecting the public from a real risk that an offender who has caused considerable harm by offending sexually justifies a scheme which allows preventive detention or supervision. However, sex offenders are currently subject to sex offender registration orders on their release from prison and they can be subject to a dangerous offender declaration if they have a prior conviction for rape or indecent assault and such an order is necessary to protect the public from harm. The Institute is not persuaded that it is necessary to create an entirely new preventive detention or supervision scheme purely for sexual offenders to better protect the public from the risks of the recidivisms of convicted sexual offenders. It notes that dangerous offender applications under s 19 of the *Sentencing Act 1997* (Tas) can be made during a term of imprisonment as well as at the same time that the term of imprisonment is imposed. In effect, Tasmania already has a post-sentence preventive detention scheme.

6.4.27 The Institute has given consideration to the issue of whether there is a need to change the trigger conditions for a dangerous offender declaration or to extend it to give the court the option of imposing supervision rather than detention. It is not persuaded of the need to change the trigger conditions by abandoning the requirement for a prior conviction for an offence of violence, for example. Dangerous criminal declarations should continue to be confined to exceptional cases. The option of ordering supervision as an alternative to detention is something that could be considered by the government. This would entail amendments to s 19 of the *Sentencing Act 1997* (Tas) and would of course have significant resource implications.

6.4.28 The literature shows that considerable advances have been made in the assessment of the risk of re-offending and that jurisdictions such as Scotland have endeavoured to improve the quality of information that is made available at the time of sentencing.<sup>99</sup> The Institute acknowledges that in some cases it may be appropriate to make an application for a dangerous offender declaration during an offender's term of imprisonment, but is of the view that where possible that the application should be made at the time of sentence. Currently the legislation provides that a dangerous offender application has to be made to judge before whom an offender is convicted or brought up for sentence after being convicted. This can create problems if the sentencing judge has ceased to hold office during an offender's term of imprisonment because of death, retirement or resignation. It is therefore recommended that s 19 of the *Sentencing Act 1997* (Tas) be amended to insert a provision to the effect that if the sentencing judge has ceased to hold office or in other special circumstances, another judge may consider an application to declare an offender a dangerous criminal.

## Recommendations

76. The Institute does not recommend the introduction of provisions for post-sentence detention and supervision orders on the grounds that existing provisions for preventive detention and monitoring of released sexual offenders are adequate. The *Sentencing Act 1997* (Tas) s 19 already provides for dangerous criminal declarations, which can be made at any time during a sentence of imprisonment of an offender who is eligible for such an order. To add a new and separate set of provisions for post sentence detention would be unnecessary duplication and confusing. (6.4.25)

77. The Institute does not recommend that the trigger conditions for a dangerous offender declaration should be extended. However, it does suggest that consideration be given to amending s 19 so that courts have the option of making a supervision order after the end of the offender's sentence of imprisonment as an alternative. (6.4.26)

<sup>99</sup> For a description of Scottish orders of lifelong restriction scheme and the Risk Management Authority created to manage the scheme see McSherry, Keyzer and Freiberg (2006), above n 41, 49.

78. To ensure that an application for a dangerous criminal declaration can be heard when the sentencing judge is not available, it is recommended that sub-section (1A) be inserted into s 19 to provide that if the sentencing judge has ceased to hold office or in other special circumstances, another judge may hear an application for a dangerous criminal declaration. (6.4.27)

### *US post sentence civil commitment schemes*

6.4.29 A number of US states have sexual offender predator laws. McSherry, Keyzer and Freiberg outline the typical components of such schemes:<sup>100</sup>

- It commences when an offender convicted of sexually violent offence is scheduled for release.
- The person is assessed to determine whether they meet the statutory definition of a sexually violent predator.
- If there is sufficient evidence, a case is filed for a court or tribunal to determine if probable cause exists and if so the offender is taken into custody.
- A trial is then held to determine whether the offender is a sexually violent predator.
- If the court or jury so determines, the offender is committed to a state facility for control, care and treatment until he or she no longer poses a risk to the community.

6.4.30 McSherry, Keyzer and Freiberg outline six criticisms of these schemes.<sup>101</sup> First, sex offenders do not clearly fit within the boundaries of the mental health system, which is to detain and treat those with an identifiable mental illness. As Lievore has pointed out, the belief that the majority of sex offenders are mentally ill is not supported by research.<sup>102</sup> Secondly, the use of civil commitment to encompass the detention of sex offenders has been criticised as representing nothing more than the transferral of preventive detention from the criminal to the civil system. Thirdly, the inpatient medical model may actually undermine treatment efforts for sex offenders who do not have a mental illness in a number of ways. For example, labelling them as mentally abnormal may detract from offenders taking responsibility for their conduct. Fourthly, using the civil mental health system to detain sex offenders after the expiration of their sentence may violate their civil rights. Fifthly, inadequate focus has been placed on the potential for restorative justice alternatives to the civil mental health model of managing sex offenders. Finally, the medical model approach has significant resource implications. The use of the mental health system to detain sex offenders may limit the availability of resources for the treatment of individuals with mental illnesses who have not offended.

### *The Institute's view*

6.4.31 For the reasons outlined in para 6.4.30 the Institute does not support the creation of sexual predator laws which allow civil commitment procedures to detain sex offenders beyond the expiry of an offender's sentence.

### **Recommendation**

79. The Institute does not recommend the introduction of civil commitment procedures to detain sex offenders beyond the expiry of an offender's sentence for the reasons given in para 6.4.29.

<sup>100</sup> Ibid, 50-51.

<sup>101</sup> Ibid, 55-57.

<sup>102</sup> Citing Denise Lievore, 'Thoughts On Recidivism and Rehabilitation of Rapists' (2005) 28 *University of New South Wales Law Journal* 293.

### ***Sex offender treatment and chemical castration***

6.4.32 As discussed in Part 3 (paras 3.2.31-3.2.33) there is now considerable evidence that some forms of treatment are effective for sex offenders. The Institute recommends that the government continues to fund sex offender treatment programs both in an out of prison and that in particular more resources be devoted to follow-up of offenders after their release whilst on parole. The Institute has also considered whether ‘chemical castration’ should be a sentencing option.

6.4.33 Drug treatments are sometimes used in the treatment of sex offenders. Medroxyprogesterone acetate (MPA), for example, is a drug which slows the release of the male hormone androgen from the testicles and has a suppressing effect on male sexual desire. While its use is relatively uncontroversial in the case of volunteers and such drugs are used in the correctional context in Australia, court ordered ‘chemical castration’ is not a sentencing option in any Australian jurisdiction. However, in some US jurisdictions such treatments can be a sentencing option with nine American states incorporating MPA treatment in their sentencing regime. There are differences between these jurisdictions in the sexual offences they apply to, the assessment preconditions and whether the treatment is discretionary, mandatory or voluntary. Some states (Louisiana and Oregon) mandate chemical castration for first time offenders in certain circumstances and three others (California, Florida and Iowa) mandate it for certain repeat offenders. In the other four states it is either discretionary or voluntary. In other words, if it is discretionary, the court has a discretion to make an order for compulsory treatment for certain sex offenders; if it is voluntary, the order is subject to the consent of the offender.

#### **The Institute’s view on chemical castration**

6.4.34 The Institute does not support making chemical castration compulsory – either as a mandatory order if the trigger conditions are satisfied or giving courts a discretion to make a sentencing order which compels the offender to submit to drug treatment. Coercive treatment of this nature infringes ethical and human rights principles and is contrary to the general right to refuse medical treatment and to submit to a number of known possible side effects of the drugs. Instrumental arguments about the effectiveness of such treatment as a means of reducing sexual recidivism are reasons for offering such treatment to sex offenders but do not justify compelling offenders to undergo such treatment as part of a sentencing order.<sup>103</sup> However, if an offender chooses to have this form of treatment and it is medically indicated and appropriate for the offender, it should be made available by correctional authorities as part of an offender’s treatment program.

#### **Recommendations**

80. The Institute recommends that for the protection of the public the best possible evidence-based sex offender treatment programs should be made available in the prison system and in the community and that prisoners on sex offender treatment programs should be receive follow-up treatment and support after their release. (6.4.30)

81. The Institute does not recommend that chemical castration should be a sentencing option or a condition of a sentencing order but when appropriate it be made available to offenders who consent as part of their treatment program. (6.4.32)

<sup>103</sup> Linda Weinberger, Shoba Sreenivasan, Thomas Garrick, Hadley Osran, ‘The Impact Of Surgical Castration On Sexual Recidivism Risk Among Sexually Violent Predatory Offenders’ (2005) 33(1) *American Academy of Psychiatry and the Law* 16; Grant Nichol, *Paraphilic Sex Offenders: A Literature Review and Proposal for Program Development in Victoria*, Research Fellow Working Paper No 17, Centre For Health Program Evaluation (1991); Fred Berlin, ‘Commentary: The Impact of Surgical Castration on Sexual Recidivism Risk Among Civilly Committed Sexual Offenders’ (2005) 33(1) *American Academy of Psychiatry and the Law* 37.

## 6.5 What is an appropriate response to the public perception that sentences for sex offenders are too lenient?

6.5.1 The final issue to discuss in this Part is how to respond to the public perception that sentences for sex offenders are too lenient. It may be that while the protection of society cannot be shown to require measures in addition to dangerous offender declarations and sex offender registration orders such as extended detention orders, longer than proportionate measures or mandatory penalties, the existing penalties for sex offenders are regarded as too lenient on the grounds that they do not adequately reflect the seriousness with which the public views such crimes. To put this another way, it is not a question of giving courts the power to impose penalties for sex offenders that infringe the principle of proportionality. Rather, it is a question of whether existing penalties for sex offenders are disproportionately lenient – that they fail to adequately denounce such offences or to recognise the seriousness of such offences and the culpability of those who commit them.

6.5.2 As stated above in para 6.2.12, the Institute is unable to answer the question whether current sentencing practices for sex offences are appropriate. This is an issue which requires further research and it has been suggested that this could be done as an extension of the University of Tasmania's jury sentencing study and Mackenzie's ARC research (see para 6.2.12). In Part 7 the Institute recommends that a Sentencing Advisory Council be established to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. Exploring the issue of the appropriate sentencing levels of sexual offences is a matter that could be undertaken by such a body taking into account the research findings from the Jury Sentencing Study and the ARC study. While the mechanism of a guideline judgment application would be a means by which the Sentencing Advisory Council could advise the Court of Criminal Appeal of a recommended guideline for rape, the Institute at this stage has not recommended guideline judgments be introduced (see Part 7, 7.3.36). However, the advice of the Sentencing Advisory Council could be relied upon by the Director of Public Prosecutions in a Crown sentencing appeal if the advice were to the effect that current sentencing range for rape is too low.

### **Recommendation**

82. The Institute recommends that the issue of the appropriateness of sentencing patterns for sexual offenders be referred to the proposed Sentencing Advisory Council. (6.5.2)

## Part 7

# Role of the Community

- (a) Consider the level to which the objective in section 3(f) of the Sentencing Act [of promoting public understanding of sentencing practices and procedures] has been met and make recommendations as to how the public can be informed of the sentencing process.
- (b) Consider how community attitudes towards sentencing should be ascertained.
- (c) Examine whether any mechanism could be adopted to more adequately incorporate community views into the sentencing process.

## 7.1 Promoting public understanding of sentencing

7.1.1 One of the stated purposes of the *Sentencing Act* is to ‘promote public understanding of sentencing practices and procedures’ (s 3(f)). The Attorney-General’s second reading speech indicates a clear understanding of the problems surrounding community perceptions of sentencing, but offers only consolidation of the legislation as a means of solving these problems and promoting public understanding of sentencing:

Mr Speaker, the purpose of the bill is to consolidate into the one act, all the various legislative provisions in relation to sentencing in Tasmania. In recent years there has been a considerable degree of community interest in the criminal justice system, particularly in the sentencing process. With public disquiet about crime rates, there is a public perception that sentences imposed are generally inadequate as either a deterrent or for punishment purposes. This public dissatisfaction often arises from a misunderstanding of the law and the sentencing process, although one must say that one can appreciate the level of concern that is out there in the community.

Public debate on sentencing issues often occurs in response to quite exceptional cases. It is therefore an opportune time for government to rationalise and consolidate existing legislative provisions into a single statute. By this means, the sentencing process will become more understandable to the general public, offenders, and those responsible for the administration of justice.<sup>1</sup>

7.1.2 While consolidation of sentencing legislation may assist to promote public understanding of sentencing practice and procedure, at most it is a preliminary step. The *Sentencing Act 1997* (Tas) tells us very little. As far as sentencing legislation goes, the information on sentencing goals and factors relevant to the sentencing discretion is scant. While s 3(g) states the purpose of the Act is to set out the objectives of sentencing and related orders, the only orders which include objectives are adjournments, discharges and dismissals. Even the general aims of sentence in s 3(e) are stated indirectly, rather than as directions to judicial officers. Whether the Act should contain more detail in relation to sentencing goals and principles will be considered below. However, the usefulness of legislation as a means of educating the public about sentencing practice is doubtful. No matter how detailed, no matter how accessible in theory (the Internet has improved accessibility of legislation), sentencing legislation of its nature reveals very little about sentencing practice in a way likely to assist public understanding of sentencing practice and procedure.

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<sup>1</sup> Hansard, Parliamentary Debates, Attorney-General Ray Groom 13 August 1997.

### ***The importance of a well-informed public***

7.1.3 In Part 2 it was explained that international evidence suggests that misperceptions about sentencing practice fuels public dissatisfaction, and that one of the ways of improving public confidence in criminal justice and perceptions of safety is to improve public understanding of sentencing. In addition, in Part 4 it was recognised that the information and advice provided to victims needs to ensure they have realistic expectations about the sentencing process. The views of victims and victims' families feature prominently in media coverage of crime stories and feed into public perceptions of sentencing.

7.1.4 Robust evidence of public opinion about sentencing in Tasmania is limited and research on public knowledge of sentencing and criminal justice issues scanty. Letters to newspapers, talkback radio and media polls convey the impression that the public thinks that sentences are too lenient and that judges are out of touch. Representative surveys similarly suggest the public considers sentences are too lenient. As mentioned in Part 2, the Australian Survey of Social Attitudes has consistently reported that over 70 percent of respondents agree that people who break the law should be given stiffer sentences.<sup>2</sup> However, in recent years researchers have questioned the claim that surveys such as these demonstrate that public opinion supports harsher sentences and have highlighted 'the methodological limitations of using a single abstract question to measure complex and nuanced public attitudes'.<sup>3</sup> More sophisticated public opinion research has shown that,

- people answering a general question respond punitively because they have the worst kind of offenders and the most serious cases in mind;
- people recall particularly lenient sentences and do not consider whether the crimes and sentences that come to mind are representative of most cases;
- people fail to consider the alternatives to incarceration;
- people have very little accurate knowledge of crime, the criminal justice system and sentencing practices;
- those with the lowest levels of knowledge hold the most punitive views;
- when people are given more information, their levels of punitiveness drop dramatically.<sup>4</sup>

7.1.5 The limited research on public knowledge of sentencing and criminal justice issues in Tasmania suggests that the Tasmanian public is probably as uninformed as is the public in other jurisdictions.<sup>5</sup> The Australian Survey of Social Attitudes has found that just five percent of Australians stated that crime levels had decreased over the last two years, or, in other words, just one in 20 respondents answered the question accurately. Tasmanian respondents were a little more accurate with one in 10 respondents giving a correct response.<sup>6</sup> Preliminary findings from the University of Tasmania's jury sentencing study have revealed that jurors perceive recorded crime to be increasing, overestimate the proportion of crime that involves violence and underestimate the severity of sentencing practices. For example, only one percent of respondents correctly stated that recorded crime had decreased in the last five years and 63 percent stated it had become more common.<sup>7</sup>

<sup>2</sup> D Indermaur and L Roberts, 'Perceptions of Crime and Justice' in S Wilson et al, *Australian Social Attitudes: The First Report*, (2005) 141, 155.

<sup>3</sup> K Gelb, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, Sentencing Advisory Council, Research Paper, (2006) 12.

<sup>4</sup> *Ibid*, 1-18; Julian Roberts, Loretta Stalans, David Indermaur and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (2003) 21-34.

<sup>5</sup> For other jurisdictions see Gelb (2006), above n 3, 13.

<sup>6</sup> Indermaur and Roberts (2005), above n 2, 143.

<sup>7</sup> K Warner, J Davis, M Walter and R Bradfield, 'Talking to juries about punishment: investigating a new way to gauge public opinion and inform the public' (paper presented the 2008 Supreme and Federal Courts' Conference, Sydney, 19 January 2008).

7.1.6 Low levels of public knowledge about crime and sentencing are a matter of concern because there is strong international evidence that dissatisfaction with sentencing practice is due, at least partly, to a number of aspects of public misperception and misinformation. Using British Crime Surveys, Hough and Roberts have found that a number of aspects of public misperception were significantly associated with a belief that sentences were too lenient:

- those saying there was a lot more crime were more likely to think sentences were too soft;
- over-estimators of the of proportion of recorded crime involving violence were more likely to think sentences were too soft;
- under-estimators of the number of burglars and rapists sent to prison were more likely to think sentences were too soft.<sup>8</sup>

7.1.7 Further, almost half of the respondents thought lenient sentencing was a major cause of rising crime rates. This belief in a direct relationship between severity of sentencing and crime rates is a concern because it leads many to blame judges and magistrates for failing to control crime despite the evidence that factors affecting crime rates lie largely outside the reach of judicial officers.<sup>9</sup>

### ***The mass media is primary source of information about crime and sentencing***

7.1.8 According to an Australian Bureau of Statistics (ABS) survey, the main sources of information about crime and sentencing are television and newspapers.<sup>10</sup> Findings from the Australian Survey of Social Attitudes demonstrate that the accuracy of perceptions regarding crime fluctuates with the type of media upon which a person relies. For example, those who rely on internet sites for their news and information are most likely to believe that crime rates are stable or falling, whilst those who rely on talkback radio, family and friends and commercial television are least likely to believe this.<sup>11</sup>

7.1.9 The mass media provides a distorted picture of crime and criminal justice issues. It is frequently criticised for selectively reporting crime stories. Decisions that are unremarkable are simply not reported.<sup>12</sup> Quantitative analysis of media coverage does not always show newspapers are more likely to cover sentencing stories if the sentence is a light one, but the attention given to apparently lenient outcomes in serious cases and strident editorial comment distorts information about sentencing practice.<sup>13</sup> The attention of the public is likely to be drawn to a specific case, which seems in the light of the reported facts to be too lenient. In Australia, studies show that while the ‘quality press’ neglects sentencing matters, the approach of the ‘tabloid’ press on the other hand is to ‘fan emotion, quash reason and present false impressions’.<sup>14</sup> Just as listening to talk-back radio and watching commercial television predicts misperceptions of crime rates, UK research has shown that reading the tabloid press is a strong predictor of under-estimators of sentencing severity.<sup>15</sup> As Indermaur and Roberts point out, unpacking the cause and effect in the relationship between media and perceptions of crime and sentencing is complex:

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<sup>8</sup> M Hough and J Roberts, ‘Sentencing Trends in Britain: Public Knowledge and Public Opinion’ (1999) 1 *Punishment & Society* 11, 18 cited by Gelb (2006), above n 3, 14; M Hough and J Roberts, ‘Public knowledge and public opinion of sentencing’ in C Tata and N Hutton (eds) *Sentencing and Society* (2002) 157, 164.

<sup>9</sup> J Roberts and M Hough, *Understanding Public Attitudes to Criminal Justice*, (2005) 48 cited by Gelb (2006), above n 3, 14; see above 2.1.20 on the relationship between crime levels and sentencing.

<sup>10</sup> Australian Bureau of Statistics *Community Safety Tasmania*, Cat no 4515.6 (1999) 4: 30.5 percent used television as their main source of information about crime, while 23.7 percent used newspapers.

<sup>11</sup> Indermaur and Roberts (2006), above n 2, 148.

<sup>12</sup> Report to Parliament by the Hon DK Malcolm, Chief Justice of Western Australia, (1998) referred to by N Morgan and B Murray ‘What’s in a Name? Guideline Judgments in Australia’ (1999) 23 *Criminal Law Journal* 90, 98.

<sup>13</sup> M Hough and J Roberts (2002) ‘Public knowledge and public opinion of sentencing’ in C Tata and N Hutton (eds) *Sentencing and Society*, 170.

<sup>14</sup> A Lovegrove, ‘Judicial Sentencing Policy, Criminological Expertise and Public Opinion’ (1998) 31 *Australian and New Zealand Journal of Criminology* 287, 293.

<sup>15</sup> Hough and Roberts (2002), above n 8, 164.

While the media may feed negative stories and images to viewers, individuals are likely to seek out media sources that accord with their pre-existing opinions and beliefs. What is most likely then, is that individual views and audience-maximising media programming amplify each other through synergistic selection and reinforcement.<sup>16</sup>

7.1.10 There is general agreement that by presenting an inaccurate and incomplete picture of sentencing practice, the popular media plays a significant role in contributing to a misinformed public.<sup>17</sup> Whether it is the media's role to ensure that the public is well-informed on criminal justice issues can be questioned. Media outlets are businesses with commercial imperatives.

### ***How should the public be better informed about sentencing?***

7.1.11 In the light of evidence that a lack of public confidence in the criminal justice system and punitive attitudes are linked with misperceptions about crime and sentencing patterns, improving public knowledge of crime and sentencing is a priority. The Issues Paper canvassed a number of ways in which this could be achieved.

#### **Statistics and website**

7.1.12 The Issues Paper contained a proposal for the production and publication of sentencing statistics on the Internet with an annual press release to media outlets. It was suggested this should provide simple factual information about crimes and sentencing indicating the range of sentences handed down in the Supreme Court and the Magistrates Courts each year for specific offences in such a way as to communicate the 'going rate' for specific sorts of crime. Links could be provided to the courts' websites. This would be a resource for members of the public and the media. While there is no guarantee that the media would use this data to provide a context for discussion of particular cases, at least the media would not have the excuse that such data was unavailable or available in an indigestible form.<sup>18</sup>

7.1.13 The Issues Paper explained that the usefulness of sentencing data is not confined to improving public knowledge of sentencing practice. It would also be useful for prosecutors, defence counsel, judges and magistrates, defendants, victims and other participants in the criminal justice system. Addressing the reservations expressed by Gaudron, Gummow and Hayne JJ in *Wong v The Queen*<sup>19</sup> it was argued first, that an indication of the percentage of custodial sentences and the ranges of penalty with a median is better than no knowledge at all about sentencing patterns for a particular offence and secondly, that the sentencing data will not be used by sentencers in isolation from appellate guidance and sentencing remarks.

7.1.14 In addition to sentencing data, it was suggested that information on crime rates should also be made more accessible. Data on crime trends is available but it needs to be conveyed in a more understandable format. Studies have shown that even when crime rates have been consistently declining, the majority of the public view crime rates as increasing. ABS data or police data on crime rates for this State should be included on the same Internet site as the sentencing data. Data on parole release should also be included.

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<sup>16</sup> D Indermaur and L Roberts (2006), above n 2, 148.

<sup>17</sup> Gelb (2006), above 3, 15.

<sup>18</sup> Hough and Roberts (2002), above n 8, 171.

<sup>19</sup> (2001) 207 CLR 584, 608.

### ***Responses to the Issue Paper***

7.1.15 There was support for the publication of annual sentencing statistics in easily accessible form.<sup>20</sup> The Director of Public Prosecutions strongly supported the production of Magistrates Courts sentencing statistics.<sup>21</sup> The Manager of the Launceston Community Legal Centre supported the provision of a state-wide sentencing data base covering both the Supreme Court and Magistrates Courts. It was suggested that this should be maintained by the University to provide a degree of independence in the interpretation of the data.<sup>22</sup> As well as supporting Internet availability of sentencing statistics, Tasmania Police also suggested that a regularly up-dated database of judges' comments on passing sentence (COPS) be available on the Internet rather than the current practice of removing the comments after a few weeks.<sup>23</sup>

### ***The Institute's view***

7.1.16 The Institute remains of the view that there are a number of deficiencies in sentencing data that need to be addressed. First, there is no available data on sentencing patterns in Magistrates Courts. This could partly explain the apparent disparities in sentencing outcomes between magistrates and regions revealed by the analysis of sentencing trends in Part 1 (see paras 1.3.12-1.3.13). Secondly, the Supreme Court sentencing database has a number of limitations. While judges and practitioners have access to the whole database of all COPS since 1989 and can search it to obtain the tariff for any particular crime, this database is not available to the general public. A member of the public can only access sentencing comments for a few weeks after the sentence is handed down. Moreover, while the Supreme Court database may be easily searchable from the point of view of a judge who is familiar with it, it does not provide a quantitative overview of the sentencing pattern for a particular offence such as the percentage of custodial sentences, the range of sentences and the median for a particular offence. The same is true of the version of the database which is available to legal practitioners (TasinLaw).

7.1.17 It is not appropriate that all COPS should be available publicly. Making them available from the date of the sentence for a period of two or three weeks ensures that the media and members of the public can access the comments to get a complete and accurate picture of the judge's reasons for sentence in a particular case. Making the whole database available would carry the risk of jurors accessing the database to see if an accused has a prior record and could prejudice a trial.

7.1.18 New technology provides an opportunity to disseminate crime and sentencing information. With 55 per cent of Tasmanian dwellings having access to the Internet<sup>24</sup> there is the opportunity to provide complex up-to-date information in an accessible way. The Victorian Sentencing Advisory Council's sentencing snapshots for particular offences provide an illustration of simple and accurate sentencing information that is available on line. The Tasmanian Justice Department now has a database, which records sentencing outcomes for the Supreme Court and Magistrates Courts for the whole of the State. However, it is not used to produce sentencing information in a regular and systematic way and the searches required to extract the data are complex. A lack of resources and personnel means that ad hoc requests for sentencing data to the Justice Department cannot be easily accommodated. The Institute recommends that protocols be developed for extracting the data and that the task of cleaning, sorting and analysing it be outsourced with appropriate funding to ensure that annual sentencing data is published. Similar data should also be published for the Supreme Court compiled from either the Justice Department's or the Supreme Court's data base. For the purposes of the Sentencing project, the Institute has compiled a database of Supreme Court sentences from 2001-2006 and this could be up-dated for the purpose of the publication of annual sentencing data. Because it would appear that public misperceptions about sentencing are related to misperceptions about crime

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<sup>20</sup> Legal Aid Commission of Tasmania, submission, 2, 12; Tasmania Police, submission, 8; Jane Hutchinson and Olivia Montgomery, Hobart Community Legal Service, submission, 3.

<sup>21</sup> T J Ellis, SC, Director of Public Prosecutions, submission, 4.

<sup>22</sup> Bob Hamilton, Manager, Launceston Community Legal Centre, submission, 2.

<sup>23</sup> Tasmania Police, submission, 9.

<sup>24</sup> Australian Bureau of Statistics, *Patterns of Internet Access in Australia*, Cat no. 8146.0.55.001 (2006) 16.

trends, in addition to sentencing information, information on crime trends and general sentencing information should be published.

7.1.19 There are a number of possibilities for undertaking the task of analysing and publishing the data including the Tasmania Law Reform Institute, the Tasmanian Institute of Law Enforcement, or a designated person based at the Justice Department or a sentencing body of some kind. This will be considered further below.

### **Recommendation**

83. The Institute recommends that the government allocate funding for the publication of easily accessible and digestible general crime and sentencing information including annual sentencing statistics to promote public understanding of crime and sentencing matters. This would also remedy the information deficit in relation to sentencing practices in magistrates' courts and promote consistency. (7.1.18)

### ***Public education campaigns, printed booklets and sentencing workshops***

7.1.20 The Issues Paper recommended the publication of printed booklets as a means of improving public knowledge of the sentencing process. It was argued that contact with the criminal justice system provides an opportunity to make information about the system available and to shape participants' expectations about it. This could be done relatively cheaply and easily by producing a booklet explaining crime rates, basic court procedures, the aims of sentencing, basic factors which are taken into account in sentencing, common aggravating and mitigating factors, and giving an indication of the range of penalties that can be expected for different offences. Such a booklet could be made available to victims and their families by placing it at police stations, courts and other appropriate places. The effectiveness of this format for providing simple factual information to a wide cross-section of the public is supported by Home Office research.<sup>25</sup>

7.1.21 This strategy has the support nationally of the Judicial Conference of Australia which released a booklet in 2007 entitled *Judge for Yourself: a Guide to Sentencing in Australia*. The aim of the booklet is 'to educate the public and journalists in the face of what it believes is often unwarranted criticism'.<sup>26</sup> Publicising the booklet's launch in September 2007, Debelle J, the Chairman of the Judicial Conference, was reported as saying it was intended to help the public understand the process of sentencing and to 'weigh criticism in the media. It is also provided for the purpose of educating journalists to be more temperate in their criticism'.<sup>27</sup> Another publication is planned to be 'aimed at a more informed audience'. The booklet is available to members of the public at the Supreme Court in Tasmania and links are available to an electronic version of the booklet on the Supreme Court's website.

7.1.22 Sentencing workshops have also been used as a means of educating the public about sentencing matters. In *You be the Judge* sentencing workshops, members of the public participate in a seminar with a mock trial component. Participants are asked to discuss what sentence should be imposed.<sup>28</sup> These workshops have been used in a number of jurisdictions.<sup>29</sup> Many have been conducted by Victoria's Sentencing Advisory Council and dates of forthcoming workshops are advertised on the Council's website. Since August 2002, a number of workshops have been run in Tasmania involving judges and magistrates and using participants from organisations such as Neighbourhood Watch. The mock trial component of these workshops has been filmed as the basis of a multimedia educational

<sup>25</sup> Ibid.

<sup>26</sup> M Pelly, 'Judges hit back on mandatory sentencing', *The Australian* (Sydney) 28 September 2007, 39.

<sup>27</sup> Ibid.

<sup>28</sup> This has been done in a number of jurisdictions, see Neighbourhood Watch, Northern Territory Legal Aid Commission, Northern Territory Law Society and the Public Purposes Act, Trial of the Century: Final Report (2001); *You Be the Judge*, Supreme Court of Tasmania, <[www.courtlists.tas.gov.au/Sentencing/home.html](http://www.courtlists.tas.gov.au/Sentencing/home.html)> at 12 November 2007.

<sup>29</sup> See Issues Paper at [110] for a description of the Northern Territories Trial of the Century Project.

package for schools that is available on the web.<sup>30</sup> The Victorian Sentencing Advisory Council has developed a sophisticated *You be the Judge* educational package for Legal Studies and Civics students consisting of a Teacher Guide, case studies and notes. The package was released in April 2007 and the information is updated frequently.

### ***Response to the Issues Paper***

7.1.23 The Issues Paper invited responses about public education of sentencing and criminal justice issues. Many respondents supported the need for improved public education. Tasmania Police, for example, submitted:

Public education on sentencing and crime trends should be a priority, particularly in the Tasmania Together context. Fear of crime is a significant problem in Tasmania, and lack of understanding about sentencing practices and the extent of crime is a contributing factor that needs to be addressed.<sup>31</sup>

7.1.24 Tasmania Police also supported sentencing workshops and judges and magistrates' involvement in presentations about sentencing to community groups such as Rotary and Neighbourhood Watch. The production of a sentencing booklet, which should be made available to victims as a matter of course and made available on the Internet, was also supported. There was considerable support for sentencing workshops.<sup>32</sup> There was also support for a sentencing information booklet. The Legal Aid Commission suggested that rather than publishing hard copies of the booklet, it be made available online so that it could be continually up-dated and printed on demand. The Shadow Attorney-General supported public education about sentencing and suggested a monthly insert for each of the daily newspapers with sentences and sentencing comments including information about sentences in Magistrates Courts. On the other hand, in consultations with the Justice Department, Peter Hoult voiced scepticism about the effectiveness of public education campaigns. Letter box drops were criticised on the grounds that they have a 25 per cent readership rate at most.<sup>33</sup> Jim Connolly however, supported education in schools about crime and justice matters in order to inform people of the facts before their opinions became entrenched. In the Justice Department's submission, it was suggested that rather than unrelated and piecemeal strategies such as booklets and sentencing seminars, a comprehensive public education program with clearly defined target groups would be more effective. However, problems with a lack of resources to devote to such a program were noted.<sup>34</sup>

### ***The Institute's view***

7.1.25 In the Institute's view a variety of approaches are needed to improve public information about sentencing. Existing approaches such as sentencing workshops should be continued. While Home Office research confirms that seminars are not an effective way of conveying information to a wide cross-section of the general public because of the low attendance rates and the unrepresentative nature of those attending (attendees were more likely to have educational qualifications and to read broad-sheet newspapers), such an approach received very positive ratings from those who did attend. Sentencing workshops may therefore be a means of stimulating interest in the criminal justice system and improving knowledge about it for those with no contact with the criminal justice system. The preparation of the multimedia package for schools and community groups by the Legal Aid Commission is to be commended. However, this could no doubt be updated and improved by the

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30 This can be accessed at <[www.courtlists.tas.gov.au/Sentencing/about.html](http://www.courtlists.tas.gov.au/Sentencing/about.html)> or by accessing the Supreme Court website and following the Sentencing link.

31 Tasmania Police, submission, 8.

32 The Honourable Justice Cox, Chief Justice, submission, 5; The Honourable Justice Underwood, submission, 2; Criminal Law Subcommittee of the Law Society, submission, 2; Legal Aid Commission of Tasmania, submission, 12.

33 Peter Hoult, consultation with Justice Department, 7 October, 2002.

34 Justice Department, submission, 18.

inclusion of more supporting material along the lines of the Sentencing Advisory Council's *You be the Judge* package to ensure its ongoing usefulness for legal studies students.

7.1.26 The Institute also supports the use of a sentencing information booklet and noted above that the Judicial Conference of Australia's booklet *Judge for Yourself: a Guide to Sentencing in Australia* is already available in the Supreme Court and electronically on the Supreme Court website. However, the Institute is aware that the provision of accessible information by booklet and on websites has limitations. Not all commentators are convinced about the value of attempting to educate the public by providing accessible information. For example, Green has argued that public education programs embraced by the Home Office, such as distributing booklets or videos, are insufficiently bold to make a significant and lasting impact on public knowledge and attitudes.<sup>35</sup> They are inherently flawed because they do not help the public work through the ambivalent attitudes that crime and punishment issues often produce to allow for the development of more considered views. Information, it is argued is a necessary condition for attitude change but it is not sufficient. Similarly, Maruna and King have cautioned that 'public education will help, but is no panacea'.<sup>36</sup> They argue that attitudes have an emotional dimension as well as a factual one, and when attitudes to crime, sentencing and penalties are not merely based on information deficits, they are not easily altered.<sup>37</sup> In conclusion, they state:

Schemes to educate and inform the public about the nuances of sentencing, the "facts" about crime, and so forth are noble, well-meaning efforts, but unlikely to have more than marginal impact on either public understanding of crime issues or punitive, prison-centric attitudes.<sup>38</sup>

7.1.27 Maruna and King note that the most promising findings about the impact of education is in the context of active participation by citizens in the criminal justice process, such as serving on a jury or participating in restorative justice work. Research suggests active participation increases satisfaction with the criminal justice system and decreases punitiveness.<sup>39</sup> This suggests that using jurors as a means of educating the public has some potential. Currently a study is underway in Tasmania which is exploring the use of jurors both as a means of educating the public about sentencing matters and using them as a source of public opinion.<sup>40</sup> Jurors are recruited from trials after a guilty verdict is returned and invited to stay to listen to the sentencing submissions and participate in the study. At the first stage they are invited to fill in a questionnaire which asks them to state the sentence they consider should be imposed and tests their knowledge of crime and sentencing matters. They are then sent an information package containing the COPS, a booklet about crime and sentencing and a second questionnaire which explores their response to the judge's sentence and assesses the impact of the booklet on their knowledge of crime and sentencing matters. The study will attempt to discover what impact the information has on jurors' knowledge of criminal justice issues and perceptions of sentencing. There are obvious limitations in the study as a long-term strategy for informing the public about crime and sentencing issues. However, it may show that it is worthwhile engaging the jury in the sentencing process to the extent of not only inviting them to listen to the sentencing submissions but also sending them information about crime and sentencing and the COPS. It is hypothesised that as their interest has been aroused in the case by jury service and perhaps their emotions engaged, they are in a position to absorb knowledge and change their attitudes and perceptions. Preliminary results indicate that jurors do take an interest in the sentencing outcome and many discuss it with friends and family.

<sup>35</sup> D Green, 'Public Opinion versus Public Judgment about Crime' (2006) 46 *British Journal of Criminology* 131.

<sup>36</sup> S Maruna and A King, 'Public Opinion and Community Penalties' in A Bottoms, S Rex and G Robinson (eds), *Alternatives to Prison: Options for an Insecure Society* (2004) 83, 101.

<sup>37</sup> *Ibid.*, 102. Others have also argued for the need to address the emotional attitudes to crime and justice, e.g. A Freiberg, 'Affective vs. Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment and Society* 265.

<sup>38</sup> Maruna and King (2004), above n 36, 102.

<sup>39</sup> *Ibid.*

<sup>40</sup> Warner et al. (2008), above n 7.

7.1.28 The Institute agrees with the Justice Department's submission that rather than piecemeal and unrelated efforts to improve public knowledge of crime and sentencing matters, a comprehensive and carefully targeted public education campaign may be more effective. However, resources for this will always be an issue. The issue of over-sighting public education efforts will be picked up below in 7.3.

### **Recommendations**

84. The Institute recommends that a number of strategies are necessary to improve public education about crime and sentencing including:

- continuation of sentencing workshops and making them available on a more regular basis by calling on more judges and magistrates to assist with them; (7.1.25)
- updating and expanding the materials for the You be the Judge multi-media package to ensure that it is useful and relevant for school and community groups; (7.1.25)
- ensuring that the 'Judge for Yourself' booklet is widely available or a booklet that includes data about crime trends as well as sentencing information; (7.1.26)
- reviewing the outcome of the Jury Sentencing Study to see if it supports supplying COPS and an information booklet to jurors as a regular and ongoing procedure. (7.1.27)

### ***Public relations and court media officers***

7.1.29 The judiciary has for the most part been poor at developing strategies to defend itself from attack. While there is some evidence of an increasing willingness of judges to speak out on legal issues and at least one Chief Justice regards it as his role to defend his fellow judges from attack and criticism, the Issues Paper suggested consideration should be given to what else should be done. It was suggested that it is perhaps time that thought be given to obtaining the skills of public relation and communications experts to deal with the crisis in public confidence in the courts and the parole system. In Bartels's interviews with magistrates and judges for the purpose of her suspended sentences study, some magistrates suggested that the appointment of a media liaison person might assist to correct misunderstanding about sentences, improve the flow of information and to correct public perception of suspended sentences in particular.<sup>41</sup>

7.1.30 None of the submissions received addressed the issue of the appointment of a media liaison officer, although, as noted above, in consultations with the Justice Department one of the participants suggested that as the media was the primary cause of misperceptions they should also be the solution. The Institute agrees that media reporting does play a critical role in the development of public opinion on sentencing and by presenting an inaccurate and incomplete picture of sentencing practice, contributes to public misperceptions about it. However, it is not convinced that the appointment of a media liaison officer is a priority and recommends prioritising its recommendations to improve public knowledge of the sentencing process.

### ***Legislative statement of sentencing purposes***

7.1.31 As explained at the beginning of this Part, the Tasmanian *Sentencing Act* contains little detail in relation to sentencing principles and goals. The aims of sentence in s 3 are stated as a purpose of the Act rather than as directions to sentencers. Section 3 states the purpose of this Act is to:

- (a) amend the consolidate the State's sentencing law; and

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<sup>41</sup> Lorana Bartels, *Sword or Sever? The Use and Utility of Suspended Sentences in Tasmania* (PhD thesis, University of Tasmania, 2008) 4.5.

- (b) promote the protection of the community as a primary consideration in sentencing offenders; and
- (c) promote consistency in the sentencing of offenders; and
- (d) establish fair procedures for –
  - (i) imposing sentences on offenders generally; and
  - (ii) imposing offenders on offenders in special cases; and
  - (iii) dealing with offenders who breach the conditions of sentences; and
- (e) help prevent crime and promote respect for the law by allowing courts to –
  - (i) impose sentences aimed at deterring offenders and other persons from committing offences;
  - (ii) impose sentences aimed at the rehabilitation of offenders; and
  - (iii) impose sentences that denounce the conduct of offenders; and
- (f) promote public understanding of sentencing practices and procedures; and
- (g) set out the objectives of sentencing and related orders; and
- (h) recognise the interests of victims of offences.

7.1.32 It could be argued that the purposes of sentencing in paras (b) and (e) should be a more explicit direction to judicial officers and that they be placed in a hierarchy with an indication of a dominant rationale. The sentencing objectives could also be criticised for the omission of retribution, the non consequentialist goal of imposing deserved punishment regardless of its effects. Legislating for sentencing purposes can be a contentious and complex question. The common law does not identify a dominant rationale and its failure to do so has been criticised. It is argued that to give judges freedom to choose which rationale of sentencing to adopt is a major source of inconsistency in sentencing. A distinction is made between discretion, which allows the sentencer to respond to particular facts of the individual cases, which is necessary, and a freedom to pursue individual penal philosophies, which is not. Recently, the issue was considered by the Australian Law Reform Commission (ALRC). The ALRC recommended that federal sentencing legislation should contain a provision specifying the purposes of sentences rather than the current practice of including some purposes in the list of matters a court is required to take into account in imposing sentence.<sup>42</sup> The recommendation was supported by the argument that it is currently standard practice to specify the purposes of sentencing legislatively and that doing so provides a useful means of communicating with the public about sentencing. Given ‘the fundamental importance of the purposes of sentencing to the sentencing process’, it was recommended that the list of purposes be exhaustive.<sup>43</sup> Ranking the purposes or identifying a primary or dominant purpose was rejected on the grounds it would not necessarily enhance consistency and because of a lack of agreement about which purpose should be adopted and changing views as to which purpose should be dominant.

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<sup>42</sup> Australian Law Reform Commission (ALRC), *Same Crime, Same Time, Sentencing Federal Offenders*, Report 103, (2006) 4.32-4.48.

<sup>43</sup> *Ibid*, 4.38.

### ***Responses to the Issues Paper***

7.1.33 The Issues Paper asked how the *Sentencing Act* should deal with sentencing goals. This question was asked in the context of a discussion of how the public can be better informed of the sentencing process. There was some support for including a list of aims of sentencing at the beginning of the *Sentencing Act*.<sup>44</sup> For example, Tasmania Police submitted:

The *Sentencing Act* should clearly define the goals of sentencing both to promote public understanding and ensure a more consistent approach between sentencers.<sup>45</sup>

7.1.34 However, just as the ALRC found, there were conflicting submissions about the goals and their prioritisation. The then Commissioner of Police, Richard McCreadie suggested priority should be given to protection of the public as a goal, that ‘the sublimated vengeance of punitive sentencing has no place in a liberal democratic society’ and that the value of general or specific deterrence is often highly questionable.<sup>46</sup> Tasmania Police submitted that currently too much weight is placed by courts on deterrence<sup>47</sup> and in consultations with the Legal Aid Commission of Tasmania it was suggested that general deterrence is used by judicial officers as a cloak for retribution and denunciation and acknowledging these aims would assist in avoiding media criticism.<sup>48</sup> The Tasmanian Catholic Justice and Peace Commission suggested that the primary goal of sentencing should be justice and rehabilitation.<sup>49</sup>

### ***The Institute’s view***

7.1.35 The Institute is somewhat sceptical of the educative value of including a list of purposes of sentencing in the *Sentencing Act*. Legislation may be easily accessible by members of the public but the extent to which the public access legislation to become better informed is open to question. However, there are no disadvantages in listing the purposes and it could be seen as having some value as a symbolic attempt to communicate with the public and improve the transparency of sentencing goals, particularly as the Act currently fails to acknowledge that retribution and restoration are goals of sentencing. It is therefore recommended that the *Sentencing Act* be amended by separating the objects of the Act from the purposes of sentencing. This would entail omitting from s 3, paragraph (b) and paragraphs (i), (ii) and (iii) from paragraph (e) and adding a new section which sets out the purposes of sentencing. Section 3(b) should be replaced with the following purpose: ‘to provide the courts with the purposes of punishment’. Paragraph (e) should be replaced with ‘to preserve the authority of the law and to promote respect for the law.’<sup>50</sup>

7.1.36 The Institute does not recommend that priority should be given to any one sentencing purpose. While there are strong arguments in favour of selecting a dominant rationale of sentencing including a reduction in unwarranted sentencing disparity, the selection of the primary purpose is controversial. In the context of making suggestions to better inform the public about sentencing matters, it is sufficient to list the purposes without ranking them. The Institute is of the view that in addition to the goals of retribution, deterrence, rehabilitation, incapacitation and denunciation, the goal of restoration or repairing the harm caused by the offence and restoring relations between the offender, the victim and the community should be included in the list of aims. This is an important addition, complementing the recommendations in Part 4 that a compensation order be a sentencing option in its

<sup>44</sup> Tasmania Police, submission, 8; Legal Aid Commission of Tasmania, submission, 12; Hobart Community Legal Service, J Hutchinson and O Montgomery, submission, 2.

<sup>45</sup> Tasmania Police, submission, 8.

<sup>46</sup> Submission, 1.

<sup>47</sup> Tasmania Police, submission, 8.

<sup>48</sup> Consultations with LACT, 1 October 2002; see further on this issue P Robinson and J Darley, ‘The Role of Deterrence in the Formulation of Criminal Law Rules: At its worst when doing its best’ (2003) 91 *Georgetown Law Journal* 949, 971-974.

<sup>49</sup> Tasmanian Catholic Justice and Peace Commission, Maureen Holloway, submission, 2.

<sup>50</sup> ALRC (2006), above n 42, 116 has a discussion about the objectives of a Commonwealth *Sentencing Act*.

own right (para 4.4.17) and that community conferencing for young adults be piloted (paras 4.3.5-4.3.5). Together these recommendations are concrete ways in which the Act could promote the interests of victims in accordance with the objective in s 3(e) of the *Sentencing Act 1997* (Tas). The Institute also recommends that the wording of these aims be clear and accessible and adopts the wording of in the ALRC's sentencing report.<sup>51</sup>

### Recommendations

85. The Institute recommends that the *Sentencing Act 1997* (Tas) include separate sections for the purposes of the Act and the purposes of sentencing.

86. In the *Sentencing Act 1997* (Tas) s 3, para (b) and (e) should be replaced with the following:

- (b) to provide the courts with the purposes of punishment;
- (e) to preserve the authority of the law and to promote respect for the law.

87. It recommends that to better promote the interests of victims and to complement the recommendations in Part 4, that the purposes of sentencing include restoration (reparing the harm caused by the offence and restoring the relations between the offender, the victim and the community).

88. The purposes of sentencing should provide:

A court can impose a sentence on an offender for one or more of the following purposes only:

- (a) to ensure that the offender is punished justly for the offence;
- (b) to deter the offender and others from committing the same or similar offences;
- (c) to promote the rehabilitation of the offender;
- (d) to protect the community by limiting the capacity of the offender to re-offend;
- (e) to denounce the conduct of the offenders; and
- (f) to promote the restoration of relations between the community, the offender and the victim.  
(7.1.35 - 7.1.36)

### *Legislative statement of sentencing principles*

7.1.37 Another issue is whether the Act should incorporate a list of matters relevant to sentence as is done in the *Crimes Act 1914* (Cth), s 16A(2) and sentencing legislation of all other states and territories.<sup>52</sup>

7.1.38 The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A provides an example of such a list:

- (1) In determining the sentence to be imposed on an offender, a court must impose a sentence of a severity that is appropriate in all the circumstances of the case.
- (2) For that purpose, the court must take into account such of the following matters as are relevant and known to the court:

<sup>51</sup> Ibid, 147.

<sup>52</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2), (4), (6); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) s 33; *Sentencing Act 1995* (NT) s 5(2); *Sentencing Act 1995* (WA) ss 6-8.

- (a) the nature and circumstances of the case,
  - (b) if the offence forms part of a course of conduct consisting of a series of criminal acts that course of conduct,
  - (c) the personal circumstances of any victim of the offence, including:
    - (i) the age of the victim (particularly if the victim is very old or very young), and
    - (ii) any physical or mental disability of the victim, and
    - (iii) any vulnerability of the victim arising because of the nature of the victim's occupation,
  - (d) any injury, loss or damage resulting from the offence,
  - (e) the degree to which the offender has shown contrition for the offence:
    - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence, or
    - (ii) in any other manner,
  - (f) the need to deter the offender or other persons from committing an offence of the same or a similar character,
  - (g) the need to protect the community from the offender,
  - (h) the need to ensure that the offender is adequately punished for the offence,
  - (i) the character, antecedents, cultural background, age, means and physical or mental condition of the offender,
  - (j) the prospect of rehabilitation of the offender.
- (3) In addition, in determining whether a sentence under Division 2 or 3 of Part 2 is appropriate, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender under that sentence.
  - (4) The matters to be taken into account by a court under this section are in addition to any other matters that are required or permitted to be taken into account by the court under this Act or any other law.
  - (5) This section does not apply to the determination of a sentence if proceedings (other than committal proceedings) for the offence were commenced in a court before the commencement of this section.

7.1.39 There are conflicting arguments about the merits of lists of relevant factors. The New South Wales Law Reform Commission recommended against such a list on a number of grounds:

- it is likely to stultify the common law;
- the common law of sentencing is not generally in need of restatement;
- attempts to do so in other Australian jurisdictions do not add anything to the common law and there are dangers in such a list;
- such a list is likely to make sentencing a more time consuming exercise.<sup>53</sup>

7.1.40 Another objection is that there is a risk that such a list will be treated as a codification of the law, especially by less experienced judicial officers who may concentrate on the matters listed and overlook other considerations that may be relevant in a particular case.<sup>54</sup> Introducing rigidity into the

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<sup>53</sup> New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996) 333-335.

<sup>54</sup> M Rozenes, 'Fundamental Flaws in Sentencing Laws' (1992) 27(4) *Australian Law News* 12, 14-15.

sentencing exercise and fettering discretion have also been raised as a drawback to legislatively listing sentencing factors.<sup>55</sup>

7.1.41 On the other hand, a legislative list of relevant factors has been claimed to assist in inspiring public confidence in the courts.<sup>56</sup> In New South Wales the Attorney-General also justified the enactment of s 21A on the grounds it would give a greater level of protection to the elderly and vulnerable professions such as nurses and police officers.<sup>57</sup> However, the most common justification for such a list is that provides useful guidance and promotes consistency in sentencing. Legislative specification of sentencing factors also promotes clarity where there is conflicting case law about the relevance of particular factor or the circumstances in which the factor should be applied.<sup>58</sup>

### ***Submissions to the Institute***

7.1.42 There was some support for the legislative listing of relevant factors but it was by no means unanimous. Legal Aid Commission lawyers advised against reproducing the common law on the grounds that it was a mess and instead suggested:

- Clearly listing the factors that can be taken into account in determining sentence, along the lines of section 16A of the Commonwealth *Crimes Act 1914*, but in a way that prevents it from becoming a process issue;
- Clarify that drug or alcohol use is not a mitigating factor;
- The one-third discount for pleading guilty should be specified in the Act; ...<sup>59</sup>

7.1.43 In consultations with Legal Aid, it was argued that such a list would be good for public education, improve accountability and transparency and provide a framework for giving reasons.<sup>60</sup> Transparency and accountability were also the reasons given by Tasmania Police for supporting such a list.<sup>61</sup> The Justice Department submitted that listing relevant factors would clarify the sentencing process but doubted whether it would improve public awareness of it.<sup>62</sup> On the other hand, the then Chief Justice opposed statutory attempts to incorporate the common law in respect of sentencing in the *Sentencing Act* on the grounds that ‘they serve no useful purpose’.<sup>63</sup>

### ***The Institute’s views***

7.1.44 As stated above in para 7.1.35, whether or not sentencing legislation can promote public understanding of sentencing is open to question. It may however have some benefits in terms of transparency and accountability and that may have an impact on public confidence. While the Institute has recommended a legislative statement of the purposes for which a sentence may be imposed, a legislative list of factors that should be taken into account is more problematic for a number of reasons. While the common law is clear about the factors that are relevant and not relevant, the process of listing factors is not so easy and there are issues about whether factors should be classified as aggravating or mitigating, whether certain factors should be mandatory or discretionary and to how the list should be structured.<sup>64</sup> There are also dangers in such a list. Politicians can be subjected to

<sup>55</sup> See ALRC (2006), above n 42, 6.7.

<sup>56</sup> See New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 March 2002, Second Reading debate, (Mr Debus).

<sup>57</sup> Ibid.

<sup>58</sup> ALRC (2006), above n 42, 6.11.

<sup>59</sup> Legal Aid Commission of Tasmania, submission, 1, 12.

<sup>60</sup> Kate Cuthbertson, consultation with Legal Aid Commission of Tasmania, 1 October 2002.

<sup>61</sup> Tasmania Police, submission, 8.

<sup>62</sup> Justice Department, submission, 18.

<sup>63</sup> The Honourable Justice Cox, Chief Justice, submission, 5.

<sup>64</sup> See the ALRC’s discussion of these issues: ALRC (2006), above n 42, 6.4.

public pressure to add and remove matters from the list as part of a tough on crime agenda. The Institute is of the view that the relevant factors are well known to judicial officers and the matter is best left to the common law which is not in need of restatement. The Institute is of the same view in relation to giving statutory recognition to sentencing principles such as the principle of proportionality, the totality principle and other fundamental principles. For the reasons stated the Institute does not recommend that there be a statutory listing of relevant sentencing factors or a listing of the fundamental sentencing principles.

### **Recommendation**

89. The Institute does not recommend a legislative listing of common law sentencing principles or the relevant factors that should be taken into account in imposing sentence on the grounds that such legislative listing is unnecessary, complex and has dangers. (7.1.44)

## **7.2 Ascertaining community attitudes towards sentencing**

7.2.1 The impetus for the Attorney-General's terms of reference for this project on sentencing was community concern about the adequacy of sentences and amongst other things, the terms of reference required the Institute to consider how attitudes towards sentencing should be ascertained (5(b)). In the intervening years the media has from time to time focused on sentences which have been said to be too lenient, and suggestions that judges are out of touch and sentences are too lenient have continued to surface. In 2007 the print media in particular focused on this issue. Newspaper articles and polls suggested that most people were of the view that sentences were too lenient and that judges in particular were not responding to public concern about lenient sentences. Sentencing for sex offences was a particular focus (see 6.2.12). However, as indicated in para 7.1.4 above, ascertaining community attitudes towards sentencing is not an easy task. There is a difference between top-of-the-head responses to polls and surveys and informed public judgment about sentencing matters. The importance of ascertaining informed public opinion as part of the development of appropriate policies directed at crime and sentencing cannot be over-stated. Politicians and judicial officers should not alter sentencing policies and practices in response to populist calls for harsher penalties that are based on people's perceptions of crime levels and sentencing severity. Appropriate decisions can only be made by acting on informed public opinion. In this part of the Report ways of ascertaining public opinion are critically evaluated. Considerable reliance is placed on the Victorian Sentencing Advisory Council's report of a project which was designed to create a suite of methodological tools to gauge informed public opinion.<sup>65</sup>

### ***Ways of measuring public opinion***

7.2.2 Media polls inevitably report that the majority of respondents consider that sentences are too lenient suggesting there is widespread dissatisfaction with the severity of sentences.<sup>66</sup> For example, results of a recent Internet poll in a Tasmanian newspaper on 15 December 2007 reported that 88 per cent of respondents believed sentences were too lenient.<sup>67</sup> These polls inevitably have an impact on politicians and policy makers<sup>68</sup> but they are fundamentally flawed. There are severe limitations on the generalisability of findings due to the self-selected nature of the sample and its unknown relationship

<sup>65</sup> Gelb (2006), above n 3.

<sup>66</sup> Ibid, 11.

<sup>67</sup> 'Internet Poll', *The Examiner* (Launceston) 15 December 2007, 2.

<sup>68</sup> M Israel, 'What Works in South Australian Newspapers' (2000) 12 *Current Issues in Criminal Justice* 227; Green (2006), above n 35, 136-136.

to the rest of the community. The polling organisation has no control over individuals or agencies that might provide multiple responses, allowing those with a vested interest in the outcome of the poll to have an undue influence on the results. Moreover, media polls tend to be linked with a controversial news item and so the response may be a momentary response rather than an enduring and transferable belief.<sup>69</sup> For these reasons such polls should not be relied upon as a source of public opinion.

7.2.3 Representative surveys are the most common method of measuring public opinion. They are more methodologically robust than media polls and if sufficiently large their findings can be generalised to the broader community. Based on findings that increasing the provision of information will decrease levels of punitiveness, researchers have moved away from general abstract questions about sentencing to providing much more information before seeking a response. The vignette approach uses case studies to provide more information about the offence, the offender and the impact on the victim. However, representative surveys have limitations related to conceptual concerns rather than sampling accuracy. In Gelb's words, critics argue that 'the survey method is ill-equipped to measure people's complex, nuanced and shifting perceptions and opinions and instead provide at best a partial glimpse and at worst a distortion of public perceptions.'<sup>70</sup> Respondents are generally provided with a list of pre-determined responses and this limits the depth of the information elicited. Additionally, such surveys cannot determine whether what is being measured is an enduring attitude, a firmly held belief, a top-of-the head view, a judgment based on knowledge and experience or an answer created on the spot to fill out the questionnaire or respond to the question.<sup>71</sup>

7.2.4 Focus groups are generally regarded as a superior method as they are able to elicit far more detailed, thoughtful and insightful responses from participants. Moreover, there is the opportunity for imparting information and allowing discussion and questions so that more considered and informed responses are obtained. Lovegrove's recent study provides an example in the sentencing context.<sup>72</sup> Groups were first addressed about sentencing law and sanctions before a judge presented the group with the facts of the case and then asked for a view as to the appropriate sentence. In three of the four cases in which the judge had imposed a prison sentence, the median sentence was less than the judge's sentence. In the other case the judge's sentence fell just below the median of the group's sentence. This accords with findings of more sophisticated representative surveys that use vignettes and supply other facts about crime and sentencing – when people are given more information their levels of punitiveness drop dramatically.

7.2.5 Focus groups are regarded by researchers as a valuable adjunct to large-scale representative surveys but they have limitations:

- very small samples are used due to the difficulty of gathering discussion groups and so there are problems with generalising the results to the broader community;
- the cost involved in speaking at length to small groups means that this approach is impractical for those wishing to access broad community opinions on an issue.<sup>73</sup>

7.2.6 Deliberative polls combine elements of the focus groups with the advantages of the representative survey. A sub-sample of several hundred respondents is drawn from a representative survey and brought together for an extended session of small group discussion and deliberation with academics, criminal justice professionals, offenders and victims. In small group sessions researchers use more open-ended questioning to elicit a more complete and nuanced view of public opinion. Participants then complete a questionnaire which elicits an informed and considered public judgment on the issue or issues. The disadvantage of this approach is that it is extremely resource intensive and

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<sup>69</sup> Gelb (2006), above n 3, 6.

<sup>70</sup> Ibid, 7.

<sup>71</sup> Ibid, 8.

<sup>72</sup> A Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] *Criminal Law Review* 769.

<sup>73</sup> Gelb (2006), above n 3, 9.

this makes it prohibitive for widespread use.<sup>74</sup> As Gelb concludes, each of these methodological approaches has its own advantages and disadvantages.<sup>75</sup>

A comprehensive picture of public knowledge can only be obtained by a multi-method approach: representative opinion polls can be used to set the approximate bounds on public attitudes while focus groups are needed to evaluate the depth of a particular opinion.

### ***Responses to the Issues Paper***

7.2.7 The TLRI Sentencing Issues Paper highlighted the lack of research in Tasmania and nationally on the subject of public opinion on sentencing. It asked for comments on whether resources should be allocated to ascertaining public opinion on sentencing in Tasmania. Few respondents addressed this issue. Those that did supported doing so.<sup>76</sup> For example, Tasmania Police submitted:

Such a survey should be conducted by a reputable firm, and the survey sample should be representative and sufficiently large to identify any regional differences in community understanding and support for local sentencing practices, and to take into account variations in media coverage of cases being dealt with by the local courts. Such a survey should be repeated at regular intervals to help evaluate the effectiveness of strategies implemented to promote public understanding of sentencing.<sup>77</sup>

7.2.8 Whilst supportive of efforts to ascertain public opinion, the Justice Department submitted that a public information strategy on sentencing was a greater priority. The then Chief Justice noted that ascertaining public opinion on sentencing would be of no assistance unless it were informed public opinion.<sup>78</sup>

### ***The Institute's view***

7.2.9 Gelb's research paper for the Victorian Sentencing Advisory Council comprehensively reviews public opinion research on sentencing in Australia, finding just a handful of studies on public opinion in this country and confirming the Issues Paper's lament about this research vacuum. Very limited information is available from the Australian component of the International Crime Victimization survey and the Australian Survey of Social Attitudes has just three questions about public attitudes to sentencing. As Gelb points out, the danger of this vacuum is that policy will be created on the assumption of a punitive public. She argued that what is needed (in Victoria) is an understanding of the nature of informed public opinion in terms of both general perceptions and in relation to specific sentencing options for specific offences. She asserts:

We need a combination of large scale representative surveys with well-considered questions (using both the core simple question and the more complex crime vignette) combined with the qualitative aspects of the deliberative focus groups that can provide a richness of detail on specific issues.<sup>79</sup>

7.2.10 There are now two research projects underway which will go some way to providing more information on both public knowledge of crime and justice issues and public opinion on sentencing in this State. The first, the Jury Sentencing Study has been referred to above. This study, which is funded by the Criminal Research Council,<sup>80</sup> has considerable potential as a means not only of using jurors as a vehicle for better informing the public about sentencing issues, but as a means of ascertaining

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<sup>74</sup> Ibid, 10.

<sup>75</sup> Ibid.

<sup>76</sup> Tasmania Police, submission, 9; Legal Aid Commission of Tasmania, submission 12; Justice Department, submission 18.

<sup>77</sup> Tasmania Police, submission, 9.

<sup>78</sup> Submission, 5.

<sup>79</sup> Gelb (2006), above n 3, vi.

<sup>80</sup> K Warner, J Davis, M Walter and R Bradfield, *Jury Sentencing Study*, Criminology Research Council Grant (04/06-07).

informed public opinion on sentencing from jurors who have listened to the facts of the case, the sentencing submissions and the judge's reasons for sentence. It has the potential to explore public opinion on sentencing severity in relation to particular offences and types of offender, on sentencing options and on relevant sentencing factors. Because jurors are given information on crime trends and sentencing patterns, the opinions elicited on sentencing severity are informed. And by asking jurors about aggravating and mitigating factors, the study has the potential to shed light on public opinion on factors that are included in statutory listing of sentencing factors. Preliminary findings are already available and confirm the potential of this approach to ascertaining public opinion on sentencing.

7.2.11 The second project is an Australian Research Council study of public opinion which combines a large scale representative survey with a focus groups approach.<sup>81</sup> The survey is national in scope and will be the largest representative survey undertaken (6,400 interviews with 800 for each state and territory) in Australia. Stage two of the study and the focus groups, which are drawn from the survey population, will only be conducted in Victoria and Queensland. However, by providing additional funding to the researchers, the opportunity exists to conduct stage two of the study and the focus groups in Tasmania as well. It is estimated that the cost of including Tasmania in the focus group phase of the study would be approximately \$30,000. The Institute recommends that the research team be offered funding to extend the study to include focus groups in Tasmania.

7.2.12 Public opinion research is a costly exercise. However, when policy decisions purport to be based on public opinion it is essential that it be done. Without it there is the danger that policy will be made on the run on the assumption of a punitive public when properly ascertained public judgment on the issue would have suggested a different policy outcome. 'Bending to the perceived punitive desires of the public may be electorally popular but it comes with high financial costs.'<sup>82</sup> Costs which are likely to be far more significant in the long term than determining informed public judgments on issues of crime and punishment. The criminal justice system (and therefore politicians and judges) should be responsive to the community it was designed to protect. But being responsive to the community means responding to informed public judgment not mass public opinion. For these reasons the Institute recommends that priority be given to public opinion research as a means making the criminal justice system properly responsive to the public.

### Recommendation

90. The Institute emphasises the importance of research which aims to ascertain informed public opinion. It therefore recommends that priority be given to allocating resources to public opinion sentencing research in Tasmania. In particular it is recommended that the ARC research team on the Sentencing and Public Confidence project be invited to conduct focus groups in Tasmania with appropriate financial support. (7.2.12)

## 7.3 Incorporating community views into the sentencing process

7.3.1 As discussed in the preceding section, it is generally agreed that governments, policy makers and judicial officers should have regard to informed public opinion on sentencing when enacting sentencing legislation, formulating policy, imposing sentence or giving appellate guidance on

<sup>81</sup> G McKenzie, D Indermaur, R Broadhurst, K Warner, L Roberts and N Stobbs, *Sentencing and public confidence: public perceptions and the role of the public in sentencing practice and policy*, ARC Discovery Project, DP 0878042 (funding allocated by the ARC of \$236,000).

<sup>82</sup> Arie Freiberg and Karen Gelb, 'Penal Populism, Sentencing Councils and Sentencing Policy' in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008), 4.

sentencing.<sup>83</sup> New mechanisms are being developed to incorporate a public voice into the criminal justice system. Sentencing advisory bodies, councils, panels and commissions with a mandate to incorporate public opinion in their advice to policy makers and judges are the obvious example of such a mechanism. Before this new institutionalised means of incorporating public opinion into sentencing process is discussed, more traditional means of taking public opinion into account will be described. Specifically, the case law with respect to the relationship between public opinion and sentencing is briefly reviewed and the role of penalties set by parliament in reflecting public views of offence seriousness will be considered.

### ***Sentencing law and public opinion***

7.3.2 In *Sargeant*,<sup>84</sup> a much cited English case, Lawton LJ asserted that sentencers are duty-bound not to ignore public opinion, however they do not have to reflect it. In his words:

There is, however, another aspect of retribution which is frequently over-looked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and that the only way in which courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand the courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.<sup>85</sup>

7.3.3 In a later decision, *Broady*,<sup>86</sup> the Court of Appeal reiterated the view that while public opinion must not be disregarded, it is not overriding. They endorsed the view of the sentencing judge that ‘Judges are not here to gain approval or avoid disapproval from the public, and thus decide their sentences perhaps, on the basis of the lowest common denominator of public opinion.’<sup>87</sup> The Court offered some guidance as to how public opinion is to be factored into a sentence stating that courts ‘... have a duty to the public to pass judgment in a way which is generally acceptable amongst right-thinking, well-informed persons’.<sup>88</sup>

7.3.4 Tasmanian judges have expressed similar views. In *Canning v Smith*<sup>89</sup> Burbury CJ made it clear that in sentencing, judges and magistrates are sometimes obliged to make unpopular decisions and in *Bayley*<sup>90</sup> he talked of the need to take into account ‘the restrained moral sense of the community as a whole’.<sup>91</sup> In *Hancox*,<sup>92</sup> one of the grounds of the Crown appeal against the sentence imposed for the sexual assault of a child in a public park was that the judge had failed to take into account the sense of public outrage which the circumstances of the crime excited. Green CJ said:

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<sup>83</sup> Indermaur found a significant majority of Australian judges expressed the view that public opinion should be a consideration at sentencing: D Indermaur, *Perceptions of Crime Seriousness and Sentencing: A Comparison of Court Practice and the Perception of the Public and Judges*, Report to the Criminology Research Council, Canberra, Australian Institute of Criminology, (1990); Bartels found that most judges in Tasmania considered public opinion relevant in the context of imposing a suspended sentence but magistrates did not: Bartels (2008), above n 41, 3.4.5; in a Canadian study a significant proportion of judicial respondents considered community reaction before imposing a house arrest sanction on an offender convicted of a serious crime of violence: J Roberts, A Doob and V Marinos, *Judicial Attitudes Towards Conditional Sentences of Imprisonment: Results of National Survey*, Department of Justice, Canada, (2000).

<sup>84</sup> (1974) 60 Cr App R 74.

<sup>85</sup> *Ibid.*, 77.

<sup>86</sup> (1988) 10 Cr App R (S) 495.

<sup>87</sup> *Ibid.*, 498.

<sup>88</sup> *Ibid.*

<sup>89</sup> [1969] Tas SR 8, 14.

<sup>90</sup> Serial No 77/1972.

<sup>91</sup> *Ibid.*, 3.

<sup>92</sup> Serial No 46/1980.

It is clear that when determining sentence it is proper for a court to take into account public feeling about the crime in respect of which the sentence is being imposed: see *Austin v The Queen* [1971] Tas SR 227. But it would be wrong for a court to take that factor into account to the exclusion of all others. That would not be in accordance with the common law requirement that all relevant considerations should be taken into account.

Further, the public feeling which is to be reflected in a sentence is informed public feeling. Some knowledge of the circumstances of the particular case must be attributed to the notional reasonable man whose feeling of outrage the Court is attempting to reflect. I have no doubt that the same reasonable man who would express outrage at a sexual assault upon a child would also agree that a distinction ought to be drawn between the sentence which would be appropriate in the case of say, a mature, intelligent recidivist and the sentence which would be appropriate in the case of a young offender of low intelligence with only one relevant prior conviction.<sup>93</sup>

7.3.5 According to Underwood J in *Inkson*,<sup>94</sup> ‘informed opinion’ in this context means, ‘rational balanced opinion based upon all the material put to the court for the purpose of imposition of sentence and an awareness of the range of penalties imposed in the past in like cases.’<sup>95</sup>

7.3.6 So the task of gauging public opinion is a matter delegated to the court and it follows, as the Court of Criminal Appeal held in *Inkson*, that the actual opinion of members of the public in a particular case is irrelevant. In *Inkson*, the Crown, in its submissions on sentence, told the Court of the sense of community outrage generated by the crime and this was expressly taken into account by the sentencing judge.<sup>96</sup> The Court of Criminal Appeal made it clear that actual community outrage about the incident was not a relevant matter. This approach accords with the approach usually adopted by courts in other jurisdictions.<sup>97</sup> While there are instances where courts have taken into account the attitude of a community to a particular type of crime<sup>98</sup> or evidence of the fear felt by residents following a murder,<sup>99</sup> this is distinguishable from paying heed to public petitions or public demands that a particular offender be severely punished.

7.3.7 It has been shown that law as it stands allows for a limited role for taking public opinion into account.<sup>100</sup> Because courts are concerned with maintaining public confidence in the administration of justice, judges cannot dismiss public opinion as having no relevance. In *Markarian v The Queen*<sup>101</sup> McHugh J observed:

Public responses to sentencing, although not entitled to influence in any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, the risk undermining public confidence in the administration of justice and invite legislative interference in the

<sup>93</sup> Ibid, 4; cited in *Causby* [1984] Tas R 54, 59 (Green CJ).

<sup>94</sup> (1996) 6 Tas R 1.

<sup>95</sup> Ibid, 16.

<sup>96</sup> *Inkson* pleaded guilty to grievous bodily harm in a case in which he had struck a man whose death resulted from the actions of a co-offender. The deceased was a popular member of the local community.

<sup>97</sup> *H* (1981) 3 A Crim R 53, 65: the NSW Court of Criminal Appeal refused to take into account letters to the Attorney-General expressing outrage at a lenient sentence in a case of incest and held it was wrong for the sentencing judge to ask a witness about the community’s reaction to the offence; *Secretary of State for the Home Department, ex parte Venables and Thompson* [1997] 3 WLR 23 (the Bulger case) where there are obiter statements from three Law Lords in the majority to the effect that public clamour in a particular case for a severe punishment is not a relevant matter.

<sup>98</sup> *Smith v Luker* (1992) 111 FLR 99, 103 (supply of cannabis on Bathurst Island).

<sup>99</sup> *Miller* [1995] 2 VR 348, 354.

<sup>100</sup> Shute’s analysis of the English law suggests that public opinion is not a legally recognised factor in sentencing and that judges at first instance should not attempt to incorporate community views into their sentence: cited by J Roberts, ‘Sentencing policy and practice: the evolving role of public opinion’ in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 15.

<sup>101</sup> (2005) 215 ALR 213.

exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.<sup>102</sup>

7.3.8 It is clear there is wisdom in sentencing courts refusing to respond to hysteria or clamour for a severe sentence for a particular offender. Taking into account the restrained moral sense of the community, opinion which is rational and balanced will exclude the views of bigots, racists and other extreme views. However it leaves open the question of how judicial officers are to discover what is the true nature of informed public opinion, legitimate community expectation or the restrained moral sense of the community. The Chief Justice of the High Court of Australia has addressed this issue when he asked:

How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Should they develop techniques for obtaining feedback from lawyers and litigants? And what kind of public opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is that judges should be in touch with? Whose values should we know and reflect?<sup>103</sup>

7.3.9 The reality is that the judges are expected to reflect and be responsive to community attitudes to some extent but just how they should do this is unclear.

### ***Statutory maximum penalties***

7.3.10 Statutory maximum penalties can be viewed as one means of taking community attitudes into account. The maximum penalties set by parliament for particular offences are intended to reflect the relative severity with which the community perceives particular offences. It provides a legislative view of the gravity of the offence. Sentencing law views the maximum penalty for an offence as being reserved for the gravest instance of the offence likely to occur. In Tasmania almost all summary offences have their own statutory maximum but for indictable offences the *Criminal Code* is unusual. Instead of providing a separate maximum penalty for each offence, with the exception of murder, the *Code* provides an overall maximum term of imprisonment of 21 years and leaves it to the courts to place the various crimes into different categories of gravity. While this appears to be a radical departure from the position in other jurisdictions, in practice it is not so significant. Because the maximum penalty must necessarily be set at a very high level to allow for the gravest possible crime of that nature likely to occur, it bears little relationship to the usual sentence for the particular crime. So at most, the maximum penalty can reveal the relative seriousness of particular crimes. A related problem with statutory maxima as a method of taking public opinion into account is that most crimes cover a wide range of circumstances. It follows that little can be hoped to be achieved by imposing separate maxima for each crime in terms of public input into the severity of penalties.

7.3.11 The Issues Paper did not seek submissions on the issue of whether separate statutory maxima should be introduced in Tasmania. However, the Legal Aid Commission of Tasmania suggested that Parliament should set maximum penalties for indictable offences taking into account such things as case law and public opinion. For the reasons stated above the Institute does not regard statutory maxima as an effective means of reflecting public opinion in relation to the gravity of particular offences.

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<sup>102</sup> Ibid, 236.

<sup>103</sup> The Honourable Justice Murray Gleeson, Chief Justice of the High Court, 'Out of Touch or Out of Reach' (2005) 7 *The Judicial Review* 241, 241.

## Recommendation

91. For the reasons outlined in para 7.3.10, the Institute does not recommend introducing a statutory maximum penalty for each crime in the *Criminal Code* to replace the general maximum in s 389 of 21 years.

## Guideline judgments

7.3.12 Guideline judgments promulgated by an appellate court after there has been the opportunity for community input can provide a mechanism for courts to take properly ascertained public opinion into account. A guideline judgment is a judgment of an appeal court which goes beyond the facts of the particular case before the court and suggests a starting point or range for dealing with variations of certain types of offence, or it may indicate relevant sentencing considerations without specifying a range or starting points, or alternatively it may deal with an issue of general principle such as pleas of guilty. Guideline judgments were pioneered in the United Kingdom in the 1970s as an initiative of the Lord Chief Justice. They have been adopted in New Zealand, Canada and Hong Kong. In Australia, New South Wales, Victoria and Western Australia have legislation authorising appellate courts to give a guideline judgment on their own motion.

## US guidelines distinguished

7.3.13 Guideline judgments should not be confused with United States-style sentencing guidelines. In the United States some twenty states and the federal government have introduced sentencing guidelines which are formulated by sentencing commissions independently of the court. In the case of the Federal Commission, there was a requirement that the guidelines be developed to reflect the views of the public, and public hearings and national surveys were conducted in the process of formulating the guidelines. There are different models of US guidelines, some are voluntary and some are mandatory. Many involve a sentencing matrix or grid, which provides numerical information depending on the type of offence and criminal history of the offender. US sentencing guidelines have been considered by a number of Australian law reform bodies and sentencing enquiries and rejected. They have been widely criticised on the grounds they have not removed discretion, are mechanical, unjust and have increased prison populations, dramatically, in some cases.<sup>104</sup> It should be noted that there are important differences in the US and Australia with respect to sentencing. In the United States, guidelines were an attempt to reform a system characterised by indeterminate sentencing, broad and unfettered discretion, no appeals on quantum and an undeveloped common law of sentencing. The situation demanded drastic action. The purpose of guidelines and Sentencing Guidelines Commissions or Councils was primarily the structuring of judicial discretion rather than incorporating a public view into the sentencing process. Australia, with a well-developed common law system of sentencing presents a different picture. Matrix style sentencing, even if developed with a mandate that it be consistent with the views of public, is not an acceptable option. However, using guideline judgments as a mechanism for incorporating public opinion into the sentencing process as well as improving consistency has gained wide acceptance in many common law jurisdictions.

## Guideline judgments in England

7.3.14 Since the delivery of the first guideline judgment in 1974,<sup>105</sup> the Court of Appeal has handed down guideline judgments which they have expressly called ‘guideline cases’ or ‘guideline judgments’ and many of these offer numerical guidelines by specifying starting points for a particular type of

<sup>104</sup> A Freiberg, *Pathways to Justice*, (2002) 192, 201-202; New South Wales Law Reform Commission (1996), above n 53, 7.

<sup>105</sup> *Willis* (1974) 60 Cr App R 146 (buggery).

offence or sub-category of offence determined by specified aggravating factors (as for rape)<sup>106</sup> or indicative penalties are linked to a quantitative measure relating to the facts of the offence (e.g. amount stolen in theft in breach of trust<sup>107</sup> or weight of the drug in importing).<sup>108</sup> Guideline judgments are not intended to be construed strictly. They merely set the general tariff, leaving judges free to tailor the sentence to the facts of the particular case. As Ashworth observes, the approach to guideline judgments has changed markedly in the last decade.<sup>109</sup> The first important change was the establishment of the Sentencing Advisory Panel in 1999. The function of the Panel was to draft guidelines, consult widely on them and then advise the Court of Appeal about the form they should take. At the same time the Court of Appeal lost the power to create guidelines on its own. Introducing the Panel was intended to provide a source of guidance to the Court by researching the subject more thoroughly and bringing a wider range of views to it than the Court is able to do. When framing a guideline judgment the Court was required by the Act to consider the views of the Sentencing Advisory Panel and the need to promote public confidence in the criminal justice system. Promoting public confidence and the aim of providing a wider range of advice to the Court became important aspects of the role of guideline judgments. In the course of framing its advice the Panel has undertaken public opinion research. For example, it commissioned a public attitude survey on domestic burglary to help generate the idea of a typical burglary from which other varieties of burglary, more or less severe, could be differentiated.<sup>110</sup>

7.3.15 The second change came with the enactment of the *Criminal Justice Act 2003* (UK) which implemented the recommendations of the Halliday Report in relation to guideline judgments. The Sentencing Advisory Panel remains and continues to draft guidelines, however, that advice goes to a new body, the Sentencing Guidelines Council rather than the Court of Appeal.<sup>111</sup> There were two reasons for the change: first, to divorce the function of creating guidelines from that of deciding individual appeals and secondly, to address the ‘democratic deficit’ in the previous arrangements by making provision for Parliament and the Minister for Justice to have a voice in the creation of guidelines. Courts are required to have regard to any guidelines that are relevant to a particular case and to give reasons for passing a sentence outside the range indicated by any guideline.<sup>112</sup> The Court of Appeal has continued to issue guidelines on matters that the Panel and Council have not had time to consider.<sup>113</sup>

7.3.16 The way in which the English guideline system, the Sentencing Panel and Sentencing Commission combine to provide a mechanism for incorporating public opinion into the sentencing process has recently been summarised by Ashworth:

It is evident ... that the English guideline system places a considerable premium on ascertaining the opinions of members of the public. In the first place, three of the members of the Panel are members of the public who have no other connection to the criminal justice system. Secondly, the Panel conducts a wide public consultation on its provisional proposals.<sup>114</sup>

<sup>106</sup> *Billam* (1986) 82 Cr App R 347; *Milberry* [2003] 2 Cr App R (S) 142.

<sup>107</sup> *Barrick* (1985) 7 Cr App R (S) 142.

<sup>108</sup> E.g. *Aroyewumi* (1994) 16 Cr App R (S) 211.

<sup>109</sup> A Ashworth, ‘English sentencing guidelines in their public and political context’ in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 15, 112.

<sup>110</sup> *Ibid*, 117.

<sup>111</sup> *Ibid*, 113.

<sup>112</sup> *Criminal Justice Act 2003* (UK) ss 172(1), 174(2)(a).

<sup>113</sup> Ashworth, (2008), above n 109, 120-121.

<sup>114</sup> *Ibid*, 118.

## Guidelines in New Zealand

7.3.17 New Zealand is in the process of introducing quite radical sentencing reforms, implementing the recommendations of the New Zealand Law Commission.<sup>115</sup> The current system of guideline judgments will be replaced by sentencing guidelines promulgated by a Sentencing Council. Rather than issuing guidelines incrementally, the Council will develop a comprehensive set of initial guidelines which will be released in draft for public consultation with a statement of the forecasted impact on the prison population. After public consultation the finalised guidelines will be tabled in Parliament for consideration and automatic ratification after 30 days. The reforms were designed to address six basic problems in the current sentencing structure: lack of legislative input into the overall quantum of punishment, the inadequacies of judicial guidance, lack of consistency, lack of transparency and a lack of consideration of cost effectiveness.

7.3.18 The premise underlying the creation of a Sentencing Council to promulgate guidelines is that the quantum of punishment is fundamentally a matter of public policy and that a well resourced body such as a Sentencing Council composed of five judicial members and five non-judicial members representing a diversity of values is much better placed to make decisions about the appropriate range of penalties than an appeal court. Such a method of developing guidelines has the advantage of providing the opportunity for research in-put on matters such as the effectiveness of different penalty options, for consultation with a full range of stakeholders to ensure a wide range of perspectives are included and allows for a degree of parliamentary ownership of the guidelines. Sentencing guidelines will be developed for each common offence type; they will specify sentencing ranges and contain a brief commentary to provide a context for those ranges. At the lower end of the spectrum, guidelines are likely to concentrate on factors that are relevant to the custody threshold. Purely narrative guidelines will also be drafted covering such matters as aggravating and mitigating factors and sentencing discounts for a guilty plea. The guidelines will have statutory force and sentencing judges will be required to adhere to them unless 'it would be contrary to the interests of justice to do so'. The Council will be fully operational by mid 2008.<sup>116</sup> As well as drafting numerical and narrative guidelines it will have related information and police advice functions.

## Guideline judgments in Australia

7.3.19 Western Australia, New South Wales, South Australia and Victoria have legislation authorising appellate courts to give a guideline judgment on their own motion.<sup>117</sup> In some states, the Attorney-General or other parties may request a guideline judgment without the need for a relevant appeal.<sup>118</sup> Whatever the situation in relation to the validity of guideline judgments in federal matters, there is no doubt that with legislative backing guidelines judgments are lawful both when promulgated by appeal courts on their own motion and when applied for without a relevant appeal.<sup>119</sup>

<sup>115</sup> See *Sentencing Council Act 2007* (NZ) and the *Sentencing Amendment Act 2007* (NZ). The description of these reforms is taken from W Young, 'Sentencing reform in New Zealand: a proposal to establish a sentencing council' in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008), 179-190.

<sup>116</sup> Young (2008), above n 115, 186.

<sup>117</sup> *Sentencing Act 1995* (WA) s 143; *Crime Sentencing Procedure Act 1999* (NSW) ss 37B and 41 (amendments made in 2001 in response to the High Court's decision on *Wong v The Queen* (2001) 207 CLR 584; *Criminal Law (Sentencing) Act 1988* (SA), pt 2, div 4; *Sentencing Act 1991* (Vic) pt 2AA.

<sup>118</sup> *Crime Sentencing Procedure Act 1999* (NSW) s 37; *Criminal Law (Sentencing) Act 1988* (SA) s 29B

<sup>119</sup> ALRC (2006), above n 42, 531-535; see also the discussion of *Wong v The Queen* in the Issues Paper at 124.

### *Guideline judgments in New South Wales*

7.3.20 Whilst not the first state to legislate for guideline judgments, New South Wales is regarded as having pioneered them in Australia in 1998 when the Court of Criminal Appeal delivered its decision in *Jurisic*,<sup>120</sup> a guideline judgment for culpable driving causing death or serious injury. In his judgment the Chief Justice made it quite clear that one of the purposes of guideline judgments is to reinforce public confidence in the integrity of the process of sentencing by showing that courts are responsive to public criticism of the outcomes of sentencing processes. He acknowledged that ‘public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified’ and that such criticisms are not necessarily allayed by the usual case by case appellate process.<sup>121</sup> He pointed out the limitation of Crown appeals as a means of correcting error and added that public confidence in the administration of justice would be best served by ensuring that the system minimises errors. Guideline judgments were seen as a means of doing this. Spigelman CJ stated:

it appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving. The existence of such disparity constitutes an appropriate occasion for the promulgation of a guideline judgment by a Court of Criminal Appeal.<sup>122</sup>

7.3.21 The way in which the concept of guideline judgments was marketed by the Chief Justice demonstrates the importance placed on them as a public relations exercise. Not only did the Chief Justice appear on television, he wrote an article for the *Daily Telegraph* to explain the importance and impact of the decision.<sup>123</sup>

7.3.22 Since *Jurisic*, the Court has promulgated seven more guideline judgments including guidelines for armed robbery, importing drugs, pleas of guilty, burglary, a revised guideline for culpable driving and a guideline for high range PCA (high range drink driving). On a number of other occasions requests have been made but refused or adjourned. There have been no new guideline judgments promulgated since the enactment of standard non-parole periods.

7.3.23 The New South Wales Sentencing Council was established in 2002 with functions which included giving advice in relation to matters suitable for guideline judgments. However, to date it has given advice in relation to one guideline judgment only, namely the criteria for suspended sentences and recommended against the institution of proceedings.<sup>124</sup> It seems that the introduction of standard non-parole periods has disrupted the flow of guideline judgments. Whether this will continue to be the case is not clear. However, it must be acknowledged that the potential of guideline judgments to be developed as a means of incorporating informed public opinion into the sentencing process through the assistance of advice from the Sentencing Council has not been realised so far.

### *Guideline judgments in Western Australia, South Australia and Victoria*

7.3.24 Guideline judgments have not been embraced with the same enthusiasm in other states as they were in New South Wales. In Western Australia there have been a number of applications for guideline judgments but none have been handed down. Nor it seems have there been any guideline judgments handed down in South Australia utilising the legislative provisions. However, as explained in the Issues Paper, similar kinds of appellate guidance have been handed down in both of these states

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<sup>120</sup> (1998) 45 NSWLR 209.

<sup>121</sup> *Ibid*, 221.

<sup>122</sup> *Ibid*, 223.

<sup>123</sup> Chief Justice Spigelman, ‘Making the punishment fit the crime’ *Daily Telegraph* (Sydney) 13 October 1998.

<sup>124</sup> A Abadee, ‘The New South Wales Sentencing Council’ in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 126, 133.

including numerical guidance such as starting points and standard ranges in cases that have not been tagged as guideline judgments.<sup>125</sup>

7.3.25 As explained in the Issues Paper, because of the opposition of the judiciary and the legal profession to guideline judgments, the 2002 Victorian sentencing review did not recommend their introduction. However, the creation of a Sentencing Council with research and public education functions was strongly supported in consultations and recommended. In the event of a change in judicial and professional attitudes, the Report outlined how a scheme of guideline judgments might operate with broad community input and wide consultation.<sup>126</sup> Despite the opposition from the legal profession and the Report's recommendation, legislation for the creation of a Sentencing Council included provisions for guideline judgments.<sup>127</sup> However, quantitative guidelines, starting points or the appropriate range of penalties for a particular offence or class of offence are omitted from the list of matters that can be covered by a guideline judgment. The statutory scheme envisages a major role for the Sentencing Advisory Council in the development of a guideline judgment. The Act provides that if the Court of Appeal decides to give or review a guideline judgment it must notify the Council and consider any views stated in writing by the Council. It must also give the Director of Public Prosecutions and Victorian Legal Aid an opportunity to appear and make submissions on the matter and the Court is required to have regard to their views. Community input into the sentencing process can occur in two ways: through the membership of the Council, which includes members from victims' support groups, members with experience in community issues affecting courts, and through the Council's consultative process. Freiberg reports that to date the Court of Appeal had not yet decided to give a guideline judgment.<sup>128</sup>

7.3.26 While the Victorian Sentencing Advisory Council has not had the opportunity to provide community input into the sentencing process through advice on guideline judgments it has been very active in pursuing its statutory role of gauging public opinion on sentencing matters, consulting with the general public and providing policy advice to the Attorney-General on sentencing.<sup>129</sup> In commenting on the nature and rationale for the Victorian Sentencing Advisory Council, Freiberg and Gelb have observed:

A dominant reason for its establishment was that it would be a mechanism to incorporate community views in the sentencing process: it is probably singular in this respect. Compared to most other bodies, its terms of reference are broader and its independence of the courts and the executive greater. Its summary aim – to 'bridge the gap between the community, the courts and government by informing, educating and advising on sentencing issues' – encapsulates this unusual role.<sup>130</sup>

7.3.27 Its functions also include providing statistical information on sentencing, conducting research and disseminating information on sentencing.<sup>131</sup>

### ***Arguments for and against guideline judgments***

7.3.28 While the issues of guideline judgments and sentencing commissions or similar bodies are related, both have independent functions and purposes. More specifically, while a sentencing commission or body and guideline judgments can together create a mechanism for providing community input into the judicial sentencing process, without guideline judgments sentencing councils can still have a role in providing community input into sentencing policy as the Victorian Sentencing

<sup>125</sup> N Morgan, 'What's in a Name? Guideline Judgments in Australia' (1999) 23 *Criminal Law Journal* 90, 98; and see Issues Paper at 131.

<sup>126</sup> Freiberg (2002), above n 104, 206.

<sup>127</sup> *Sentencing Act 1991* (Vic) s 6AB.

<sup>128</sup> A Freiberg, 'The Victorian Sentencing Advisory Council: incorporating community views into the sentencing process' in A Freiberg and K Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 156.

<sup>129</sup> The *Sentencing Act 1991* (Vic) s 108C sets out the functions of the Commission.

<sup>130</sup> Freiberg and Gelb (2008), above n 82, 10-11.

<sup>131</sup> See Freiberg (2008), above n 128, 155-162 for an overview of how the Commission is discharging these functions.

Advisory Council demonstrates. Conversely, guideline judgments have functions and advantages in addition to their potential as a mechanism for community input into the sentencing process. The Issues Paper set out the following arguments for and against guideline judgments.

#### **Arguments in favour**

- Guideline judgments are an acceptable means of resolving the tension between maintaining flexibility in the exercise of sentencing discretion to ensure justice is done in the individual case and ensuring consistency of sentencing decisions.
- Tagging a case as a guideline judgment increases the profile of the sentencing guidance minimising errors by the sentencer.
- There may be fewer sentencing appeals because it is easier for both prosecution and defence to see whether a particular sentence falls within range.
- They may assist the objective of general deterrence by publicising the level of sentence for particular offences.
- Sentencing guidelines offer a more transparent approach to sentencing. They require greater disclosure of the way in which a decision is reached and can be contrasted with unexplained judicial intuition.
- Promulgating a guideline judgment, formally so labelled, may assist in diverting unjustifiable criticism of sentences imposed in particular cases by making the public aware of attempts by the judiciary to address their concerns.
- With statutory mechanisms for requests for guideline judgments, the appeals process' shortcoming of uneven coverage of offences attracting appellate guidance can be redressed.
- Sentencing guidance in guideline judgments is to some extent protected from short-term political pressures.
- They can provide a mechanism for wider community input into the sentencing process.

#### **Arguments against**

- Guideline judgments unduly restrict judicial discretion because they cannot foresee all the innumerable factors that may arise in sentencing a particular offender. 'Publishing a table of predicted or intended outcomes masks the task of identifying relevant differences.'<sup>132</sup> The result is they 'hazard inconsistency, incoherence and inadequate individualisation.'<sup>133</sup>
- With the passage of time they can assume the status of rules of universal application which they were never intended to have.
- They may require more work by the appeal courts and judicial administrators. The task of having regard to statistical and other research, evidence of community views and the need to make effective use of correctional facilities has significant resource implications.
- Most sentencing is done in the lower courts and their work is unlikely to be covered by guideline judgments.
- Guideline judgments do not permit a systematic appraisal of the sentencing system. They are unsuitable for debating the overall objectives of the system and do not allow penalties for a particular offence to be assessed in relation to other penalties.
- Assisting or improving general deterrence has little weight when there is no conclusive evidence that increasing severity of penalties has a significant deterrent effect on crime. And if

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<sup>132</sup> Gaudron, Gummow and Hayne JJ in *Wong v The Queen* (2001) 207 CLR 584, [65].

<sup>133</sup> A Lovegrove, 'Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments' (2002) 14 *Current Issues in Criminal Justice* 182.

publication of the maximum penalties has little effect, why will publishing a lesser sentence have such an effect?<sup>134</sup>

- Those who endorse an instinctive synthesis approach to sentencing argue that guideline judgments, with their starting points followed by additions and subtractions for aggravating and mitigating factors, are not compatible with such an approach.
- Publication of a table of future punishments is not within the jurisdiction or powers of a court. It is a legislative function rather than a judicial function.

### ***Responses to the Issues Paper***

7.3.29 The Issues Paper noted that broadly, the claimed advantages of guideline judgments focus around two matters: usefulness in improving consistency and improving public confidence in the criminal justice system. It was suggested there is reason to question whether sentencing inconsistency in Tasmania was a matter of real concern in the light of the research conducted for the Issues Paper and the size of the judiciary. However, it was submitted that there is a *prima facie* case for guideline judgments as a means of improving public understanding of the criminal justice system and as a means of incorporating community views into sentencing, thereby improving public confidence in sentencing and criminal justice. If informed public opinion is to be ascertained and consultations conducted to allow for public input into the formulation of guideline judgments, it was suggested that a sentencing body of some kind with resources needs to be created.

7.3.30 The Issues Paper asked for responses to the following questions:

- Should guideline judgments be introduced in Tasmania?
- Should a modest ‘sentencing advisory council’ be established?
- If so, what should its functions be?
- Should Parliament have a role in considering and scrutinising draft sentencing guidelines?

7.3.31 A number of submissions addressed these issues with divided responses. Both the then Chief Justice and Justice Underwood, as he was at the time, expressed opposition to guideline judgments. The then Chief Justice stated:

Guideline judgments in the Tasmanian jurisdiction are unnecessary. The volume of cases is much smaller than the mainland States where guideline judgments have been published and the judicial community far more close knit and aware of current sentencing trends. Consistency can be maximised by correction in the Court of Criminal Appeal of aberrant penalties.<sup>135</sup>

7.3.32 Justice Underwood reiterated his view, expressed in *O’Brien v ADC Sport Pty Ltd*<sup>136</sup> that: ‘It is for the legislature alone to specify the range of penalties.’ He added that the Issues Paper makes it clear that they are unnecessary in this State to ensure consistency. In relation to their role in improving public confidence in sentencing he stated:

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<sup>134</sup> However, the argument of assisting deterrence is not an argument for increasing severity – it is merely that if general deterrence is a goal then the public should know about penalty levels.

<sup>135</sup> Submission, 5.

<sup>136</sup> Serial No 57/1988, 6.

I completely accept there is a need for public confidence in the judicial system. Indeed, absent public confidence, the Court is powerless. However, I have grave doubts whether guideline judgments on sentencing will boost public confidence. What boosts public confidence in the judicial system is the demystification of the law, plain speaking, and abolition of meaningless, ritualistic ceremonies. This coupled with a willingness on the part of judicial officers to accept responsibility of informing and educating the public generally about the work of the judiciary, will do far more to boost confidence in the work of the Courts than the issuing of guideline judgments.<sup>137</sup>

7.3.33 The Director of Public Prosecutions was equally dismissive of guideline judgments, noting that in the Supreme Court, sentencing consistency is reasonable and therefore guideline judgments are unnecessary. He added that in Tasmania they would be ‘faintly ridiculous. Which three judges will tell the other three judges what is acceptable?’ He submitted that in the Magistrates Court disparate sentencing is more pronounced. However, the solution to achieving consistency was not guideline judgments but reliable and comprehensive sentencing statistics for the Magistrates Court and a change in the basis for appellate review so that the courts could substitute its view of an appropriate sentence for that of the court below without first having to establish that it was manifestly excessive or inadequate.<sup>138</sup> The Director of Public Prosecutions also dismissed the idea of a sentencing advisory council which would merely give the illusion of a public input into sentencing, particularly given his rejection of guideline judgments. A sentencing advisory council was also rejected by the then Chief Justice.

7.3.34 Other submissions saw some merit in guideline judgments.<sup>139</sup> The Legal Aid Commission of Tasmania supported guideline judgments<sup>140</sup> and asserted that there is a significant variation in sentencing practices between magistrates with magistrates in the north of the State imposing considerable harsher sentences than magistrates in the south and north-west.<sup>141</sup> In consultations with Magistrates, some support was expressed for guideline judgments. Tasmania Police supported guideline judgments as a ‘means of improving transparency, addressing concerns about inconsistency and incorporating community views into sentencing. Tasmania Police also supported a Sentencing Advisory Council with ‘representation for the judiciary and magistracy, the legal profession, Legal Aid, the Crime Prevention and Community Safety Council and victims’ groups.’ The Council should have a role in advising the Court in relation to guideline judgments, preparing sentencing statistics and conducting research on public opinion on sentencing.

7.3.35 The Shadow Attorney-General, Michael Hodgman submitted that the Liberal Party would be supportive of guideline judgments as a means of reducing disparity, increasing sentencing transparency, improving deterrence and allowing a broader input into the sentencing process.<sup>142</sup> The establishment of some form of sentencing advisory council was also supported by the Liberal Party with the function of providing input into guideline judgments and undertaking sentencing research.<sup>143</sup> The Justice Department submission was also supportive of the idea of guideline judgments and a place for a sentencing review body. Its suggested role was to review sentencing patterns in relation to sentencing over each twelve months and annually present a public report that identifies the outcomes of that analysis. A submission received from Alison Ritchie, MLC, supported the creation of a Sentencing Advisory Council ‘to conduct research, consult on sentencing matters and most importantly gauge public opinion on sentencing’.<sup>144</sup>

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<sup>137</sup> Submission, 3.

<sup>138</sup> Submission, 2-3.

<sup>139</sup> In addition to those mentioned below, support for guideline judgments came from Bob Hamilton, Community Legal Service, Launceston.

<sup>140</sup> Submission, 12.

<sup>141</sup> Submission, 2.

<sup>142</sup> Submission, 3. A previous Liberal affairs spokesman, Ray Groom, suggested guideline judgments in 1998, a plan which was rejected by the Law Society: *The Mercury* (Hobart), 16 October 1998.

<sup>143</sup> Submission, 5.

<sup>144</sup> Submission, 8 March 2007.

## *The Institute's views*

### **A sentencing advisory body**

7.3.36 Independently of the issue of guideline judgments, research undertaken by the Institute suggests that there is a role for some kind of sentencing body. The creation of such a body was also supported by a number of submissions responding to the Issues Paper. However, the Director of Public Prosecutions' suggestion that such a body would be merely 'window dressing, giving the illusion of public input into sentencing without the reality of it' is noted. The Institute acknowledges that the functions of such a body were not well explained in the Issues Paper and that such a proposal seemed to be inextricably entwined with that of guideline judgments. Further consideration of the issue in the light of the evidence that has emerged since the creation of the Victorian Sentencing Advisory Council in July 2004 and the New South Wales Sentencing Council in February 2003 demonstrates that such bodies can provide a mechanism to incorporate community views into sentencing by means of a broadly based composition and by gauging public opinion as a basis for policy advice to the Attorney-General. The following tasks have been identified by this report as important ones for tackling sentencing issues in the criminal justice system:

- the provision of accessible sentencing data for both the Supreme Court and the Magistrates Court which informs the courts and the public about what is happening in sentencing and may assist to address issues of inconsistencies in sentences in the Magistrates Court discussed in Part 1;
- the provision of accessible data on crime trends;
- the provision of information about recidivism rates, program rates and completion and breach rates in relation to conditional orders such as suspended sentences and community service orders; (3.10.4)
- reviewing procedures for breach of conditional orders; (3.12.3)
- gauging public opinion on sentencing;
- the co-ordination of strategies to educate the public on crime and sentencing issues;
- a feasibility study of day fines; (3.9.14-3.9.16)
- research on the value of VIS in Tasmania; (4.2.14)
- a community conferencing pilot for young adults; (4.3.5)
- a review of the administrative procedures associated with compensation orders; (4.4.21)
- a review of the appropriate penalty range for rape and sexual offences. (6.2.12)

7.3.37 If such a body were to be created, it should also have the following general functions:

- a media-liaison role on sentencing issues;
- to conduct research on sentencing matters;
- to consult with government departments and other interested persons and bodies as well as member of the general public on sentencing matters;
- to advise the Attorney-General on sentencing matters.

7.3.38 These last three functions are squarely within the remit of the Law Reform Institute and so should be conducted in collaboration with it.

7.3.39 An important issue in relation to the creation of a sentencing advisory body in Tasmania is one of resources. The Victorian Sentencing Advisory Council represents the ideal model. 'It is an innovative organisation performing the functions of a specialised law reform commission, bureau of

statistics, sentencing guidelines panel and public education body combined.<sup>145</sup> In just three years its output and impact has been considerable. But it is very well-resourced and to reproduce such a body in Tasmania is not feasible. The Council of 12 members is supported by a grant of in excess of \$1.5 million which funds a secretariat of at least 12 employees including data analysts, legal policy officers and a criminologist.

7.3.40 The New South Wales Sentencing Council is more modest. The Council has just two full-time staff members and is also assisted by student interns.<sup>146</sup> However, New South Wales has the benefit of having bodies such as the New South Wales Bureau of Crime Statistics and Research and the Judicial Commission of New South Wales providing research, public education and statistical functions.

7.3.41 The Institute is of the view that a sentencing advisory body should be established in Tasmania. It should be noted that the State has no statistical secretariat with the capacity to produce sentencing statistics or data. It has the Law Reform Institute, but this body is not a specialised criminal law body and it has severe resource constraints which made the production of this report an onerous and drawn-out exercise. Any sentencing projects it undertakes are episodic and reactive forays into sentencing issues. A body which could address the need for information, education and advice on sentencing matters would fill an obvious vacuum. As proposed in the Issues Paper it should be a relatively 'modest' body. However, its composition should be drawn from a wide membership to facilitate broad community input and a balance of views. It should be an independent statutory body (called the Sentencing Advisory Council) which would act as a circuit breaker or policy buffer when contentious criminal justice issues arise and allow for a considered response drawing on a diverse range of views in formulating its advice. As with the composition of the Victorian and New South Wales bodies, membership should comprise persons with experience in community issues affecting courts, victim support or advocacy groups, judges and magistrates, academics in relevant disciplines, experienced defence and prosecution lawyers and those with experience in the operation of the criminal justice system (such as police officers and persons with experience in juvenile justice or corrective services). The Council should be supported by a modest secretariat with some of its tasks outsourced. However, while tasks such as gauging public opinion on sentencing issues, and some research projects could be outsourced, the urgent and ongoing need for statistical information to inform the courts and the public about what is happening in sentencing suggests that the Council should have support staff with some expertise in relation to this to ensure there is ongoing institutional expertise and memory in relation to sentencing data issues in this State. Without such support, the Council would be unable to undertake its overall task of bridging the gap between the community, the courts and government by informing, educating and advising on sentencing issues. The tasks of preparing papers, drafting project outlines, co-ordinated education strategies, running a webpage, producing annual sentencing statistics cannot be undertaken by a body of part time members without support.

## Recommendations

92. The Institute recommends the creation of an independent statutory sentencing advisory council (the Sentencing Advisory Council) with a broad membership (of approximately 10 persons) drawn from persons with experience in community issues affecting courts, victim support or advocacy groups, judges and magistrates, academics in relevant disciplines, experienced defence and prosecution lawyers and those with experience in the operation of the criminal justice system. (7.3.36)

93. The primary role of the Sentencing Advisory Council should be to bridge the gap between the community, courts and government by informing, educating and advising on sentencing matters. More specifically it should have the following functions:

<sup>145</sup> Freiberg (2008), above n 128, 163.

<sup>146</sup> Currently it has a base budget of \$280,000.

- the provision of accessible sentencing data;
- the provision of accessible data on crime trends;
- gauging public opinion on sentencing matters;
- co-ordinating strategies to educate the public on crime and sentencing issues;
- conducting research on sentencing matters;
- consulting with government bodies, stakeholders and members of the public on sentencing matters; and
- advising the Attorney-General on sentencing matters. (7.3.36)

94. The Institute recommends that the proposed Council be supported by a full-time secretariat and a budget that can fund this and the outsourcing of some of its tasks and functions. (7.3.41)

### Guideline judgments

7.3.42 In theory the Institute believes there is a case for guideline judgments. It notes that such a proposal was opposed by the then Chief Justice, the then senior puisne judge and the Director of Public Prosecutions. However, those views were expressed against the background of the Issues Paper which had found no evidence of inconsistency in sentencing practice. As discussed in Part 1 of this Report, the state-wide database for the Magistrates Court enabled sentencing practices between magistrates to be compared. This appears to confirm the view of a number of respondents to the Issues Paper that there sentencing disparities between some magistrates.<sup>147</sup> It is worth repeating that different sentencing outcomes do not necessarily indicate unjustified sentencing disparity. Differences in outcomes can be justified on the basis of differences between cases. However, significant differences in outcomes for similar offences may indicate inconsistency in approach – that like cases are not being treated in a like manner. The comparison showed that in the case of one count of assault, the magistrate who made most use of custodial sentences was eight times as likely to imprison as the magistrate who used custodial sentences the least. For motor vehicle stealing, the magistrate who used custodial sentences most often was three times more likely to imprison than the magistrate who made least use of prison. For one count of stealing the disparity was even more marked with the most severe magistrate on this measure imposing custodial sentences more than twenty times more often than the most lenient magistrate. Comparing regions, offenders in the south were twice as likely to be imprisoned for assault and motor vehicle stealing than offenders in the north-west.

7.3.43 In Part 1 of this Report it was revealed that a comparison between sentences imposed by judges for robbery and assault suggested that judges were quite consistent in the sentences they imposed. However, while this simple comparison of sentencing outcomes by offence type and judge revealed no evidence of disparity, more sophisticated analysis suggests that in two aspects of sentencing practice there are differences in sentencing outcomes between judges that may suggest an suggest inconsistent approach. As discussed in Part 5 (Parole), there is evidence of differences between judges in their willingness to extend non-parole periods and to deny parole, suggesting a difference in approach to parole eligibility (see para 5.2.11). Disparities between judges also emerged in Bartels' study of suspended sentences.<sup>148</sup> In her quantitative analysis of sentences imposed in the Supreme Court over a two year period (2002-2004) she found that one judge was almost twice as likely as two of the other judges to impose a wholly suspended sentence. As there were no statistically

<sup>147</sup> The Director of Public Prosecutions submitted that 'he was confident that there is disparity between Magistrates from long experience in the Magistrates' Court', submission, 2; the Legal Aid Commission of Tasmania also submitted, 'We believe there is significant variation in sentencing practices between Magistrates', submission, 2.

<sup>148</sup> Bartels (2008), above n 41, 4.3.6.5.

significant differences in the cases coming before each judge as to the offender's age, gender, prior record, plea, type or seriousness of the offence or number of counts, it would appear that the different outcomes were due in some measure to a different approach to suspended sentences.

7.3.44 In the consultation with magistrates in 2002 there was some support for guideline judgments from the Court of Appeal and in Bartels' interviews with judicial officers in 2006-2007, a guideline judgment on suspended sentences was suggested by one of the magistrates as a means of improving consistency in approach.<sup>149</sup> While improved statistical information on sentencing patterns in Magistrates Courts could assist in addressing the issue of disparity, a guideline which sets out the sentence for a typical case of assault or stealing which concentrates on factors relevant to the custody threshold would be of much more assistance. There are other models for guidelines for magistrates. In the UK, guidelines for magistrates' courts used to be prepared by the Magistrates' Association and later by a group including justices' clerks and district judges. However, now the Sentencing Guidelines Council has the responsibility for preparing guidelines for all courts.<sup>150</sup> The Institute prefers the guideline judgment approach on the grounds that this mechanism does provide the opportunity for community input by obtaining the advice of the proposed sentencing advisory body. It would be important to include magistrates in the composition of this body to ensure that appropriate expertise were available in sentencing summary matters. Guideline judgments would be delivered by the Court of Appeal with the process initiated by the Court itself including referral from a judge hearing a lower court appeal, or on application from the Attorney-General, or on a recommendation from the Sentencing Advisory Council. Drawing on guideline judgment schemes from other jurisdictions, features that the model should include are provision for input into the guidelines by the Director of Public Prosecutions and the Legal Aid Commission of Tasmania in the form of submissions with respect to the framing of guidelines and arguments in support or opposing the giving of a guideline judgment by the Court. When the Court is considering framing a guideline it must notify the Sentencing Advisory Council.

7.3.45 Guidelines for judges are more controversial in a small jurisdiction like Tasmania where there is no separate Appeal Court. The Director of Public Prosecution's objection that it would be ridiculous for a bench of six to have a guideline judgment issued by three of their number can be answered by the observation that this is what always occurs in relation of appeal judgments decided by a court of three judges and by the point that the model proposed requires input from the proposed Sentencing Advisory Council. Justice Underwood (as he then was) opposed guideline judgments on two grounds: first, that he disagreed with the concept of judges embracing what he perceived to be a legislative function and secondly, that in the absence of inconsistency they are unnecessary. This report has found some evidence of inconsistent sentencing outcomes that suggests that there is a degree of inconsistency in approach to sentencing in this State. However, consistency is not the only purpose of guideline judgments. As argued in the Issues Paper, guideline judgments can assist in addressing the issue of public confidence in the sentencing process. They can improve transparency and assist in addressing perceptions of inconsistency. As Kirby J argued in *Wong v The Queen*,<sup>151</sup> they 'replace informal, private and unrevealed judicial means of ensuring consistency with a publicly declared standard'. This has added force in Tasmania where the statutory maximum for crimes other than murder is a general 21 years imprisonment with no indication of the relative seriousness of crimes. An important benefit of guideline judgments is that they can be prepared in such a way as to allow public input into the sentencing process thus addressing the public perception that judges are out of touch and unresponsive to community concerns.

7.3.46 Notwithstanding its support for guideline judgments, the Institute has determined that it would be unwise to recommend legislation for a statutory scheme for guideline judgments without the support of the judges and the Director of Public Prosecutions. Legislation introducing guideline judgments would be a waste of time if those who are required to promulgate guideline judgments were

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<sup>149</sup> Ibid, 3.4.9.

<sup>150</sup> A Ashworth, *Sentencing and Criminal Justice*, (4<sup>th</sup> ed., 2005) 141-142.

<sup>151</sup> (2001) 207 CLR 584, [93].

antagonistic to the concept. It may be that there would be less opposition to the non-numerical guidelines which set out the criteria to be applied in selecting among various sentencing alternatives for a particular offence, particularly a guideline for magistrates which focuses on factors relevant to the custody threshold. Guidance could be given in relation to the use of specific sentencing alternatives such as suspended sentences – including guidance in relation to how breaches should be dealt with. However, it is by no means clear that there is sufficient support for any kind of guideline judgment in the legal community in Tasmania for them to be used. The New Zealand model of guidelines issued by a Sentencing Council and ratified by Parliament so that they have statutory force could seem to solve any problems of judicial resistance. However, judicial co-operation would still be essential because of the importance of a strong representation of judicial officers on the Council. As Warren Young of the New Zealand Law Commission has noted, ‘judges are at the coalface of sentencing decisions and must have a significant input into the development of sentencing guidelines.’<sup>152</sup>

7.3.47 The Institute has come to the same conclusion as Freiberg’s 2002 Victorian Sentencing Review in which guideline judgments were not recommended because of the strong opposition of the Court of Appeal and the Criminal Bar.<sup>153</sup> However, the Institute recommends that, if the proposed Sentencing Advisory Council is established, the matter be reconsidered. The Council should be given some time, at least 12 months, to consolidate its operations before being given the task of reviewing the introduction of guideline judgments.

### **Recommendations**

95. That guideline judgments should not be introduced at this stage in the absence of broad judicial and professional support for them from the legal profession. (7.3.46)

96. That, if a sentencing advisory council is established, after it has had the opportunity to consolidate its operations, it be requested to review the introduction of guideline judgments for magistrates and judges. (7.3.47)

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<sup>152</sup> Young (2008) above n 115, 186.

<sup>153</sup> Freiberg (2002) above n 104, 214. However, despite this criticism legislation has been passed in Victoria giving the Court of Appeal the power to give or review a guideline judgment (see above para 7.3.25). To date no guideline judgments have been issued.

## APPENDIX A

S=single count sentence (one count); G= global sentence (more than one count)

**Table 1: Offences against the person, Supreme Court sentences 1978-2006**

Section	Crime	Years	Median Sentence	No. cust	Total no.	% Custodial
157	murder	78-89	life			100.00
		90-00	24y	37	37	100.00
		01-06	20y	17	17	100.00
157	attempted murder	78-89	5y	12	12	100.00
		90-00*	-	2	2	100.00
		01-06	4y6m	3	3	100.00
159	manslaughter	78-89	3y	35	35	100.00
		90-00	3y	26	26	100.00
		01-06	2y	8	8	100.00
167A	death by dang. driving	78-89	9m	30	32	93.75
		90-00	9m	14	15	93.33
		01-06	9m	4	4	100.00
170	act intended cause gbh etc	78-89	1y	4	4	100.00
		90-00	2y6m	12	12	100.00
		01-06	3y	5	5	100.00
170 (G)	act intended cause gbh etc	78-89	2y	5	5	100.00
		90-00	2y10.5m	12	12	100.00
		01-06	2y	5	5	100.00
172	wounding or gbh	78-89	6m	66	77	85.71
		90-00*	9m	97	110	88.18
		01-06	9m	68	71	95.77
172 (G)	wounding or gbh	78-89	9m	35	39	89.74
		90-00	18m	32	34	94.12
		01-06	12m	29	29	100.00
183 (115FA)	aggravated assault	78-89	7m	16	17	94.12
		90-00*	6m	24	25	96.00
		01-06	6m	13	14	92.86
114	assault police officer	78-89	3m	12	14	85.71
		90-00	-	2	2	100.00
		01-06	3.5m	8	8	100.00
114 (G)	assault police officer	78-89	6m	17	18	94.44
		90-00	6m	11	12	91.67
		01-06		5	6	83.33
184	assault	78-89	4m	146	201	72.64
		90-00	4m	179	229	78.17
		01-06	4m	160	198	80.81
184 (G: 2-3)	assault	78-89	6m	44	53	83.02
		90-00	6m	68	79	86.08
		01-06	5.5m	64	73	87.67
184 (G: 4+)	assault	78-89	9m	10	11	90.91
		90-00	1y	18	18	100.00
		01-06	1y	21	21	100.00

Notes: n a = not applicable: if less than ten sentences in one of the periods.  
gbh = grievous bodily harm.

**Table 2: Sexual offences, Supreme Court sentences, 1978-2006**

Section	Crime	Years	Median Sentence	no. cust	total no.	% Custodial
185	rape	78-89	4y	27	27	100.00
		90-00	3y	27	27	100.00
		01-06	2y1m	12	12	100.00
185 (G:2)	rape	78-89	5y	17	17	100.00
		90-00	3y9m	21	21	100.00
		01-06	4y	7	7	100.00
185 (G:3-4)	rape	78-89	4y	10	10	100.00
		90-00	5y	18	18	100.00
		01-06	5y	4	5	80.00
185 (G:5+)	rape	78-89	6y	8	8	100.00
		90-00	7y	23	23	100.00
		01-06	6y	9	9	100.00
125A	maintain a sexual rel/p	95-00	18m	15	15	100.00
		01-06	2y4m	46	46	100.00
125A (G:2)	maintain a sexual rel/p	95-00	2y6m	4	4	100.00
		01-06	2y9m	14	14	100.00
125A (G:3+)	maintain a sexual rel/p	95-00	-	2	2	100.00
		01-06	5y6m	18	18	100.00
124	sexual inter. with <17y	78-89	3m	13	34	38.24
		90-00	3m	12	31	38.71
		01-06	4m	12	19	63.16
124 (G:2)	sexual inter. with <17y	78-89	3m	5	12	41.67
		90-00	6m	8	11	72.73
		01-06	6m	3	3	100.00
124 (G:3-4)	sexual inter. with <17y	78-89	6m	5	8	62.50
		90-00	1y	5	9	55.56
		01-06	15m	1	1	100.00
124 (G:5+)	sexual inter. with <17y	78-89	6m	10	12	83.33
		90-00	18m	9	9	100.00
		01-06	19.5m	4	4	100.00
127	indecent assault	78-89	6m	60	72	83.33
		90-00	3m	41	47	87.23
		01-06	4m	15	16	93.75
127 (G:2)	indecent assault	78-89	9m	24	26	92.31
		90-00	6m	16	17	94.12
		01-06	5m	14	17	82.35
127 (G:3-4)	indecent assault	78-89	9m	21	24	87.50
		90-00	6m	16	16	100.00
		01-06	6m	9	10	90.00
127 (G:5-9)	indecent assault	78-89	9m	12	13	92.31
		90-00	12m	9	9	100.00
		01-06	6.5m	4	4	100.00
127 (G:10+)	indecent assault	78-89	12m	7	7	100.00
		90-00	2y	5	5	100.00
		01-06	3y	3	3	100.00

**Table 3: Robbery, property offences and other offences, Supreme Court sentences, 1978-2006#**

Section	Crime	Years	Median Sentence	no. cust	total no.	% Custodial
240 (S&G)	robbery (all)	78-89	12m	87	115	75.65
		90-00	18m	359	391	91.82
		01-06	15m	192	210	91.43
240 (3) and (4) S count	armed robbery arm & ag arm	90-95	18m	97	102	95.10
		96-01	18m	105	113	92.92
		02-06	18m	72	78	92.31
240 (1) and (2) S count	unarmed robbery rob & ag rob	90-95	9m	35	46	76.09
		96-01	12m	55	60	91.67
		02-06	12m	33	38	86.84
234 S count	stealing	83-89	6m	74	121	61.16
		90-00	6m	85	110	77.27
		01-06	6m	37	44	84.09
234 (G)	stealing	83-89	9m	43	52	82.69
		90-00	12m	91	105	86.67
		01-06	9.5m	56	62	90.32
258	receiving	83-89	4.5m	26	39	66.67
		90-00	4m	55	80	68.75
		01-06	4m	29	43	67.44
244 and 245 (a)(iii) (S)	burglary (intent steal)	83-89	4m	26	32	81.25
		94-00	4m	33	45	73.33
		01-06	4m	11	12	91.67
(G: 2)	burglary (& stealing)	83-89	6m	133	187	71.12
		94-00	6m	278	397	70.03
		01-06	7m	95	125	76.00
(G: 5-10)	burglary (& stealing)	83-89	12m	60	64	93.75
		94-00	11m	92	103	89.32
		01-06	12m	36	41	87.80
(G: 11+)	burglary (& stealing)	83-89	18m	43	55	78.18
		94-00	18m	70	75	93.33
		01-06	24m	39	40	97.50
244(a)(i) and (b) S	aggravated burglary	83-89	9m	14	16	87.50
		94-00	12m	13	15	86.67
		01-06	8m	3	4	75.00
G	aggravated burglary	83-89	12m	?	?	
		94-00	12m	70	78	89.74
		01-06	12m	44	47	93.62
268	arson	78-89	12m	29	34	85.29
		90-00	12m	58	64	90.63
		01-06	12m	36	39	92.31
268A	setting fire to property	78-89	6m	24	35	68.57
		90-00*	4m	27	42	64.29
		01-06	4m	31	38	81.58
273	destroy or injure property	78-89	6m	18	31	58.06
		90-00	6m	17	32	53.13
		01-06	4m	7	13	53.85
47 (3)(b) (S&G)	traff. proh. plant / subst*.	85-89	6m	44	49	89.80
		90-00	5m	89	97	91.75
		01-06	4.5m	59	59	100.00
47(1)(b) (S&G)	trafficking in a narcotic**	85-89	9m	8	9	88.89
		90-00	9m	30	30	100.00
		01-06	6m	37	38	97.37

105	perverting justice	78-89	3m	21	29	72.41
		90-00	3m	29	41	70.73
		01-06	3m	44	71	61.97

#not all crimes include data from 1978 because of changes in definition for example.

\* Includes trafficking in a controlled substance under *Misuse of Drugs Act* that relate to 'plants'.

\*\* Includes trafficking in a controlled substance under *Misuse of Drugs Act* that relate to 'narcotics'.

## Appendix B

### *Data for average sentences*

Notes on the data sources and explanations for Tables 20 and 21 are as follows:

**Tasmania** – Compiled from the Tasinlaw database of Supreme Court sentences (1989-2006). Includes partially suspended. Calculated on offender's imprisoned and not total offenders. No rounding.

**New South Wales** - JIRS 1 Feb 2003 – 30 Sept 2006 for sexual offences which includes s 61I – sexual assault and s 61J – aggravated sexual assault. 1 Feb 2003 – 31 March 2006 for robbery related offences which includes s 94 – robbery & stealing from the person; s 95(1) aggravated robbery; s 96 – aggravated robbery with wounding/gbh; s 97(1) robbery, being armed or in company; s 97(2) – aggravated robbery etc being armed with a dangerous weapon; s98 – robbery being armed and causing wounding/gbh . Excludes assault with intent to rob. Offenders sentenced to imprisonment. The data source that provided the basis for calculating averages was displayed in 6 month, 12 month, 18 month, 24 month, 30 month, 36 month, 42 month, 48 month, 52 month increments, then 5 year, 6 year etc increments with the sentence rounded upwards, eg a term of 7 months would be shown in 12 months.

**Victoria** – Sentencing Advisory Council Sentencing Snapshots concerning rape, robbery and armed robbery. Figures are total effective sentence and includes suspended sentences.

**Queensland** – QSTS 1 July 1999 – 30 June 2006. Offenders sentenced to imprisonment. This does not include suspended sentences as not have that data. The data source that provided the basis for calculating averages was rounded upwards, eg a term of 7 months would be shown in 12 months. The data source that provided the basis for calculating averages was displayed in 6 month, 12 month, 18 month, 24 month, 30 month, 36 month, 42 month, 48 month, 52 month increments, then 5 year, 6 year etc increments with the sentence rounded upwards, eg a term of 7 months would be shown in 12 months.

The rape figure excludes one offender who was sentenced to 20+ years but the data source did not specify the actual length. Of the 246 offenders convicted of rape, 195 were imprisoned and 43 received a partially suspended sentence. The sentence length imposed for the 43 partially suspended sentences is not included in the average sentence data (as not have that data).

Robbery includes s 411(1) – robbery; s 411(2) – armed robbery. Excludes assault with intent to rob. Of the 929 offenders convicted of robbery offences under s 411(1) and (2), 445 were imprisoned and 252 received a partially suspended sentence. The sentence length imposed for the 252 partially suspended sentences is not included in the average sentence data (as not have that information).

Removed SA and WA as this only shows most severe penalty for the major offence proved, and so does not include sentences for other charges. Makes it difficult to compare.

**UK** – UK Home Office Annual Report on Criminal Statistics, England and Wales, Jan 2002 – 31 Dec 2005, persons sentenced to immediate custody by average sentence length.