

TASMANIA
LAW REFORM
INSTITUTE

Sentencing

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How to respond to this issues paper

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. At the end of each part there are questions which may be useful in responding to this issues paper. The questions are intended as a guide only – you may chose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. If you would like your views and/or the fact that you made a response to this paper to be kept confidential, simply say so, and the Institute will respect that wish.

Responses should be made in writing by 4 October 2002.

Responses may be sent to the Institute by mail, fax or email.

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Inquires should be directed to Jenny Gawlik, on the above contacts, or by phoning (03) 62262069.

This issues paper is also available on the Institute's web page at:

www.law.utas.edu.au/reform

or can be sent to you by mail or email.

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), Paul Turner (appointed by the Attorney-General), Philip Jackson (appointed by the Law Society) and Terese Henning (appointed by the Council of the University).

Terms of Reference and Background

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. 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.

It was decided to deal with the sentencing project in three stages. The first stage was the preparation of this issues paper, covering research into sentencing patterns and crime rates and issues for discussion in relation to the terms of reference. The second stage is the release of this issues paper for public consideration and response. Finally, these responses will be considered and incorporated in a final report containing recommendations.

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 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.

Executive summary and discussion points

Sentencing Trends

Public dissatisfaction with sentencing is endemic. Sentences are not perceived to be appropriate in the sense of sufficiently severe. And there appears to be a perception that sentences are becoming more lenient. Nor are they seen to be consistent. Sentencing trends and prison statistics were examined to explore the issue of changes in sentencing patterns. The issue of consistency between judges was also investigated. The sentencing data also demonstrate what courts see as the appropriate sentencing range for particular offences.

Sentencing patterns in the Supreme Court over the last two decades appear quite stable. There is no evidence that sentencing is becoming more lenient. If anything it appears to have become more severe for offences such as dangerous driving, serious assault, child sexual assault and unarmed robbery. The only significant decrease in sentencing severity appears to be for selling or supplying a prohibited plant or substance. A comparison between the sentences imposed by five judges for robbery and assault failed to reveal significant disparity. Data from courts of petty sessions is currently inadequate to allow anything more than a rough indicator of sentencing trends. It suggests little difference in the rate of custodial sentences for offences like burglary and motor vehicle stealing but quite significant increases for exceeding .05 and driving whilst disqualified. Prison statistics on average time served by released prisoners fail to support the perception of increased leniency. Instead they suggest sentencing is becoming more severe.

Crime Levels

Recorded crime rates have more than doubled in Tasmania over the last 20 years for both crimes against the person and property crime. However for the last three years the burglary rate has declined and the rates for stealing and injury to property have plateaued. It is possible that rape and robbery may also have stabilised. In the Australian context, Tasmania is below the national rate for crimes like assault, sexual

assault and robbery and also for theft and burglary. However for motor vehicle theft the rate is on a par with the national rate.

The 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. However this will achieve little in terms of crime reduction. With only 4 in 100 crimes resulting in a conviction, it is clear that sentencing can have little impact on crime levels. The belief that sentencing can reduce crime is based on the assumption that this can be achieved through deterrence, incapacitation or reform and rehabilitation.

The evidence of the general deterrent effect of harsher penalties is limited and provides no basis for expecting that general penalty increases 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 one-third) 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.

The role of sentencing in achieving the Tasmanian Together Goals

Tasmania Together has goals in relation to safe environments and perceptions of safety. The identified challenges include halving the crime rate by 2020 and ensuring at least 95% of people feel safe in their homes by 2020. Fear of crime is undoubtedly a problem and dissatisfaction with the criminal justice system is 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, 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:

Promoting understanding of sentencing practice: Studies from elsewhere have shown that in general, the public lacks knowledge about 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.

Reviewing aspects of the system that undermine public confidence: For example, sentencing options should be reviewed to ensure that they are appropriate and credible. Parole is another aspect of the system that attracts public criticism.

Taking public opinion into account: Ways of taking public opinion into account in sentencing should be examined.

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. 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.

Sentencing Options

Imprisonment

Encouraging restraint in the use of custody

There are strong arguments in favour of a low imprisonment rate. Imprisonment may incapacitate offenders while they are in prison, but it achieves little else in terms of crime reduction. Between one-half and one-third re-offend, showing prison has little impact in deterring prisoners. Short prison terms are the most common. In magistrates' courts 85% of prison sentences are 3 months or under and in the

Supreme Court 20% are of this length. It seems short prison sentences are particularly ineffective for most offenders. Ways of encouraging restraint in the use of imprisonment should be considered.

Discussion Points:

- 1.1 Should the possibility of abolishing sentences of 3 months or less be further explored?
- 1.2 Should the English idea of “Custody Plus” be explored as a means of attempting to reduce the reconviction rate of offenders?
- 1.3 Should short custodial sentences be discouraged and if so how?
- 1.4 Should it be required that reasons be given justifying why a sentence of 6 months or less was imposed?
- 1.5 Should statutory recognition be given to the principle of imprisonment as a last resort?

Deferral of 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.

Discussion Points:

- 1.6 Should courts be given the power to defer sentence where appropriate to allow offenders to be given a limited period of time to put their affairs in order after being sentenced and prior to the commencement of imprisonment?
- 1.7 In the case of sentences not exceeding 3 months, should courts be given the power to order that sentences be served over a period not exceeding 3 years, during the prisoner’s leave?

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. In Tasmania about half of all sentences of imprisonment are wholly suspended. Most of these sentences are short sentences. Suspended sentences have been criticised on many grounds. First, they are confusing. 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”. It is also argued that many offenders breach the conditions without consequences. It is further argued that suspended sentences are ineffective as a deterrent and do not result in a reduction of the prison population. The suspended sentence could be said to be a feature of the criminal justice system that contributes to a lack of confidence in it. On the other hand it can be regarded as a valuable tool.

Discussion Points:

- 1.8 Should there be any changes in relation to suspended sentences in Tasmania to make this a more logical, credible and effective sentencing option?
- 1.9 Should there be further research into the operation of suspended sentences in Tasmania?

Home Detention

Home detention is not a sentencing option in Tasmania although a pilot program is planned. 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.

Discussion Points:

- 1.10 Should a system of front-end home detention be introduced?
If so:
Should it be an alternative to imprisonment?
Should it be limited to sentences of 18 months or less as in New South Wales?
Should there be strict eligibility criteria or a wide discretion?
How should disadvantaged offenders be included in the scheme?
How should the offender’s family be protected?
- 1.11 Should a system of back-end home detention be introduced?
If so:
Should it be determined by the sentencing court or by administrative decision after the sentence is imposed?

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.

Discussion Point:

- 1.12 Should periodic detention be introduced in Tasmania?
If so:
Should it be a substitutional sanction?
Should it include a Stage II non-residential component?

Intensive Correction Orders

An intensive correction order is a Victorian sentencing option which is more onerous than community service. Core conditions include requirements to report twice per week (at a minimum) and 12 hours attendance for community work (8 hours minimum) and counselling treatment or education. Additional conditions could include curfew restrictions and electronic monitoring.

Discussion Point:

- 1.13 Should intensive correction orders be introduced in Tasmania?
If so:
Should it be a sentencing option in its own right or a “substitutional sanction”?
Should home detention or curfew conditions be attached?
What should be the consequences of breach?

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. This issues paper provides an opportunity to review the operation of community service orders.

Discussion Points:

- 1.14 Are there any problems with this sentencing option?
- 1.15 Is it an appropriate, logical, credible and effective sentencing option?
- 1.16 Are courts taking full advantage of it?
- 1.17 Is there enough guidance about how it should be used?
- 1.18 Is it being used appropriately?
- 1.19 Should it be imposed as an alternative to a fine when the offender is impecunious?
- 1.20 Should a form of reward be built into the community service order?
- 1.21 Are the completion rates satisfactory?
- 1.22 Are breach procedures satisfactory?
- 1.23 Should the offence of breach of a community service order be abolished?
- 1.24 Are the resources available to support community service orders adequate?
- 1.25 Is there room for more user-pays partnership agreements to supervise community service?

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 3 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. As with community service orders, this issues paper provides an opportunity to review the operation of probation orders.

Discussion Points:

- 1.26 Are probation orders being used appropriately by the courts?
- 1.27 Is it an appropriate, logical, credible and effective sentencing option?

- 1.28 Are conditions used appropriately?
- 1.29 Is there a need to restructure orders in any way? For example is there a need for categories of order with varying degrees of supervision or different kinds of supervision?
- 1.30 Is there a need for a specialised order for offenders convicted of drug and drug-related offences such as the drug and alcohol treatment order recommended by Freiberg in the recent Victorian review?¹ This order was recommended as part of an integrated series of drug and alcohol sentencing options.
- 1.31 Are the completion rates satisfactory?
- 1.32 Are breach procedures satisfactory?
- 1.33 Are the resources available to support probation orders adequate?

Fines

The fine is the most common sanction in courts of petty session, but is rarely imposed in the Supreme Court. A fine cannot be imposed unless a conviction is recorded. Allowing magistrates to fine without a conviction may be desirable in some cases. A common difficulty with fines is enforcement and a number of suggestions have been made to reduce the number of offenders who are imprisoned for fine default.

Discussion Points:

- 1.34 Should the courts be empowered to fine an offender without recording a conviction?
- 1.35 Should the possibility of day or unit fines be reconsidered?
- 1.36 Should consideration of financial circumstances be allowed to increase the amount of a fine?
- 1.37 Should any changes be made to fine default procedures? In particular should legislation facilitate the asset seizure of non-essential possessions of fine defaulters?

¹ A Freiberg (2002) *Pathways to Justice*, at 172-176.

- 1.38 Should cancellation of driver's licence or vehicle registration be introduced as alternative sanctions for fine default?
- 1.39 Should sanctions for fine default include placing a charge on the defaulter's property?

Adjournments with undertakings

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.

Discussion Point:

- 1.40 Should breach of an adjourned undertaking be an offence?

Role of Victims

An objective of the *Sentencing Act* is to recognise the interests of victims. The issues paper explores this objective.

Victim Impact Statements (VIS)

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. Section 81A of the *Sentencing Act* also gives the victim a right to read that statement to the court. If the victim declines to read the statement, the court must have the statement read.

While the statutory provisions relating to VIS are recent and have yet to be proclaimed, VIS have been provided to the courts for at least 10 years. However, the use of VIS has varied between jurisdictions and over time, raising questions about the resources that have been made available to assist victims to have the full impact of the crime made known to the court.

Discussion Points:

- 2.1 Are there any issues arising out of giving legal recognition to VIS that need to be addressed?
- 2.2 Should victims have the option of furnishing a VIS without having that statement read out in court?

Victim mediation

The *Sentencing Act* 1997, s 84(1) provides that courts may order or receive mediation reports 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, nor does it seem that much use has been made of victim offender mediation at the post-sentence stage.

Discussion Points:

- 2.3 Why have there been so few referrals for mediation reports?
- 2.4 Has there been enough encouragement and training of personnel to allow proper use to be made of victim offender mediation?

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. 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. For 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.

Discussion Points:

- 2.5 Should compensation orders remain mandatory for property loss in cases of burglary, stealing, robbery, arson and injury to property?
- 2.6 If not, should courts be required to consider making a compensation order in certain cases and where such an order is not made give reasons for not doing so?

- 2.7 Should the compensation order be a sentencing option in its own right?
- 2.8 Should additional resources be given to police/prosecutors to deal with compensation claims?
- 2.9 Should means be relevant to the amount of compensation orders?
- 2.10 Is a compensation order relevant to sentencing orders other than fines?
- 2.11 Should compensation orders be enforced in the same way as fines?
- 2.12 What measures could improve enforcement of compensation orders?

The Victims Levy

Convicted offenders are required to pay compensation levies which are used to help fund criminal injuries compensation awards for personal injuries. 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.

Discussion Points:

- 2.13 Are compensation levies producing hardship on offenders?
- 2.14 Are they an economic means of helping to compensate victims?

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. While the Charter was adopted in 1992, it is only recently that a Victims' Register has begun to be compiled to provide a mechanism for this to be done.

Discussion Points:

- 2.15 What difficulties have been encountered in compiling the Victims' Register?

2.16 Are procedures for alerting victims to their right to be notified effective?

Role of the Community

Promoting public understanding of sentencing

There are no studies ascertaining the extent of public knowledge of sentencing in Tasmania, however, it is likely they would replicate studies elsewhere which show that there are widespread misperceptions about sentencing practices and patterns and other criminal justice issues such as crime rates. Nor is there reliable evidence of public attitudes to sentencing in Tasmania, although it would appear that there is dissatisfaction with sentencing and a widespread belief that sentences are too lenient and judges and magistrates are out of touch. Research elsewhere has shown that dissatisfaction with sentencing is related to misperceptions about sentencing and criminal justice issues and so it follows that improving public understanding of sentencing should improve confidence in it.

An objective of the *Sentencing Act* is to promote public understanding of sentencing practices and procedures. The Act consolidates sentencing legislation but does nothing else to promote this. There are a number of ways in which the public knowledge of sentencing and criminal justice issues could be improved. Providing this knowledge in an accessible way will require improvements in sentencing data collection and analysis.

Discussion Points:

- 3.1 How should the *Sentencing Act* deal with sentencing goals?
- 3.2 Should the *Sentencing Act* incorporate the common law by including a list of relevant factors which a judge or magistrate must take into account?
- 3.3 Should public education of sentencing and crime trends be a priority?
- 3.4 Should annual sentencing statistics be produced as recommended? How should they be published?
- 3.5 Should Trial of the Century type seminars be run in Tasmania?
- 3.6 Should a booklet be produced to convey simple factual information about crime and sentencing?
- 3.7 What other strategies do you suggest to promote public understanding of sentencing?

Ascertaining community attitudes towards sentencing

Ascertaining community attitudes towards sentencing is not an easy task. It can be done but requires carefully designed opinion polls and carefully selected focus groups. It is also expensive.

Discussion Points:

- 3.8 Should resources be allocated to ascertaining public opinion about sentencing in Tasmania?

Incorporating community views into the sentencing process

The law as it stands gives public opinion a limited role in sentencing. 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. This does not always provide assurance to the public that its views are being considered. 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. They are used in the United Kingdom, Canada, New Zealand, Hong Kong and New South Wales. One of their advantages is that they can provide a mechanism for incorporating public opinion into sentencing. In the United Kingdom, for example, the Court of Appeal is required to consider the views of the Sentencing Advisory Panel when framing guidelines. This Panel can commission public attitude surveys to ascertain the views of the public in relation to sentencing issues. It also calls for submissions to assist in the preparation of the advice it gives to the Court. Recently the government has indicated that Parliament will be given the opportunity to scrutinise draft guidelines to ensure democratic engagement in the sentencing process.

In addition to providing the opportunity for public input into the sentencing process, advocates of guideline judgments suggest that they increase the profile of sentencing guidance and aid consistency. They also offer a more transparent approach to sentencing, by providing a clear picture of the way in which particular offences should be dealt with. Providing a mechanism for factoring in public opinion to the sentencing process, improving consistency and transparency are likely to improve public confidence in sentencing.

Discussion Points:

- 3.9 Should guideline judgments be introduced in Tasmania?

- 3.10 Should a modest “sentencing advisory council” be established?
- 3.11 If so, what should its functions be?
- 3.12 Should Parliament have a role in considering and scrutinising draft sentencing guidelines?

Parole

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 6 months or one-half of the sentence, whichever is longer. However this will not be the case if the sentencing judge has extended the non-parole period or ordered that the offender is not to be released on parole. The courts take the view that prima facie a person is eligible for parole at the expiration of the statutory non-parole period unless there is sufficient reason to change this. The release of prisoners eligible for parole is decided by the Parole Board.

Stating the non-parole period as part of the sentence

Currently, when a judge imposes sentence no reference is made to parole eligibility unless the statutory period is extended or the judge orders that the offender is not to be released on parole. So if an offender is sentenced to 4 years imprisonment, the judge will not say, “I sentence you to 4 years but you will be eligible for release on parole after 2 years.” He will merely say, “You are sentenced to 4 years imprisonment”. Because a sentence of 4 years imprisonment does not necessarily mean the offender will serve 4 years, it is sometimes said that a sentence does not mean what it says. Amendments to the *Sentencing Act* and the *Corrections Act*, which are yet to be proclaimed, will change this. They require the sentencer to state the non-parole period if the offender is to be eligible for parole. If none is stated the prisoner is not eligible. It can be argued that if the intention of Parliament was merely to make it clear what a sentence means it would have been simpler and clearer to require the judge to state when each offender is eligible for parole.

Discussion Point:

- 4.1 Should the amendment to s 17 of the *Sentencing Act* requiring a judge to state the non-parole period be redrafted so that it casts no doubt on the prima facie position that a person should be eligible for parole after serving half of the sentence?

What should the minimum non-parole period be?

The minimum period that a prisoner must serve before being eligible for parole varies between jurisdictions. One-half of the sentence is common, however in some jurisdictions the minimum is one-third (eg Canada, New Zealand, Western Australia) and in others it is longer (eg New South Wales). Before the recent Tasmanian election it was Liberal Party policy to increase the non-parole period to two-thirds on the grounds of community concern about soft treatment of criminals. The counter argument to this suggestion is that increasing sentence severity in this way will not alter the widespread view that sentencing is too lenient, nor is it an effective strategy to reduce crime.

Victim Statements

Amendments to the *Corrections Act* 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. 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. Arguably the provision of such information is inappropriate if this information has not been provided to the sentencing court. 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.

Discussion Points:

- 4.2 Is it appropriate to provide a victim statement to the Parole Board relating to particulars of injury, loss or damage and the effects on the victim of the offence if that information had not been provided to the sentencing court? If so, how should that information be used by the Board?
- 4.3 Should the victim's statement provided to the Parole Board focus on the victim's fears and concerns in relation to the offender's release?

Publication of Parole Board Decisions

Recent legislative amendments, yet to be proclaimed, require 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. 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. Informing victims about release is

also important. Another way of ensuring accountability and transparency of Parole Board decisions would be to make hearings open to the public.

Discussion Point:

- 4.4 Should parole hearings be open to the public?

Other issues in relation to parole

Parole has imperfections. However, it does serve very useful and important functions. Its economic benefits are clear. It reduces the prison population and the costs of supervision are less than the costs of incarceration. There is some evidence too that parole supervision has an effect on reducing recidivism.

For a parole system to work effectively it needs to be properly resourced and supported. This issues paper provides an opportunity for submissions to be made in relation to the legislative framework for parole in Tasmania in practice.

Discussion Points:

- 4.5 Do you have any suggestions for change in relation to the legislative framework for parole?
- 4.6 Do you have any suggestion for change in relation to parole procedures or practices?

Part 1

Sentencing Trends

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

Introduction

What is sentencing?

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.² 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.

² A Freiberg (2002) *Pathways to Justice*, at 30 citing Victorian Sentencing Committee (1988) *Report: Sentencing*, at 15.

Evaluating sentencing

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”.³ 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 believe that sentencers should be *responsive* to public concerns. The issues of transparency and responsiveness will be discussed below (see Part 5).

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”.⁴ 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*:⁵

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.

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,⁶ 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 the offence this is treated as a signal that the courts should regard the offence more seriously. Increases in the incidence of an offence 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.

Public dissatisfaction with sentencing is endemic. Sentences are not perceived to be appropriate in the sense of sufficiently severe. And there appears to be a perception

³ Australian Law Reform Commission (1988) *Sentencing*, Report No 44, para 26.

⁴ *Webb v O'Sullivan* [1952] SASR 65, Napier CJ at 66.

⁵ (1984) 154 CLR 606 at 610-611.

⁶ See K Warner (2002), *Sentencing in Tasmania*, 2nd ed, para 2.337.

that sentences are becoming more lenient. Nor, it seems, are they seen to be consistent. The following discussion of sentencing trends is relevant to the issue of what the courts see as the appropriate sentencing range for the most common crimes and serious summary offences, and to the issue of consistency over time.

Trends in the Supreme Court

Tables 1 to 3 show the sentencing ranges for custodial sentences imposed by the Supreme Court and the percentage of sentences for each crime which were custodial. It also compares sentences over the last two decades. Given the relatively small numbers of sentences imposed by the Supreme Court for each offence, a year by year comparison for most offences is not possible. This was only attempted for assault and robbery. For all other offences a comparison was made between two periods – in most cases 1978 to 1989 and 1990 to 2000 – corresponding with data collected for the two editions of *Sentencing in Tasmania*.⁷ For convenience these periods will be referred to as “decades”. For assault and robbery, where there were more sentences imposed, the sentencing trends by year were examined.⁸ The data demonstrate that the sentencing patterns over these two decades have been remarkably consistent. For many crimes the median sentence is the same and the proportion of custodial sentences the same or similar. Of the 46 categories of crimes examined,⁹ 18 (40%) had no change in the median sentence and 7 (15%) had only a slight change.¹⁰ In terms of the percentage of custodial sentences there was no change or a slight change¹¹ in all but six of the crime categories.¹² The percentage of custodial sentences was 79% in the earlier period and 82% in the later 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.

⁷ K Warner (1990) *Sentencing in Tasmania*, and (2002) *Sentencing in Tasmania*, 2nd ed. For some offences the periods were different – eg 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.

⁸ 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.

⁹ Excluding murder because there was no discretion in the first decade.

¹⁰ Defined as a 16% change or less.

¹¹ Defined to include a change of less than 10%.

¹² Dangerous driving, 2 counts of unlawful sexual intercourse with a person under 17 years, robbery, single counts of stealing, 11 or more counts of burglary and selling or supplying a prohibited substance.

Table 1: Offences against the person and dangerous driving, Supreme Court sentences, 1978-2000

section	crime	years	min	med	max	% cust	no. cust	total no.	% diff
157	murder	78-89		life		100			0
		90-00	10y	24y	life	100	37	37	
157	attempted murder	78-89	3y	5y	8y	100	12	12	0
		90-00*	3y	5y	10y	100	2	2	
159	manslaughter	78-89	1y	3y	7y	100	35	35	0
		90-00	9m	3y	10y	100	26	26	
167A	death by dang. driving	78-89	3m	9m	18m	94	30	32	1
		90-00	6m	9m	2y	93	14	15	
32(1) (TA)	dangerous driving	80-89	1m	3m	9m	78	59	76	17
		90-00	2m	3m	9m	93	14	15	
170	act intended cause gbh etc	78-89	6m	1y	2y	100	4	4	n a
		90-00	4m	2y6m	6y	100	12	12	
170 (G)	act intended cause gbh etc	78-89	1y	2y	3y	100	5	5	n a
		90-00	9m	2y10.5m	8y	100	12	12	
172	wounding or gbh	78-89	2m	6m	3y	86	66	77	2
		90-00*	1m	9m	5y	88	97	110	
172 (G)	wounding or gbh	78-89	2m	9m	4y	90	35	39	4
		90-00	1m	18m	7y	94	32	34	
183 (115FA)	aggravated assault	78-89	3m	7m	2y	94	16	17	2
		90-00*	1m	6m	1y	96	24	25	
114	assault police officer	78-89	14d	3m	18m	86	12	14	n a
		90-00	4m	-	12m	100	2	2	
114 (G)	assault police officer	78-89	3m	6m	2y	94	17	18	2
		90-00	1m	6m	21m	92	11	12	
184	assault	78-89	14d	4m	4y	73	146	201	6
		90-00	14d	4m	18m	78	179	229	
184 (G:2-3)	assault	78-89	2m	6m	3y	83	44	53	3
		90-00	2m	6m	2y	86	68	79	
184 (G:4+)	assault	78-89	3m	9m	18m	91	10	11	9
		90-00	4m	1y	19m	100	18	18	

*attempted murder: excluding twenty sentences of 21y imposed on Martin Bryant

*wounding or gbh: excluding sentences imposed on Martin Bryant

*aggravated assault: excluding four sentences of 21y imposed on Martin Bryant

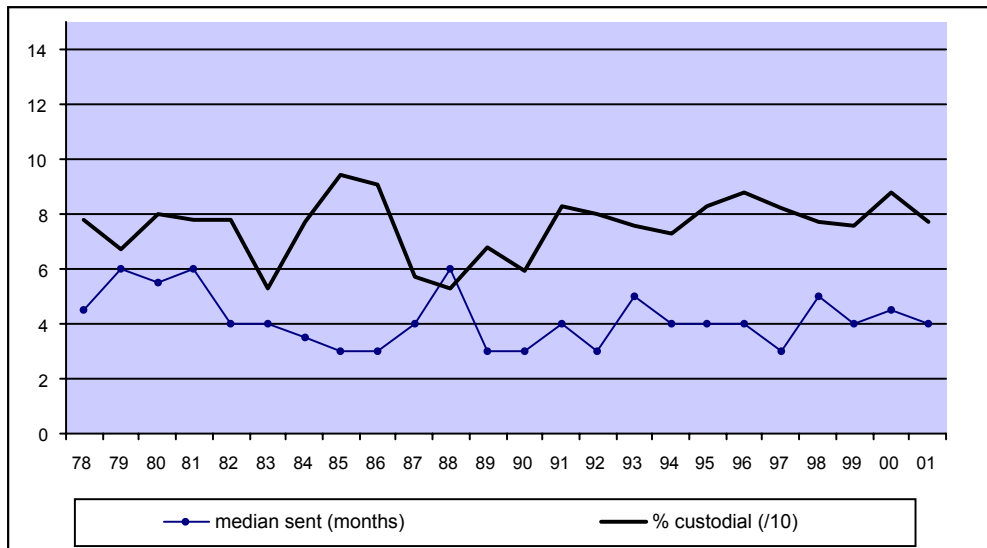
n a = not applicable: if less than ten sentences in either period

gbh = grievous bodily harm

Offences against the Person and Dangerous Driving

The sentencing trends for the offences in Table 1 show consistent patterns for most of the offences. In some cases there appears to be a trend for more severe sentences. For dangerous driving¹³ sentences were more often custodial in the later period and for serious assaults contrary to ss 170 and 172 the median sentences were higher and the proportion of custodial sentences similar or higher. For four plus counts of assault the median sentence was slightly higher. Fig 1 shows 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 ranged from a high of 41 to a low of 8, some fluctuations in sentencing patterns are inevitable. Despite this sentencing patterns appear quite stable. The median ranged from 3 months to 6 months but was usually between 3.5 months and 4.5 months. The proportion of custodial sentences was usually between 70% and 90%.

Fig 1: Assault, Supreme Court sentences, 1978-2001



Sexual Offences

Table 2 shows the median sentence for one count of rape has gone from 4 years to 3 years and the median for two counts is also lower. The median sentence for indecent assault (one to 4 counts) 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 impacting on cases in the second decade resulted in

¹³ This offence is no longer triable on indictment: *Driving Offences (Miscellaneous Amendments) Act 2000*.

cases, which were formerly defined as indecent assault (such as non-consensual fellatio), being covered by rape, and the more invasive kinds of indecent assault being covered by the more serious crimes of rape or aggravated sexual assault (eg digital penetration). Therefore one would expect the median for rape and indecent assault to be lower in the second decade.

Table 2: Sexual offences, Supreme Court sentences, 1978-2000

section	crime	years	min	med	max	% cust	no. cust	total no.	% diff
185	rape	78-89	18m	4y	7y	100	27	27	0
		90-00	6m	3y	8y	100	27	27	
185 (G:2)	rape	78-89	2.5y	5y	8y	100	17	17	0
		90-00	9m	3y9m	10y	100	21	21	
185 (G:3-4)	rape	78-89	2.5y	4y	6y	100	10	10	0
		90-00	3y	5y	7y	100	18	18	
185 (G:5+)	rape	78-89	4y	6y	20y	100	8	8	0
		90-00	3y	7y	12y	100	23	23	
124	sexual inter. with <17y	78-89	1m	3m	6m	38	13	34	3
		90-00	2m	3m	1y	39	12	31	
124 (G:2)	sexual inter. with <17y	78-89	1m	3m	3m	41	5	12	41
		90-00	3m	6m	1y	70	8	11	
124 (G:3-4)	sexual inter. with <17y	78-89	2m	6m	1y	62.5	5	8	n a
		90-00	2m	1y	3y	56	5	9	
124 (G:5+)	sexual inter. with <17y	78-89	3m	6m	12m	83	10	12	n a
		90-00	6m	18m	4y6m	100	9	9	
127	indecent assault	78-89	1m	6m	5y	83	60	72	5
		90-00	1m	3m	1y	87	41	47	
127 (G:2)	indecent assault	78-89	3m	9m	2y	92	24	26	2
		90-00	2m	6m	15m	94	16	17	
127 (G:3-4)	indecent assault	78-89	2m	9m	3y	87.5	21	24	12.5
		90-00	5m	6m	18m	100	16	16	
127 (G:5-9)	indecent assault	78-89	6m	9/12m	2y	92	12	13	n a
		90-00	9m	12m	8y	100	9	9	
127 (G:10+)	indecent assault	78-89	6m	12m	2y6m	100	7	7	n a
		90-00	12m	2y	4y	100	5	5	

n a = not applicable: if less than ten sentences in either period

While sentencing patterns for one count of sexual intercourse with a young person are very similar over the two decades, for multiple counts sentencing appears to be more severe. The same is true for global sentences of more than four counts of indecent assault. The majority of sentences for indecent assault (more than 80%) were imposed in cases where the victim was a child or a young person under the age of consent. This may suggest a trend to treat child sexual assault more seriously, reflecting increased societal awareness of the harmfulness of this conduct.

Robbery, Property Offences and Other Offences**Table 3: Robbery, property offences and offences, Supreme Court sentences, 1978-2000**

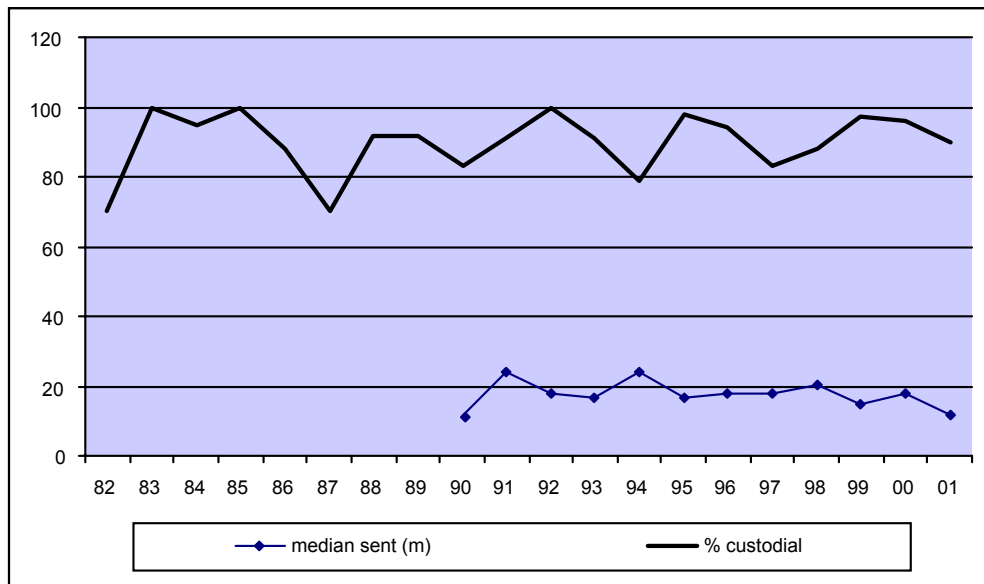
section	crime	years	min	med	max	% cust	no. cust	total no.	% diff
	robbery (all)	78-89 90-00	1m 1m	12m 18m	6y 8y	76 92	87 359	115 391	17
S count	robbery arm & ag arm	90-95 96-01	3m 3m	18m 18m	8y 8y	95 93	97 105	102 113	2
S count	robbery & ag rob	90-95 96-01	3m 20d	9m 12m	2y6m 5y	76 92	35 55	46 60	17
234	stealing	83-89 90-00	stroc 1m	6m 6m	3y9m 2y8m	61 77	74 85	121 110	21
234 (G)	stealing	83-89 90-00	2m 2m	9m 12m	4y 6y	83 87	43 91	52 105	5
258	receiving	83-89 90-00	stroc 1m	4.5m 4m	12m 18m	67 69	26 55	39 80	3
	burglary (intent steal)	83-89 94-00	1m 1m	4m 4m	9m 12m	81 73	26 33	32 45	10
(G: 2)	burglary (& stealing)	83-89 94-00	6w 1m	6m 6m	2y6m 3y	71 70	133 278	187 397	1
(G: 5-10)	burglary (& stealing)	83-89 94-00	stroc 1m	12m 11m	2y6m 3y	94 89	60 92	64 103	5
(G: 11+)	burglary (& stealing)	83-89 94-00	6m 4m	18m 18m	3y6m 5y	78 93	43 70	55 75	16
S	aggravated burglary	83-89 94-00	3m 3m	9m 12m	3y 2y6m	87.5 86	14 13	16 15	2
G	aggravated burglary	83-89 94-00	6m 28d	12m 12m	4y6m 3y	100 90	? 70	? 78	10
268	arson	78-89 90-00	2m 2m	12m 12m	4y 4y	85 91	29 58	34 64	7
268A	setting fire to property	78-89 90-00*	stroc 2w	6m 4m	15m 18m	69 64	24 27	35 42	7
273	destroy or injure property	78-89 90-00	1m 1m	6m 6m	12m 2y	58 53	18 17	31 32	9
47 (3)(b)	traff. proh. plant / subst.	85-89 90-00	2m 2m	6m 5m	2y 5y	90 92	44 89	49 97	2
47(1)(b) (S&G)	trafficking in a narcotic	85-89 90-00	3m 2m	9m 9m	18m 4y	89 100	8 30	9 30	n a
47(1)(a)	sell or supply plant / substa.	85-89 90-00	1m stroc	4m 3/4m	12m 13m	78 52	14 32	18 62	33
105	perverting justice	78-89 90-00	2w stroc	3m 3m	6m 15m	72 71	21 29	29 41	1
107	escape	78-89 90-00	2w 1m	4m 2m	12m 2y	89 92	16 12	18 13	3

*omitting the 21y sentence imposed on Martin Bryant
stroc = sentenced to the rising of the court

Table 3 shows that for many offences - receiving, burglary (up to ten counts), arson, damage to property and trafficking in a prohibited plant) sentences appear quite stable over the two decades. Sentencing patterns have become more severe for stealing and for global sentences for more than ten counts of burglary. The only significant decrease in sentencing severity appears to be for selling or supplying a prohibited plant or substance where there is a substantial drop in the proportion of custodial sentences. However there were few offences for this offence in the earlier period.

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 combined these categories of robbery. It shows the median sentence and the percentage of custodial sentences increased in the second decade. This table also shows a comparison for armed robbery (including aggravated armed robbery) and unarmed robbery (robbery and aggravated robbery) between 1990-1995 and 1996 to 2001. This suggests that while sentencing has become more severe for robbery overall, this is because sentencing for unarmed robbery has become harsher. Sentences for armed robbery have not changed. The trends by year are shown in Fig 2. By reason of the small numbers, fluctuations are to be expected. The median ranged from 12 to 24 months and the percentage of custodial sentences was between 70% and 100%.

Fig 2: Robbery, Supreme Court sentences, 1982-2001



Consistency between judges

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 1990-2001. 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, nor 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 not suspended (wholly or partly). As Fig 3 and 4 show, judges were quite consistent, with no judge standing out as most lenient or most severe for either crimes on these measures.

Fig 3: Assault, Sentences by Judges in the Supreme Court, 1990-2001.

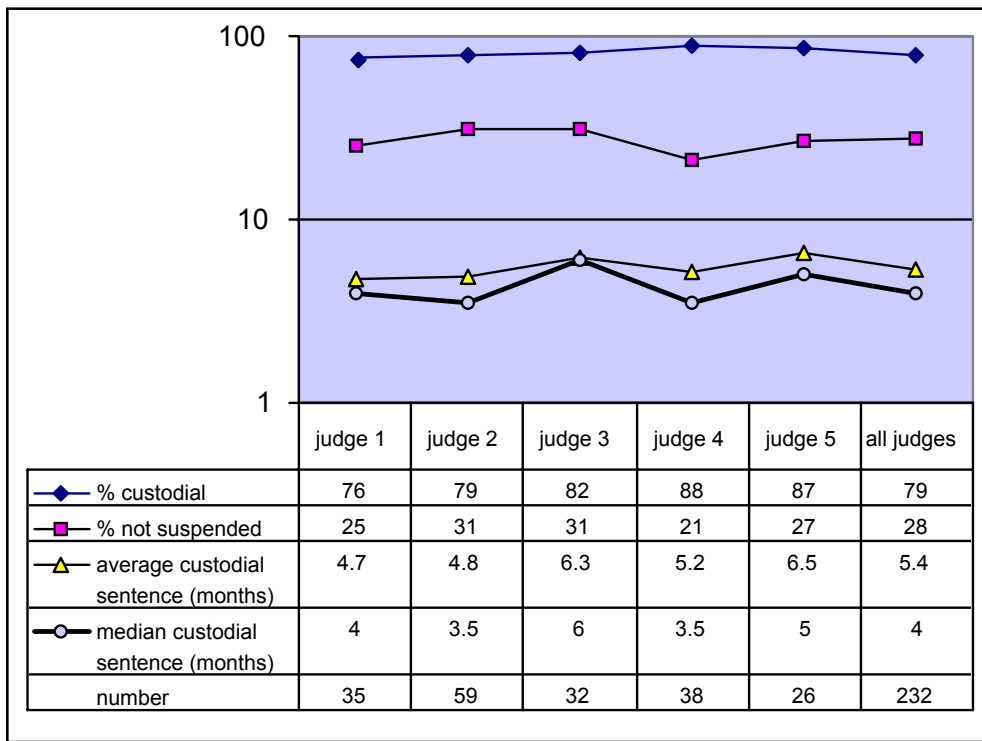
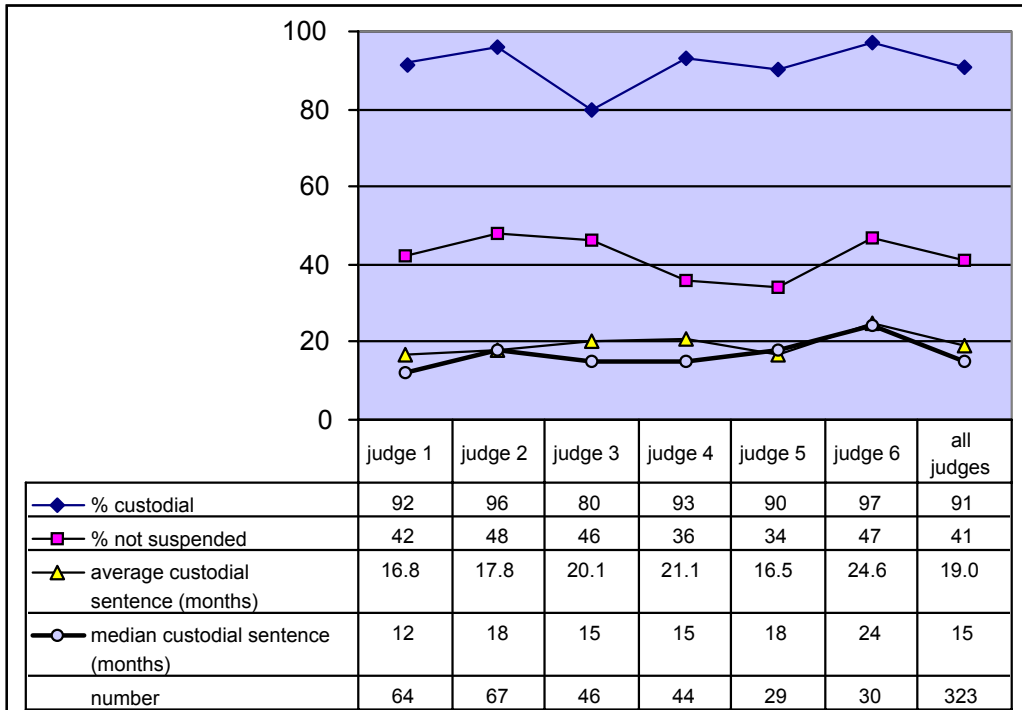


Fig 4: Robbery, Sentences by Judges in the Supreme Court, 1990-2001.



Trends in the Magistrates' Courts

Most sentencing is done in Magistrates' Courts. While custodial sentences are imposed in less than 20% of summary offences heard in a year, 70% of prison sentences are imposed by Magistrates Courts, although most are short sentences (about 85% are for 3 months or less) and about half of these short sentences are wholly suspended. For the most common serious offences it would be possible to get an idea of sentencing trends with a year by year comparison. However this could not be done because of a lack of data. Computerised data is available from 1997 but this only applies to the south of the State. And because of the way the data is entered on this database, extracting usable statistics from it is a labour intensive process which could not be undertaken given the Institute's resources. The discussion in this section uses data that has been collected for other purposes. This consists of a three month state-wide sample from 1988 of Magistrates' Courts' sentences¹⁴ and data extracted from the Hobart Magistrates' Courts database for 1999-2000.¹⁵

¹⁴ Data collected from the first edition of *Sentencing in Tasmania*.

¹⁵ For the second edition of *Sentencing in Tasmania*.

Custodial sentences

Custodial sentences are handed down for less than 20% of summary offences heard in Magistrates' Courts. Tables 4-7 show the percentage of custodial sentences for 24 common offences in the earlier (1988) and later period (1999-2000). For offences where custodial sentences are most likely, such as burglary, motor vehicle stealing and driving whilst disqualified under the *Road Safety Alcohol and Drugs Act*, there was little difference in the rate of custodial sentences. However for other offences there were quite significant increases, notably for drink driving offences (120% increase for exceeding .05) and driving whilst disqualified under the *Traffic Act* (a 278% increase). The only offence to show a significant drop is stealing with a 36% decrease. There were too few custodial sentences for drug offences to allow comment.

Table 4: Police Offences Act offences, Magistrates' Courts, custodial sentences, comparing 1988 sample with 1999-2000.

section	offence	years	total no.	no. custodial	% custodial
4(1)(a)	drunk and incapable	88	145	1	1
		99-00	115	1	1
4(1)(b)	drunk and disorderly	88	123		
		99-00	276	1	
13(1)(b)	disturb the public peace	88	59		
		99-00	59		
13(1)(e)	commit a nuisance	88	138		
		99-00	48		
14B	trespass	88	85	6	7
		99-00	122	9	7
34B (1)(a)	assault a police officer	88	134	11	8
		99-00	219	11	5
34B (1)(b)	threat/abuse police officer	88	69	1	1
		99-00	280	2	1
35(1)	assault	88	74	21	15
		99-00	445	99	22
37(1)	damage property	88	98	13	13
		99-00	311	47	15
37B(1)	motor vehicle stealing	88	72	30	42
		99-00	153	71	46
55A(1)	fail to state name & add.	88	45	1	2
		99-00	42		
Police Offences Act total		88	1042	84	8
		99-00	2070	241	12

Table 5: Poisons Act offences, Magistrates' Courts, custodial sentences, comparing 1988 sample with 1999-2000.

section	offence	years	total no.	no. custodial	% custodial
48	possess a narc. substance	88	25	2	8
		97-00	26	2	8
49	possess a prohib. plant	88	73	2	3
		97-00	62	1	1
52	grow a prohib. plant	88	35	2	6
		97-00	73	4	5
55(1)(c)	possess a prohib. subst.	88	81	4	5
		97-00	173	3	2
55(1)(d)	use a prohib. subst.	88	82	3	4
		97-00	48		
Poisons Act total		88	296	13	4
		97-00	382	10	3

Table 6: Driving offences, Magistrates' Courts, custodial sentences, comparing 1988 sample with 1999-2000.

section	offence	years	total no.	no. custodial	% custodial
Road Safety (A & D) Act					
4	Drive under the influence	88	67	15	22
		99-00	176	57	32
6(1)	Exceed .05	88	1119	57	5
		99-00	1698	187	11
19A(1)	Drive whilst disqualified	88	66	39	59
		99-00	439	289	65
Traffic Act					
14(4)(a)	Unlicensed driver	88	233	1	
		99-00	1699	4	
37(1)	Drive whilst disqualified	88	34	5	14
		99-00	261	142	53
32(2)	negligent driving	88	30		
		99-00	49	6	12
Driving offences total		88	1549	117	8
		99-00	4322	685	16

Table 7: Stealing and burglary, Magistrates' Courts, custodial sentences, comparing 1988 sample with 1999-2000.

section	offence	years	total no.	no. custodial	% custodial
234	stealing	88	427	127	30
		99-00	698	136	19
244	burglary	88	192	114	59
		99-00	80	48	60

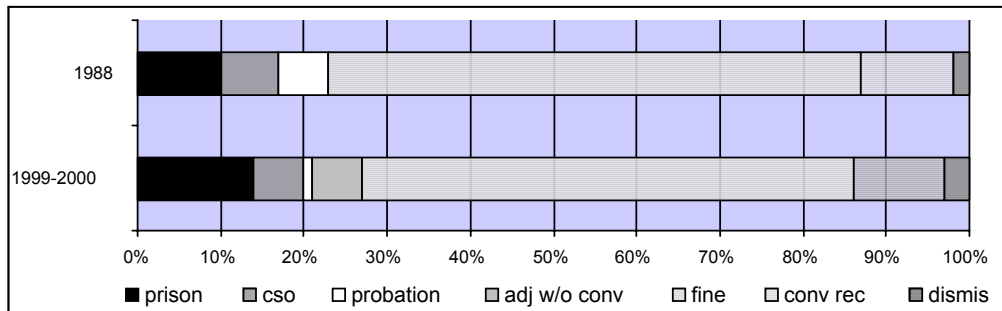
Because most sentences are short sentences, a comparison of median sentences is fairly meaningless. No offences analysed attracted a median sentence of more than 3 months including global sentences for multiple counts of burglary. A comparison of the proportion of custodial sentences passed would seem to be a more accurate indicator of sentencing severity and this shows the percentage of custodial sentences has increased from 10% in the 1988 sample to 14% in 1999-2000. Data was not available to indicate whether the use of suspended sentences has changed over this period.

Non-custodial sentences

Fig 5 shows the distribution of sentence types over the two periods. It shows:

- Community service orders have remained steady at 6-7% of sentences.
- Fines are the most frequently imposed sanction. They are imposed for about 60% of offences. Their use has declined a little.¹⁶
- The use of probation is difficult to assess because of a change in terminology. Under the *Sentencing Act* 1997, probation now 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. A conditional adjournment with or without conviction is the new equivalent of the old unsupervised probation order.
- The proportion of “conviction recorded” sentences is the same for the two periods.
- Dismissal without conviction appears to have remained about the same.

Fig 5: Sentence type distribution in Magistrates’ Courts



¹⁶ Changes in counting rules may have exaggerated this difference because fines were treated as more serious than probation in the earlier period but less serious in the later period. However even if all probation orders in the later period included a fine (unlikely) and these are added to the number of fines in '99/00, we would still have a smaller proportion of fines in the later period: 59.4% compared to 64.3%, a difference of almost 5 percentage points.

Average time served by released prisoners

Another way of measuring sentencing trends is by examining average time served in prison for particular offences over time. In addition to the sentence imposed, the impact of remissions and parole release can affect time served. A number of offences for which average yearly numbers of released prisoners were reasonably high (close to 100) were examined. This shows that for drink driving, which would be unaffected by the reduction in remissions in 1992, time served has been quite stable with a slight upward trend (see Fig 6). Assault (including s 170 and s 172) has fluctuated with an increase since the 1999-2000 financial year (see Fig 7) and burglary has fluctuated, increasing in the 2000-2001 financial year (see Fig 8). Overall the average time served by released prisoners in the years since 1985-1986 has tended to increase (see Fig 9).

Fig 6: Drink driving, average time served (days) by released prisoners, 1985/86 – 2000/01 (average no. per financial year = 112; min = 86; max = 140)

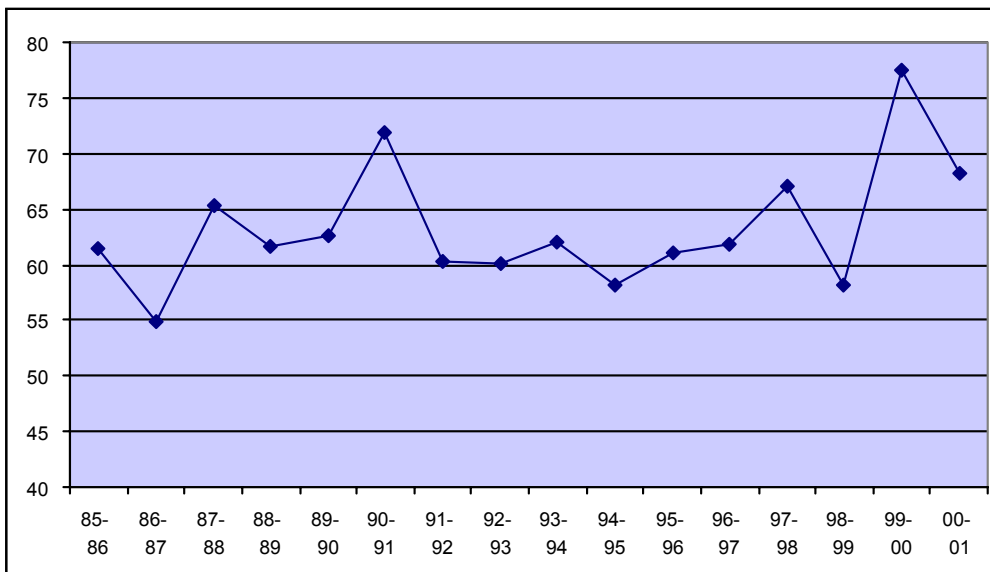


Fig 7: Assault, average time served (days) by released prisoners, 1985/86 – 2000/01 (average no. per financial year = 82; min = 46; max = 123)

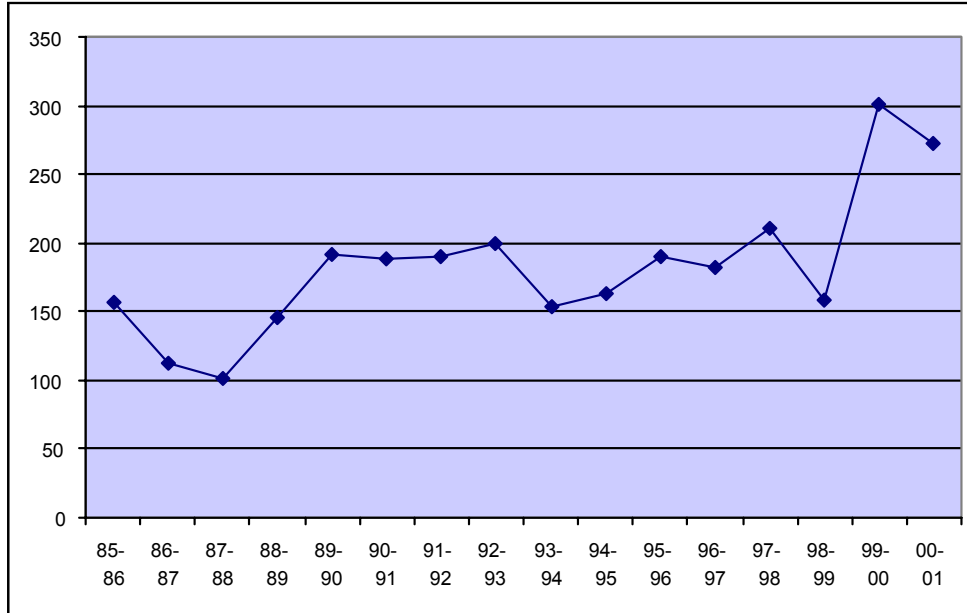


Fig 8: Burglary, average time served (days) by released prisoners, 1985/86 – 2000/01 (average no. per financial year = 99; min = 37; max = 133)

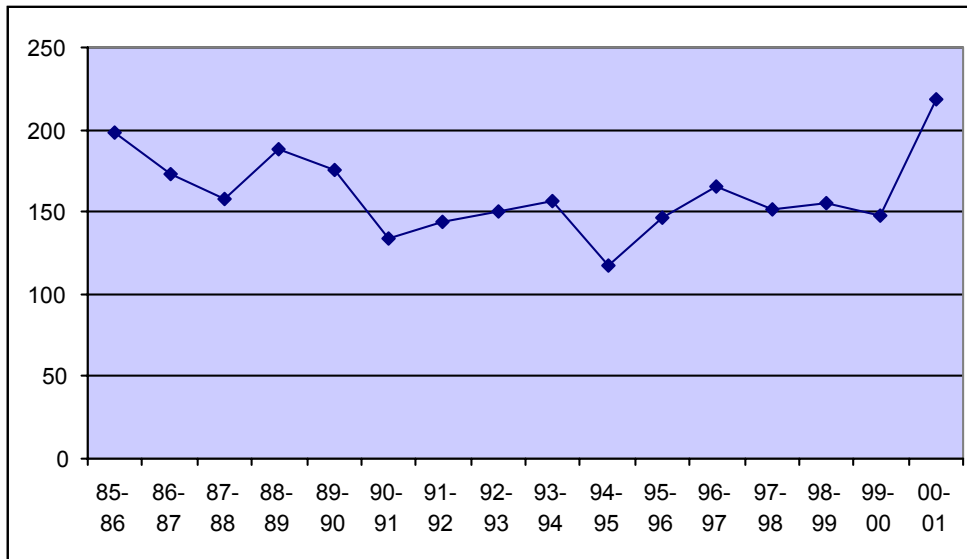
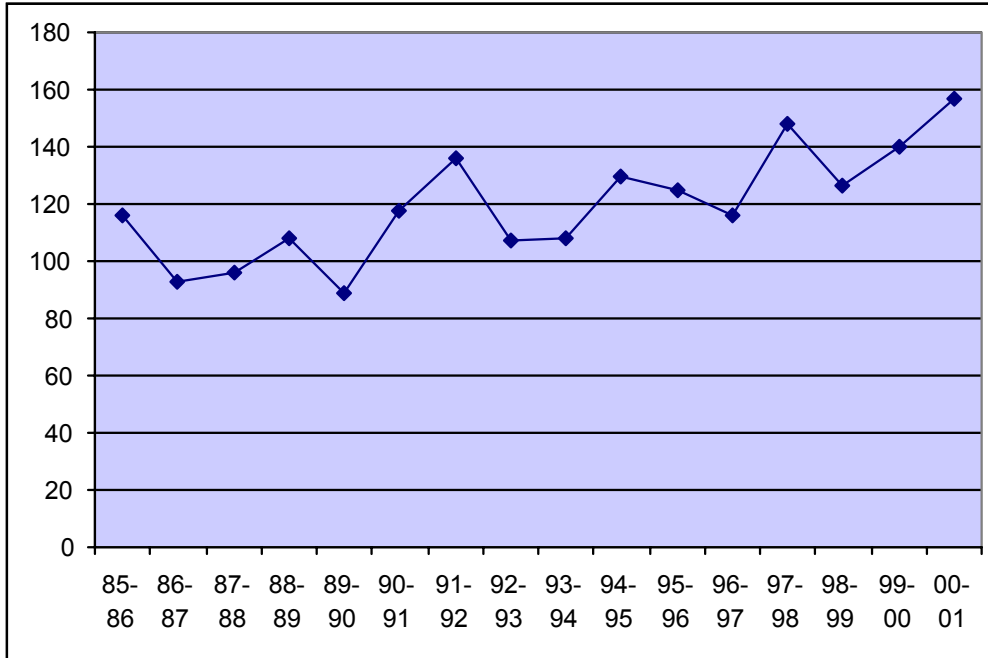


Fig 9: All sentenced offenders, average time served (days) by released prisoners, 1985/86 – 2000/01 (average no. per financial year = 681; min = 408; max = 783)



Summary

Using the limited data available, sentencing patterns appear relatively stable and consistent. Certainly there is no evidence supporting increased leniency, if anything sentencing may have become more severe. What is most striking is the consistency in sentencing patterns. In the Supreme Court, where over 20 years of data was available, there was consistency in median sentences and percentage of custodial sentences for most crimes. For some crimes - dangerous driving, serious assault, unarmed robbery and stealing - sentencing patterns were more severe in the second decade. Sentencing consistency was also explored by a comparison of sentences between judges for robbery and assault. This showed little disparity between judges on three measures: proportion of custodial sentences; use of suspended sentences and the median sentence. The data for courts of petty sessions were far from robust for comparative purposes over time. However it suggests for the offences of drink driving and driving whilst disqualified sentencing may have become more severe using proportion of custodial sentences as an indicator. The data on average time served by released prisoners shows the same kind of trends: quite consistent patterns with a trend for slightly longer terms of imprisonment.

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?*

Goal 2: To have a community where people feel safe in all aspects of their lives.

Goal 2.1: To ensure that community facilities and spaces, transport facilities and private homes are, and are perceived to be, safe environments.

(a) Crime Levels and Sentencing

Introduction

A major obstacle to more effective policies to reduce the level of serious crime is the “common sense view of crime”.¹⁷ 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 problems of rising crime, this section of the paper explores the relationship between crimes 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.

¹⁷ R Hogg and D Brown (1998) *Rethinking Law and Order*, Pluto Press.

Crime levels

Crime is not a static phenomenon. Over time and in different social conditions there are changes in the type of crimes 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. Criminal statistics are themselves social constructs. 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.¹⁸ Crime statistics are at best a flawed indication of real crime levels. Official statistics that are traditionally relied upon as a measure of crime levels are *crimes reported* (or more accurately, recorded) by the police. However police statistics are incomplete 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 a much lower rate for crimes such as sexual assault. 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. With these cautionary comments in mind, the trends in Tasmania of crimes reported to the police will be discussed.

Reported Crime in Tasmania

Reported crime statistics in Tasmania for the last 20 years suggest a general increase in crime. The number of reported offences against the person and the rate of reported crime per 100,000 population has more than doubled (see Fig 10). The same is true for offences against property although for the last 3 years the rate has decreased (see Fig 11). The data for specific property offences shows (see Fig 12) that reported burglary of buildings (private and commercial premises) has declined in the last 3 years and that stealing¹⁹ and injury to property appear to have plateaued. However, motor vehicle stealing has continued to increase.

¹⁸ J Lea and J Young (1984) *What is to be Done about Law and Order*, Harmondsworth.

¹⁹ This is stealing not connected with burglary and it excludes shoplifting and motor vehicle stealing.

Fig 10: Offences against the person, rate reported to the police per 100,000 population, financial year ending 1982-2001

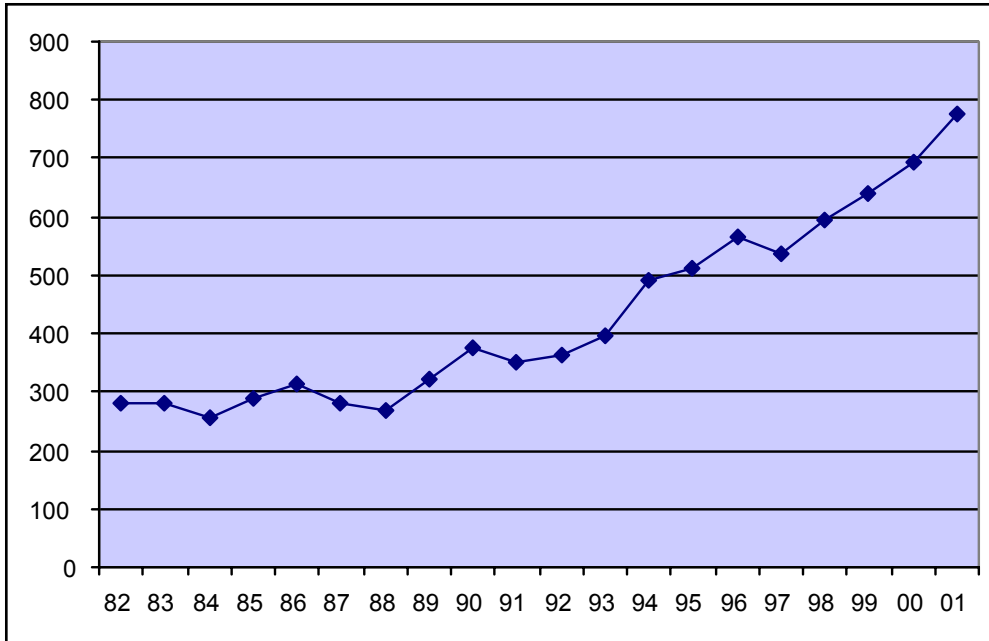


Fig 11: Offences against property, rate reported to the police per 100,000 population, financial year ending 1982-2001

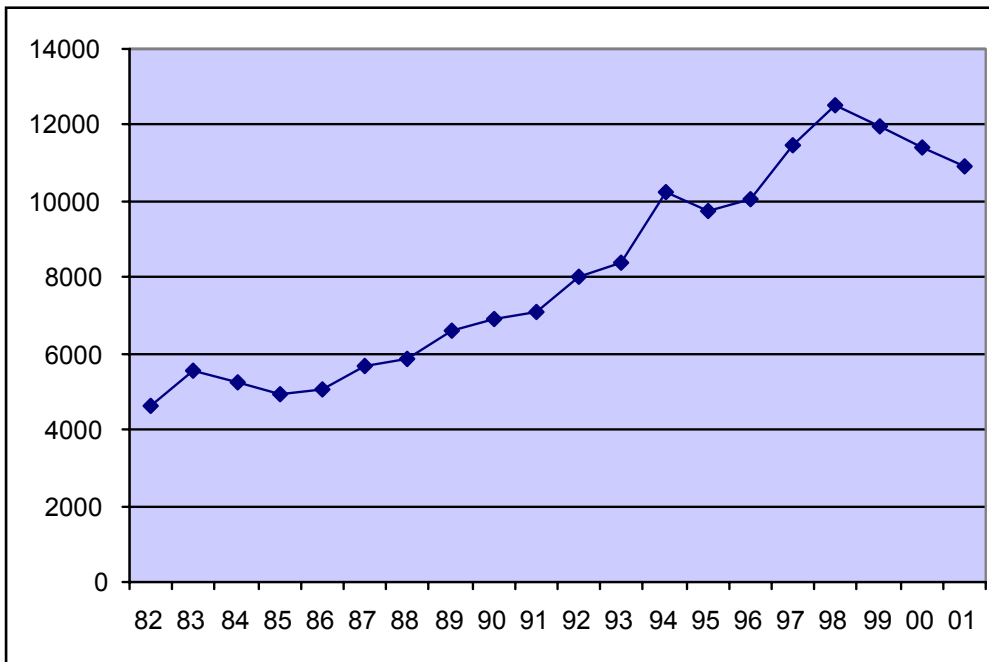


Fig 12: Specific offences against property, number reported to the police, financial year ending 1982-2001

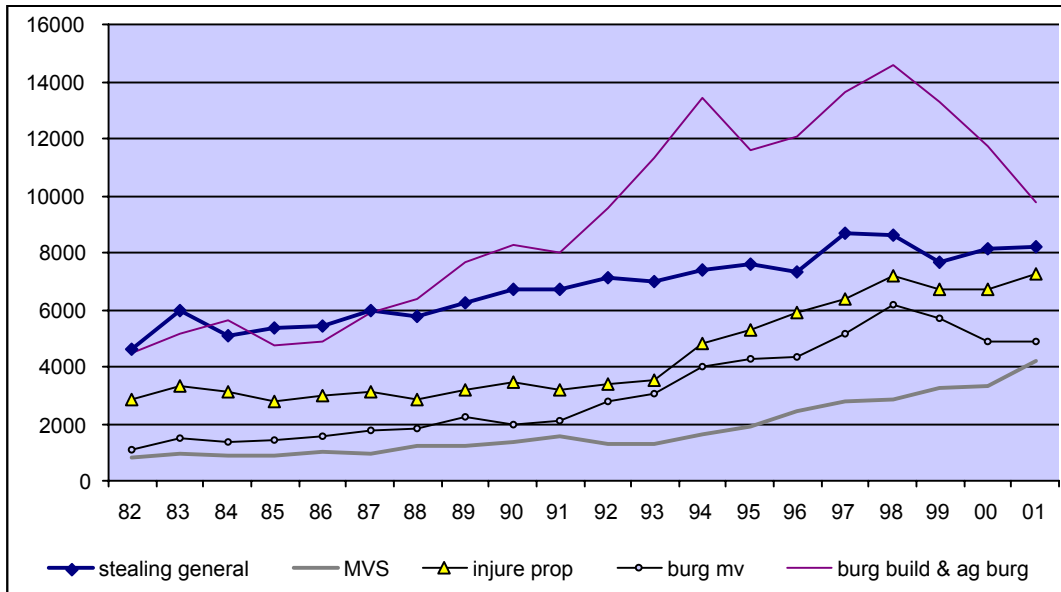


Fig 13: Assault, number reported to the police, financial year ending 1982-2001

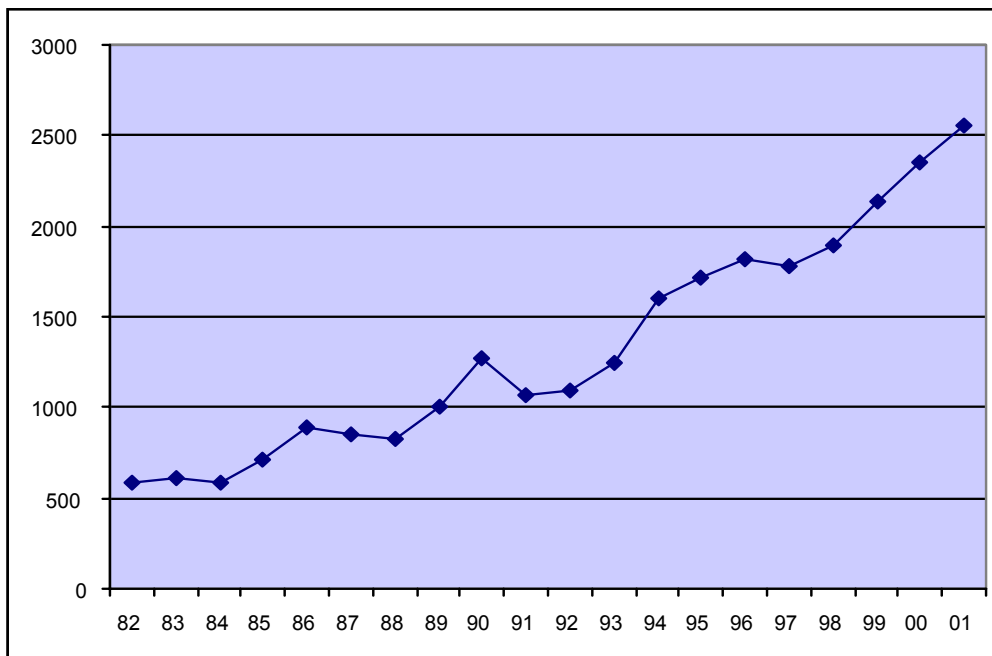
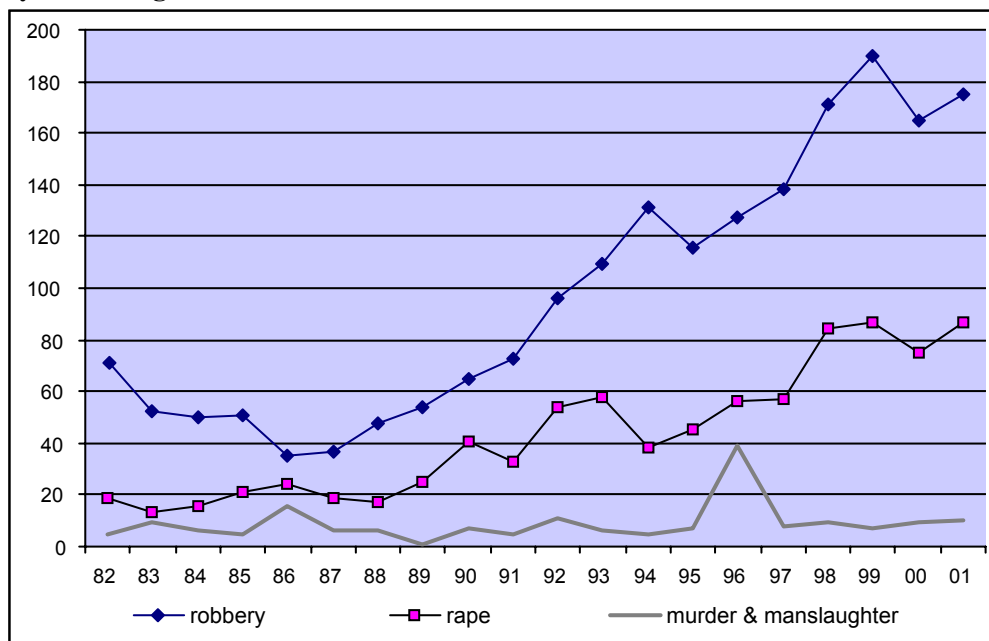


Fig 14: Rape, robbery and homicide, number reported to the police, financial year ending 1982-2001



Data on specific crimes against the person show a steady rise in the number of assaults reported to the police from 580 in 1982 to 2559 in 2001 (see Fig 13). The rate in 2001 was four times that in 1982. Reported rape has also increased by four times. Some of this increase for rape and assault may be due to increased reporting but this is not likely to account for the increase in robbery. Fig 14 suggests the steady increase in rape and robbery may be levelling out. The homicide rate has remained largely stable with the exception of the year of the Port Arthur Massacre (1996).

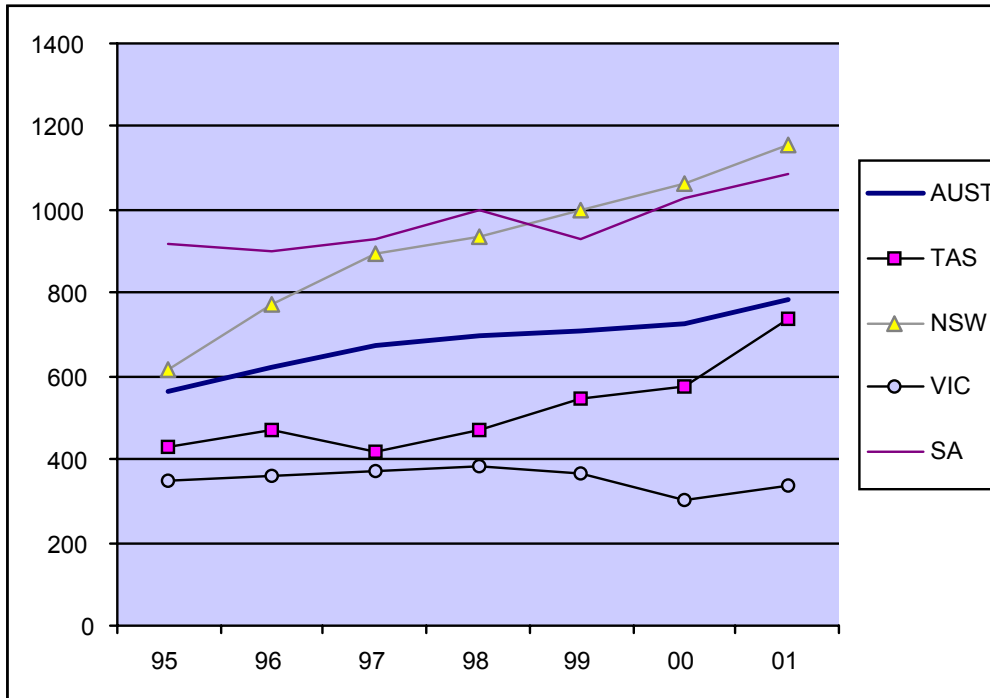
Tasmania in the Australian context

Violent crime accounts for roughly 10 per cent of recorded crime in Australia but in the last 25 years it has increased at a faster rate than property crime. The rate of serious assault has increased by more than 600 per cent over this period and the rate of robbery has more than trebled. Property crime such as burglary, motor vehicle theft and stealing has also increased but at a much slower rate.²⁰ Figs 15-20 show Tasmanian rates in comparison with national data for the years 1993-2001. Tasmania is below the national rate of recorded crime for crimes like assault (Fig 15), sexual assault (Fig 16) and robbery (Fig 17). For property crimes the picture is different. The rate for burglary, stealing and motor vehicle stealing increased nationally until

²⁰ S Mukherjee (2000) 'Crime Trends: A National Perspective' in D Chappell and P Wilson, *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, 45 at 55.

the early 1990s and then plateaued.²¹ The burglary rate in Tasmania is higher than the national rate in each of the years until 2000 and 2001 (see Fig 18) but the rates for theft (Fig 19) and motor vehicle stealing (Fig 20) are generally lower although the latter rate has risen more sharply than the national rate and is now on a par with it.

Fig 15: Assault, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2001



²¹ *Ibid* at 56.

Fig 16: Sexual assault, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2001

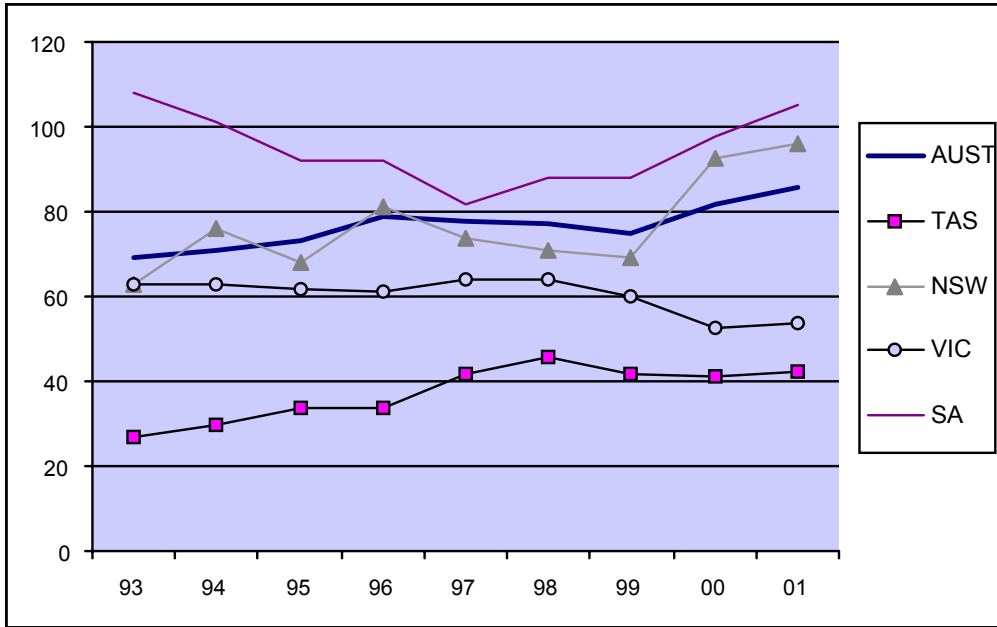


Fig 17: Robbery, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2001

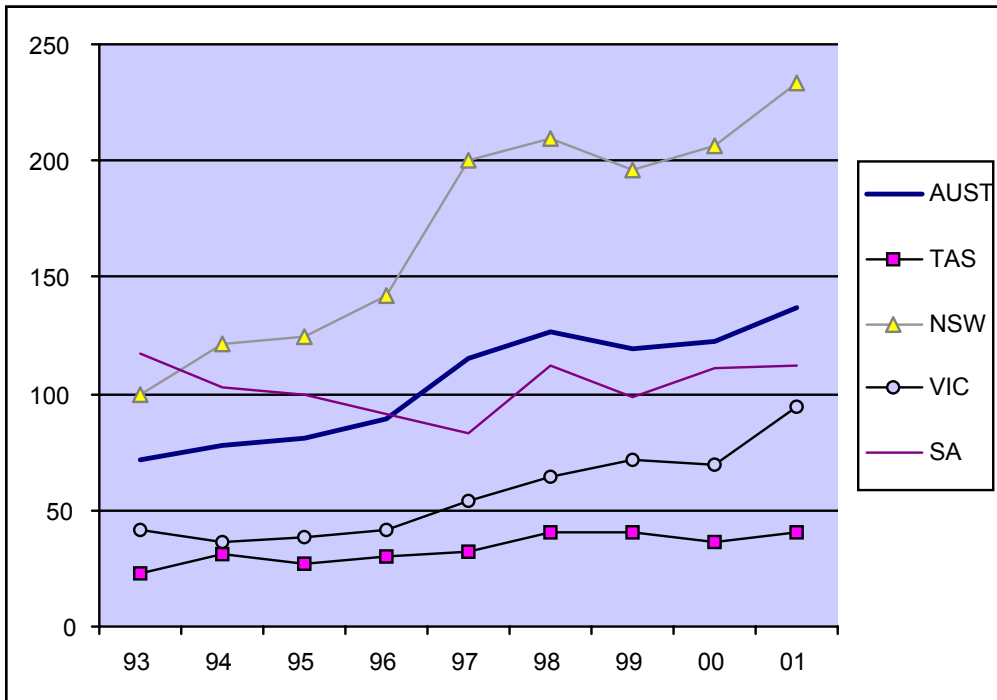


Fig 18: Burglary, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2001

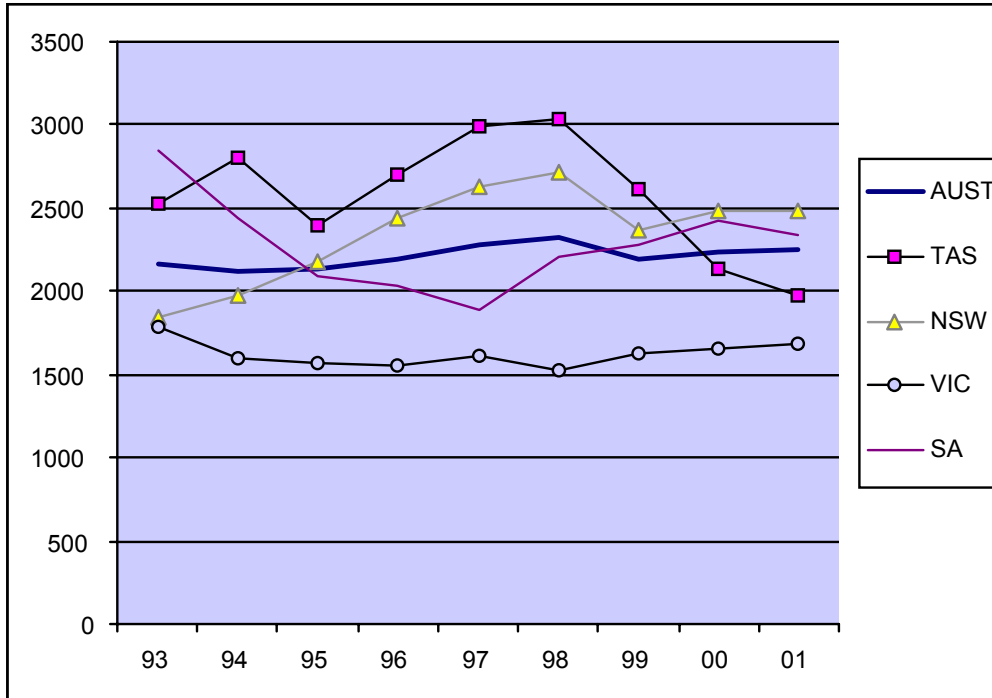


Fig 19: Theft, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2001

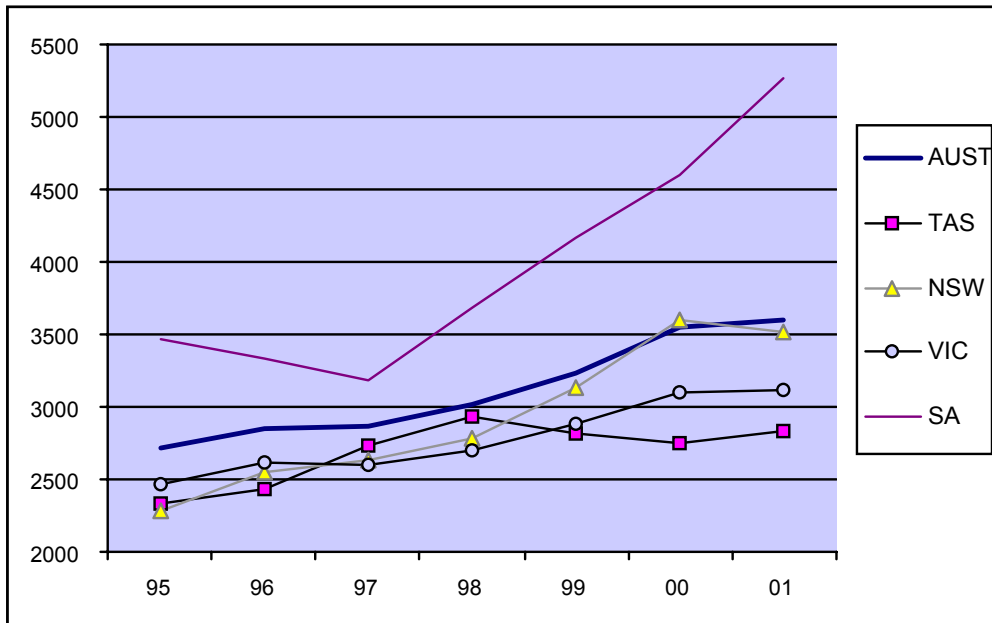
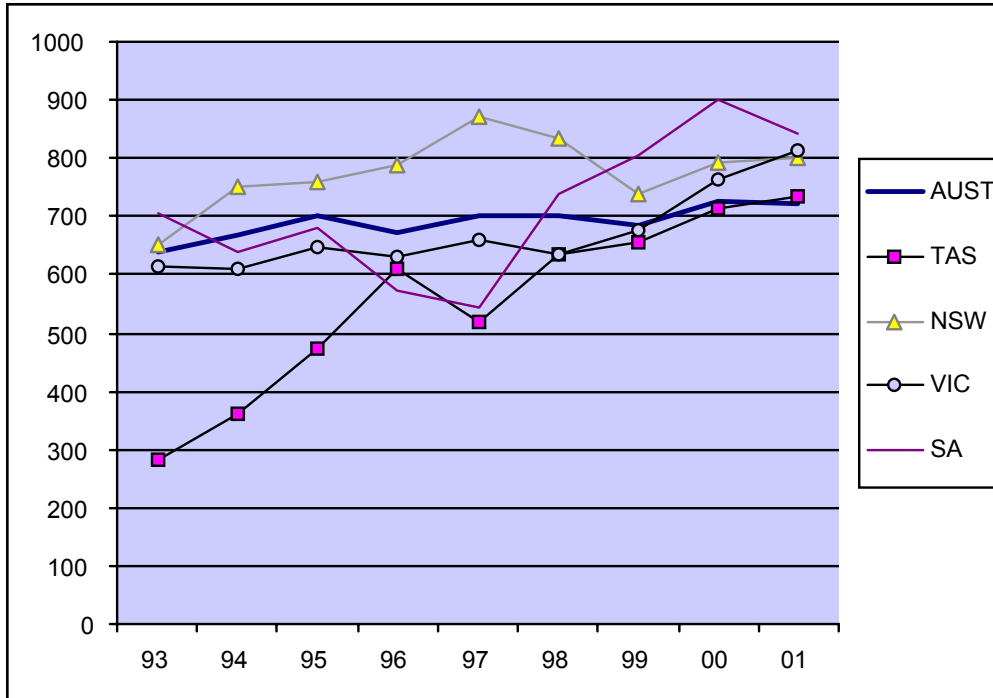


Fig 20: Motor vehicle stealing, rate per 100,000 population in Australia, Tas, NSW, Vic and SA, 1993-2001



Australia in the international context

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. The United States has a rate considerably higher although it declined in the 1990s.²² Victim surveys suggest that Australia has higher crime rates than many other industrialised countries.²³ In the most recent 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).²⁴

²² *Ibid* at 53.

²³ Mostly European countries with the addition of Japan, US, Canada and Australia.

²⁴ J van Kesteren, et al, Criminal Victimization in Seventeen Industrialised Countries, <<http://www.minjust.nl/b-organ.wodc/publicaties/>>

The relationship between crime levels and sentencing

We have seen that sentencing levels appear to have remained quite stable in Tasmania over the last 20 years, perhaps with increases for some offences. At the same time, crime statistics suggest that the level of reported crime has increased. The imprisonment rate in Tasmania has also increased. There was a period of rapid growth in imprisonment in 1985-1987, this was followed by much lower figures through to late 1990 and then steady figures through to the beginning of 1998. Since 1998 the trends have been upward.²⁵ While sentencing may have resulted in marginal increases in imprisonment rates, the increase in the prison population appears to be a result of factors largely unrelated to sentencing levels, such as increases in crime rates and improving clear-up rates.²⁶ In the last three or so years it appears that crime levels for some crimes have plateaued or even decreased, for example robbery and burglary have both decreased since 1998.

There is nothing to suggest that these changes in the crime rates are attributable to sentencing practice or sentence severity and experts on crime trends tell us there is no point in mapping sentencing trends against crime trends. 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.

The courts too could 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. Expert opinion, however, disputes a causal link. Research suggests that harsher sentencing brings about small, if any, reductions in the crime rate. It is said that “crime rates appear to have life independent of punishment rates”.²⁷

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. Three bases for the link are commonly suggested:

²⁵ J Walker (2000, September) *Tasmanian Prison Projections 2000-2019*, at 9 and Australian Bureau of Statistics (2001) *Prisoners in Australia*, Cat no 4517.0, June 2001 census data.

²⁶ Walker, *ibid*, at 10, 18.

²⁷ N Morgan (1999) ‘Capturing Crims or Capturing Votes?’ 22 *University of New South Wales Law Review*, 267, at 273.

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 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.

Each of these “common sense” assumptions will be considered in the light of the empirical evidence.

General deterrence

Evaluating the deterrent effect of harsher penalties is notoriously difficult. For example, it is difficult to separate deterrent effects from the results 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. The most recent review of deterrence research²⁸ 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.

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.

²⁸ A von Hirsch, et al (1999) *Criminal Deterrence: an analysis of recent research*, Hart Publishing.

Mandatory sentencing in Western Australia

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.²⁹ While there was another car chase death on the day following the passage of the legislation, there were no such deaths for around seven months and the Government pointed to this lull as evidence of a deterrent effect.³⁰ 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 Loh³¹ 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. Morgan³² concludes, "burglary rates appear to have a lifecycle that is to some extent seasonal and that operates quite independently of punishment levels".

Mugging in England

Another situation which is widely cited as demonstrating the failure of general deterrence is when a 20 year exemplary sentence was imposed on a mugger in Birmingham in England. The sentence was widely reported in local and national newspapers but there was a continued rise in muggings for several weeks after.³³

²⁹ Morgan (1999), *op cit* note 27, at 271.

³⁰ *Ibid.*

³¹ (1993) 'The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) Sentencing Act' 26 *ANZJ Criminol* 251.

³² N Morgan (2000) 'Mandatory Sentences in Australia' 24 *Criminal Law Journal* 164.

³³ R Baxter and C Nuttall (1975) 'Severe sentences no deterrent to crime?' 31 *New Society* 11.

Capital punishment

Research on capital punishment for homicide is sometimes relied upon to demonstrate that penalty severity has no impact of deterrence. In the United States, comparisons of the murder rates in “abolitionist” and “retentionist” states give no indication of which are the abolitionist states. 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. One cannot conclusively generalise from these findings that harsher penalties are no more effective a deterrent than less harsh ones. However the evidence suggests that, at least for murder, capital punishment is no more effective a deterrent than life imprisonment.³⁴

Successful deterrents

There is evidence that in some situations, more severe penalties can have a general deterrent effect. The introduction of wheel clamping in London as a penalty for parking offences instead of a fine achieved a reduction in illegal parking. And 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 is due to an increased subjective probability of sanctions rather than simply an increase in penalty severity.³⁵ Another example is Harding’s finding that an additional penalty for carrying a firearm in a robbery deterred some robbers from carrying a firearm.³⁶ In contrast with the Birmingham mugging case, the passing of exemplary sentences after the race riots in Notting Hill in 1958 were said to be responsible for the reduction in racial troubles in the following months. Cause and effect has been questioned here. Other factors may have had this effect, such as the removal of the ring leaders and increased police patrols increasing the perceived risk of getting caught.³⁷

³⁴ This may be because (the minority of) deterrable murders are adequately deterred by life imprisonment (N Walker (1991) *Why Punish?* Oxford University Press, at 16). But they may be adequately deterred by a lesser term. We just do not know.

³⁵ HL Ross (1973) ‘Law, Science and Accidents: the British Road Safety Act of 1967’ 2 *Journal of Legal Studies* 1; R Homel (1981) ‘Penalties and the Drink Driver: a study of one thousand offenders’ 14 *ANZJ Criminol* 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: D Riley (1985) ‘Drink Drivers: the Limits of Deterrence’ 24 *Howard J CJ* 241.

³⁶ R Harding (1990) ‘Rational Choice in Gun use in Armed Robbery’ 1 *Criminal Law Forum* 427.

³⁷ A Ashworth (2000) *Sentencing and Criminal Justice*, 3rd ed, Butterworths, at 66.

General deterrence: conclusions

For general deterrence to have any chance of being effective the conditions must be favourable: the risk of detection should not be too remote; the penalty should be publicised adequately; the penalty should be perceived as a deterrent and potential offenders must consider the risks rationally. For many offences the clear-up rates are so low that the risk of detection is quite remote and many crimes are committed without the offender addressing the risks rationally (eg the offender is impulsive, over optimistic, not in a condition to assess the risks or not worried about the risks). Interviews with burglars have suggested they are “not rational calculators, rather short term hedonists or eternal optimists”.³⁸

In summary, while it cannot be said that the severity of the penalty adds nothing to crime reduction, it is difficult to gauge the deterrent effects of penalties and few studies have managed to identify the existence and extent of general deterrent effects flowing from the legal penalty. In some situations general deterrence may be effective, and very drastic sanctions may prove effective. However, 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.³⁹ 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.⁴⁰ That we sometimes knowingly harm non-offenders for the benefit of others (eg quarantine, compulsory acquisition) is no answer because these measures do not have the censuring dimension that punishment has.⁴¹ 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 policies, increasing penalty severity to reduce offending is not one.⁴²

Incapacitation

Incapacitative strategies are said to work most effectively when high risk re-offenders are targeted either on the basis of assessments of dangerousness or on the basis of a simulation model that identifies certain high risk offenders. However this strategy has

³⁸ Ashworth, *ibid*, at 65 citing D Riley (1991) *Drink Driving: the Effects of Enforcement*, Home Office Research Study 121, HMSO.

³⁹ D Beyleveld (1979) *A Bibliography of General Deterrence*, Saxon House; von Hirsch et al (1999) *op cit* note 28; Ashworth (2000) *op cit* note 37.

⁴⁰ Ashworth (2000) *op cit* note 37, at 66; Australian Law Reform Commission (1988) *Sentencing Report* No 44.

⁴¹ Ashworth (2000) *op cit* note 37, at 67.

⁴² See also United Kingdom *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, July 2001, Home Office, London (*The Halliday Report*) at 8.

been shown to have major flaws, and calculations of the incapacitative effects of such strategies have been shown to be exaggerated.⁴³ Moreover the incapacitative policies usually advocated, “three strikes and you’re out” for example, are crude examples 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.⁴⁴ In the US, one of the results of the War on Drugs has been that one-fourth of all prison beds are now 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.⁴⁵

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 15% for a reduction in crime of 1%, 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.⁴⁶

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 rate for prediction reoffending is low.⁴⁷ 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 rate group. Clearly this is ethically unacceptable as the high risk offender group commit crimes only two or three times more often than the low risk group.⁴⁸

Specific deterrence and rehabilitation

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. English evidence suggests that comparing convictions rates for custody with community penalties generally shows no significant

⁴³ Ashworth (2000) *op cit* note 37, at 69.

⁴⁴ Morgan (2000), *op cit* note 32.

⁴⁵ W Spelman (2000) ‘The Limited Importance of Prison Expansion’ in A Blumstein and J Wallman (eds) *The Crime Drop in America* Cambridge University Press; New York, at p 116.

⁴⁶ *The Halliday Report*, *op cit* note 42, at 9.

⁴⁷ Ashworth (2000) *op cit* note 37, at 69.

⁴⁸ W Spelman (2000) *op cit* note 45, at 118.

differences in reconvictions rates.⁴⁹ 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% for prison, 49% for community service and 42% for “straight” probation.⁵⁰ 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.⁵¹

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.⁵² The *Halliday Report* is more optimistic about rehabilitation and suggests that by risk assessment and identifying programs most likely to work for the offender in question it may well be possible to reduce re-offending by 5-15 percentage points. Instead of “nothing works” it argues for “what works” strategies and programs, meaning a rigorous analysis of what works in preventing re-offending.⁵³ Currently there are very few rehabilitation programs available in the prison system. Increased optimism about the possibilities of achieving some improvement in recidivism rates by adopting new programs and risk assessment 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.

US Research on the Crime Drop in the 1990s

Much research has been carried out in the US where the effectiveness of prisons in controlling crime has been an important issue since the beginning of the prison boom in the 1960s. Increasingly sophisticated econometric studies have been used which

⁴⁹ C Nuttall, P Goldblatt and C Lewis (1998) *Reducing Offending: an assessment of research evidence on ways of dealing with offending behaviour*, Home Office Research Study 187, at 90.

⁵⁰ Ashworth (2000) *op cit* note 37, at 239 citing C Lloyd, G Mair and M Hough (1994) *Explaining Reconviction Rates: a critical analysis*, Home Office Research Study 135, HMSO.

⁵¹ C Nuttall, P Goldblatt and C Lewis (1998) *op cit* note 49 at 93. An earlier study had shown no difference in re-offending rates between shorter and longer sentences: S Brody (1975) *The Effectiveness of Sentencing*, Home Office Research Study 35.

⁵² “Nothing works” was and is a socially constructed reality rather than a scientific truth: R Sarre (2001) ‘Beyond ‘What Works?’ A 25-year Justice Retrospective of Robert Martinson’s Famous Article’ 34 *ANZJ Criminol* 38.

⁵³ *Op cit* note 42 at 6-7.

require data-sets on imprisonment rates, crime rates and a wide range of control variables that affect the crime rate such as income, unemployment and age distribution. These studies do not separate the effects of incapacitation from those of deterrence and rehabilitation. However, their advocates claim that they are better than other methods at capturing the full impact of changes in imprisonment rates. Recently a number of such studies have analysed the crime drop in the 1990s. Spelman suggests that twice doubling the prison population over 20 years did have some impact on crime levels but violent crime would have dropped a lot anyway.⁵⁴ Most responsibility for the drop rests with improvements in the economy, changes in the age structure and other social factors. Moreover, he suggests that increasing the prison population may not have been cost effective, the money could have been better spent elsewhere. Gainsborough and Mauer⁵⁵ did a study of increases in imprisonment from 1978 to 1998 with particular attention to 1991-1998. They found that states with the largest increases in incarceration experienced, on average, smaller declines in crime than other states. They concluded that increasing the imprisonment rate was not the most effective way of decreasing crime. According to their analysis, the explanation for the reduction in crime in the 1990s was due to economic expansion, changes in the drug trade (ie a decline of crack cocaine markets) and new approaches to policing.⁵⁶ Additional explanations for the 1990s drop in violent crime include more effective gun policies, the growing availability of services for abused women⁵⁷ and changing values of teenagers and young adults.⁵⁸ In summary it seems a “fortuitous confluence” of underlying factors explained the crime drop rather than simply a tougher criminal justice system.

Conclusion

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.

⁵⁴ Spelman (2000) *op cit* note 45.

⁵⁵ J Gainsborough and M Mauer (2000) *Diminishing Returns: Crime and Incarceration in the 1990's*, The Sentencing Project, Washington.

⁵⁶ *Ibid.*

⁵⁷ Spelman (2000) *op cit* note 45.

⁵⁸ A Karmen (2000) *New York Murder Mystery. The Story Behind the Crime Crash of the 1990's*, New York University Press.

(b) The role of sentencing in achieving the Tasmanian Together Goals

Tasmania Together has the following goals:

Goal 2: To have a community where people feel safe in all aspects of their lives.

Goal 2.1: To ensure that community facilities and spaces, transport facilities and private homes are, and are perceived to be, safe environments.

The challenges set by the Tasmania Together Goals under community safety relevant to crime include:

- ensuring that at least 95% of people feel safe in their homes by 2020;
- increasing to 85% the percentage of people who feel safe on public transport by 2020;
- increase by one third the percentage of people who feel safe in public places by 2020
- halve the rate of crime by 2020;
- reduce by one third the incidence of family violence by 2020;
- reduce the proportion of first offenders who re-offend.

Fear of crime is undoubtedly a problem. Surveys show that crime is an important concern and that there is a high level of public concern about crime levels. An ABS Survey in Tasmania in 1998 is said to show that eight out of ten Tasmanians aged 18 and over were very worried or worried about having their home broken into and almost two thirds were worried about being mugged or robbed.⁵⁹ Dissatisfaction with the criminal justice system is also widespread. Surveys suggest that a majority of respondents think that sentencing is too lenient and that judges are unresponsive to community concern about crime. While there appears to be no rigorously conducted research on this issue in Tasmania, there is some evidence that the public perceives sentencing to be too lenient. A poll conducted by *The Mercury* published on 27 December 1994 stated that a majority of Tasmanians view gaol terms as inadequate. Various 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.⁶⁰

Given that crime levels 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

⁵⁹ Australian Bureau of Statistics (1999) *Community Safety, Tasmania*, Cat no 4515.6: at 7 and Table 17 (note that worried includes slightly worried as well as very worried).

⁶⁰ eg Operation Switch On (interviews with Claremont Residents) and Neighbourhood Watch Survey.

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 punishment.

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 and crime reduction. 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:⁶¹

- 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.

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

Promoting understanding of sentencing practice

Studies elsewhere have shown that in general, the public lacks knowledge about sentencing practice. A recent international study found that the public under-estimate the severity of sentencing practices (eg the imprisonment rate), over-estimate the percentage of offenders who re-offend and over-estimate the percentage of prisoners released on parole and the proportion of prison terms served in the community on parole.⁶² Misperceptions about sentencing practice correlate with a belief in leniency: the lower the estimated use of imprisonment, the greater is the belief that sentencing

⁶¹ N Morgan (2002) 'A Sentencing Matrix for Western Australia: Accountability and Transparency or Smoke and Mirrors?' in N Hutton and C Tata (eds), *Sentencing and Society: International Perspectives*, Ashgate.

⁶² M Hough and J Roberts (2002) 'Public knowledge and public opinion of sentencing' in C Tata and N Hutton (eds) *Sentencing and Society*, Ashgate.

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 sentencing practice fuel public dissatisfaction. While there are no reliable studies of public perceptions of sentencing in Tasmania, let alone of public knowledge of sentencing practice, there is no reason to believe that public perceptions are different nor any better informed. A better understanding of sentencing practice should lead to an improvement in public confidence. This issue is given further consideration in Part 5.

Reviewing 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. 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.

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

Ways in which and the extent to which public opinion about crime should shape sentencing theory and practice are dealt with in Part 4.

Sentencing Smarter

These strategies for improving public confidence all relate to perceptions of public safety rather than actual improvements in public safety by reductions in the crime rate. Because crime levels are largely unaffected by sentencing levels, sentencing reform can have little impact on the Tasmania Together Goals relating to community safety and crime reduction. 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. Some of these improvements will emerge from the discussion of sentencing options in Part 3. 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.

Part 3

Sentencing Options

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

The sentencing options for courts dealing with adult offenders are set out in the *Sentencing Act 1997*, s 7. They are:

- a sentence of imprisonment (at least some of which must be actually served)
- a wholly suspended sentence of imprisonment
- a community service order
- a probation order
- a fine
- an adjournment with an undertaking
- conviction only
- dismissal without conviction

In this Part, issues relating to imprisonment, suspended sentences, community service orders, probation, fines and adjournments with undertakings will be discussed. In addition some sentencing options that are not available in Tasmania will be discussed.

Imprisonment

The Supreme Court has the power to impose sentences of imprisonment for all crimes. The maximum is 21 years imprisonment except for murder and treason, which attract a maximum of life imprisonment.⁶³ 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 3 months to 12 months. For indictable offences that are heard by magistrates the offender is liable to 12 months imprisonment for a first offence and 3 years for a subsequent offence.⁶⁴

⁶³ *Criminal Code*, s 389(3).

⁶⁴ *Sentencing Act 1997*, s 13.

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 reformatory potential of custody;
- belief in its deleterious effects;
- doubts about its individual deterrent effects; and
- humanitarian concerns.⁶⁵

The very limited role that increasing the imprisonment rate (ie harsher sentencing) has in reducing the crime rate has been explained. This has 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.⁶⁶ Having a low imprisonment rate does not mean that a community is less safe than a community with a higher imprisonment rate as a comparison between Victoria and New South Wales shows. In addition there is the issue of cost. Prison numbers in Tasmania have fluctuated over the last 15 years with a period of rapid growth between 1985 and 1987 (reaching 350 male prisoners) and much lower figures through to late 1990. Figures oscillated between 1991 and the beginning of 1998 from 250 to 300 male prisoners.⁶⁷ Since 1998 the trend has been upward.⁶⁸ Tasmania's imprisonment rate is the second lowest at 95.5 per 100,000 of the adult population compared with the Australian rate of 150.5.⁶⁹ The Government has engaged a consultancy group to explore the issue of future size of the prison population as part of the planning process for a new prison. In the light of the strong arguments in favour of restraint in the use of imprisonment, it is worth considering if there are some ways in which this could be encouraged.

Ways to encourage restraint in the use of custody

Unlike the position in a number of other jurisdictions, the principle of restraint in the use of custody is not expressly mentioned in our sentencing legislation. It is derived from the common law. There are a number of ways in which it could be given greater effect:

⁶⁵ Ashworth (2000) *op cit* note 37, at 237-241.

⁶⁶ L Jones (1994) *Review of Certain Criminal Penalties*, Department of Justice (Tas), at 126.

⁶⁷ J Walker (2000, September) *Tasmanian Prison Projections 2000-2019*.

⁶⁸ Australian Bureau of Statistics (2001) *Prisoners in Australia*, Cat no 4517.0, showed 327 male prisoners on the census date and a rate slightly down on 2000 but the same as 1999.

⁶⁹ *Ibid.*

Prohibiting very short sentence

One way would be to set a minimum length of sentence, say 4 months, which must accompany any decision to imprison. The effect would be that where a judge or magistrate would otherwise have imposed a sentence of 3 months or less, a non-custodial sentence would have to be imposed instead. Very short sentences of imprisonment are common. In magistrates' courts they are imposed in 85% of cases. In the Supreme Court in 2000, 20% of sentences of imprisonment were 3 months or less. It can be 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, loss of employment, etc) without any benefits (too short to deploy therapeutic programs) and minimum incapacitative effects. In Western Australia the recommendation of the *Halden Report*⁷⁰ was adopted and sentences of 3 months or less were abolished. Section 86 of the *Sentencing Act* 1995 (WA) provides that a term of 3 months or less can only be imposed if the aggregate of sentences exceeds 3 months, if the offender is already serving another term or if the term is imposed for a prison disciplinary offence. The context of this 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.⁷¹ 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. New South Wales⁷² and Western Australia⁷³ are now considering abolishing prison sentences of less than 6 months.

A counter argument to the abolition of sentences of 3 months or less is that sentencers might simply increase the length of shorter sentences in order to ensure that certain offenders serve a period of imprisonment. This would have the opposite effect to that intended: increasing the use of custody rather than reducing it. There is some evidence that in Western Australia, following the abolition of sentences of 3 months or less, the number of 4 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.⁷⁴ Another objection is that this proposal would require an increase in the maximum penalties for some offences. Public drunkenness for example, attracts a maximum of 1 month imprisonment and many offences in the *Police Offences Act* attract 3-month maxima. It could also be argued that Tasmania has neither the high imprisonment rates of Western Australia nor the imperative to reduce it. Victoria, which has the lowest imprisonment rate, does not have a prohibition on short terms of imprisonment and has rejected this option as a means of dealing with the problem of short terms of

⁷⁰ Western Australia (1991) *Report of the Joint Select Committee on Parole (the Halden Report)*.

⁷¹ N Morgan (1996) 'Business as Usual or a New Utopia? Non-custodial Sentences Under Western Australia's New Sentencing Laws' 26 *University of Western Australia Law Review* 364 at 365.

⁷² A Freiberg (2002) *Pathways to Justice*, at 136.

⁷³ N Morgan (2001) *Politics, Principles and Imprisonment* Unpublished Ph D thesis, University of Western Australia, at 429 quoting M Stevens, 'Jail clean-out' *The Western Australian*, 28 September, 2001.

⁷⁴ *Ibid*, at 430.

imprisonment. Freiberg argues, “Abolition of a discrete part of the sentencing range in this manner is undesirable because it leaves too large a gap in the sentencing continuum, a gap which is likely to produce counterproductive practices such as those seen in Western Australia”.⁷⁵

The UK proposal to reform the use of short custodial sentences

The *Halliday Report* on sentencing reform⁷⁶ and the recent white paper, *Justice for All*,⁷⁷ proposes a new sentencing structure which seeks to discourage short custodial sentences (defined as sentences of less than 12 months imprisonment) because they are particularly ineffective and have high reconviction rates. They involve no support or supervision after release (which occurs automatically at the half way point) and do not allow the correctional services to do any meaningful rehabilitation work with offenders. The new structure requires sentencers to consider as a first step whether a sentence of 12 months or more is needed. If not the court should then consider whether a customised community sentence (discussed below at 80-81) would meet the needs of punishment, crime reduction and reparation. If it would not, only then may a short sentence of imprisonment be imposed. The court then has the choice of two new sentences – Custody Plus or Custody Minus – or alternatively, where there is no need for a supervisory period, a period in custody of up to 3 months. Custody Plus consists of a maximum period of 3 months (6 months for multiple crimes) in custody served in full, followed by a compulsory period of supervision in the community, within an overall “sentence envelope” of up to 12 months (15 months for multiple crimes). During the period in the community, offenders will be subject to rigorous requirements designed to address the particular factors that underlie their criminal behaviour and cause them to re-offend. The necessary components of the community sentence are to be addressed in a pre-sentence report. Community Minus is a new type of suspended sentence (see below at 70). In effect this proposal prevents courts from imposing a sentence of less than 12 months or more than 3 months unless it is Custody Plus or Custody Minus.⁷⁸

Reasons justifying short sentences

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”.⁷⁹ 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 6 months or less with the hope it would encourage more

⁷⁵ A Freiberg (2002) *Pathways to Justice*, at 136.

⁷⁶ *Op cit* note 42; this report was published in July 2001 with a consultation phase through to 31 October 2001.

⁷⁷ This paper was released on 17 July 2002 (CM 5563).

⁷⁸ For a fuller description of the proposals see the *Halliday Report*, *op cit* note 42, at 18-26 and United Kingdom (2002) *Justice for All*, at 90-93.

⁷⁹ *Conlan v Arnol* [1979] Tas SR (NC 9).

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 6 months or less but also should expressly state why a non-custodial sentence was not appropriate.⁸⁰

Statutory recognition of imprisonment as a last resort

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.⁸¹ It could be argued that greater strength would be given to the principle if it were embodied in legislation. As an example, South Australia's *Criminal Law (Sentencing) Act 1988* provides in s 11 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.

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".

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 1.1 Should the possibility of abolishing sentences of 3 months or less be further explored?
- 1.2 Should the English idea of "Custody Plus" be explored as a means of attempting to reduce the reconviction rate of offenders?
- 1.3 Should short custodial sentences be discouraged and if so how?
- 1.4 Should it be required that reasons be given justifying why a sentence of 6 months or less was imposed?
- 1.5 Should statutory recognition be given to the principle of imprisonment as a last resort?

⁸⁰ New South Wales Law Reform Commission (1996) *Sentencing*, Report No 79, at 166-169; implemented in *Crimes (Sentencing Procedure) Act* (NSW) 1999, s 5(2).

⁸¹ K Warner (2002) *Sentencing in Tasmania*, 2nd ed, 2002, para 9.118.

Deferral of commencement of sentence

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.⁸²

When a sentence of imprisonment is imposed 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.

A related recommendation was that, in the case of prison sentences not exceeding 3 months, courts be empowered, in appropriate cases, to order that a sentence be served over a period not exceeding three years during the prisoner's annual leave or such other available period of leave. The Committee noted the large number of prison sentences which are under 3 months (about 60% during 1998-99) and the benefit in terms of retaining employment.

Discussion Points

These questions may be a useful guide in responding to this Part.

Please explain the reasons for your views as fully as possible.

- 1.6 Should courts be given the power to defer sentence where appropriate to allow offenders to be given a limited period of time to put their affairs in order after being sentenced and prior to the commencement of imprisonment?
- 1.7 In the case of sentences not exceeding 3 months, should courts be given the power to order that sentences be served over a period not exceeding 3 years, during the prisoner's leave?

⁸² Tasmania (1999) *Correctional Services and Sentencing in Tasmania*, (Wing Committee Report), at 135.

Suspended sentences of imprisonment

A suspended sentence is one, 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 sentence in Tasmania is a broad one.⁸³ Any sentence of imprisonment can be wholly or partly suspended⁸⁴ and there is no maximum or minimum operational period (ie the period during which breach will put the offender at risk of having the suspended sentence activated). However, in practice the operational period is normally 2 years. Breach is not an offence but, if proved, it exposes the offender to an order that the sentence take effect or to a substituted sentence.⁸⁵ In some jurisdictions it is mandatory for the courts to restore the sentence held in suspense unless the circumstances are exceptional.⁸⁶ Suspended sentences are a popular sentencing measure. For example in magistrates' courts in the south of the State in 1999-2000, 54% of prison sentences were wholly suspended and 9% were partly suspended. Sentences imposed by the Supreme Court in 2000 were suspended in 50% of cases, 26% wholly and 24% partly. In total it would appear that almost half of all sentences are wholly suspended. 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 12 months to be wholly suspended. Some data on suspended sentences appears in Tables 8 and 9. They show that sentences of 1 month in the Magistrates Courts are most likely to be wholly suspended and are the most common wholly suspended sentences. In the Supreme Court in 2000, 3 month sentences were the most likely to be wholly suspended and the most common wholly suspended sentences.

In Tasmania it is permissible to mingle suspended sentences with other sentencing options such as community service orders, fines, probation orders and driving disqualification orders.⁸⁷ This kind of suspended sentence is sometimes referred to as a "conditional suspended sentence". In the Supreme Court in 2000, 55% of wholly suspended sentences and 47% of partly suspended sentences were combined with some other order: 29% with probation, 12% with community service orders, 9% with compensation orders and 2% with fines or other conditions.

⁸³ *Sentencing Act 1997*, s 7(b) and s 24.

⁸⁴ In some jurisdictions there are restrictions on the length of sentences that can be suspended.

⁸⁵ *Sentencing Act 1997*, s 27.

⁸⁶ Eg *Sentencing Act 1991* (Vic) s 31 (5A); *Justice for All op cit* note 78, at 63 proposes automatic imprisonment for breach.

⁸⁷ *Sentencing Act 1997*, s 8(1).

Table 8: Use of suspended sentences, Courts of Petty Sessions 1999-2000 (global and single counts, southern courts)

	data	not susp.	partly	wholly	total
>1m	no.	161	7	217	385
	%	42%	2%	56%	100%
1m>2m	no.	187	12	300	499
	%	37%	2%	60%	100%
2m>3m	no.	105	24	147	276
	%	38%	9%	53%	100%
3m>4m	no.	104	33	146	283
	%	37%	12%	52%	100%
4m>5m	no.	25	34	65	124
	%	20%	27%	52%	100%
5m>6m	no.	3	8	10	21
	%	14%	38%	48%	100%
6m>8m	no.	22	25	25	72
	%	31%	35%	35%	100%
8m>12m	no.	7	10	7	24
	%	29%	42%	29%	100%
12m+	no.	5	5	1	11
	%	45%	45%	9%	100%
total no.		619	158	918	1695
total %		37%	9%	54%	100%

Table 9: Use of suspended sentences, Supreme Court, 2000 (global and single counts)

	data	not susp.	partly	wholly	total
0>3mm	no.	16	4	10	30
	%	53%	13%	33%	100%
3m>4m	no.	15	5	26	46
	%	33%	11%	57%	100%
4m>6m	no.	21	6	24	51
	%	41%	12%	47%	100%
6m>7m	no.	27	22	23	72
	%	38%	31%	32%	100%
7m>9m	no.	11	4	3	18
	%	61%	22%	17%	100%
9m>12m	no.	16	15	8	39
	%	41%	38%	21%	100%
12m>18m	no.	18	19	3	40
	%	45%	48%	8%	100%
18m>2y	no.	14	8	1	23
	%	61%	35%	4%	100%
2y>3y	no.	17	6		23
	%	74%	26%	0%	100%
3y+	no.	34	4		38
	%	89%	11%	0%	100%
total no.		189	93	98	380
total %		50%	24%	26%	100%

Criticisms of suspended sentences

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*, 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. So from a legal point of view, a wholly suspended sentence remains a sentence of imprisonment. As the *Sentencing Act 1997* s 24 provides, a wholly suspended sentence of imprisonment is taken to be sentence of imprisonment for all purposes other than enactments providing for disqualification for, or loss of office, or the forfeiture or suspension of pensions and other benefits. 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, something that is imposed when a sentence of imprisonment is appropriate but the circumstances permit suspension in the exercise of discretion, from the point of view of the public it ranks as less severe than probation or a small fine.⁸⁸ Media reports of offenders being granted suspended sentences reflect and reinforce this view by frequently referring to offenders receiving suspended sentences as having “walked free”,⁸⁹ or characterising this option as a “no-fine, no jail sentence”,⁹⁰ even describing one offender as being “thrashed with a legal feather”.⁹¹

The problem of the differences in perceived seriousness of suspended sentences is not the only criticism of this measure. 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

⁸⁸ L Sebba and G Nathan (1984) ‘Further Explorations in the Scaling of Penalties’ 24 *British Journal of Criminology* 221, at 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 Pty Ltd, ‘Review of Community Based Offender Programs’, Final Report, 1999, Justice Strategy Unit, Attorney-General’s Department, South Australia, at 40 cited by A Freiberg (2001) *Sentencing Review 2001: Discussion Paper*, at 121 note 139.

⁸⁹ *The Mercury*, 26/7/2000: 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”.

⁹⁰ *Sun Herald*, 10/9/1999, ‘Crown refuses leave to appeal on Laws’.

⁹¹ Richard Ackland, referring to the suspended sentence imposed on John Laws for soliciting information from a juror in 1999: see K Warner (2000) ‘Sentencing Review 1999’ 24 *Criminal Law Journal* 355, at 362.

is warranted at all.⁹² It is said that giving double effect to mitigating factors means that white collar and middle class offenders tend to benefit disproportionately.⁹³ Critics have also questioned the effectiveness of suspended sentences: 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.⁹⁴ Finally, it is argued that suspended sentences have had no real impact on the imprisonment rate, because courts have imposed suspended sentences in some cases when custody was not justified and they have imposed longer sentences when suspending.⁹⁵ Any reduction in actual imprisonment by suspension is counterbalanced by those given suspended sentences when they would never have received immediate imprisonment. An attempt was made to ascertain if there is evidence of sentencing escalation in Tasmania by analysing the distribution of the length of wholly suspended sentences (see Tables 8 and 9). The results did not suggest that lower courts tend to increase the length of sentences when suspending them, however there is a suggestion, using Tait's "gap and bulge test"⁹⁶ that the Supreme Court may "up-tariff" sentences under 3 months when suspending them. Criticism of suspended sentences has led to legislation drastically curtailing their use in the United Kingdom⁹⁷ and to the New Zealand government abolishing them.⁹⁸ In Victoria, Arie Freiberg's *Sentencing Review: Discussion Paper* favoured abolition of the suspended sentence, however the Attorney General ruled this out and the final report withdraws this recommendation. The suggestion that suspended sentences be given some punitive component was rejected on the grounds of the dangers of sentence escalation.⁹⁹ In New South Wales, the recommendation of the New South Wales Law Reform Commission¹⁰⁰ was adopted and suspended sentences were reintroduced in 2000.¹⁰¹ In the white paper, *Justice for All*, the United Kingdom government has announced that it will replace the existing suspended sentence with a new suspended sentence called "Custody Minus" which will give judges and magistrates the power to suspend a sentence of imprisonment for up to two years on condition of a range of possible

⁹² K Warner (2002) *Sentencing in Tasmania*, at para 9.215; A Freiberg (2002) *Pathways to Justice*, at 120.

⁹³ Ashworth (2000) *op cit* note 37, at 294; J Bagaric (1999) 'Suspended Sentences and Preventive Sentences: Illusory evils and disproportionate punishments' 22 *University of New South Wales Law Journal* 535; K Warner (2000) 'Sentencing Review 1999' 24 *Criminal Law Journal* 355.

⁹⁴ AE Bottoms (1981) 'The Suspended Sentence in England' 21 *British Journal of Criminology* 1, at 18-20.

⁹⁵ It is argued that there is clear evidence of sentence escalation in Victoria: D Tait (1995) 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' 28 *ANZJ Criminology* 143, at 153.

⁹⁶ *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% of 1 month sentences suspended, 50% of 3 month sentences suspended, and 20% of 5 month sentences suspended – this be a clear 'gap' at the 1-month level and 'bulge' at the 3-month level; suggesting that sentences are being increased because they are being suspended and/or are not being suspended simply because they are short.

⁹⁷ The Halliday review was requested to remove the restriction on suspended sentences to "exceptional circumstances" but declined to so recommend: *The Halliday Report*, *op cit* note 42.

⁹⁸ *Sentencing Act 2002* (NZ).

⁹⁹ A Freiberg (2002) *Pathways to Justice*, at 127.

¹⁰⁰ (1996) *Sentencing Report* No 79.

¹⁰¹ *Crimes (Sentencing Procedure) Act 1999*.

options including compulsory unpaid work, education or treatment programs, drug testing requirements, intensive community supervision, curfew or exclusion restrictions, electronic monitoring and participation in restorative schemes. Any breach will lead to immediate imprisonment.¹⁰²

The case for review

Despite the flaws of the suspended sentence, it does have advantages. To remove it reduces the range of sentencing options and a valuable tool, which enables courts to mark the seriousness of the offence by imposing 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 half of the sentences of imprisonment imposed are wholly suspended. Perhaps the most potent criticism is that the confusing nature of the suspended sentences has contributed to a reduction in public confidence in the criminal justice system. This suggests that a review of suspended sentences should be undertaken examining the claims and counterclaims in relation to effectiveness and sentence escalation. Moreover there are real concerns in relation to breach in Tasmania. There are concerns that breach proceedings are neglected and many offenders breach without proceedings being initiated. It could be argued that the suspended sentence would be given more credibility as a threat if the discretion in relation to the consequences of breach were to be restricted. Another possibility is to require some additional punitive component to be added to the sentence.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 1.8 Should there be any changes in relation to suspended sentences in Tasmania to make this a more logical, credible and effective sentencing option?
- 1.9 Should there be further research into the operation of suspended sentences in Tasmania?

¹⁰² *Justice for All*, op cit note 78, at 93-94.

Home Detention

A home detention order confines offenders to their homes during specified times for the duration of the sentence under strict supervision and subject to conditions. It takes two forms:

- “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.

Both forms of home detention involve supervision and surveillance by correctional officers. In some jurisdictions the home detainee wears an electronic bracelet, which cannot be removed without detection and through which a signal can be sent. In the Northern Territory home detention operates as a form of conditional suspended sentence. In New South Wales home detention is a sentencing option for offenders sentenced to no more than 18 months imprisonment.¹⁰³ In South Australia, Western Australia and Queensland it has been used as a back-end option. In 2001 the Victorian government introduced legislation for home detention as a front-end option but the legislation was defeated.

Curfew orders can amount to a form of home detention. In the UK a Home Detention Curfew Scheme was introduced in 1999. This allows low risk imprisoned offenders to be released during the last 2 months of their sentence under a curfew monitored by electronic tagging.¹⁰⁴ Curfew orders are also available as an independent sentencing option or as a condition of other orders. They require the offender to remain at home, or at some other specified place, for between two and twelve hours a day for up to 6 months. This can be monitored electronically.¹⁰⁵

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 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.¹⁰⁶ The most recent Justice Department Annual Report has flagged a pilot program, scheduled to be implemented and evaluated in the fourth quarter of the 2001-02 year.¹⁰⁷

¹⁰³ The *Crimes (Sentencing Procedure) Act* 1999, s 7.

¹⁰⁴ Ashworth (2000) *op cit* note 37, at 260.

¹⁰⁵ *Power of Criminal Courts (Sentencing) Act* 2000, ss 37-40.

¹⁰⁶ *Wing Committee Report*, *op cit* note 82, at 140.

¹⁰⁷ Department of Justice and Industrial Relations (Tas), *Annual Report 2000-01*, at 77.

Advantages of home detention

The Committee summarised the strengths of home detention as follows:¹⁰⁸

- 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;
- 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.

Disadvantages

The literature on home detention raises a number of problems with home detention:

- 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;¹⁰⁹
- back-end home detention compromises the concept of truth in sentencing unless determined by the sentencing court and it is difficult for the sentencing court to predict whether or not an offender will be suitable for home detention;
- back-end home detention may be unattractive to offenders; the experience in Western Australia is that few short term prisoners have been prepared to accept such an order which involves 24 hour a day electronic monitoring;¹¹⁰
- electronic monitoring is a degrading form of punishment and violates human rights.¹¹¹

¹⁰⁸ *Ibid*, at 139.

¹⁰⁹ See A von Hirsch (1990) 'The Ethics of Community Based Sanctions' 36 *Crime and Delinquency* 162.

¹¹⁰ Morgan (1996) *op cit* note 71, at 381.

¹¹¹ See Ashworth (2000) *op cit* note 37, at 284.

In New South Wales an attempt was made by the New South Wales Law Reform Commission to address some of these disadvantages. It suggested the front-end scheme be monitored to ensure it is diverting offenders from imprisonment.¹¹² To avoid the scheme operating in a discriminatory fashion by excluding poor offenders the 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.¹¹³ The potentially negative effect of home detention on an offender's family was addressed by recommending that consideration be given to making the likelihood of domestic violence against the offender's family relevant to the suitability of the offender for a home detention order.¹¹⁴ The Commission also recommended that the focus be personal contact with probation officers rather than simply electronic monitoring so officers are able to assess whether there are problems arising in relation to the family. In addition it recommended that the co-residents of a home detainee should be permitted to withdraw consent to an order for home detention.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

1.10 Should a system of front-end home detention be introduced?

If so:

Should it be an alternative to imprisonment?

Should it be limited to sentences of 18 months or less as in New South Wales?

Should there be strict eligibility criteria or a wide discretion?

How should disadvantaged offenders be included in the scheme?

How should the offender's family be protected?

1.11 Should a system of back-end home detention be introduced?

If so:

Should it be determined by the sentencing court or by administrative decision after the sentence is imposed?

¹¹² New South Wales Law Reform Commission (1996) *Sentencing*, Report No 79, at 146.

¹¹³ *Ibid*, at 153.

¹¹⁴ The *Crimes (Sentencing Procedure) Act* 1999, s 76 provides home detention is not available for a domestic violence offence.

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 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. Where an offender is sentenced to a term of imprisonment for not more than 3 years, the sentencing court may order that a sentence of imprisonment be served by way of periodic detention.¹¹⁵ 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.¹¹⁶ At the time it was reviewed by the Law Reform Commission, the periodic detention scheme in New South Wales operated in two stages. During Stage 1 detainees were required to remain in custody in a detention centre for the detention period. After serving one third or 3 months (whichever is the greater), periodic detainees, who had attended regularly and who had been of good behaviour, were eligible for Stage II. Stage II was a non-residential component of periodic detention which allowed 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 was that it provided an incentive for regular attendance and good behaviour in Stage 1. 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.¹¹⁷ In the United Kingdom, the white paper, *Justice for All*, has indicated that the government will legislate for a new sentence of “Intermittent Custody” to be piloted immediately. It indicates that a network of community custody centres will be developed within existing prison perimeters. The sentence is targeted at offenders who are currently serving short sentences who are not dangerous.¹¹⁸

Advantages

The advantages of periodic detention are said to include:

- 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;

¹¹⁵ *Crimes (Sentencing Procedure) Act 1999*, s 6.

¹¹⁶ *Crimes (Administration of Sentences) Act 1999*, s 84.

¹¹⁷ New South Wales Law Reform Commission (1996) *Sentencing*, Report No 79, at 141.

¹¹⁸ *Justice for All*, *op cit* note 78, 94.

- by keeping the offender away from hotels and the possibility of excessive drinking it can decrease the risk of reoffending;
- it is much cheaper than full-time imprisonment;¹¹⁹
- 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

The disadvantages of periodic detention are said to include:

- 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 a not insignificant capital cost;
- it is difficult to run because of the burden of processing prisoners' frequent entry and exit from custody;
- there may be a 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;¹²⁰
- compliance rates are a problem.¹²¹

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.¹²² This recommendation was supported by the submission from the Tasmanian Magistracy. It is not clear from the recommendation if it was envisaged as a sentencing option in its own right or as a substitutional sanction, to be imposed only if a sentence of imprisonment has been first considered to be the appropriate sanction. 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 also recommended the inclusion of a Stage II, similar to that operating in New South Wales at the time of the Committee's investigations. It was argued this would give courts the opportunity to include offenders living in remote areas in the scheme. As noted above it also has the advantage of encouraging compliance. It should be noted that in New South Wales, the use of periodic detention is declining, orders dropped

¹¹⁹ 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, *Sentencing*, Report No 79, 1996, 111 note 9.

¹²⁰ A Freiberg (2002) *Pathways to Justice*, at 100 citing I Potas et al (1998) *Periodic Detention Revisited*, at 18.

¹²¹ Freiberg, *ibid*, at 137.

¹²² *Wing Committee Report*, *op cit* note 82, at 124-131.

from 1,409 in 1995 to 1,074 in 2001.¹²³ This raises questions about the effectiveness of this measure as an alternative to short terms of imprisonment.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

1.12 Should periodic detention be introduced in Tasmania?

If so:

Should it be a substitutional sanction?

Should it include a Stage II non-residential component?

Intensive Correction Order

The intensive correction order is an intermediate sentencing sanction which is available in Victoria. It has been described as a community service order with teeth. It was introduced in the early 1990s with the aim of diverting offenders from short terms of imprisonment.¹²⁴ 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. 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 8 hours and to spend any balance in counselling, treatment or education. Other special conditions may be added by the sentencer in relation to attendance at prescribed programs. In the event of breach, there is a presumption of imprisonment, unless there are exceptional circumstances. The customised community sentence proposed for the United Kingdom (see below at 80-81) also allows for a high end community sentencing option by the provision of punitive and protective options in the customised community sentence including intensive community supervision, curfew restrictions, residence requirements and electronic monitoring.¹²⁵

Advantages

¹²³ Freiberg (2002) *Pathways to Justice*, at 137 citing New South Wales, Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report*, Parliamentary Paper No 924, November 2001, at 120.

¹²⁴ Freiberg (2002) *Pathways to Justice*, at 134.

¹²⁵ *Halliday Report*, *op cit* note 42, at 38-44; *Justice for All*, *op cit* note 78, at 91-92.

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

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 (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.¹²⁶ 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.

Freiberg makes a number of recommendations to address these problems. First, 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. Secondly, he recommended that there be discretion for the hours of community work to be served more flexibly over the period of the order and be scaled back if the offender shows progress. Thirdly, that at least one of the program conditions be mandated in the order to increase the rehabilitative component of the order. He also recommended that consideration be given to the desirability of attaching home detention, curfew, or hostel residence conditions to an intensive correction order. Finally, he recommended that breach should not amount to an offence and that there should be a limited power to resentence.

¹²⁶ Freiberg (2002) *Pathways to Justice*, at 135.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

2.14 Should intensive correction orders be introduced in Tasmania?

If so:

Should it be a sentencing option in its own right or a “substitutional sanction”?

Should home detention or curfew conditions be attached?

What should be the consequences of breach?

Community Service Orders

Community service orders 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*, 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 Work 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.¹²⁷ 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 resentence the offender for the original offence.¹²⁸

Community service orders have many advantages over imprisonment not the least of which is cost. The cost of community service supervision in Tasmania in 2000-2001 was \$8.17 daily compared with an average cost of \$148 per day for keeping a person in custody.¹²⁹ The extent to which community service orders have been used to replace imprisonment is not entirely clear. An obvious advantage of community

¹²⁷ *Wing Committee Report*, *op cit* note 82, at 142.

¹²⁸ *Sentencing Act 1997*, s 36.

¹²⁹ Department of Justice and Industrial Relations (Tas), *Annual Report*, 2000-2001.

service is that it has a restorative element: it provides an opportunity for offenders to give something back to the community. So, 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. Clearly it is a useful and credible sentencing option in the sentencing hierarchy for medium range offences.

In 1997/98 1,091 persons were made subject to community service orders. The average length of CSOs was 45 hours in 2000/2001. The Wing Committee reported that there had been a steady upward trend in the use of CSOs since 1980 and was a significant increase in 1996/1997,¹³⁰ however since then their use has declined.¹³¹ Sentencing data analysed for this project suggests that in the south of the State the use of community service orders (as the most serious sanction imposed) has probably remained steady as a proportion of sentences at about 6% in courts of petty sessions.¹³² In the Supreme Court they are imposed in about 5% of cases and are combined with sentences of imprisonment (usually wholly suspended) in a further 5% of cases.¹³³

Community service orders may be combined with suspended sentences and or probation orders. In the Supreme Court about a third of those who receive community service orders also receive probation orders¹³⁴ and about 10% of those who receive suspended sentences also receive community service orders.¹³⁵ There are clearly advantages in combining community service with suspended sentence in some cases so that the community service order is given some bite: a punitive element as well as reparation. Similarly combining probation with community service allows rehabilitation to be emphasised as well as repayment to the community. However if this combination is over used it may stretch the resources of community corrections by the supervisory requirements of combined orders.

Some jurisdictions, such as Victoria, have a different model for community-based orders. Rather than separate categories of order for community service and probation they have an order with multiple elements capable of being tailored to the needs of different types of offenders. It is called a community-based order. While this has the advantage of flexibility, there are problems with a lack of clarity regarding the aims of the order. For this reason the Victorian Sentencing Review has recommended that the community-based order be separated into three broad orders or sub orders: community work orders; supervision and treatment orders; and drug and alcohol program orders.¹³⁶ In contrast, the United Kingdom white paper, *Justice for All*, has adopted the recommendation of the *Halliday Report* that existing community

¹³⁰ *Wing Committee Report, op cit* note 82, at 143.

¹³¹ Department of Justice and Industrial Relations (Tas), *Annual Report, 2000-2001*. at 69; Productivity Commission's annual publication *Report on Government Services*.

¹³² Above, at 35.

¹³³ Based on data for 2000.

¹³⁴ Based on data for 1997-2000.

¹³⁵ Based on data for 2000.

¹³⁶ Freiberg (2002) *Pathways to Justice*, at 166.

sentences should be replaced by a new generic community punishment order (called a customised community sentence) which gives sentencers a menu of options which can be combined to form a single sentence. The “menu” includes compulsory unpaid work; programmes; intensive community supervision; curfew or exclusion orders; electronic monitoring and participation in restorative justice programs.¹³⁷

A suggestion of the Wing Committee was that consideration be given to implementing a “user pays” community service order scheme, along similar lines to that operating in South Australia. This involves developing partnerships between Corrective Services and a recipient agency, organisation or department for the benefit of the wider community. The partnership involves an agreed number of hours of labour supplied free of cost with the recipient agency providing supervision and material costs. There is currently such an arrangement with Local Government here in Tasmania.

New initiatives: rewards and fines

A number of possible reforms to community service orders are being debated in other jurisdictions. First, 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% from the aggregate number of hours of community work imposed by the court. There is a question of whether this would compromise “truth in sentencing” and also the question of whether such a remission should require judicial sanction. The second issue relates to the relationship between community service orders and fine default. In Victoria there is some evidence that sentencers are using community work as a substitute for the fine for impecunious offenders, in effect short-circuiting the fine default process.¹³⁸ Freiberg states that the knowledge that in all probability a fine would be converted to community service by the processes of law results in a pragmatic escalation of the sentence. He argues that for many offenders, community work has less impact on their lives than the payment of a fine and so community service orders are not a more severe sanction than the fine in such cases. He recommended that a provision be added relating to community work orders to the effect that a community work order may be imposed on an offender where it appears to a court that a fine is the appropriate sentence but the offender lacks the means to pay the fine or expresses an unwillingness to pay and no lesser sentence is appropriate in view of the seriousness of the offence.¹³⁹ Arguments against such a proposal are that it subverts the position of community service orders in the sentencing hierarchy and also that, by increasing the numbers of community service orders, it could place too great a strain on the resources of Community Corrections.

¹³⁷ The *Halliday Report*, *op cit* note 42, at 38-44; *Justice for All*, *op cit* note 78, at 91-92.

¹³⁸ Freiberg (2002) *Pathways to Justice*, at 168.

¹³⁹ *Ibid*, at 170.

Breach of non-custodial orders

Breach of a community service order, breach of probation or breach of an adjournment with an undertaking constitutes an offence. The breach offence is not used for breach of a suspended sentence. 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 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 3 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, in the recent 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.¹⁴⁰

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

This Sentencing reference provides an opportunity to review the operation of community service orders.

- 1.14 Are there any problems with this sentencing option?
- 1.15 Is it an appropriate, logical, credible and effective sentencing option?
- 1.16 Are courts taking full advantage of it?
- 1.17 Is there enough guidance about how it should be used?
- 1.18 Is it being used appropriately?
- 1.19 Should it be imposed as an alternative to a fine when the offender is impecunious?
- 1.20 Should a form of reward be built into the community service order?

¹⁴⁰ *Ibid*, at 118-1119.

- 1.21 Are the completion rates satisfactory?
- 1.22 Are breach procedures satisfactory?
- 1.23 Should the offence of breach of a community service order be abolished?
- 1.24 Are the resources available to support community service orders adequate?
- 1.25 Is there room for more user-pays partnership agreements to supervise community service?

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. 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ The period of probation must not exceed 3 years.

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 resentence the offender for the original offence.¹⁴⁴

Probation orders (as the most serious sanction imposed) represent about 1-2% of sanctions imposed. However they may be used in combination with more serious sanctions such as community service orders and suspended sentences. Using Supreme

¹⁴¹ *Sentencing Act 1997*, s 7(d).

¹⁴² *Sentencing Act 1997*, s 37(1).

¹⁴³ *Sentencing Act 1997*, s 37(2).

¹⁴⁴ *Sentencing Act 1997*, s 42.

Court data, probation orders were attached to about 30% of community service orders and suspended sentences. In Tasmania, in common with other Australian jurisdictions, the use of probation orders is declining. It seems this is partly due to an increase in the use of community service orders.¹⁴⁵

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

Probation orders have the advantage of promoting rehabilitation by maintaining community contacts and allowing for remedial intervention in a cost effective way. As with community service orders, this reference provides an opportunity to review the operation of probation orders.

- 1.26 Are probation orders being used appropriately by the courts?
- 1.27 Is it an appropriate, logical, credible and effective sentencing option?
- 1.28 Are conditions used appropriately?
- 1.29 Is there a need to restructure orders in any way? For example is there a need for categories of order with varying degrees of supervision or different kinds of supervision?
- 1.30 Is there a need for a specialised order for offenders convicted of drug and drug-related offences such as the drug and alcohol treatment order recommended by Freiberg in the recent Victorian review?¹⁴⁶ This order was recommended as part of an integrated series of drug and alcohol sentencing options.
- 1.31 Are the completion rates satisfactory?
- 1.32 Are breach procedures satisfactory?
- 1.33 Are the resources available to support probation orders adequate?

¹⁴⁵ Wing Committee Report, *op cit* note 82, at 120.

¹⁴⁶ Freiberg (2002) *Pathways to Justice*, at 172-176.

Fines

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 offence. In the sentencing hierarchy it is less severe than a probation order. Fines are the most common sanction in courts of petty sessions (see Fig 5 at page 35 above) but are rare in the Supreme Court where they account for less than 2% of sentences. The sentencing data examined in Part 1 of this paper suggests that the use of fines may have declined for the more serious summary offences. As a sentencing option the fine has many advantages: it produces revenue; it is flexible in the sense that it can be adjusted to means and it is said to be effective as a general or specific deterrent.¹⁴⁷

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. 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. In fact the worth of a penalty unit has remained as it was in 1987 at \$100.

Fines without convictions

A fine cannot be imposed unless a conviction is recorded.¹⁴⁸ The Wing Committee recommended that courts be empowered to impose a fine without recording a conviction. 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.

Fine default

A common difficulty with fines is enforcement. Many offenders are unable to pay fines. While means are relevant to the amount of a fine and sentencers are required to ensure the amount of the fine is within the offender's reasonable capacity to pay, this principle has no application where parliament has specified that a minimum fine is to be imposed.¹⁴⁹ Moreover in many cases, courts will have no information about the offender's means.

¹⁴⁷ K Warner (2002) *Sentencing in Tasmania*, at para 4.102.

¹⁴⁸ *Sentencing Act* 1997, s 7(e).

¹⁴⁹ K Warner (2002) *Sentencing in Tasmania*, at para 4.212.

A magistrate, faced with an offender brought to court for non-payment of a fine, has 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.¹⁵⁰ For an offender who is committed to prison for fine default, the amount in respect of which the warrant was issued is reduced by \$100 for each day served in prison.¹⁵¹ The number of fine defaulters has fluctuated in recent years from 192 in 1997/98 to 445 in 2000/01. These fluctuations appear to be due to more rigorous enforcement in some years than others.¹⁵²

Table 10: Fine defaulters imprisoned

year	no. fine defaulters imprisoned	no. of days imprisoned	average no. of days served
1997-98	192	1833	9.5
1998-99	369	2766	7.5
1999-00	200	1818	10
2000-01	445	2140	5
2001-02(April)	231	1671	7

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. 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 if the offender is affluent. However, day fines have been considered and rejected in Tasmania¹⁵³ and have not found favour in any Australian jurisdiction. Nevertheless there are strong arguments in favour of day or unit fines in terms of greater justice in fining. It means that, in the case 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.¹⁵⁴ In the United Kingdom unit fines were introduced and then abandoned. However, it has been argued that the problems which led to the failure of unit fines were avoidable.¹⁵⁵ Another way of dealing with the issue of equal impact is to provide, as is now done in the United Kingdom, that financial circumstances be relevant to the amount of a fine and that this applies to increase as well as reduce the amount of the fine.¹⁵⁶ However, it seems this has not been nearly as effective in dealing with the fairness problem as unit fines, with

¹⁵⁰ *Sentencing Act* 1997, s 47(2).

¹⁵¹ *Sentencing Act* 1997, s 51(1) and *Sentencing Regulations* 1998, reg 5.

¹⁵² Wing Committee Report, *op cit* note 82, at 17.

¹⁵³ Law Reform Commission of Tasmania, *Fines*, Report No 41, 1985.

¹⁵⁴ *Crime Justice and Protecting the Public*, White paper, Home Office, 1990; see Ashworth (2000) *op cit* note 37, at 272.

¹⁵⁵ Ashworth, *ibid*, at 272-274.

¹⁵⁶ *Powers of Criminal Courts (Sentencing) Act* 2000, s 128(5). This was rejected by the Law Reform Commission of Tasmania on privacy grounds: *Fines*, Report No 41, 1985, at 9.

average fines increasing for the unemployed and decreasing for the employed following the abandonment of unit fines.¹⁵⁷

The Wing Committee recommended that efforts be made to reduce the number of fine defaulters sent to prison noting that it is quite uneconomical for the community to fund the cost of keeping a fine defaulter in prison (currently about \$150 per day) while the fine is being reduced at the rate of \$100. One suggested method of doing so was to introduce legislation to facilitate asset seizure of non-essential chattels of fine defaulters. Together with measures such as personal communication with offenders at an early stage, this has been effective in Victoria in increasing the compliance rate of payments of fines without the need to increase the incarceration rate of offenders.¹⁵⁸

In a number of jurisdictions including New South Wales and Western Australia, non-custodial options for enforcing fines include the cancellation of driver's licence or vehicle registration. This is a general provision and applies whether or not the fine relates to a traffic or a non-traffic offence. In commenting on this measure, the New South Wales Law Reform Commission raised concerns about the effectiveness of this as a means of enforcement and the possibility that it may simply promote the use of unregistered vehicles and a greater incidence of unlicensed driving.¹⁵⁹ There was also the concern that cancellation of licence or vehicle registration may result in greater hardship in individual cases than was intended by the original order. The Commission therefore recommended that this sanction should be subject to the defaulter being allowed to regain his or her licence or registration upon part-payment of the fine on conditions that he or she continue to pay off the fine by instalments. This recommendation does not appear to have been implemented. In Western Australia, increasing the range of measures for fine default had an immediate impact on imprisonment rates, however it is not known the extent to which driving whilst disqualified for fine default is generating sentences of imprisonment and thereby having a net widening effect.¹⁶⁰

The New South Wales Law Reform Commission also explored the possibility of placing a charge on the defaulter's property as a sanction for non-payment. The *Fines Act* 1996 (NSW) provides for charges over land to be applied in relation to non-payment of fines which exceed \$1000. The charge operates as a proprietary interest and is subject to ordinary principles relating to priorities of interests in land. The Commission recommended that this be extended to other property where there is a refined system for registration of interests in property.

¹⁵⁷ Ashworth (2000), *op cit* note 37, at 275.

¹⁵⁸ Wing Committee Report, *op cit* note 82, at 117-119.

¹⁵⁹ New South Wales Law Reform Commission (1996) *Sentencing*, Report 79, at 64-67.

¹⁶⁰ N Morgan (2001) *Politics, Principles and Imprisonment*, unpublished Phd thesis, University of Western Australia, at 424.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 1.34 Should the courts be empowered to fine an offender without recording a conviction?
- 1.35 Should the possibility of day or unit fines be reconsidered?
- 1.36 Should consideration of financial circumstances be allowed to increase the amount of a fine?
- 1.37 Should any changes be made to fine default procedures? In particular should legislation facilitate the asset seizure of non-essential possessions of fine defaulters?
- 1.38 Should cancellation of driver's licence or vehicle registration be introduced as alternative sanctions for fine default?
- 1.39 Should sanctions for fine default include placing a charge on the defaulter's property?

Adjournments with undertakings (conditional unsupervised release)

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, 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.¹⁶¹ In the sentencing hierarchy this 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

¹⁶¹ *Sentencing Act* 1997, s 7(f).

recorded.¹⁶² Non-compliance with the conditions of the undertaking may expose the offender to being resentenced for the original offence as well as to being fined for the breach.¹⁶³ 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.

This sentencing measure is used for about 6% of offences in courts of petty sessions and, as one would expect, less often in the Supreme Court. In 2000 for example it accounted for 1.5% of sentencing outcomes. No data was available on enforcement and breach of adjourned undertakings.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

1.40 Should breach of an adjourned undertaking be an offence (see discussion above at page 82).

¹⁶² *Sentencing Act* 1997, ss 60 and 61.

¹⁶³ *Sentencing Act* 1997, ss 60(4), 62(4)(c).

Part 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 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. 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 orders at sentencing. 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".¹⁶⁴ 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."¹⁶⁵ The focus of restorative justice is not solely on victims. Equally important is 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,¹⁶⁶ 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. The *Sentencing Act 1997*, s 3(h) provides that a purpose of the Act is to recognise the interests of victims. In his second reading speech the then Attorney General claimed that the *Sentencing Act 1997* (Tas) promoted a focus on

¹⁶⁴ T Marshall (1999) *Restorative Justice: an overview*, Home Office.

¹⁶⁵ L Walgrave (2000) 'Extending the Victim Perspective towards a Systematic Restorative Alternative' in A Crawford and J Goodey (eds) *Integrating a victim perspective within criminal justice*, Ashgate, Aldershot.

¹⁶⁶ J Braithwaite and P Pettit (1990) *Not Just Deserts*, Oxford University Press.

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 recognise the interests of victims.

Victim Impact Statements

The effect of the crime on the victim is relevant to the exercise of sentencing discretion.¹⁶⁷ It is the role of the prosecution to provide the court with this information and they may do so by means of a victim impact statement (VIS). A recent addition to the *Sentencing Act 1997*, s 81A gives statutory recognition to VIS but the section has yet to be proclaimed. However, VIS may be received by the court in accordance with its general power to receive such information as it thinks fit to enable it to impose a proper sentence,¹⁶⁸ and the courts have given some guidance as to how they should be presented.¹⁶⁹ The *Charter of Rights of Victims of Crime* is a document which was adopted by the Tasmanian Government in 1992 and issued to government departments as an administrative direction. Clause 14 provides that a victim of crime has the right to have the full impact and effects of the crime made known to the sentencing court by the prosecutor if he or she requests this.

In Tasmania victim impact statements are prepared by the Victims of Crime Service. This service operates in Hobart, Launceston and in the North West. The Justice Department Annual Report indicates that there were 213 reports prepared in 1998-1999 and 138 in 1999-2000. Most of these reports were prepared by the Hobart office. In 2000-2001 132 reports were prepared by the Hobart office, 87 of these were ordered by police prosecutors or Crown prosecutors. While victim impact statements were controversial in the 1980s and 1990s with proponents for and against legislation for their admissibility, they now appear to have gained acceptance, with most jurisdictions in Australia legislating for their admissibility.¹⁷⁰ However, the admissibility of VIS on behalf of homicide victims remains controversial. In New South Wales, where the government, contrary to the recommendation of the Law Reform Commission, introduced a provision requiring courts to accept VIS from relatives of homicide victims, the provision has been rendered nugatory by the courts.¹⁷¹ Evaluations have proved inconclusive. The South Australian evaluation found no evidence that VIS had an impact on sentencing outcomes. In terms of victim satisfaction, 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

¹⁶⁷ This is subject to a number of technical sentencing rules: K Warner (2002) *Sentencing in Tasmania*, at 80-82, 87.

¹⁶⁸ *Sentencing Act 1997*, s 81(1).

¹⁶⁹ *G Serial No A47/1993*, Zeeman J at 3; Green CJ at 3.

¹⁷⁰ See K Warner (1997) 'Australia' in A Eser and S Walther, *Reparation and Criminal Law Vol 2*, Max Planck Institute, Freiburg, 222-229.

¹⁷¹ G Zdenkowski (2000) 'Sentencing Trends: Past, Present and Prospective' in D Chappell and P Wilson (eds) *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, citing *Previtera* (1997) 94 A Crim R 76.

information made no difference and 6% considered the experience made them feel worse.¹⁷²

Victim impact statements may also provide the victim with the opportunity to express a view about 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.¹⁷³ A consideration of fairness and consistency supports this. A sentencing outcome should not depend on whether a victim is vengeful or forgiving.¹⁷⁴

In Tasmania there is little available information about victim impact statements. The numbers of reports requested appears to vary depending on prosecution personnel. It is not clear whether there are adequate services to enable victim impact statements to be prepared in all cases when victims would appreciate this. Nor is it known whether victims are aware that they have the opportunity to provide VIS. The fact that so few are provided in the North and North West suggests that more effort or resources could be put into VIS in these places.

The new s 81A of the *Sentencing Act* 1997, 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. As with any pre-sentence information, the court must ensure that the offender has knowledge of it and the opportunity to challenge it.¹⁷⁵ If the victim so requests, the court must allow the victim to read the VIS to the court; if not the court must cause the statement to be read to the court.¹⁷⁶ The object of this is to give the victim the opportunity to explain the impact of the crime to assist them in coming to terms with the wrong they have suffered.¹⁷⁷ The effect of this provision is that if the victim does not want the statement read out in court, the only option is to decline to furnish a VIS. It may be that the victim should have the option of following the current practice of the prosecution handing the VIS to the sentencer and supplying it to the defendant. Arguably transparency in the sentencing process would be promoted by ensuring VIS are read out in all cases. The contrary argument is that details of the impact may embarrass or upset the victim and discourage disclosure of the full extent of the crime.

¹⁷² E Erez, et al (1994) *Victim Impact Statements in South Australia*, Office of Crime Statistics, South Australia.

¹⁷³ See *F* (1998) 8 Tas R 88, Slicer J at 97-98; *McGhee* Serial No 69/1994, Green CJ at 4, Zeeman J at 9.

¹⁷⁴ See K Warner (2002) *Sentencing in Tasmania*, at para 3.420.

¹⁷⁵ *Sentencing Act* 1997, s 81A(7).

¹⁷⁶ *Sentencing Act* 1997, s 81A(4) and (5).

¹⁷⁷ House of Assembly *Hansard*, Sentencing Amendment Bill 2002 (No 34) Second Reading, 29 May.

Section 81A will not be proclaimed until the management procedures are in place to ensure that victims are aware of their rights in relation to VIS and the new procedures can be accommodated. Rules under the *Criminal Code Act* and the *Justices Act* will also be made dealing with the process. This suggests some commitment to providing extra resources for VIS and some mechanisms to ensure they are available to victims in all parts of the State.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 2.1 Are there any issues arising out of giving legal recognition to VIS that need to be addressed?
- 2.2 Should victims have the option of furnishing a VIS without having that statement read out in court?

Victim mediation

The *Sentencing Act* 1997, s 84(1) 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. A mediation report is a written or oral report by a mediator about any mediation or attempted mediation between the offender and a victim. 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.” The procedures as to disclosure and challenge are the same as for probation officers’ pre-sentence reports.

Despite the existence of these provisions it does not seem that mediation reports or victim offender mediation is widely used in Tasmania. Victim offender mediation is a restorative justice measure that has been piloted in a number of jurisdictions in Australia over the last ten years or so. At the level of juvenile courts 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.¹⁷⁸ These conferences are primarily an alternative to court proceedings but they may also be ordered by a magistrate prior to sentencing a youth.¹⁷⁹ At the adult court level there has been less enthusiasm for restorative justice measures like conferencing or mediation. 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. Responsibility for co-ordination of this service now rests with the Victims' Assistance Unit. It was forecast that the Victims' Assistance Unit would develop a full mediation program to begin operating this year, however no funding has been allocated for the program in this financial year (2002-03). The program is to receive referrals in relation to prisoners as well as pre-sentence referrals.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 2.3 Why have there been so few referrals for mediation reports?
- 2.4 Has there been enough encouragement and training of personnel to allow proper use to be made of victim offender mediation?

Compensation Orders

One of the restorative justice measures in the Act was the introduction of mandatory compensation orders for some offences. The Attorney 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. 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

¹⁷⁸ See *Youth Justice Act 1997*, ss 13-20.

¹⁷⁹ *Youth Justice Act 1997*, s 37.

to make it easier and faster for courts to make an order. A compensation order is an order in addition to sentence rather than a sentencing option in its own right.

An examination of the use of compensation orders under the *Sentencing Act* provisions suggests that these provisions have failed to fulfil the promise of compensating victims of property crime. For despite provisions requiring the courts to make orders in respect of convictions for some 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

A study of court records showed that in the year following the introduction of the Act (1 August 1998 until 31 July 1999) compensation orders were made in 42% of burglary, stealing and unlawfully injuring property cases in the Supreme Court (see Table 11), and in only 8.3% of burglary and/or stealing cases and 25% of injury to property cases in courts of petty session in the south of the State (see Table 12). Data was not collected for robbery and arson.

Table 11: Compensation orders made for burglary and/or stealing or unlawfully injuring property in the Supreme Court, 1/8/98 – 31/7/99

	number	% of total
compensation orders made	96	42%
order or assessment adjourned sine die	55	24%
loss recovered (so no order)	35	15%
no loss (so no order)	9	4%
loss, but no order	16	7%
no order or explanation	17	7%
total	228	

Table 12: Compensation orders made for burglary, stealing and unlawfully injuring property in the Courts of Petty Sessions, 1/6/97 – 31/7/99

	1/6/97 – 31/7/98		1/6/98 – 31/7/99	
	comp order	total	comp order	total
burglary only		60	4	84
stealing only	15	329	36	531
burglary & stealing	8	208	41	359
all burglary &/or stealing	23 (4%)	597	81 (8.3%)	974
unlawfully injuring property	32 (18%)	174	74 (25%)	291

nb: burglary includes aggravated burglary

Enforcement and payment of orders

The failure of the new compulsory compensation orders as a restorative measure is further demonstrated by looking at payment of the orders. Section 69 of the *Sentencing Act* provides that compensation orders are enforceable by the same procedures as civil judgments. However the Act is possibly open to the interpretation that they can also be enforced like fines. This is discussed in more detail below. In practice it was found that while courts of petty session used the fine enforcement procedures, the Supreme Court did not. The Supreme Court does not oversee the payment of compensation orders. Nor does it transfer the payment and recovery process to the courts of petty session as it does with fines (see *Sentencing Act* 1997, s 45). Instead, the DPP sends the offender a letter instructing him or her to pay the victim directly or through their solicitor. On just one occasion an offender requested that his payments be made by instalments through the Supreme Court. Otherwise it is not known if compensation orders are complied with. For compensation orders made by magistrates it is possible to track whether they have been paid. Recovery is pursued by the Fines Enforcement Unit and recorded on the courts' database. Very few compensation orders are paid. In the first year of mandatory orders only 4% of burglary and or stealing compensation orders were fully paid and 20% of injury to property orders (see Table 13). In the second year (1999-2000) the percentages were 8% and 21%.

Table 13: Payment of compensation orders in the Courts of Petty Sessions for burglary, stealing and unlawfully injuring property

		number of orders	full or part paid	fully paid	over 1/2 paid	less 1/2 paid	max \$ paid
burglary and stealing	97-98	8	1			1	100
	98-99	41	2	1		1	2515
	99-00	34	3 (8%)	1		2	35
stealing only	97-98	15	4	1		3	420
	98-99	36	6	2	2	2	340
	99-00	39	6 (15%)	5		1	920
total burglary &/or steal	97-98	23	5	1 (4%)		4	420
	98-99	77	8	3 (4%)	2	3	2515
	99-00	73	9 (12%)	6 (8%)		3	920
unlawful injury to property	97-98	32	9	6 (19%)	1	2	404
	98-99	74	17	15 (20%)		2	420
	99-00	95	26	20 (21%)	1	5	169

nb: burglary includes aggravated burglary

Reasons for failure

Clearly this attempt to incorporate a meaningful restorative measure into the criminal justice system has failed. Although supposedly mandatory in cases of loss, orders were made in courts of petty session in less than 10% of burglary and stealing offences and 25% of damage to property cases (12% of such offences overall). Of these orders few were fully paid, particularly in cases of burglary and stealing. While a higher proportion of burglary, stealing and damage to property offences resulted in

compensation orders in the Supreme Court (42%), there seems little likelihood that many were paid. Compulsory compensation orders have failed victims and far from being a measure that has helped restore confidence in the criminal justice system, the false promise of compensation is probably counterproductive. In a recent front page article in *The Mercury* headlined “Victims robbed, Criminals ignoring pay orders” the failure of compensation orders is highlighted.¹⁸⁰ The article attributes the failure of compensation orders to “lack of funding to Tasmania’s fine collection system for technological and human resources”. However the problem is not simply a matter of lack of resources for enforcement. Mandatory compensation orders have failed to achieve reparation for victims for a number of reasons. In part, it may be because it is not easy to accommodate victim-oriented measures into a system which is primarily about punishing the offender rather than compensating the victim. The status of compensation orders under the *Sentencing Act* is ambiguous and this may help explain the reluctance of prosecutors and courts to really embrace their use. This confusion about the precise nature of compensation orders is reflected in doubts about the following.¹⁸¹

- whether means are relevant in assessing the amount of compensation;
- doubts about the relevance of a compensation order to other sanctions (eg can a compensation order lead to reduction in imprisonment or community service? Can a sentence of imprisonment be suspended to facilitate payment of a compensation order?);
- confusion about enforcement procedures (can imprisonment or community service be ordered in default of payment?)

Ambivalence towards compensation orders

Neither the courts nor prosecutors have done all they could to make compensation orders more successful. Rather than adjourning applications for compensation sine die in cases where there was insufficient evidence of loss, courts could have adjourned the matter to a definite date with a request that the prosecution supply details of the loss. Or alternatively the prosecution could take the responsibility to relist the matter after making the necessary inquiries. Better still, greater efforts could be made to adduce evidence of loss at the initial sentencing stage as part of the normal information supplied to the court. But this has not happened and resources have not been allocated to allow it to happen. Instead much is left to the victim. In courts of petty session cases victims are told that it is their responsibility under the Act to pursue adjourned matters although the Act does not explicitly state this. The same could be said in relation to enforcement of Supreme Court orders. Enforcement is left to the victim after the order is made.

¹⁸⁰ *The Mercury*, 10 June 2002.

¹⁸¹ For an elaboration of these problems see K Warner (2002) *Sentencing in Tasmania*, at 141-144; K Warner and J Gawlik, ‘Mandatory compensation orders for crime victims and the rhetoric of restorative justice’ forthcoming in *ANZJ Criminol*.

Ambivalence towards compensation orders by courts and prosecutors is understandable. Many offenders are impecunious making almost any order for compensation pointless. While the amount of the compensation orders made is not particularly large - the median amount was \$895 in the Supreme Court and about \$250 in the magistrates' courts - many offenders had multiple orders made against them. In the Supreme Court multiple orders ranged from a low of \$68 to a high of \$44,847 with a median of \$9000. Convicted offenders frequently also have outstanding fines, they are frequently unemployed and invariably have victim levies to pay. From the point of view of courts and prosecutors the effort entailed in ascertaining the details of loss for the purposes of a compensation order is usually a waste of time. Police prosecutors and the Director of Public Prosecutions complain they lack the resources to deal with compensation claims and that they have not been provided with additional resources to deal with applications. Moreover they are working in a system geared to dealing with offenders and there may well be a cultural resistance to dealing with matters outside their traditional role.

Table 14: Amounts of compensation orders made in the Supreme Court and the Courts of Petty Sessions (southern region) for burglary, stealing and unlawful injury to property

	number	min (\$)	median (\$)	max (\$)
Supreme Court 1/8/98-31/7/99				
offender with single order	56	19	540	10,493
multiple orders counted singly (by victim)	190	0.25	995	43,580
multiple order (counted by offender)	40	68	9,001	44,847
total by orders	246	0.25	895	43,580
total by offenders	96	19	5,750	44,847
Courts of Petty Sessions 1/8/97-31/7/00				
buglary &/or stealing (by order)	173	3	250	9114
unlawful injury to property (by order)	201	15	220	6026

Should compensation orders be compulsory?

Undoubtedly administrative and legislative improvements could be implemented to increase the number of orders made and the number paid. Allocating some resources to prosecutors to assist in ascertaining the extent of loss would assist in avoiding the need to adjourn matters. And if there was a need for adjournment the matter could be adjourned to a fixed date with the prosecutor assuming the responsibility for following the matter up. Making compensation orders mandatory has had some effect in increasing the number of compensation orders made (see Table 12) but in the majority of cases there is no order (see Tables 11 and 12) and in any event few compensation orders are actually paid in full. Mandatory compensation orders in cases of property damage or loss would seem to be a simplistic and unsatisfactory

way of ensuring reparation for victims. The experience in other jurisdictions suggests that compensation orders can be more effective than has been the case in Tasmania. In the United Kingdom orders are not mandatory but they are an independent sentencing option (as they are in South Australia). Since 1988 courts have been required to consider making a compensation order in every case of death, injury, loss or damage and, where such an order is not made, the court has a duty to give reasons for not doing so.¹⁸² Means are relevant and Zedner states that figures for the use of compensation orders in the UK suggest that the need for the criminal justice system to recognise the harm suffered by victims has firmly established itself in the minds of the courts. For example 56% of offenders convicted of criminal damage in magistrates courts in 1994 were ordered to pay compensation and overall 22% of those sentenced for indictable offences in magistrates courts were ordered to pay compensation.¹⁸³ In Crown Courts the figure was much lower: only 9% of those sentenced, due it seems to the fact that custodial sentences are not normally combined with a compensation order.¹⁸⁴ However it should be noted that there is some evidence that the making of compensation orders is declining in the UK.¹⁸⁵ What is significantly better in the UK compared with Tasmania is compliance with orders for payment. In 1994 around 80% of compensation orders were paid in full within 12 months. This suggests that it is better to be more selective in making orders by taking means into account and not normally making orders in combination with imprisonment when there is little chance of the offender having the capacity to pay.

How can enforcement procedures be improved?

Enforcement procedures need to be reconsidered in Tasmania. It may be that compliance would be improved if compensation orders were enforced in the same way as fines.¹⁸⁶ This would avoid the need for the victim to pursue recovery of the order as a judgment debt and provide a more persuasive mechanism for compliance. Care should be taken to avoid injustice to offenders by not imposing default imprisonment or any other punitive sanction if the offender lacks the reasonable capacity to pay. Clarifying the relationship between compensation orders and other components of the sentence could also assist in compliance. If a compensation order coupled with a realistic and genuine proposal for paying it were to be clearly recognised as a mitigating factor, something that could lead to some reduction in sentence and to suspension of imprisonment in an appropriate case, there would be an incentive for compliance.

¹⁸² L Zedner (1997) 'Victims' in M Maguire, M Morgan, and R Reiner (eds) *The Oxford Handbook of Criminology*, 2nd ed, Clarendon Press, Oxford, at 606.

¹⁸³ G Barclay (1995) *The Criminal Justice System in England and Wales*, 3rd ed, Home Office.

¹⁸⁴ Zedner (1997) *op cit* note 182, at 606.

¹⁸⁵ Ashworth (2000) *op cit* note 37, at 270.

¹⁸⁶ The issue of enforcement of compensation orders has been thoroughly investigated in Victoria, where studies of enforcement practice in the UK and New Zealand were examined and it was recommended that compensation orders should be subject to the same enforcement measures as fines (Parliament of Victoria, Law Reform Committee (1993) *Restitution for Victims of Crime, Interim Report*, at 112-119).

The question of whether it is worth making legislative, administrative and cultural changes to recover more compensation from offenders needs to be considered. If the goal of compensation orders in criminal cases is to compensate victims of crimes like burglary and stealing and damage to property, the reality is that relatively few offences are cleared by charge, and fewer result in conviction. Added to this is the inability of many offenders to pay orders.¹⁸⁷ The result is that a tiny percentage of victims will actually recover compensation from the offender even if a greater proportion of convictions in such cases result in compensation orders and enforcement procedures are improved. If the offender manages to pay small instalments over a considerable period of time this may be of little practical use but serve only as a constant reminder of the offence, making it more difficult for the victim to put the offence behind them. From the point of view of rehabilitating the offender they may also be counterproductive, increasing the financial burden and perhaps encouraging a return to crime to resolve financial problems. The wisdom of measures such as deducting amounts from social security payments at source to satisfy compensation orders is questionable.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 2.5 Should compensation orders remain mandatory for property loss in cases of burglary, stealing, robbery, arson and injury to property?
- 2.6 If not, should courts be required to consider making a compensation order in certain cases and where such an order is not made give reasons for not doing so?
- 2.7 Should the compensation order be a sentencing option in its own right?
- 2.8 Should additional resources be given to police/prosecutors to deal with compensation claims?
- 2.9 Should means be relevant to the amount of compensation orders?
- 2.10 Should a compensation order be relevant to sentencing orders other than fines?
- 2.11 Should compensation orders be enforced in the same way as fines?
- 2.12 What measures could improve enforcement of compensation orders?

¹⁸⁷ Ashworth (2000) *op cit* note 37, at 271.

The Victims' Levy

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 suffer 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. 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 courts of petty sessions 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.

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.¹⁸⁸ 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.¹⁸⁹ However the point about the hardship of default imprisonment is a valid one. It may also be that enforcement of levies makes them uneconomic. This should be explored.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 2.13 Are compensation levies producing hardship on offenders?
- 2.14 Are they an economic means of helping to compensate victims?

¹⁸⁸ P Grabosky (1987) 'Victims' in G Zdenkowski, et al, *The Criminal Injustice System*, Vol 2, Sydney, at 149.

¹⁸⁹ C Sumner (1987) 'Victim participation in the criminal justice system' 20 *ANZJ Criminol* 195, at 214.

The Victims' Register

The *Charter of Victims Rights* provides that victims have the right 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. They also have 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.

When the Victims Assistance Unit commenced operation on 1 July 2001 its first priority was the establishment of a Victims' Register to enable victims to be advised of the offender's 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. 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 had the opportunity to request notification. There have been other reported incidents of victims first learning of the release of an offender by seeing them in public. 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* provide a mechanism for informing the victim of this and of the right to provide a statement (see discussion below in Part 6 at page 141 and 143).

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 2.15 What difficulties have been encountered in compiling the Victims' Register?
- 2.16 Are procedures for alerting victims to their right to be notified effective?

Part 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.*

Promoting public understanding of sentencing

One of the stated purposes of the *Sentencing Act* was to ‘promote public understanding of sentencing practices and procedures’ (s 3(f)). How it was thought that the Act could achieve this goal is not made clear by the Act itself. The Attorney-General’s second reading speech indicates a clear understanding of the problems surrounding community perceptions of sentencing, but goes on to offer only consolidation of the legislation as a means of solving these problems and promoting public understanding of sentencing.¹⁹⁰

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.

¹⁹⁰ Hansard, Parliamentary Debates, Attorney-General Ray Groom 13 August 1997.

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.

While consolidation of sentencing legislation may assist to promote public understanding of sentencing practice and procedure, at most it is a very preliminary first step. The *Sentencing Act* 1997 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 s3(e) are stated indirectly, rather than as directions to sentencers as is usual in most jurisdictions. Whether the Act should contain more detail in relation to sentencing goals and principles will be considered below. 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.

In Part 2 it was suggested that there is evidence that misperceptions about sentencing practice fuel 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. As was pointed out, there are no studies of public attitudes to sentencing in Tasmania. But what evidence we do have suggests that the public is dissatisfied with sentencing and believe that sentences are too lenient. We do know that the main sources of information about crime for Tasmanians aged 18 and over are television and newspapers.¹⁹¹ The media have been criticised because they tend to report sentencing decisions that are perceived to be lenient or that are very severe. Decisions that are unremarkable are simply not reported.¹⁹² 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.¹⁹³ 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. Or reports of the imminent release on parole in a case that attracted media attention and condemnation at the time are likely to attract attention.¹⁹⁴ In Australia, studies show that while the “quality press” neglects sentencing matters, the approach

¹⁹¹ Australian Bureau of Statistics (1999) *Community Safety Tasmania*, Cat no 4515.6, at 4: 30.5% used television as their main source of information about crime, while 23.7% used newspapers.

¹⁹² Report to Parliament by the Hon DK Malcolm, Chief Justice of Western Australia, 1998, referred to by N Morgan and B Murray (1999) ‘What’s in a Name? Guideline Judgments in Australia’ 23 *Criminal Law Journal* 90 at 98.

¹⁹³ M Hough and J Roberts (2002) ‘Public knowledge and public opinion of sentencing’ in C Tata and N Hutton (eds) *Sentencing and Society*, Ashgate, England, at 170.

¹⁹⁴ Eg Hyland: The Mercury ‘Amanda Carter’s mum reveals her agony...’ 27/4/2002; A J Smith resented 1997: The Mercury ‘Parent’s anger as killer walks free’ 22/12/2001; The Sunday Tasmanian ‘Don’t let him out’ 12/4/1998.

of the “tabloid” press on the other hand is to “fan emotion, quash reason and present false impressions”.¹⁹⁵ In England research has shown that reading the tabloid press is a strong predictor of under-estimators of sentencing severity.¹⁹⁶

Public knowledge of sentencing and criminal justice issues

Just as there are no studies of public perceptions of sentencing in Tasmania, there has been no research exploring public knowledge of sentencing and criminal justice issues. Studies conducted elsewhere suggest widespread misperceptions about crime rates, the proportion of recorded crime involving violence, clearance rates for crimes, the imprisonment rate for particular offences and the range of sentences and rates of parole release. Limited public awareness of sentencing options apart from imprisonment is also indicated by such surveys.

The relationship between perceptions and knowledge

In the absence of Tasmanian surveys of public perceptions of sentencing and public knowledge of sentencing there is much to be learnt from surveys conducted elsewhere. The British Crime Survey (BCS), which is conducted by the Home Office, examines, amongst other things, public attitudes towards criminal justice issues and knowledge of sentencing practice and criminal justice matters. Similar kinds of studies have also been conducted in other jurisdictions including Western Australia. The BCS and other surveys consistently confirm widespread dissatisfaction with court practices and the judiciary. Judges received the worst evaluations of six criminal justice professions in relation to their job performance and a low percentage of respondents believed judges were “in touch with what ordinary people think”.¹⁹⁷ In the 1996 BCS sweep, over half the respondents thought sentences were much too lenient¹⁹⁸ with four out of five stating sentences were too soft to some degree.¹⁹⁹ Belief in leniency appears to be correlated with misperceptions about sentencing practice. So people who believed that sentences were too lenient generated a lower average estimate of the percentage of rapists imprisoned than did people who believed that the sentences were about right.²⁰⁰ The misconceptions identified as the most significant predictors of a belief that sentences were too soft were a belief that there was “a lot more crime” and underestimates of the number of convicted muggers and burglars sent to prison.²⁰¹ Perceptions of leniency have also been shown to be

¹⁹⁵ A Lovegrove (1998) ‘Judicial Sentencing Policy, Criminological Expertise and Public Opinion’ 31 *ANZ J Criminology* 287, at 293.

¹⁹⁶ M Hough and J Roberts (2002) ‘Public knowledge and public opinion of sentencing’ in C Tata and N Hutton (eds) *Sentencing and Society*, Ashgate, England, at 164.

¹⁹⁷ *Ibid* at 160.

¹⁹⁸ *Ibid* at 160.

¹⁹⁹ *Ibid* and J Mattinson and C Mirlees-Black (2000) ‘Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey’, Home Office Research Study 200.

²⁰⁰ Hough and Roberts (2002) *op cit* note 196, at 163.

²⁰¹ *Ibid*.

related to beliefs about crime causality. Almost half of respondents who believed the crime rate was rising (three quarters of the sample thought it was but it was not) believed that lenient sentencing was the cause.²⁰² So rising crime and lenient sentencing are linked in the public mind, although most do not see tougher sentences as the most effective solution to rising crime or even as the primary cause.²⁰³

How should the public be better informed about sentencing?

Perceptions that sentencing is too lenient lead to lack of public confidence in the criminal justice system. There is evidence that perceptions of leniency are linked with misperceptions about the operation of the criminal justice system and sentencing trends. Assuming such misperceptions exist in this state, which is likely, public education in relation to such issues as sentencing trends should be a priority. Crime trends and other criminal justice issues should also be the focus of such a campaign. A recent English study commissioned by the Home Office explored whether providing information has an effect on levels of public knowledge; whether any improvements in knowledge that result have an impact on attitudes and confidence in the criminal justice system and which of three methods of presentation of information (a booklet, a seminar and a video) would be the most efficient and effective methods of imparting information to the public.²⁰⁴ The study found that providing simple factual information about crime and sentencing can improve public knowledge about crime and sentencing in the short term at least and that it has an impact on attitudes and confidence in the criminal justice system. After receiving the information participants were less worried about being a victim of crime, and less likely to say sentencing is currently too lenient. Each of the three information formats tested produced similar improvements in knowledge and had some influence on attitudes. The booklet was found to be the most cost-effective of the formats tested and it also reached the widest cross-section of people. Participation in the seminar was very low, despite the fact that participants were being paid to attend. Many who had initially agreed to attend did not turn up at the venues and those who did were not at all representative of the general population and it was concluded that seminars are unlikely to be an effective way of conveying this type of information to a broad cross-section of the general public. There was also a poor response to the video format, again despite financial incentives.

²⁰² *Ibid.*, at 167.

²⁰³ *Ibid.*, at 168: one-fifth of respondents said tougher sentences were the most effective strategy, more stated increasing discipline in the home (36%) and reducing levels of unemployment (24%). Making sentences tougher is the easiest to change.

²⁰⁴ B Chapman, C Mirrlees-Black and C Brown, (2002) *Improving public attitudes to the Criminal Justice System: The impact of information* Home Office Research Study 245.

Statistics and web-site

Providing simple factual information about crimes and sentencing which is current requires adequate information sources. This presents a problem in Tasmania in respect of sentencing data because they are not compiled in any systematic way. Appendix A contains a detailed proposal for the annual production of sentencing statistics. This would indicate 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. In addition to providing an information source for a booklet and seminars, these statistics could be published on the internet with a press release to media outlets. Links could be provided to the Supreme Court web-site where comments on passing sentence are published. 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.²⁰⁵

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. While the usefulness of such information is rarely questioned, it is significant that in *Wong* members of the High Court expressed conflicting views of the value of sentencing statistics. Gaudron, Gummow and Hayne JJ argued that the assumption underlying the contention that sentencing statistics give useful guidance is that the task of the sentencer is merely one of interpolation in a graphical representation of sentences imposed in the past. They said:²⁰⁶

It may be mathematically possible to say of twenty or thirty examples of an offence like being knowingly concerned in the importation of narcotics where the median or mean sentence lies. But to give any significance to the figure which is identified assumes a relationship between all members of the sample which cannot be assumed in so small a sample. To take only one difficulty, why were the highest and lowest sentences set as they were? Do they skew the identification of the median or mean?

There are a number of answers to this criticism. Surely 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, the sentencing data will not be used by sentencers in isolation. They will have access to relevant appellate decisions indicating reasons why particular sentences were set as they were. Possibly they will also have access to sentencing comments or distillations or overviews of sentencing remarks which suggest why the highest and lowest sentences were set as well as the kind of case that has attracted a median sentence.

In addition to sentencing data, information on crime rates should also be included. 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

²⁰⁵ Hough and Roberts (2002) *op cit* note 196, at 171.

²⁰⁶ [2001] HCA 64 at [66].

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.

New technology provides an opportunity to provide information to the public. With over 30% of Tasmanians having internet access²⁰⁷ there is the opportunity to provide complex up to date information in an accessible way. However, there are limits on the extent to which the general public will seek out information on crime and punishment and so other methods of communicating need to be explored. The Home Office study on information, knowledge and attitude change mentioned above, suggested social surveys, news articles and prize quizzes as the kinds of methods that are likely to be successful in stimulating interest in information on crime and sentencing for those with no contact with the criminal justice system.²⁰⁸

Printed booklet

Each 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.²⁰⁹

Sentencing workshops and the Trial of the Century concept

In a number of Australian jurisdictions sentencing workshops have been held. In the Northern Territory a project called "Trial of the Century" has been developed with the aim of informing the community about sentencing options and processes used by judges and magistrates in court and it provides the public with an opportunity to meet with members of the Territory legal community and judiciary and to gain access to vital information about the operation of the justice system. In 2001 sessions were held in four locations: Darwin, Katherine, Tennant Creek and Alice Springs. The project was funded by the Law Society Public Purposes Trust. The sessions began with a mock trial component in which participants watched legal practitioners in action and learnt about the details of the crime and the offender. In the second part, the audience broke into groups to discuss sentencing principles and to determine a

²⁰⁷ Australian Bureau of Statistics, census data 2001: 154,720 people (out of Tasmania's population of 456,652) had used the internet in the week preceding the census at home, work and/or elsewhere.

²⁰⁸ *Op cit* note 204 at 52.

²⁰⁹ *Ibid.*

sentence for the accused. Each group then delivered their “sentence”, followed by the judge/magistrate’s sentence. There was then a discussion comparing the “sentences”. The Final Report of the project noted that the sentences passed down by the judges and magistrates were more severe in most cases than the sentencing options proposed by the Trial participants.²¹⁰ About 180 participants were involved, drawn from a range of organisations such as Neighbourhood Watch, victims groups, legal services, members of the community and schools. A similar workshop is planned for Hobart in late August 2002.

While Home Office research suggests that seminars were not an effective way of conveying information to a wide cross-section of the general public because of the low attendance rate and unrepresentative nature of those attending (they were more likely to have educational qualifications and to read broad-sheet newspapers), the seminars received very positive ratings from those who did attend. Trial of the Century type seminars 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.

Public relations

The judiciary has for the most part been very 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, consideration should be given to what else should be done. Perhaps it is 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.

Legislative statement of sentencing purposes and incorporation of common law principles

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 s3(e) are stated as a purpose of the Act rather than as directions to sentencers. It could be argued that goals should be more explicit and be placed in a hierarchy with an indication of a dominant rationale. This is a 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. Another issue is whether the Act should incorporate a list of matters relevant to sentence using the approach of the *Crimes Act 1914* (C’th), s 16A(2) and

²¹⁰ *Trial of the Century*, Final Report, 2001, at 7.

sentencing legislation in a number of States including now, New South Wales. The New South Wales Law Reform Commission recommended against this on a number of grounds:²¹¹

- 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.

The *Crimes (Sentencing Procedure) Act* 1999 (NSW), did not include a list of relevant factors. However recent amendments have added s 21A which provides:

- (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:
 - (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.

The parliamentary debate clearly indicates the reasons for the change. It was seen as requiring the courts to give particular attention to the personal circumstances of a

²¹¹ *Sentencing*, Report No 79, 1996, at 333-335.

victim of crime. The Attorney-General claimed it would give a greater level of protection to the elderly, and vulnerable professions such as nurses and police officers and the expression of clearly defined sentencing principles was aimed at inspiring public confidence in the courts.²¹² 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.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 3.1 How should the *Sentencing Act* deal with sentencing goals?
- 3.2 Should the *Sentencing Act* incorporate the common law by including a list of relevant factors which a judge or magistrate must take into account?
- 3.3 Should public education of sentencing and crime trends be a priority?
- 3.4 Should annual sentencing statistics be produced as recommended? How should they be published?
- 3.5 Should Trial of the Century type seminars be run in Tasmania?
- 3.6 Should a booklet be produced to convey simple factual information about crime and sentencing?
- 3.7 What other strategies do you suggest to promote public understanding of sentencing?

²¹² See *New South Wales Legislative Assembly Hansard*, 21/3/2002, Second Reading debate, Mr Debus.

Ascertaining community attitudes towards sentencing

Ascertaining community attitudes towards sentencing is not an easy task. Letters to newspapers, talk-back radio, phone in polls to radio stations are not properly ascertained public opinion. Research has exposed the limitations of the survey method as a method of ascertaining public opinion about sentencing. Hough and Roberts have summarised the conclusions:²¹³

- People answering a general question on a poll respond punitively in part because they have the worst kinds of cases in mind;
- When responding to questions about sentence severity on polls, people recall atypical sentences, which usually means lenient dispositions reported in the media;
- When asked about the appropriateness of prison for specific cases, people fail to consider the wide range of alternative punishments available to the courts.
- When presented with a description of an actual case with details relating to the circumstances, the public tend to be less punitive. And when given details about the range of punishments available, the public tend to be less likely to select imprisonment as the appropriate response.

Hough and Roberts conclude that on the basis of the BCS and research in other countries:²¹⁴

[T]he more detail that people are given about any given crime and the available penalties, the more that their sentencing preferences converge with actual sentencing decisions.

This finding conforms with the findings of sentencing workshops such as the Northern Territory Trial of the Century Project discussed above. It is also important to ensure that the survey sample is representative. The Victorian experience of attempting to gauge public opinion is instructive. In the mid 1990s, the Liberal/National Party government attempted to ascertain public opinion by a newspaper survey. The responses were far from representative of the Victorian community as a whole with responses heavily skewed towards the over fifty age-group.²¹⁵ The attempts of the Victorian Community Council Against Violence to inquire into community knowledge and views of sentencing did not fare much better. There was a very low response rate and it was not representative of the community or of the range of offences and sentences dealt with by the courts.²¹⁶

²¹³ *Ibid*, 3.

²¹⁴ *Ibid*, 14.

²¹⁵ A Freiberg (2002) *Pathways to Justice*, at 186.

²¹⁶ Victorian Community Council Against Violence (1997) *Community Knowledge and Perceptions of Sentencing in Victoria: A Report on the Findings and Consultations*, at viii discussed in Freiberg, *ibid*, at 187.

Improved poll design can ensure that public opinion is properly ascertained:

To be valid, opinion polls must be based on properly stratified random samples of the community so that the sample is representative of the larger population. In posing the questions, the poll should provide as much information as is necessary to enable the respondent to make a sensible response and should inform them about the range and cost of sentencing options available to the courts. ... If focus groups are used, they should be carefully selected for their representativeness.²¹⁷

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

3.8 Should resources be allocated to ascertaining public opinion about sentencing in Tasmania?

Incorporating community views into the sentencing process

Sentencing law and public opinion

In *Sargeant*,²¹⁸ 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.

In a later decision, *Broadby*,²¹⁹ 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

²¹⁷ Freiberg (2002) *ibid*, at 212, at 193 relying on Roberts et al *Penal Populism and Public Opinion*, forthcoming, Oxford University Press, at 294.

²¹⁸ (1974) 60 Cr App R 74.

²¹⁹ (1988) 10 Cr App R (S) 495 at 497.

the lowest common denominator of public opinion.” And they offered some guidance as to how public opinion is to be factored into a sentence stating courts “... have a duty to the public to pass judgment in a way which is generally acceptable amongst right-thinking, well-informed persons”.

Tasmanian judges have expressed similar views. In *Canning v Smith*²²⁰ Burbury CJ made it clear that in sentencing, judges and magistrates are sometimes obliged to make unpopular decisions and in *Bayley*²²¹ he talked of the need to take into account “the restrained moral sense of the community as a whole”. In *Hancox*,²²² 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:²²³

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.

According to Underwood J in *Inkson*,²²⁴ “ ‘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.

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.²²⁵ 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

²²⁰ [1969] Tas SR 8 at 14.

²²¹ Serial No 77/1972 at 3.

²²² Serial No 46/1980.

²²³ *Ibid* at 4; cited in *Causby* [1984] Tas R 54, Green CJ at 59.

²²⁴ (1996) 6 Tas R 1 at 16.

²²⁵ *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.

courts in other jurisdictions.²²⁶ While there are instances where courts have taken into account the attitude of a community to a particular type of crime²²⁷ or evidence of the fear felt by residents following a murder,²²⁸ this is distinguishable from paying heed to public petitions or public demands that a particular offender be severely punished.

The law as it stands allows for a limited role for taking public opinion into account. 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 will exclude the views of bigots, racists and other extreme views. However when it is coupled with the qualification that the public opinion be “informed” it probably leaves little scope for public opinion. Taking into account “informed public opinion” which assumes a knowledge of all the material put to the court including the circumstances of the offence and the offender, the range of penalties imposed in the past and presumably – if the opinion is properly informed – knowledge of the complex body of sentencing rules that govern sentencing. A judge who considers the views of this hypothetical informed member of the public in this way is unlikely to come up with a view any different from his or her own opinion.

There is no reason why sentencers and appeal courts should not respond to public concern about the severity or lack of severity of sentences for a particular type of offence, however similar problems arise in ascertaining this. And again it must be both informed and reflect the “restrained moral sense of the community”. The advantage of delegating the gauging of public opinion or public feeling to the judge or magistrate is that it avoids the problems of how else to ascertain it and the problem that it is uninformed. However it does restrict the impact of public opinion. The assumption by the court of the role of sole arbiter of public opinion may not be the best way of assuring the public that its views are relevant and are taken into account in the sentencing process. It is the kind of approach that could exacerbate feelings that judges and magistrates are out of touch with fear of crime and do not know what the public wants in terms of punishment.²²⁹ Before considering new ways in which public opinion could be incorporated into the sentencing process, statutory maximum penalties will be discussed, as they can be viewed as a means of taking community attitudes into account. Victim impact statements (discussed above at page 92) are sometimes viewed as a means of allowing public input into sentencing. If a victim impact statement includes an indication of the victim’s wishes in relation to penalty it does provide one member of the public’s view. However a victim’s view will not

²²⁶ *H* (1981) 3 A Crim R 53 at 65: 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.

²²⁷ *Smith v Luker* (1992) 111 FLR 99 at 103 (supply of cannabis on Bathurst Island).

²²⁸ *Miller* [1995] 2 VR 348 at 354.

²²⁹ As alleged in *The Mercury*, Editorial, 25/9/2001.

necessarily reflect the views of the general public and so victim impact statements achieve little in terms of democratic engagement with the sentencing process.

Statutory maximum penalties

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.

Guideline judgments

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 South Wales and in New Zealand, Canada and Hong Kong.

US Guidelines distinguished

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.²³⁰ 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. Australia, with a well-developed common law system of sentencing presents a different picture. For this reason, the Western Australian attempt to introduce a US inspired sentencing matrix, which prescribed indicative sentences for some offences and virtually no room for discretionary departures from the prescribed sentences for other offences, met with strong opposition.²³¹ Matrix legislation was passed in November 2000 but with a change in government the legislation has not been proclaimed. 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 is worth exploring in more detail.

Guideline Judgments in England

Since the delivery of the first guideline judgment in 1974,²³² the Court of Appeal has handed down quite a number of 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 offence or sub-category of offence determined by specified aggravating factors (as for rape)²³³ or indicative penalties are linked to a quantitative measure relating to the facts of the offence (eg amount stolen in theft in breach of trust²³⁴ or weight of the drug in importing).²³⁵ 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. A recent development of particular interest is the establishment of the Sentencing Advisory Panel in 1999. The Panel has 13 members and is required to be notified by the Court of Criminal Appeal whenever the court decides to frame or

²³⁰ A Freiberg (2002) *Pathways to Justice*, at 192, 201-202; New South Wales Law Reform Commission (1996) *Sentencing*, Report No 79, at 7.

²³¹ N Morgan (1999) ‘Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?’ 28 *University of Western Australia Law Review* 259.

²³² *Willis* (1974) 60 Cr App R 146 (buggery).

²³³ *Billam* (1986) 82 Cr App R 347.

²³⁴ *Barrick* (1985) 7 Cr App R (S) 142.

²³⁵ eg *Aroyewumi* (1994) 16 Cr App R (S) 211.

revise guidelines for a particular category of offence.²³⁶ The Panel may also decide of its own motion to propose guidelines for a particular category of offence, and is obliged to prepare guidelines if the Home Secretary directs. When proposing guidelines it is required to consult an approved list of interested bodies. In its advice to the Court, it is obliged to provide certain information, including relevant statistical information about sentencing for the offence. The Court has a statutory duty to take account of the proposals but it is not bound to adopt all or any of them. The Panel is intended to operate as a source of guidance by assisting the Court by researching the subject more thoroughly and bringing a wider range of views to it than the Court is able to do.²³⁷ When framing a guideline judgment the Court is 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. Clearly promoting public confidence and the aim of providing a wider range of advice to the Court are now viewed as important aspects of the role of guideline judgments. The Panel has commissioned a public attitude survey on domestic burglary to test the extent to which the public's views of the relative seriousness of particular cases of burglary coincide with the aggravating and mitigating factors identified by the Court of Appeal.²³⁸ In 2001 the Panel had four guideline judgments adopted by the Court of Appeal.

The *Halliday Report* reviewed the role of guideline judgments and of Parliament in controlling judicial discretion. The major weaknesses identified in the current approach were that the guidelines are not comprehensive and they are not all set down in one place. The Report recommended codifying guidelines and suggested a number of possible options for new independent machinery to achieve this purpose.²³⁹ The white paper, *Justice for All*, has adopted this approach and foreshadowed legislation for a Sentencing Guidelines Council, chaired by the Lord Chief Justice, which will be responsible for setting guidelines for the full range of criminal offences. Members of the Council will be drawn from the Court of Appeal, the High Court, the Crown Court and the magistrates' courts. Parliament will have a role in considering and scrutinising the draft guidelines to ensure democratic engagement in sentencing. The Sentencing Advisory Panel will remain but will offer advice to the Council rather than the Court of Appeal.²⁴⁰

Guideline Judgments in Western Australia

Section 143 of the *Sentencing Act* 1995 (WA) provides that the Full Court of the Supreme Court or the Court of Criminal Appeal may give a guideline judgment containing guidelines to be taken into account by courts in sentencing offenders. It provides that a guideline judgment may be given in any proceeding considered appropriate by the court giving it, and whether or not it is necessary for the purpose of determining a proceeding. This power was first given to the Court by an earlier

²³⁶ *Crime and Disorder Act* 1998, s 81(2).

²³⁷ A Ashworth, *op cit* note 37, at 48; see also A Freiberg (2002) *Pathways to Justice*, at 199-201.

²³⁸ <www.sentencing-advisory-panel.gov.uk>

²³⁹ *Halliday Report*, *op cit* note 42, at 52-57.

²⁴⁰ *Justice for All*, *op cit* note 78, at 89-90.

amendment to the *Criminal Code* and then transferred into the *Sentencing Act* 1995. The purpose of the power was to ensure consistency in sentences handed out in different courts for similar crimes.²⁴¹ Although guideline judgments have been applied for by the Director of Public Prosecutions on four occasions and by defence counsel on one occasion, none have been handed down. They have been sought for sexual relationships and suspended sentences; fraudulent activity; domestic violence; indeterminate sentences of imprisonment and intellectually disabled offenders.

In 1999, s 143A was added to the *Sentencing Act* (WA) to give the Chief Stipendiary Magistrate the power to publish guidelines for the sentencing of offenders in such courts. The section states that guidelines may include suggestions as to the appropriate sentence for a particular offence or class of offence and guidance about assessing the seriousness of the offence and when it is appropriate to impose particular sentencing options. The idea was adopted from the UK where the Chief Stipendiary Magistrate publishes non-binding tariffs which were said to result in greater consistency of sentences.²⁴² It was claimed such a tariff would be of assistance by giving people an idea of the sort of tariff being applied,²⁴³ addressing the concerns of the Criminal Law Association about inconsistency in sentences for summary offences and assisting the Supreme Court in dealing with these matters on appeal.²⁴⁴ At the time this amendment was being debated the government was still hopeful of s 143 being utilised by the Court²⁴⁵ and it seems the Chief Justice had indicated that the first formal guideline was imminent.²⁴⁶ The Court's failure to do so was clearly a source of contention and later that year the government introduced a sentencing matrix system, a stricter, more prescriptive numerical guidelines regime to address concerns that sentencing lacks accountability, consistency, transparency and is unresponsive to public concerns. Despite considerable opposition, the legislation was finally passed in an amended form at the end of 2000 and retained a regime of indicative sentences set by regulation and the requirement that the judiciary report to the Executive in a prescribed format on their sentencing decisions. However the Coalition lost the election, the Labour Party was elected to office in February 2001 and the legislation has not been proclaimed although it remains on the statute book.

The Court of Criminal Appeal of Western Australia has been criticised for not utilising s 143 and embracing the concept of guideline judgments despite support from the legal profession and other judges. Morgan has argued that their failure to do so made it harder to fight political calls for mandatory sentencing and a sentencing

²⁴¹ Western Australia, Hansard, House of Assembly, *Sentencing Bill*, Second Reading, 25 May, 1995, 4260.

²⁴² Hon Peter Foss, Hansard, Legislative Council, *Sentence Administration Bill*, Second Reading, 27 May, 1999 page 8508/1.

²⁴³ *Ibid.*

²⁴⁴ Hon Peter Foss, Hansard, Legislative Council, *Sentencing Legislation Amendment and Repeal Bill* 1999, 19 October, 1999 page 2164/1.

²⁴⁵ *Ibid.*, he said, 'Noises have been coming out of the court which indicate that maybe one is coming.'

²⁴⁶ N Morgan (2001) *Politics, Principles and Imprisonment*, unpublished Phd thesis, University of Western Australia, quoting *The Western Australian* 30 September 1999, at 9.

matrix²⁴⁷ and that the Court should have done more to redress public concerns about sentencing and to render their practices more accessible.²⁴⁸ It seems there is some support in the profession and the judiciary for guideline judgments²⁴⁹ and the Supreme Court has not yet ruled them out. In a recent case, Malcolm CJ commented on the High Court's decision in *Wong*.²⁵⁰ He referred to the joint judgment's disapproval of prescriptive guideline tables of sentences on the grounds they were outside the court's power because they were not directed to quelling the only dispute which constituted the matter before the court.²⁵¹ He stated, "The position in Western Australia is clearly different, so far as offences against the laws of Western Australia are concerned" and referred to the *Sentencing Act* s 143 which confers on the Court of Criminal Appeal the jurisdiction and power to give a guideline judgment. He added that, "in the light of the majority in *Wong*, the relevant power may not be exercised in respect of an offence against Commonwealth law".²⁵²

Guideline Judgments in New South Wales

In October 1998 the New South Wales Court of Criminal Appeal embraced the English idea of guideline judgments with the delivery of its decision in *Jurisc*.²⁵³ In doing so 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 they 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.²⁵⁴ 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.²⁵⁵

...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.

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.

²⁴⁷ N Morgan and B Murray (1999) 'What's in a Name? Guideline Judgments in Australia' 23 *Criminal Law Journal* 90.

²⁴⁸ N Morgan (1999), *op cit* note 231, at 263.

²⁴⁹ N Morgan (2002), *op cit* note 73.

²⁵⁰ *Johnson* [2002] WASCA 102

²⁵¹ *Ibid* at [50] –[52].

²⁵² *Ibid* at [52].

²⁵³ (1998) 45 NSWLR 209.

²⁵⁴ *Ibid* at 221

²⁵⁵ *Ibid* at 223.

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.²⁵⁶ Primarily for the benefit of legal practitioners and the media, the Chief Justice distributed an information package containing a general discussion of guideline judgments, a list of such judgments and copies of a number of academic articles on the subject.

Since *Jurisc*, the Court has promulgated four more guideline judgments. The aim of increasing awareness of appellate guidance, addressing inconsistency and sentencing patterns which are too harsh or too lenient and deterring potential offenders by increasing knowledge of sentencing practice have been repeated.²⁵⁷ Four of the five judgments have involved numerical guidelines. In *Jurisc*, the Court specified starting points for cases of pleas of guilty to culpable driving causing death (3 years) or grievous bodily harm (2 years) where the standard of abandonment of responsibility for conduct was demonstrated by the presence of at least one of a list of nine aggravating factors. It also stated that a non-custodial sentence for these offences should be “exceptional” and almost invariably confined to cases involving momentary inattention or misjudgement. In *Henry*,²⁵⁸ the Court specified a range of 4-5 years for a typical case of armed robbery (which was described) where there was a plea of guilty. The guideline for importing drugs in *Wong & Leung*²⁵⁹ is structured by five levels of quantum of the drug involved and for each level a range of penalties is suggested rather than a starting point. The guideline was intended to apply to couriers and persons low in the hierarchy of the importing organisation. *Thomson*²⁶⁰ deals with the discount for pleading guilty and suggests that the utilitarian value of a plea should generally be assessed in the range of 10 to 25 per cent of the sentence, depending primarily on the timing of the plea. In *Ponfield*²⁶¹ the Court declined to suggest a starting point or range for burglary on the grounds that it was not possible to specify a typical case as in *Henry* or a particular standard of general application as in *Jurisc*. Instead the guideline is limited to listing eleven aggravating factors.

Following *Jurisc*, the New South Wales Parliament passed legislation to permit the Attorney-General to request the Court of Criminal Appeal to consider providing guidelines without the need for a relevant appeal.²⁶² The second reading speech indicated that the aim of the legislation was to avoid the delay involved in waiting for an appropriate appeal. But the political context was clear. An election was imminent and the coalition opposition had announced a sentencing grid system as part of a law and order package. The legislation on Attorney-General initiated guidelines was put forward as a more measured response to the control of sentencing legislation.²⁶³ Later

²⁵⁶ *Daily Telegraph*, 13 October 1998.

²⁵⁷ *Henry* (1999) 46 NSWLR 346, Spigelman CJ at 353; *Ponfield* (1999) 48 NSWLR 327, Grove J at 331; *Wong* (1999) 48 NSWLR 340, Spigelman CJ at 363.

²⁵⁸ (1999) 46 NSWLR 346.

²⁵⁹ (1999) 48 NSWLR 340.

²⁶⁰ (2000) 49 NSWLR 383.

²⁶¹ (1999) 48 NSWLR 327.

²⁶² *Criminal Procedure Act* 1986 as amended by the *Criminal Procedure (Sentencing Guidelines) Act* 1998.

²⁶³ G Zdenkowski (2000) ‘Sentencing Trends: Past, Present and Prospective’ in D Chappell and P Wilson, eds, *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, 161, at 177.

changes allow the Director of Public Prosecutions to intervene and allow guideline judgments to be sought for summary matters.²⁶⁴

Guideline judgments have clearly proved useful in New South Wales to a government called upon to respond to outcries about lenient sentences. In the pre-election climate of a let's get tough on crime auction, giving legislative endorsement to guideline judgments provided a way out for the government. There have been a number of other instances when the availability of guideline judgments has proved useful as a means of defusing debate over allegedly lenient sentences.²⁶⁵

The High Court's judgment in Wong & Leung

The decision in *Wong & Leung*²⁶⁶ was appealed to the High Court. While the Court was divided as to the result of the appeal,²⁶⁷ all judges considered the *Wong & Leung* guidelines invalid. Gaudron, Gummow, Hayne and Kirby JJ decided they were incompatible with federal legislation and Gleeson CJ was of the same view. There were two reasons for incompatibility. First, by introducing a judicially created subclassification of the offence of importing, the guideline was inconsistent with the *Customs Act*. Secondly, by elevating quantity of the narcotic to a position of primacy, it was inconsistent with the sentencing legislation in the *Crimes Act* and s 16A in particular which assumes an individualised discretion – one which takes into account all of the circumstances. Gaudron, Gummow and Hayne JJ also had more fundamental objections of a constitutional nature to the guideline, as did Callinan J. The guideline went beyond the judicial power contemplated by the *Constitution*. Callinan J said, “They appear to have about them a legislative quality, not only in form but as they speak prospectively.”²⁶⁸ Kirby J declined to decide whether the guideline was invalid because it went beyond the judicial power contemplated by the *Constitution* because it established a new legal norm or because it went beyond the jurisdiction of the Court of Criminal Appeal over “matters”. Gaudron, Gummow and Hayne JJ also objected to the guideline on the ground that quantitative guidelines of future punishments are contrary to common law principle.

The judgments of the High Court in *Wong & Leung* make it quite clear that both the *Constitution* and the *Crimes Act* s 16A present obstacles to the promulgation of guideline judgments for federal offences which go beyond general principles. While Kirby J expressly reserved the issue of whether it is possible to formulate other

²⁶⁴ *Crimes (Sentencing Procedure) Act* 1999, ss 37-39.

²⁶⁵ Critics of the reduction of the sentence imposed for the killing a police officer, Constable Peter Forsyth; lenient sentences for gun offences and lenient sentences for the pack rape of two teenage girls. In all cases the Attorney announced he was seeking a guideline judgment.

²⁶⁶ (1999) 48 NSWLR 340.

²⁶⁷ [2001] HCA 64. The majority (Gaudron, Gummow and Hayne JJ, and Kirby J in a separate judgment) allowed the appeal and holding the sentencing guideline promulgated by the Court of Criminal Appeal invalid; Gleeson CJ and Callinan J dissented on the ground that the guideline had not been directly applied by the Court of Criminal Appeal.

²⁶⁸ *Ibid* at [165].

guidelines consistently with federal legislation and the Constitution,²⁶⁹ it is quite clear that quantitative guidelines that are highly specific and give priority to a single factor are invalid.

The validity of guidelines in state matters was left undecided by the decision. Callinan J expressed no concluded view in relation to such guidelines. But if backed by legislation, he suggested that guidelines, including quantitative guidelines could be issued. He said:²⁷⁰

It is difficult to see, however, why, a State legislature might not [as New South Wales and Western Australia] have, legislate for the promulgation of guidelines in relation to State offences, so long as it is understood that they are guidelines only, that is, at most, merely indicative starting points, not to be rigidly or mechanistically applied, and that the trial judge has a real, judicial sentencing discretion to exercise of the kind discussed by this Court in *House v The King*.

Gleeson CJ also expressed tacit approval for quantitative guidelines. He said:²⁷¹

Whether one talks of a range of appropriate sentences or, like Canadian courts, in terms of a starting point for consideration, appellate courts, both for the purpose of making and explaining their own decisions, and for the guidance of primary judges, may find it useful to refer to information about sentences that have been imposed in comparable cases, and to indicate, subject to relevant discretionary considerations, the order of the sentence that might be expected to be attracted by a certain type of offender who commits a certain type of offence.

He did not think appeal courts needed any particular statutory power to do this.²⁷²

The tenor of Kirby J's judgment is supportive of guideline judgments in cases without a federal element.²⁷³ And his support appears to extend to quantitative guidelines which require a two stage approach to sentencing.²⁷⁴

Gaudron, Gummow and Hayne JJ on the other hand are clearly critical of guideline judgments of the quantitative variety. They have no difficulty with guideline judgments which lack a quantitative element and which merely indicate relevant sentencing considerations without establishing a starting point or developing a range. So they had no objection to the guideline judgment in *Re Attorney-General's Reference No 1 (Ponfield)*²⁷⁵ and they were also supportive of the Full Court of South Australia's decision in *Police v Cadd*²⁷⁶ which gave guidance about the type of punishment that should ordinarily be imposed for driving whilst disqualified (imprisonment) with an indication of what they regarded as an ordinary case. The real

²⁶⁹ *Ibid*, see note at [149].

²⁷⁰ *Ibid* at [168].

²⁷¹ *Ibid* at [9].

²⁷² *Ibid* at [30].

²⁷³ *Ibid* at [124] where he agreed with Gleeson CJ's comments as to the importance of courts of criminal appeal communicating collective experience.

²⁷⁴ As to the two stage approach, see para [101] – [103].

²⁷⁵ (1999) 48 NSWLR 327.

²⁷⁶ (1997) 69 SASR 150.

content of the guidance in *Police v Cadd* was said to lie in the reasons for the stated conclusion. They contrasted these guidelines with quantitative guidelines, which publish tables of future sentences. They objected to the promulgation of quantitative guidelines on a number of grounds. First that “publishing a table of predicted or intended outcomes masks the task of identifying relevant differences”²⁷⁷ and pretends to mathematical accuracy of analysis.²⁷⁸ Secondly, if the quantitative guideline is fixed by reference to one factor alone it endorses a two-stage approach to sentencing which is wrong.²⁷⁹ And they considered that numerical guidelines cannot “address considerations of proportionality”.²⁸⁰ In the view of Gaudron, Gummow and Hayne JJ, tables of recommended punishments are legislative rather than judicial because they become too prescriptive and unduly fetter judicial discretion.²⁸¹ They are also wary of the use of “bare” sentencing statistics that describe existing sentencing practice because they tell little about why the sentences were fixed as they were.

The NSW Government’s Response to Wong & Leung

With the High Court split over the validity of guideline judgments, their status is left in doubt by the decision. It leaves open the possibility that unless such judgments have statutory backing they could be challenged on the basis they are contrary to statutory sentencing guidelines or common law principle. In New South Wales, the Premier Bob Carr reacted angrily to the High Court’s decision and threatened to introduce mandatory sentencing if the High Court continued to criticise the use of guidelines.²⁸² His government moved to amend legislation to protect guideline judgments. The judgments of Justices Gaudron, Gummow and Hayne were interpreted as deciding that the Court of Criminal Appeal has no power to issue guidelines judgments of its own motion as distinct from issuing them on the application of the Attorney-General.²⁸³ It was recognised that the decision of Gaudron, Gummow and Hayne JJ did not turn on the power of the court to issue a guideline judgment. However, as a matter of caution, it was considered appropriate to introduce amendments in order to ensure that the court has the power and jurisdiction to give guidelines on its own motion and to retrospectively validate any such guidelines from previous decisions.²⁸⁴ In addition the amendments ensure, when the Court of Criminal Appeal proposes to issue a guideline judgment on its own motion, that the Attorney-General, the Senior Public Defender and the Director of Public Prosecutions be given the opportunity to appear. The Attorney said, “The promulgation of guideline judgments is an integral part of the Government’s strategy to provide guidance to the courts and the community about sentencing practice and

²⁷⁷ *Wong and Leung* [2001] HCA 64 at [65].

²⁷⁸ *Ibid* at [66].

²⁷⁹ *Ibid* at [74].

²⁸⁰ *Ibid* at [78].

²⁸¹ *Ibid* at [80] – [86].

²⁸² *The Weekend Australian*, 1-2 December, 2001, at 7.

²⁸³ Criminal Legislation Amendment Bill, Legislative Council, Second Reading, 12 December, 2001.

²⁸⁴ *Crimes (Sentencing Procedure) Act* 1999, ss 37B and 41.

principles”, and, “Certainty and consistency are the key to community confidence in sentencing”.

The comments of the government make it clear that sentencing guidelines are promoted as a means not only of ensuring consistency but also of responding to public demands for harsher penalties. “Sentencing guidelines work” it was claimed on the basis that in some cases guidelines produce longer sentences and more people were receiving custodial sentences.

The judicial response

In *R v Cook*²⁸⁵ it was argued that the *Jurisic* guideline should not be followed because it had been implicitly disapproved by the High Court. The court sat as a bench of five and merely held, in dismissing the appeal, that it was unnecessary to reconsider *Jurisic*. In *R v Sharma*,²⁸⁶ a decision handed down on the same day as *Cook*, the Crown had raised the question of whether the Court’s guidance in relation to guilty pleas in *Thomson*²⁸⁷ remained appropriate in the light of *Wong & Leung*. One of the grounds for rejecting guideline judgments in the joint judgment of Gaudron, Gummow and Hayne JJ was that they involve a two-stage approach, by which a preliminary sentence is determined and thereafter adjusted by some mathematical value given to one or more features of the case (such as plea of guilty), an approach said to be wrong in principle.²⁸⁸ The Court held the doctrine of precedent did not require reconsideration of *Thomson* on the ground that in *Wong*, the other member of the majority (Kirby J) did not join in the criticism of the two-stage approach. Hence the criticism was not part of the majority decision.²⁸⁹ Spigelman CJ, with whom the rest of the Court concurred, repeated his comments in *Thomson* which contest that the guideline judgments compromise intuitive synthesis:²⁹⁰

The instinctive synthesis approach is the correct general approach to sentencing. This does not, however necessarily mean that there is no element which can be taken out and treated separately, although such elements ought be few in number and narrowly confined. As long as they are such, their separate treatment will not compromise the intuitive or instinctive character of the sentencing process considered as a whole.

²⁸⁵ [2002] NSWCCA 140.

²⁸⁶ [2002] NSWCCA 142.

²⁸⁷ (2000) 49 NSWLR 383.

²⁸⁸ The decision also considered the implications of the joint majority judgment of Gaudron, Gummow and Callinan JJ in *Cameron* [2002] HCA 6; 76 ALJR 382. This concerned the basis for a sentencing discount for a plea of guilty rather than broad issues affecting the validity of guideline judgments.

²⁸⁹ *Sharma* [2002] NSWCCA 142 at [27] where Spigelman CJ also pointed out that the criticism of a “two-stage” approach expressed in *AB* (1999) 198 CLR 111, at [15]-[18] by McHugh J cannot be added to the joint judgment in *Wong* in some notional way.

²⁹⁰ *Ibid* at [24].

Guideline Judgments in Victoria

In 1988 the Victorian Sentencing Committee recommended guideline judgments²⁹¹ and the Sentencing Bill of 1990 contained a provision which empowered the Full Court to hand down guideline judgments. The draft legislation would have permitted the Full Court to have regard to a broad range of information including statistical research or other material submitted to it by the Director of a proposed Judicial Studies Board and any relevant evidence of public attitudes to sentence. The provision was opposed by a majority of Supreme Court judges on the grounds that such guidelines would restrict the discretion of the courts and the Bill was dropped.²⁹² Arie Freiberg's *Sentencing Review: Discussion Paper* prepared for the Attorney-General, which was released in August 2001, proposed the introduction of guideline judgments on the grounds of "transparency, consistency and the need for wider community input into the sentencing process." To provide an input into the formulation of guideline judgments, the creation of a Sentencing Advisory Council was recommended, to be made up of judicial officers, representatives of the legal profession, the criminal justice system, academics and a member of the public, with services provided by professional staff. The Council's tasks would include sentencing education, research, public liaison and the collation and preparation of sentencing statistics.²⁹³ In the consultation process the legal profession was "strongly and overwhelmingly hostile to the introduction of guideline judgments in Victoria"; there were few supporters.²⁹⁴ Accordingly the Review does not recommend the introduction of guideline judgments until there is more support. Freiberg explained the reasons for opposition:²⁹⁵

Victoria's long attachment to the notion of sentencing as a process of instinctive synthesis and its rejection of "two stage" sentencing does not provide a climate conducive to what would amount to a radical cultural change. The Court of Appeal's view of itself as a court of appeal against error, rather than a setter of broader legal/sentencing policy also militates against the introduction of a system which would be more normative than reactive, prescriptive rather than historical.

There was however, strong support for the formation of a Sentencing Council with research and public education functions and in the event of a change in judicial and professional opinion the Report outlines how a scheme of guideline judgments might operate with broad community input and wide consultation.²⁹⁶

²⁹¹ Victorian Sentencing Committee, *Sentencing* (Attorney-General's Department 1988).

²⁹² A Freiberg (2002) *Pathways to Justice*, 206.

²⁹³ A Freiberg (2001) *Sentencing Review 2001: Discussion Paper*, at 94 for a fuller list of functions.

²⁹⁴ For example Phillips CJ and Chief Justice Waldron were not opposed.

²⁹⁵ A Freiberg (2002) *Pathways to Justice*, at 206.

²⁹⁶ *Ibid*, at 214-216.

Arguments for and against guideline judgments

Before addressing the question whether Tasmania should consider adopting guideline judgments, it is useful to set out the arguments for and against.²⁹⁷

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."²⁹⁸ The result is they "hazard inconsistency, incoherence and inadequate individualisation".²⁹⁹
- 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.

²⁹⁷ See A Freiberg (2002) *Pathways to Justice*, at 208-211; *Jurisc* (1998) 45 NSWLR 209; *Wong & Leung* [2001] HCA 64.

²⁹⁸ Gaudron, Gummow and Hayne JJ in *Wong & Leung* [2001] HCA 64 at [65].

²⁹⁹ A Lovegrove (2002) 'Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments' forthcoming *Current Issues in Criminal Justice*.

- 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 publication of the maximum penalties has little effect, why will publishing a lesser sentence have such an effect?³⁰⁰
- 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.

Guideline judgments in the Tasmanian context

Are there particular circumstances or conditions in Tasmania relevant to the question of their adoption here? The claimed advantages of guideline judgments focus broadly around two matters: usefulness in improving consistency and improving public confidence in the criminal justice system. The opponents of guideline judgments contest that they aid consistency and coherence and raise the resource implications.

Aiding consistency

In Tasmania there is reason to question whether sentencing inconsistency is a real concern. Certainly the comparison of sentencing patterns over two decades showed little change notwithstanding differences in composition of the Supreme Court. And the comparison between individual judges of sentences for robbery and assault showed little evidence of disparity. While it is possible that there are individual differences between sentencers, these are not as great as sometimes suggested. It could be argued that considerations used to justify the promulgation of guideline judgments in New South Wales – the increasing size of the judiciary and the use of acting judges with limited experience – do not exist in Tasmania.³⁰¹ Judges and magistrates constitute a small group and the range of penalties for common offences is well known to them. Guideline judgments were in fact suggested by the Opposition in 1998. Liberal legal affairs spokesman, Ray Groom, suggested that guideline judgments – similar to those promulgated in New South Wales – would allay community concern about inconsistency and leniency without removing judicial

³⁰⁰ 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.

³⁰¹ See *Wong & Leung* [2001] HCA 64, Gleeson CJ at [10].

discretion. The suggestion was rejected by the Law Society as unnecessary and the existing system of appellate review was defended as adequate.³⁰²

Whether guideline judgments do improve consistency has been questioned.³⁰³ But the suggestion that they make matters worse seems unlikely. As Spigelman CJ pointed out in *Jurisc*, guideline judgments are not a radical proposal.³⁰⁴ “The formal step of recognising that the Court does issue such guidelines is a logical development of what the Court has long done.” Examination of appellate guidance in other jurisdictions reveals that similar kinds of guidance have been given in cases that have not been tagged as guideline judgments. The Western Australian Court of Criminal Appeal has given guidelines in the form of sentencing ranges for burglary (*Cheshire*)³⁰⁵ and sexual assault (*Podirsky*).³⁰⁶ Although these sentencing ranges merely purport to describe existing practices based upon appellate decisions, “they have set the framework and starting points in subsequent cases at levels in the court hierarchy and are frequently considered in sentencing appeals”.³⁰⁷ Appeal courts in South Australia have also shown a willingness to set appropriate sentencing standards. In *D*³⁰⁸ Doyle CJ and Bleby J suggested “starting points” for the crime of persistent sexual abuse of a child in cases of sexual intercourse and in *Place*³⁰⁹ the Supreme Court concluded that the practice of fixing a standard range of penalties for a particular crime was sound in principle, forms a proper part of the role of the Court of Criminal Appeal and is unaffected by the High Court’s decision in *Wong & Leung*. In *Hammond*³¹⁰ the Court of Appeal in Queensland reviewed the range of sentences for armed robbery and listed the dominant considerations.

In Tasmania, the Court of Criminal Appeal has adopted a more cautious approach in relation to quantitative guidelines. The Court has made it clear that standardization of penalties is an accepted policy and endorses the practice of “weighing the sentence passed against the tariff”.³¹¹ However sentencing guidance refers to a range of penalties rather than to starting points and it is quite rare for the range to be quantified although on occasions the Court has done so. For example a range of 3-7 years has been referred to as an approximately appropriate standard for conviction of

³⁰² *The Mercury*, ‘Lawyers are refusing to back a Liberal plan to bring in new criminal sentencing guidelines’ 16/10/1998.

³⁰³ Most commentators argue they do. However Lovegrove argues that the New South Wales guideline judgments will not achieve this because they are too numerically unsophisticated. He proposes a much more complex “elaborated sentencing framework” is necessary to replace intuitive synthesis rather than guideline judgments: A Lovegrove, ‘Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments’ forthcoming *Current Issues in Criminal Justice*.

³⁰⁴ *Jurisc* (1998) 45 NSWLR 209.

³⁰⁵ unreported, WA CCA, 7 November, 1989.

³⁰⁶ (1989) 43 A Crim R 404.

³⁰⁷ N Morgan (1999) ‘What’s in a Name? Guideline Judgments in Australia’ 23 *Criminal Law Journal* 90, at 98.

³⁰⁸ (1997) 96 A Crim R 364.

³⁰⁹ [2002] SASC 101.

³¹⁰ (1996) 92 A Crim R 450.

³¹¹ *O’Brien* Serial No 43/1987, Underwood J; *Inkson* (1996) 6 Tas R 1, Underwood J at 14-15, Crawford J at 22.

an unlawful act intended to cause grievous bodily harm (s170)³¹² and a penalty range of 5-7 years for large scale commercial trafficking in cannabis in the absence of mitigating factors.³¹³ In some cases the Court has suggested a particular sentence is not the top end of an accepted tariff or range: eg “in a serious case of armed robbery by a person without claims to mitigation, a sentence of six years imprisonment is by no means the top of an accepted tariff”.³¹⁴ Certainly the Court has not gone so far as to set out a schedule of penalties for any offence or even to suggest starting points for a crime with particular characteristics. In fact Underwood J has made it quite clear that in his view it is not the function of an appeal court to state the range of penalties for future cases. He said “it is for the legislature alone to specify the appropriate range of penalties.”³¹⁵ Proponents of guideline judgments would argue that this criticism misunderstands the distinction between statutory guidelines and judicial guidelines. The latter are, as Spigelman CJ said, “not binding in a formal sense. They represent a relevant indicator, much as trial judges have always regarded statutory maximum penalties as an indicator.”³¹⁶ The disinclination of most judges to quantify discounts for a guilty plea in this State³¹⁷ also suggest a preference for instinctive synthesis rather than a more explicit sentencing framework with numerical guidance.

Improving public confidence

The issue of the erosion of public confidence in the sentencing process does seem to be as real a concern in Tasmania as elsewhere. It is in this respect that guideline judgments have real benefits. Guideline judgments improve transparency of the sentencing process and assist in addressing perceptions of inconsistency. They “replace informal, private and unrevealed judicial means of ensuring consistency with a publicly declared standard”.³¹⁸ This has added force in Tasmania where the statutory maximum for crimes other than murder is a general 21 years imprisonment, giving no indication of the relative severity of crimes. An important benefit of guideline judgments is that they can be prepared in such a way as allows public input into the sentencing process thus addressing public concern that judges are out of touch and unresponsive to community concerns. It is possible, as planned in the United Kingdom, for Parliament to have a role in considering and scrutinising draft guidelines.³¹⁹

³¹² *Papazoglou* Serial No 9/1963, approved in *Allen* [1999] TASSC 112 at 13.

³¹³ *Vergos* Serial No 89/1996, Slicer J.

³¹⁴ *McFarlane* (1993) 2 Tas R 201 at 295.

³¹⁵ *O'Brien v ADC Sport Pty Ltd* Serial No 57/1988 at 6.

³¹⁶ *Jurisc* (1998) 45 NSWLR 209 at 221.

³¹⁷ *Pavlic* (1995) 5 Tas R 186: Green CJ and Wright J expressed the view that the discount for a plea of guilty should not be quantified; Slicer J preferred the quantified discount approach; in *Inkson* (1996) 6 Tas R 1, Crawford J at 19-20 suggests discounts should not be quantified.

³¹⁸ *Wong* [2001] HCA 64, Kirby J at [93].

³¹⁹ See *Halliday Report*, *op cit* note 42 at 52-57; *Justice for All*, *op cit* note 78 at 89-90.

Resources

In a jurisdiction the size of Tasmania, the resource issue is a significant constraint. New South Wales has a Judicial Commission with its computerised sentencing information system (SIS) and a statistical and research bureau (BOCSR) as well. The UK Sentencing Advisory Panel has permanent staff and access to the criminological expertise of the Home Office. Freiberg's suggestion of a Sentencing Advisory Council has received general support in Victoria. However, in Tasmania, even such a proposal with a Secretariat of 3-5 officers would be a considerable burden. What could be feasible is a body drawn from the judiciary and the magistracy, the legal profession, legal aid, the Crime Prevention and Community Safety Council and victims groups. The preparation of sentencing statistics could be outsourced (see Appendix A) as could research gauging public opinion on sentencing.

It is 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.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 3.9 Should guideline judgments be introduced in Tasmania?
- 3.10 Should a modest "sentencing advisory council" be established?
- 3.11 If so, what should its functions be?
- 3.12 Should Parliament have a role in considering and scrutinising draft sentencing guidelines?

Part 6

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.*

Introduction

Background to the terms of reference

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 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?

Parole is a system of early, supervised release. Four purposes of parole are commonly mentioned. First, it is designed to protect the community by assisting the offender to avoid re-offending through the provision of supervision and conditions, which if

breached can result in return to prison. A second purpose is mitigation of the punishment of the prisoner in favour of rehabilitation through conditional freedom once the prisoner had served the minimum time that a judge determines justice requires that he or she must serve having regard to all the circumstances of the offence.³²⁰ Thirdly, it provides an incentive for prisoners to behave better in prison and to undertake rehabilitative programs. The importance of this incentive was enhanced in this State by the drastic curtailment of remissions from one-third to a maximum of 3 months in 1993. A fourth purpose is that parole saves money by freeing up prison places through early release of prisoners.

Models of parole

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. 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 be not released on parole with respect to a sentence. This was the model incorporated into the *Sentencing Act* 1997 and the *Corrections Act* 1997.

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 3 years imprisonment, to set a non-parole period unless it decides that it is inappropriate to do so. Release on parole is automatic for sentences less than 10 years if a non-parole period has been set. If the sentence is for 10 years or longer and a non-parole period has been set, release is determined by the Attorney-General.³²¹

Stating the non-parole period as part of the sentence

For prisoners other than those sentenced to life imprisonment, the *Corrections Act* 1997, s 68(1) specifies a statutory non-parole period of one-half of the sentence. An offender cannot be released on parole before the completion of the non-parole period

³²⁰ *Power* (1974) 131 CLR 623, Barwick CJ, Menzies, Stephen and Mason JJ at 629, referring to the NSW parole system.

³²¹ For more detail see Warner (2002) *Sentencing in Tasmania* at 252-254.

or 6 months whichever is the greater, unless in the opinion of the Board, there are exceptional circumstances.³²² By virtue of the *Sentencing Act* 1997, s 17(2), this statutory period may be extended by the sentencing court or it may order that the offender is not eligible for parole. The *Sentencing Act* 1997, s 17(3) also states that the period of non-eligibility for parole must not be less than one-half of the sentence. Amendments to s 17 now provide 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.³²³ It has been quite rare for courts either to make an order that the offender be not eligible for parole or to extend the statutory non-parole order by making an order that the offender is not eligible for parole before the expiration of a specified period. The accepted view is that the *prima facie* position is that a person is eligible for parole at the end of half of the sentence. As the former Chief Justice stated:³²⁴

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 s12B 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 s12B(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 s12B a judge should have regard to the factors specified in s12B(1)(a),(b) and (c) read in the light of the established principles and objectives of sentencing.

The effect of the 2002 amendments is to require the courts to make an order in relation to the non-parole period if they wish the offender to be considered for parole. Sentencers are also 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 now, 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 requires no reasons for this method of denying parole. The amendments seem to be a rather clumsy way of achieving the purpose of requiring sentencers to state what a sentence means.

While there are many criticisms of parole and it is recognised as being imperfect, reviews of parole have almost invariably recommended reform rather than abolition.

³²² *Corrections Act* 1997, s 70.

³²³ *Sentencing Act* 1997, s 17(3A) and (6). The amendments received Royal Assent on 12 July 2002 but commencement is subject to proclamation (planned for September 2002).

³²⁴ *Gill* Serial No 34/1990 at 1-2; see also Crawford J at 7-8; *Adams* Serial No 41/1998, especially Crawford J.

One of the criticisms of parole is that it turns sentencing into a charade. Because of the impact of parole release on sentence length, the time served by a prisoner bears little relationship to the sentence imposed by the court. This lack of transparency about what a sentence actually means undermines public confidence in the criminal justice system. "Truth in sentencing" requires courts to state what a sentence really means. Requiring courts to specify the period, which must be served before being considered for parole, satisfies this demand for truth in sentencing. It is a worthwhile reform which satisfies the desirable criterion that sentencing be a transparent process (see above page 24).

The Attorney-General's Second Reading Speech does not really indicate if the amendments to s 17 were intended to do more than to make the sentencing process transparent in order to community faith in the system.³²⁵ Arguably the amendments have so disturbed the statutory scheme that it is no longer possible to say that the presumption is that ordinarily the non-parole period should be 50%. Whether it will lead to an increase in non-parole periods remains to be seen. Another explanation of the change was that "sentencing courts are far better placed to determine exactly when a convicted person should be released on parole."³²⁶ So it could be said that the change was intended to prompt courts to consider the non-parole period in every case as a matter of course. Whether this will lead to a change in practice is unclear as the Attorney-General acknowledged when he said,³²⁷ "The interesting point that we do not know at the moment is how judges will respond with their non-parole periods."

Consideration of the form of the amendment gives rise to the suggestion that if its intention is only to clarify the meaning of the sentence, it should be worded in a way to make it clear that it does not change the presumption in favour of a non-parole period of 50% in the ordinary case.

Discussion Points

These questions may be a useful guide in responding to this Part.

Please explain the reasons for your views as fully as possible.

- 4.1 Should the amendment to s 17 of the *Sentencing Act* requiring a judge to state the non-parole period be redrafted so that it casts no doubt on the prima facie position that a person should be eligible for parole after serving half of the sentence?

³²⁵ *Hansard*, House of Assembly, 29 May 2002.

³²⁶ *Ibid.*

³²⁷ *Ibid.*, In Committee.

What should the minimum non-parole period be?

Non-parole periods elsewhere in Australia

When parole was first introduced in Tasmania by the *Parole Act 1975*, the statutory non-parole period was one-third of the sentence or 6 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. For example in Western Australia, where courts have a discretion to make a parole eligibility order, the minimum non-parole period is one third of the sentence for sentences of 12 months to 6 years.³²⁸ In contrast, in New South Wales, the courts are required to set a non-parole period for sentences of more than 6 months and the non-parole period must not be less than three-quarters of the sentence, “unless the court decides there are special circumstances for it being less”.³²⁹ Release is automatic for sentences of 3 years or less.³³⁰ One half of the sentence is the most common non-parole period, although in some jurisdictions there are provisions which require a longer period for certain kinds of offence. For example 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% of the term of imprisonment but other prisoners (excluding lifers) are eligible after half of the term of imprisonment.³³¹ And 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% of the sentence but for certain sexual offences and offences against persons under 16 years of age the minimum period is 70%.³³² Victoria has a different model. There is no statutory minimum non-parole period. Refusal to specify a non-parole period amounts to a denial of parole but the way the statutory provision is structured creates a strong presumption that a non-parole period will be specified. While there is no statutory minimum proportion of the sentence that must be served, the relationship between the sentence and the non-parole period is governed by case law. Sentencing an offender to a custodial sentence with a non-parole period is done in two stages. First, the sentencer must first impose a sentence appropriate to the crime in question and then in the second stage must consider what is the minimum custodial period that is needed to serve the objectives of sentence.³³³ Since similar considerations apply to setting both the sentence (ie the head sentence) and the non-parole period, as a

³²⁸ *Sentencing Act 1995* (WA), s 93.

³²⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 44 and 46.

³³⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 50.

³³¹ *Corrective Services Act 1988* (Qld), s 166.

³³² *Sentencing Act 1995* (NT) ss 53, 54, 55.

³³³ See R Fox and A Freiberg, (1999) *Sentencing, State and Federal law in Victoria* 2nd ed, Oxford University Press at 750-768.

general rule there should not be too great a disparity between the two.³³⁴ A glance at sentencing data for Victoria suggests that non-parole periods tend to be upwards of one-half of the sentence.

International examples

In the United Kingdom, all offenders sentenced to up to 4 years imprisonment are automatically released conditionally after serving one-half of the sentence and those sentenced to more than 12 months are released at the half-way point and placed under supervision until the three-quarters point of the sentence. For those serving 4 years or longer the normal time for release becomes two-thirds but the Parole Board is entitled to release them on parole at any point between one-half and two-thirds of their sentence.³³⁵ Radical changes in the pipeline will make supervised release automatic for most offenders sentenced to 12 months or more. Discretionary parole will be confined to sexual and violent offenders assessed as dangerous.³³⁶ Under New Zealand's *Parole Act* 2002 most offenders serving sentences of 2 years or more are eligible for parole after serving one-third of their term. The only exceptions are offenders convicted of murder with aggravated circumstances and dangerous offenders subjected to an indeterminate sentence.³³⁷ In Canada, for offenders sentenced to sentences of 2 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.³³⁸ Offenders sentenced to less than 2 years imprisonment are subject to the jurisdiction of the province. In Ontario, for example, an offender sentenced to less than 2 years may be released after one-third of the sentence.³³⁹

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

Before the government's amendments to the *Sentencing Act* 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 election. The Opposition supported the increase of the non-parole period on the grounds this was what the community wanted and the "very strong community concern about soft treatment of criminals and then their release when they have only served half of their sentence."³⁴⁰ In

³³⁴ *Ibid*, 767.

³³⁵ Ashworth (2000) *op cit* note 37, at 258.

³³⁶ *Justice for All*, *op cit* note 78, 95-96.

³³⁷ G Hall, 'The Sentencing Act 2002 – new bottle same wine?': <<http://www.nzlawsoc.org.nz/lawtalk>>

³³⁸ *Corrections and Conditional Release Act* 1992 (Can), s 120.

³³⁹ <<http://www.operb.gov.on.ca>>

³⁴⁰ *Hansard*, Legislative Assembly, Corrections Amendment (Statutory Non-Parole Period) Bill 2002 (No 29), Second Reading, 22 May 2002, Mr Hodgman.

contrast, the Greens strongly opposed any extension of the non-parole period and vigorously defended the parole system.³⁴¹ The Opposition's arguments in favour of extending the non-parole period – that the public thinks that sentences are too lenient and that serving only half of the sentence will undermine deterrence and be inadequate denunciation – can be answered by the discussion in Part 2. The available evidence suggests that increasing the severity of sentences will not alter the widespread view that sentencing tends to be too lenient. And increasing sentence length is not an effective strategy to reduce crime. It could be argued that what is needed is better and more accessible information for the public about how sentencing is supposed to work, better information for sentencers about what the public think and a review of sentencing options to ensure we are using resources efficiently.

Victim Statements

Amendments to the *Corrections Act* 1997, 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. Section 72(4) has also been amended to require 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). A victim statement is described 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.”³⁴²

This description is almost identical with that provided for Victim Impact Statements that may be provided to the court prior to sentence under the *Sentencing Act* 1997, s 81A.

Arguably the provision of a victim impact statement 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 will also be relevant to offence seriousness but this will be a matter that the court should have taken into account. If no victim impact statement was provided to the sentencing court, it is possible that the court may have taken a

³⁴¹ *Hansard*, House of Assembly, Sentencing Amendment Bill 2002 (No 34), Ms Putt, 29 May 2002.

³⁴² *Corrections Act* 1997, s 72(2B).

less serious view of the crime than if informed of the full impact. But even in this case, it is not the role of Parole Board to refuse parole on the grounds that the court's sentence was lenient in the light of facts not known to it. 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 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 other words, what is most relevant to the Board is the likely effect on the victim of the offender's release on parole.

Arguably, the new provisions relating to providing victim statements to the Parole Board are misleading. 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 *Corrections Act* 1997, 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 the Board and victims.

Discussion Points

These questions may be a useful guide in responding to this Part.

Please explain the reasons for your views as fully as possible.

- 4.2 Is it appropriate to provide a victim statement to the Parole Board relating to particulars of injury, loss or damage and the effects on the victim of the offence if that information had not been provided to the sentencing court? If so, how should that information be used by the Board?
- 4.3 Should the victim's statement provided to the Parole Board focus on the victim's fears and concerns in relation to the offender's release?

Publication of Parole Board decisions and reasons

The *Corrections Act* 1997 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) requires that it give notice of this to the *prisoner*. 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*. 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.

The Charter of Victims' Rights provides that victims have the right to be notified on request of the offender's release from custody. The Charter was adopted by the government in 1992 and government departments were directed to comply with it when dealing with victims. However there was no mechanism for this to be done in a systematic manner until the Victims Assistance Unit commenced operation in 2001 and began the compilation of the Victims Register. The Parole Board and the Victims Unit then established a protocol for proper exchange of information.³⁴³ It seems there have been instances of families of deceased victims being confronted with the released offender before they had any knowledge of their release.³⁴⁴ When the Victims Register is fully operational this should no longer happen. To assist in ensuring it does not, the *Corrections Act* 1997, s 7, has been amended by adding s 7A which requires the Parole Board to publish its reasons for making a parole order and to give a copy of the reasons to any *victim* who has provided a victim impact statement to the Board. The Board is also authorised (by s 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. These amendments are yet to be proclaimed. However, the decision to release Gerald Wayne Hyland has been published.³⁴⁵ The provisions in relation to publication of the Board's decisions are to be welcomed. They improve the accountability of the Board and the transparency of the criminal justice system. In addition they aim to ensure that victims are informed of release decisions in relation to offenders who are paroled.

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.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

4.4 Should parole hearings be open to the public?

³⁴³ Parole Board, *Annual Report for the year ended 30 June, 2001*, 4.

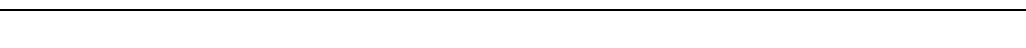
³⁴⁴ *Hansard*, House of Assembly, Sentencing Amendment Bill 2002 (No 34), Mr Hodgman, 29 May 2002.

³⁴⁵ See < <http://www.justice.tas.gov.au/parole> >

Other Issues in relation to Parole

Parole has an important role in the criminal justice system. Its functions have been outlined above (see pages 135-136). 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 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 latter 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. The economic benefits of parole are clear. It reduces the prison population and the costs of supervision are less than the costs of incarceration. Whether it works in terms of reducing reconviction rates has sometimes been doubted. However a recent English study of offenders released from prison in 1991 in the United Kingdom has shown that there was a reduction in recidivism that could be ascribed to the process of release on parole.³⁴⁶

For a parole system to work effectively it must be properly supported and resourced. Tasmania has the advantage that it is possible for each applicant for parole to be interviewed in person by the Board. But parole decision-making depends very much on the quality of the information provided to the Board. Despite the problems of predicting re-offending expert assessment can assist with this. Resources also need to be available within the prison system to identify particular issues with prisoners that need to be addressed. The availability of programs, such as drug rehabilitation programs, sex offender programs and reports of a prisoner's response to such programs are important for parole board decision-making. Post-release there is a need for a wide range of rehabilitative program options. At an administrative level the board needs to be properly resourced if it is to function properly. The Board is an independent Board with a part-time membership. It meets fortnightly. To discharge its duties it needs considerable administrative support. This issues paper provides an opportunity for submissions to be made in relation to the legislative framework for parole in Tasmania and its operation in practice.



³⁴⁶ T Ellis and P Marshall (2000) 'Does Parole Work? A Post-Release Comparison of Reconviction Rates for Parolees and Non-Paroled Prisoners' 33 *ANZJ Criminol* 300.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

- 4.5 Do you have any suggestions for change in relation to the legislative framework for parole?
- 4.6 Do you have any suggestions for change in relation to parole procedures or practices?

Appendix A

Proposal for the annual publication of sentencing data

Supreme Court

Sentence range data for the Supreme Court for a single year can be gathered in about 30 hours. This requires reading (to the extent necessary) all comments on passing sentence for that year and adding each case to a spreadsheet (using Microsoft Excel). The spreadsheet should include columns for crime, number of counts, sentence (if this is done by months it is easier to sort later), wholly or partly suspended, other sentences (eg community service order, probation, conviction recorded) name, and date. Only the most serious sentences need be entered.³⁴⁷ Ideally columns should also be provided for age (where relevant), non-parole period, disqualification, amount (eg for stealing) and other (such as type of robbery – eg “bank”). The data can then be easily sorted into crime types, then number of counts, then listed by the amount of the sentence, making calculating the range information (total numbers, minimum, median, maximum, percentage custodial, percentage suspended) a relatively easy task. A table displaying this information can be made, which can also be used for comparison with earlier years.

Where there are relatively few incidents of a crime in a single year running totals may need to be kept for the data to be meaningful. In these cases if a median needs to be recalculated this can be done by pasting the data for a crime from all the years to be included into one spreadsheet (which can be added to each year) and then finding the median etc for the particular crime from this new spreadsheet.

Magistrates’ Courts

Sentence range data for the Magistrates’ Courts can be gathered by using the Hobart Magistrates’ Courts’ database which includes data for all of southern Tasmania. This requires searches being done to extract the raw data for each offence to be reviewed. The complexity of performing these searches means that at present few people are capable of doing them. Jonathon Rees (Principle Consultant of the Office of the Secretary of the Department of Justice) did this task when the data for 1999 and 2000 was gathered. Each offence is dealt with separately and a spreadsheet is generated by the search (Microsoft Excel). Usually only single count sentences are dealt with to simplify the task. The data should be sorted by complaint number, charge number,

³⁴⁷ Descending order of seriousness of sentences: prison, community service orders, probation orders, fines, adjourned with conviction, conviction recorded, adjourned without conviction, damages awarded, dismissed (though finding of guilt).

then date. Because a new row of data appears on the spreadsheets for every sentencing outcome (often a single charge can result in a number of outcomes such as a suspended prison sentence, a probation order, and a fine), the information must be read/scanned through, and where more than one sentencing 'outcome' has been made for only one count/charge, all but the most serious sentence must be taken out (this requires deleting the whole row or rows of data relating to each less serious outcome). This is complicated by the use of the outcome term 'fine' for all money related orders against an offender (ie actual fines, damages awards, cost awards, victims levies, etc) so that it is not initially apparent whether a 'fine' is more serious than a conviction recorded. Thus, before taking out the less serious outcomes a separate search must be done for a break down of all the fine awards for each offence. The spreadsheet generated by this search can be sorted by financial category and only the 'FINE' category outcomes selected and pasted into the other spreadsheet (before the sorting is done). Thus when eliminating the less serious outcomes the 'fine' outcomes can be properly assessed for seriousness.

The data can then be sorted by types of outcomes and range information is relatively easy to generate. Although numbers are often large, counting is easy as selecting the rows generates a count of them.

Where there are relatively few incidents of an offence in a single year running totals may need to be kept. In these cases if a median needs to be recalculated this can be done by pasting the data for an offence from all the years to be included into one spreadsheet (which can be added to each year) and then finding the median etc for the particular offence from this new spreadsheet.

Where global sentences are to be analysed the search of the Magistrates' Courts database must search for all global or 'related' outcomes for a particular offence, and then using the complaint numbers generated, search for any other outcomes (regardless of offence type) for those complaint numbers. Thus all charges dealt with under the one sentence can be considered. The 'fine' outcomes must also be added as explained above. A new column must be added to the spreadsheet in which the total number of counts included within the global sentence for a complaint number is entered while the spreadsheet is read/scanned and rows not containing the most serious outcome deleted.

It is estimated that to generate the range information as was done for the 40 (about) offences included in the 1999 and 2000 data which has already been completed, approximately one to two days is required to complete the initial searches (presuming the person is already familiar with searching the database), and a further 120 hours required to sort all the data and prepare tables displaying the sentencing ranges.

The Justice department could allocate a budget to the Criminology Research Unit (based at the Law Faculty of the University of Tasmania) to perform this work, utilising University facilities (access to computers, printing facilities, taslaw database of Supreme Court comments on passing sentence).

Proposed budget

(subject to the University's Research and Development Office approval):

Supreme Court data preparation:	30 hours @ \$27.81*	834
Magistrates Court data preparation:		
Initial searches (to be performed by Justice Department)		0
sort data, make tables	120 hours @ \$27.81	3337
University infrastructure costs	45% of human resources costs	1877
Total		\$6048

*2002 Research Assistant Level 1 (includes on costs).

note: this includes analysis of Southern Magistrates Court data only. If data becomes available for the whole of the state the budget could be increased accordingly.

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