

Brooke Craven
Acting Director
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Department of Justice

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21st April, 2017

Dear Ms Craven,

Re: the *Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2017*

All sexual offences against children are inherently serious and are viewed by the community as grave crimes requiring strong condemnation. The community is well aware of the significant harm caused by child sexual abuse: harm to the victim, their families and to all of the community, and we note that statements from the courts increasingly reflect a contemporary understanding of the harm these crimes cause.¹

We are also aware that in spite of the gains made in responding appropriately to these crimes, there remain significant difficulties in reporting, investigating and prosecuting them.

It is clear from the investigations of the Tasmanian Sentencing Advisory Council (SAC) that some reform to the sentencing of serious sexual offences against children is required: for example, Tasmanian courts do not always give enough weight to certain aggravating factors in assaults; decisions are too lenient for some categories of assault sentencing, including rape; there has been insufficient recognition in the sentences imposed of the violence inherent in the act of rape; and there has been too much weight given to offenders being of 'good character' when this can be part of the pattern of grooming victims.²

While some changes are clearly needed, TasCOSS is concerned that the introduction of mandatory imprisonment is not the appropriate response to these problems. We repeat our concern about the extension of mandatory sentencing, expressed in previous submissions to sentencing amendments. Experience in other jurisdictions has highlighted the perverse social consequences of introducing mandatory sentencing, and research has established that such measures are not effective deterrents. This

¹ Sentencing Advisory Council (2016), *Mandatory Sentencing for Serious Sex Offences Against Children: Final Report No. 7*, September 2016, p9

² SAC, *ibid*,

is well understood, expressed, for example, by both in statements by the Law Society of Tasmania³ and by the Australian Law Council. For example:

there is a lack of persuasive evidence to suggest that the justifications often given for mandatory sentences – retribution, effective deterrence, incapacitation, denunciation and consistency – achieve the intended aim. Instead, mandatory sentencing regimes can produce unjust results with significant economic and social costs without a clear and directly attributable corresponding benefit in crime reduction. Further, mandatory sentencing schemes undermine community confidence in judges to administer justice and deliver appropriate sentences.⁴

In relation to the *Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2017*, TasCOSS is concerned that restraints on judicial discretion in handling cases of sexual assault against children will mean that judges will not be able to take into account mitigating circumstances where it is appropriate to do so. While sexual offences committed by adults against young children, particularly where those adults are in positions of trust or authority, are viewed by the community and by the courts as serious offences which deserve severe punishment, not all sexual offences against children fall into this category.⁵ Also potentially affected by these charges are cases involving mutual relationships, where the offender is relatively close in age to the complainant and the young complainant has agreed to sexual contact within the context of a genuine and equal relationship, and cases involving young offenders who have cognitive or intellectual impairments. Research shows that these are cases where the public is willing to extend leniency to offenders.⁶ The court requires some discretion to deal with the complexity of these situations.

TasCOSS notes that the Sentencing Advisory Council's report was constrained by the terms of reference the SAC was given, and that the SAC has been quite clear in its reports that it recommends against mandatory sentences or non-parole periods for sex offenders.

The SAC outlined a number of objections to a mandatory minimum sentencing scheme. Some of the concerns were of significance to those with specialist knowledge of the law. Others were of concern to the broader community that we represent:

1. Mandatory sentencing does not lead to deterrence, of individual offenders, or of other members of the community.⁷
2. Mandatory sentencing may remove the incentive for offenders to plead guilty⁸, thereby putting victims through the increased trauma of trials.
3. The charge pursued will determine the sentencing outcome, meaning that the decision making authority is transferred from judges to the prosecutors. The SAC states, "[T]his shift from court to

³ The Law Society of Tasmania 'Law Society opposes Sentencing Amendment (Assaults on Police Officers) Bill, Media Release – 26 November, 2014 < <http://lst.org.au/media-release-26-november-2014/>>

⁴ Ibid

⁵ Sentencing Advisory Council (2015), *Sex Offence Sentencing: Final report*, August 2015, p75

⁶ SAC *ibid* p75

⁷ SAC *Mandatory Sentencing for Serious Sex Offences Against Children*, p6

⁸ SAC *ibid*, p7

prosecution means that the process lacks transparency and consistency and may lead to unfairness.”⁹

When given the option of producing recommendations for sentencing of sex offences within the existing discretionary sentencing regime, the SAC made a series of recommendations which were intended to create mechanisms that would bring about an increase in sentencing for sexual offenders. (Even as it noted that there were indications that the Supreme Court is increasing sentencing for serious sexual offences, particularly those involving children.)

To reach our shared goal of a community in which children are free of the threat of sexual violence we need to base legislative and policy decisions on good evidence. The introduction of mandatory sentencing provisions has had recent popularity in Australian jurisdictions, where it is increasingly being introduced as a response to popular concerns about lawless behaviour, in spite of the evidence of its potential harms. As the Chair of the Tasmanian Sentencing Advisory Council has written in relation to other jurisdictions,

‘In the end, fear-based policies can do more harm to the fabric of the law than the offenders themselves. We need to look beyond opinion polls to recognise the importance of making decisions on the basis of evidence, not anecdote. And we need to bear in mind the enduring values of fairness, proportionality and due process.’¹⁰

If you have any queries about this submission, please contact



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⁹ SAC *ibid*, p8

¹⁰ Freiberg, A (2015) ‘Public fear of sex offenders should not influence sentencing policy’, *Sydney Morning Herald*, June 30, 2015, <http://www.smh.com.au/comment/public-fear-of-sex-offenders-should-not-influence-sentencing-policy-20150628-ghzu7g.html>