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Professor Arie Freiberg
Chair of the Tasmanian Sentencing Advisory Council
Via email: sac@justice.tas.gov.au

Friday 17th May 2013

Dear Professor Freiberg

Re: consultation on sentencing for sex offences in Tasmania

Thank you for the opportunity to provide a submission on this important issue. Civil Liberties Australia (CLA) commends the Sentencing Advisory Council for the quality of both the research paper and the consultation paper.

The Sentencing Advisory Council is tasked by the Attorney General with the very important role of gauging public opinion on the appropriateness of sentences imposed against sex offenders. We are sure you will appreciate the importance of seeking opinion shaped by the facts of a case as opposed to opinion shaped by the media portrayal of a case. There can be very important differences between the two.

The media, due to limited time and space, can only report what they selectively decide are the most newsworthy aspects of a case. For better or for worse, these concentrate on shocking, angering or exciting the media consumer. Unfortunately, the facts of cases which do not titivate often do not make the final report as published by the media. The excluded facts may not be consumer newsworthy but can be the core factors that the courts need to juggle when deciding a sentence.

The Tasmanian Jury Study (TJS) that you refer to in the research paper provides clear evidence of this effect. The TJS showed that when jurors were asked in the abstract about sentences imposed for a certain category of crime, they felt judges were too lenient; yet, when asked about the actual case the juror served on in which they sat through all the facts and were intimately aware of all aspects of the case, the jurors' reactions were far more evenly spread: about half thought the judge was too lenient while the other half thought the judge too harsh. The key finding of the study was that judges are, in general, meeting the mid-point of the broad spectrum that is public opinion. This is quite a positive finding indeed.

Flowing from the principle of relying on opinion shaped by facts, we believe the concluding paragraphs of the research paper provide an excellent discussion of the difficulties involved in gauging public opinion on sentencing.

We have found in writing this submission that we could not have put it any better – a key paragraph on page 38 of the research paper says:

“The question of whether current sentencing practices for sex offences in Tasmania are appropriate is not susceptible to an easy answer. The problems of relying upon public opinion surveys which ask general questions about sentencing severity have been canvassed. Such top-of-the-head opinions tend to be based upon misconceptions about crime and sentencing patterns. This is illustrated in the Tasmanian jury study where 71% of respondents underestimated the imprisonment rate for rape. (Tasmanian Jury Study, Professor Warner, 2010). Moreover, these top-of-the-head opinions seem to be unaffected by differences in imprisonment rates so increasing the severity of sentences for sex offences is unlikely to decrease the proportion of the public who think sentences are too lenient as measured by public opinion polls. The Tasmanian Jury Study provides support for the claim that informed public opinion does not consider sentences for sex offences in general are too lenient. If there are differences between the judicial approach to sex offender sentencing and the views of a properly informed public, it does not necessarily mean that one view or the other is right. What is important in this context is that those differences are examined and debated. As scholars such as Hogg have argued, populism needs to be taken seriously (Hogg, 2012, ‘Punishment and “the people”’: Rescuing populism from its critics). Or as Indermaur, puts it, public opinion cannot simply be dismissed as uninformed, there is a need to ‘deal the public in’ in the debate about sentencing and punishment.”

We find one point especially salient: *“increasing the severity of sentences for sex offences is unlikely to decrease the proportion of the public who think sentences are too lenient”.*

This finding indicates that trying to align sentences for sex offences with public opinion is highly problematic and, potentially, ultimately fruitless. Put another way, it is entirely probable that should Tasmania embark on a program to increase the average sentence for sex offences, the public would still be dissatisfied and seek higher sentences again in the future.

CLA believes that rather than increase sentences to try and meet public expectations shaped by the media, a different approach that disseminates more information on sentencing to interested members of the public may deliver better results. Whilst not specifically listed in your terms of reference, we encourage the Sentencing Advisory Council to consider what options are open to the Tasmania justice system to publish more statistical summaries of the activities and decisions of our courts, and to issue regular, perhaps weekly, media explanations of major cases of public interest (much as the High Court does) as well as statistical summaries showing current and historical offending and sentencing averages. As civil libertarians we ultimately trust the individual members of the public to make good decisions and we agree with the statements of the likes of Russell Hogg and David Indermaur. Because of this we believe the task of the Sentencing Advisory Council and the Parliamentarians you advise is to strive to lift the standard of publicly available information and the quality of debate.

In conclusion, we commend you on your work to disseminate the statistics and information contained in both the consultation paper and the research paper. They represent a significant and lasting contribution to this important issue and the level of understanding and debate throughout Australia will be raised because of it. If we can help by serving on an advisory group for how more factual information could be disseminated, we would be happy to.

Yours sincerely

Richard Griggs
Director – Tasmania