

COMMUNITY LEGAL CENTRES TASMANIA

23 May 2024

Office of Strategic Legislation and Policy
Department of Justice
GPO Box 825
Hobart TAS 7001

via email: haveyoursay@justice.tas.gov.au

To the Department of Justice,
Re: *Sentencing Amendment (Presumptive Sentencing for Assaults on Frontline Workers) Bill 2024*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Sentencing Amendment (Presumptive Sentencing for Assaults on Frontline Workers) Bill 2024* ('the Bill').¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

The Bill is the Government's second attempt to impose harsher sentences on persons convicted of assaults against frontline workers. In 2016, the Government introduced the *Sentencing Amendment (Assaults on Frontline Workers) Bill 2016* which sought to impose a mandatory minimum sentence of six months imprisonment for assaults on frontline workers. The Bill was lost after the vote was tied in the House of Assembly and the then speaker of the House of Assembly voted against the Bill.²

The Bill makes a number of amendments to the earlier iteration. First, 'frontline workers' is defined more broadly to include persons working for the Tasmanian Fire Service, retail or hospitality workers and transport workers. Second, the Bill no longer seeks to impose a mandatory sentence but instead a presumptive minimum sentence. The effect of this change is that rather than a court having to impose a mandatory sentence, the court may instead impose a sentence less than the prescribed minimum sentence if particular circumstances are met.³ Finally, the Bill

¹ CLC Tas would like to acknowledge legal researcher Alec Brodie and those persons and organisations who gave freely of their time in assisting with our submission.

² Tasmania, *Parliamentary Debates*, House of Assembly, 1 August 2019 at 75-76 (Sue Hickey).

³ See, for example, Adrian Hoel and Karen Gelb, *Sentencing matters: mandatory sentencing* (Sentencing Advisory Council Victoria: August 2008) at 6-7.

sets out a range of circumstances that will not see the imposition of the prescribed minimum sentence namely that an offender had impaired mental functioning or that the imposition of the sentence would be unjust.

THE LAW

- *Current Legislative Framework*

An assault against a police officer or an emergency service worker is already a crime pursuant to section 34B of the *Police Offences Act 1935* (Tas). An assault against a police officer is punishable with a term of imprisonment not exceeding three years whilst an assault against an emergency service worker is punishable with imprisonment not exceeding two years. More serious assaults against police officers are also able to be prosecuted pursuant to the *Criminal Code Act 1924* (Tas).⁴

In 2014, the passing of section 16A of the *Sentencing Act 1997* (Tas) meant that minimum mandatory sentences of six months are imposed where an offender is convicted of an assault which causes ‘serious bodily harm’ to a police officer on duty unless there are exceptional circumstances.⁵ Minimum mandatory sentences were strongly supported by the Police Association of Tasmania on the basis that they would “send a strong message that such violent assaults are unacceptable” and “from the evidence we have seen in other states, we anticipate that this measure will reduce the rates of assaults on Police in Tasmania”.⁶

Tasmanian police data represented in the graph below does not substantiate the claim that the introduction of a minimum mandatory sentence had the purported effect of reducing the number of assaults on police officers. Over the last decade, the number of police officers in Tasmania has increased by 15 per cent⁷ whilst the number of assaults against police officers has increased by 27 per cent. Since 2020, the data shows that the number of serious assaults against police officers has reduced, which may be explained by the introduction of body worn cameras in July 2020.⁸ When introducing the reform, the then Minister for Police, Fire and Emergency Management acknowledged that “body worn cameras provide significant operational benefits, including positively influencing the behaviors of people interacting with police and reducing the number of assaults against police”.⁹

It is clear from the data, that the introduction of section 16A of the *Sentencing Act 1997* (Tas) has had no significant deterrent effect on police officer assaults in Tasmania. This finding is consistent with academic research carried out of minimum

⁴ Section 114 of the *Criminal Code Act 1924* (Tas).

⁵ Section 16A of the *Sentencing Act 1997* (Tas) became law following the passing of the *Sentencing Amendment (Assaults on Police Officers) Bill 2014*.

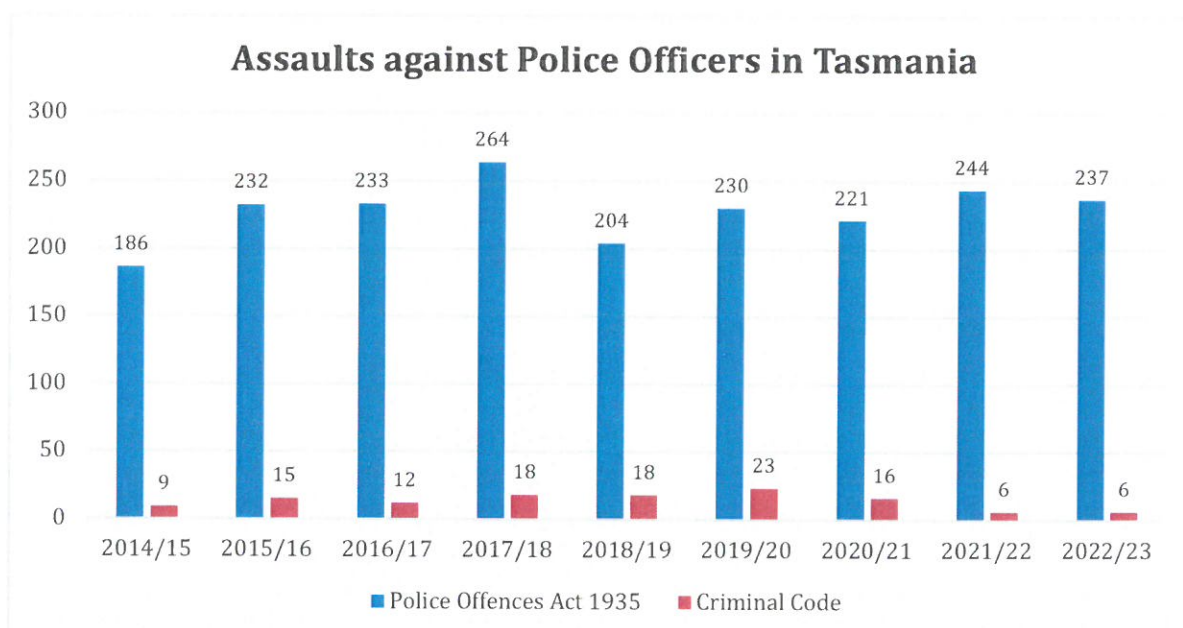
⁶ Police Association of Tasmania, ‘PAT Welcomes Minimum Sentence Announcement’ (Media Release, 3 March 2010). As found in Sentencing Advisory Council, *Assaults on Emergency Service Workers* (Final Report: No. 2) at 1.

⁷ Productivity Commission, *Report on Government Services 2024* (Released 29 January 2024). As found at Table 6A.2 of Justice – Police Services. The data notes that there were 1103 FTE police officers in 2014-15 and 1278 in 2022-23.

⁸ Mark Shelton, Minister for Police, Fire and Emergency Management, ‘Body worn camera roll out complete’ (Media Release: 17 July 2020).

⁹ Ibid.

mandatory sentencing offences in other Australian jurisdictions which have found that minimum mandatory sentences are not an effective deterrent.¹⁰



Source: Department of Police, Fire and Emergency Management, Corporate Performance Reports.

The Supreme Court of Tasmania has only reported one case in which an offender was sentenced pursuant to section 16A of the *Sentencing Act 1997* (Tas). In *Tasmania v Gladwin*,¹¹ the accused was charged with assaulting a police officer who was attempting to arrest him. During the attempted arrest, the police officer fell backwards hitting her head on a wall heater. The police officer subsequently discovered that she had fractured her left little finger in the fall. Relevantly, the case considered whether the injuries suffered by the police officer amounted to ‘serious bodily harm’. The Supreme Court noted that whilst ‘bodily harm’ and ‘grievous bodily harm’ are defined¹² there is no definition of ‘serious bodily harm’. The Supreme Court found that ‘serious bodily harm’ was more than bodily harm but not as serious as grievous bodily harm, with Brett J observing:¹³

The above considerations lead to the conclusion that by using the term "serious bodily harm", the legislature intended that the minimum degree of seriousness required to activate the section would fall somewhere between mere bodily harm and grievous bodily harm. Ultimately, the assessment as to whether the police officer has suffered serious bodily injury will be a question of fact and degree, but made in the context of the abovementioned

¹⁰ David Brown, *Mandatory Sentencing: A Criminological Perspective* (2001) 7(2) *Australian Journal of Human Rights* at 11.

¹¹ [2016] TASSC 64.

¹² Grievous bodily harm is defined in section 1 of the *Criminal Code 1924* as “any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health”. Whilst not statutorily defined, the definition of ‘bodily harm’ most often relied on in the Supreme Court of Tasmania is “Any hurt or injury calculated to interfere with health or comfort. Such hurt or injury need not be permanent but must, no doubt, be more than mere transient or trifling”: *R v Donovan* [1934] All ER 207.

¹³ [2016] TASSC 64 at [35].

considerations. The causation of mere bodily harm will not be sufficient to activate the application of the section, but neither must the harm amount to grievous bodily harm. In determining whether or not the harm suffered is serious bodily harm, the sentencing court must be satisfied of that fact beyond reasonable doubt before the section will have application.

On the facts before it, the Supreme Court determined that the bodily harm was not serious enough to warrant the imposition of a mandatory term of imprisonment because the police officer did not require hospitalisation or surgery. The accused was subsequently sentenced to 5 months imprisonment.¹⁴

Aboriginal and Torres Strait Islander persons

Mandatory and prescribed minimum sentences disproportionately affect the Aboriginal and Torres Strait Islander community. In Tasmania, 23 per cent of the prison population is Aboriginal or Torres Strait Islander whilst comprising 5 per cent of the broader Tasmanian population.¹⁵ As well, over the last decade, Tasmania's prison population has increased by 30 per cent whilst the Aboriginal and Torres Strait Islander prisoner population has almost doubled (98 per cent increase).¹⁶ We are concerned that the introduction of a prescribed minimum sentence is likely to disproportionately impact Aboriginal and Torres Strait Islander people and contribute to increased incarceration rates as documented in other jurisdictions.¹⁷

THE BILL

- *Impaired Mental Functioning*

The theory that a prescribed minimum sentence will operate as a deterrent cannot be applied to those with impaired mental functioning as offending is often not based in rational decision making.¹⁸ Persons with impaired mental functioning are more likely to come into contact with frontline workers, and as a result, the introduction of a prescribed minimum term of imprisonment is likely to have a detrimental effect on this group.

Another reason why harsher sentences should not be imposed against persons with impaired mental functioning is that families, friends and carers may be reluctant to seek medical assistance where the person is exhibiting aggressive behaviour because of a concern they may behave aggressively toward a frontline worker.

Finally, Tasmanian courts have long recognized the need for flexibility when sentencing a person with impaired mental functioning. For example, in the case of *Startup v Tasmania*,¹⁹ the Tasmanian Court of Criminal Appeal accepted that

¹⁴ *State of Tasmania v Ross Gladwin*, comments on passing sentence, 9 December 2016.

¹⁵ Australian Bureau of Statistics, *Prisoners in Australia 2022*, Table 15. Also see *Tasmania 2021 Census All persons QuickStats*.

¹⁶ Australian Bureau of Statistics, *Prisoners in Australia, 2022*, Table 14.

¹⁷ Australian Law Reform Commission, *Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples* (December 2017: Final Report 133) at 3.2.

¹⁸ See, for example, Donald Ritchie, *Sentencing matters: Does Imprisonment deter? A Review of the Evidence* (Sentencing Advisory Council Victoria: April 2011).

¹⁹ [2010] TASCCA 5.

impaired mental functioning may impact on the sentence in the following six ways:²⁰

1. *The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.*
2. *The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.*
3. *Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.*
4. *Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.*
5. *The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.*
6. *Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.*

We therefore welcome the Bill's explicit recognition that a court will be able to refuse to impose a minimum 6-month term of imprisonment if the offender has impaired mental functioning that reduces the offender's culpability.

- ***Unjust***

As well as excluding persons with impaired mental functioning, the Bill will also allow a court to refuse to impose a minimum 6-month term of imprisonment if the sentence would be "unjust". In the *Sentencing Act 1997* (Tas), "unjust" is currently used in only one context, namely where a sentencing judge is required to consider activating a term of imprisonment where an offender has been found guilty of breaching a suspended sentence.²¹ In the case of *Tanner v Brown*,²² Wood J found that the circumstances giving rise to an unjust sentence of imprisonment would be

²⁰ [2010] TASCRA 5 at para. [36]. Also see *Director of Public Prosecutions (Acting) v CBF* [2016] TASCRA 1.

²¹ Section 27(4B)-(4C) of the *Sentencing Act 1997* (Tas).

²² [2011] TASSC 59.

different in each case as would the court's assessment of the weight to be given to those circumstances:²³

Ultimately, the question of whether it would be unjust to activate a suspended sentence will depend on an evaluation of the individual circumstances of each case. In assessing this question of whether it would be unjust to activate the sentence "the objective of the suspended sentence option as reformatory as well as penal" is to be borne in mind. Thus, relevant factors may include those that indicate the progress made by an offender in relation to his rehabilitation.

...

It must be emphasised that the weight to be given to factors that weigh in an offender's favour such as considerations indicative of an individual's reform will vary from case to case depending upon the circumstances. As noted by Neasey J in Greaves v Smith the "matters that need to be weighed when breach of suspended sentence has been proved require a careful exercise of judgment". Even if a consideration is deserving of significant weight does not mean that it will be determinative. The penal nature of the suspended sentence must be given weight, ordinarily a suspended sentence is meant to operate as a last chance and there are sound reasons in principle for activating the sanction in the event the person breaches it. As stated by Callaway JA in DPP v Newman, at 718, it is a case of balancing the factors to which King CJ referred (which are set out in the passages quoted above) against the circumstances of the individual offender and the court's desire, as in all cases, not to take a more severe course than is warranted by all the relevant considerations, including the public interest. It is necessary to keep foremost in mind the statutory imperative that the sentence be activated unless that consequence would be unjust. [citations removed]

RECOMMENDATIONS

- *Limit to those working in emergency services*

As the Bill is currently drafted, the minimum 6-month term of imprisonment will be imposed against persons who assault an 'emergency services officer' or a 'frontline worker'.

Assaults against police officers and other emergency workers are specific offences in every Australian State and Territory. Although some Australian jurisdictions use the nomenclature 'frontline workers', the definition of a frontline worker is generally limited to persons working or volunteering for organisations providing emergency services such as the Fire Brigade or the Ambulance Service, as Table 1 highlights.

²³ [2011] TASSC 59 at para. [94]-[96]. Also see *Jones v Clarke* [2012] TASSC 12; *Butcher v Lyons* [2018] TASSC 39; *Parker v Stebbings* (2017) 29 Tas R 252; *Biddle v Hayward* [2014] TASSC 65.

Table 1: Assaulting a Police Officer or other Emergency Worker in Australian Jurisdictions

Jurisdiction	Specific Provision	Definition
ACT	Section 26A of the <i>Crimes Act 1900</i> "frontline community service provider"	Police Officer, protective service officer, corrections worker, members of the Ambulance Service, members and volunteers of the Fire Service and persons working for a health service.
Northern Territory	Section 189A of the <i>Criminal Code Act 1983</i> "emergency worker"	Police officers, persons employed or volunteering for the Fire Service, public servants with emergency response duties, persons employed by the Ambulance Service, medical and health practitioners.
NSW	Division 8A of the <i>Crimes Act 1900</i> "frontline emergency worker" and "frontline health worker"	Police officers, a member of an emergency services organization, a person working in a hospital or health institution, a member of the Ambulance Service, a member of the Fire Service, a person working in a pharmacy, security staff in a hospital, correctional officers, persons employed to provide services in a correctional facility.
Queensland	Section 340 of the <i>Criminal Code 1899</i> "public officer"	Police officers, persons employed by the Ambulance Service, persons employed or volunteering for the Fire Service, persons working for a health service including paramedics, nurses and doctors, child safety officers, transit officers, corrective service officers
South Australia	Section 20AA of the <i>Criminal Law Consolidation Act 1935</i> "prescribed emergency worker"	Police Officer, prison officer, community corrections officer, youth justice officer, persons working in a hospital, a general practice or medical centre, a person working in a pharmacy a member of the Ambulance Service, a member of the Fire Service, a member of the emergency service
Tasmania	Section 34B of the <i>Police Offences Act 1935</i>	Police officers, persons employed or appointed by the Fire Service, persons employed or appointed by the Ambulance Service, emergency management workers
Victoria	Section 10AA of the <i>Sentencing Act 1991</i> "emergency worker on duty"	Police Officers, protective services officer, persons employed by the Ambulance Service, person providing emergency treatment to patient in hospital, persons employed or volunteering for the Fire Service; public servants with emergency response duties, volunteer emergency workers, custodial officers and youth justice custodial workers.
Western Australia	Sections 297(4) or 318(1) of the <i>Criminal Code Act Compilation Act 1913</i> "public officer"	Police officers, custodial officers, train, ferry and bus drivers, persons employed by the Ambulance Service, persons employed or volunteering for the Fire Service, person working in hospital or providing a health service to the public, persons contracted to provide court and custodial security officers and persons contracted to work at prison.

The Bill, if passed, will significantly broaden the definition of ‘frontline worker’ as that term is used in other jurisdictions. For example, in New South Wales, the definition only extends to a frontline *emergency* worker or a frontline *health* worker. Whilst no one should ever be assaulted, we understand the important policy consideration warranting police officers and emergency service workers being protected from assault, namely that part of their role includes saving lives and keeping us safe. As a result, the assault of police officers and other emergency service workers may threaten the lives and safety of others. However, it is difficult to make the same argument for ‘retail and hospitality workers’, or ‘passenger transport service drivers’ and ‘security officers’.

Another reason why the definition should be limited to persons working in emergency situations is that there is no evidence of other occupations being targeted, warranting their inclusion. Information provided by Workcover Tasmania highlights that over the last five years, assaults against retail and hospitality workers resulting in a workers compensation claim was rare²⁴ and that assaults against security officers and guards resulting in a workers compensation claim has more than halved.

Whilst we do not support prescribed minimum sentences being introduced for any occupation, it is worth noting that three of the five occupations with the highest rates of assault are not included in the Bill and only five of the top ten are listed.

Workers Compensation Claims for assaults at work

Occupation	2019	2020	2021	2022	2023	TOTAL
Nurses and Nurse Aides	52	42	61	57	77	289
Special Care Workers	29	33	36	38	37	173
Teachers and Teacher Aides	24	14	23	22	40	123
Police Officers	20	26	16	18	22	102
Welfare Associate Professionals	14	14	16	20	16	80
Prison Officers	14	11	17	24	10	76
Bus and Coach Drivers	2	2	6	7	13	30
Security Officers and Guards	7	1	4	4	2	18
Children Care Workers	3	1	7	3	3	17
Cleaners	6	1	2	2	4	15
Sales Assistants	4	4	1		5	14
Bar Attendants and Baristas		2		2	3	7
Ambulance Officers and Paramedics	1			4	2	7
Fire and Emergency Workers					1	1
TOTAL	176	151	189	201	235	952

Source: Worksafe Tasmania.

²⁴ Data provided by the Australian Bureau of Statistics notes that 24,430 Tasmanians work in retail (9.6 per cent of employed Tasmanians) and 19,461 Tasmanians work in hospitality (7.6 per cent): Australian Bureau of Statistics, *Census of Population and Housing (2021)*.

In March 2013, the Sentencing Advisory Council released its final report 'Assaults on Emergency Service Workers'.²⁵ The report recommended that the definition of an emergency services worker be defined narrowly as "those at the forefront of an emergency".²⁶

We strongly agree with the Sentencing Advisory Council that only those occupations addressing emergencies should be included in the definition of an emergency services worker. We also see no justification for broadening presumptive minimum sentences to other so-called 'frontline workers'. Child safety officers, correctional services officers, health workers, Workplace Healthy and Safety inspectors, transport workers and retail or hospitality workers should all be excluded from the Bill.

Recommendation:

That the definition of 'frontline workers' be removed and 'emergency services officer' be limited to those persons working or volunteering for emergency services.

Summary

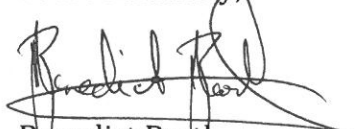
We strongly believe that the Bill will not protect either frontline workers or emergency service workers. The evidence demonstrates that the mandatory sentence provision already in place for assaults against police officers has not seen any decrease in assaults against police officers and there is no evidence that introducing presumptive minimum sentences for other occupations will have any deterrent effect.

We strongly believe that the current sentencing regime for assaults on emergency services workers is appropriate, and that the judiciary should retain the fullest discretion in reflecting the aggravating and mitigating features when sentencing the offender.

However, if the Government does intend to proceed with the Bill we urge them to merely amend the definition of 'emergency service worker' in section 34B of the *Police Offences Act 1935* (Tas) to include those working or volunteering for emergency services.

If you have any queries or we can be of any further assistance, please do not hesitate to contact us.

Yours Faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

²⁵ Sentencing Advisory Council, *Assaults on Emergency Service Workers* (Final Report: No. 2).

²⁶ *Ibid* at 37.