



## **Jesuit Social Services and Public Policy Institute**

### **NATIONAL JUSTICE SYMPOSIUM**

**'WHAT DOES A HUMANE AND EFFECTIVE JUSTICE SYSTEM LOOK LIKE?'**

**21<sup>st</sup> & 22<sup>nd</sup> October 2011**

**Australian Catholic University - Fitzroy Victoria**

---

#### **Keynote Address by Frank Vincent QC AO**

**'WHAT DOES A HUMANE AND EFFECTIVE JUSTICE SYSTEM LOOK LIKE?'**

When I was first invited to address this question, my mind went immediately to consideration of the numerous practical ways in which our criminal justice system could be improved. I thought about the inadequate physical infrastructure, the inordinate delays in the hearing of cases with their consequent additional stress and injustice, the complexity of the law that too often renders the conduct of criminal proceedings absurdly difficult, a large array of sentencing issues, the problems in our prison system and the limited resources available post release.

These are all important areas that must be addressed if we are to ensure that our legal system operates with fairness and efficiency. However, they are also symptoms that reflect our approach to more fundamental issues relating to our social structures and values and the broad attitude that has been adopted with respect to criminal justice issues generally.

We have never had what I would regard as an adequately humane and effective system, although it could reasonably be expected to be an integral feature of the kind of modern affluent society committed to human rights and values to which we aspire and that we often claim to be. So it requires some imagination to envisage how it would appear and function in practice.

Further, I am by no means confident that what I would regard as the elements of such a system would be endorsed by others. There are many involved in even the simplest of criminal cases and their perspectives can reasonably be very different. A system that is both humane and effective must respect their individual situations and reasonable responses. The notion of humanity in this context must incorporate and respect the understandable responses of the affected community, the victims and the situation of the accused or perpetrator.

The best that I have been able to do in attempting to answer this question is to indicate my views of the values on which a humane and effective system would be based and some images of how it would operate. I also propose to draw attention to problems and deficiencies that I have observed in our approach to criminal justice issues in the course of my work in the area over many years.

As I see it, a humane and effective criminal justice system cannot exist unless the community not only endorses what can be fairly described as basic human values and rights in a general sense, but is also prepared to adopt the policies and accept the costs involved in order to give real substance to them. Regrettably, for both practical reasons and our choice of priorities, there has always been a considerable gulf between our social rhetoric in this area and the realities for many who live our community. The deficiencies in the criminal justice system reflect that gulf.

Insofar as they are poor, those who come before our courts, charged with criminal offences are perceived as the undeserving poor whose position and fate are entirely within their control and the consequences of their own conduct and choices. It is not at all difficult to understand how this view has developed, particularly in times of economic uncertainty or against the background of competing demands in such areas as health, education and housing, but it is a very limited one that neither recognises the factors contributing to anti social behaviour and it's real economic and social costs nor seriously attempts to discover the best means of reducing its incidence.

Our claim to be a community that addresses social issues in a fair and humane fashion, including those related to criminal justice, has been seriously weakened over recent years as, for one reason or another, there appears to have been a hardening of attitude that perhaps can be most powerfully seen in our approach to asylum seekers who arrive by boat.

Presumably because they believe that it will increase their popularity and give them an advantage over their opponents, rather than leading the community in the manner in which these unfortunate people should be treated, there has been resort by both of our major political parties to a primitive populism that strips them of human rights to which, through our adoption of international conventions, we have, as a nation, acknowledged they are entitled. This, of itself ought to be felt as acutely embarrassing. But more importantly, the approaches that have been pursued are devoid of moral principle and involve the effective rejection of any recognition of the individual humanity of those who seek haven for themselves and their families.

The justifications proffered to support these approaches, namely, that it is important to restrict the opportunities of those profiting from people smuggling and to discourage asylum seekers from placing themselves in danger by embarking on such journeys are clearly unsatisfactory. It is difficult to avoid the conclusion that they are provided as rationalisations for decisions made for less honourable reasons.

How can we justify the adoption of policies that involve the indefinite detention of people, including women and children who, on any reasonable assessment, must be viewed as highly unlikely to constitute any threat whatever to the security, health or standard of living in our society and whose central aim is clearly to find a safe place with the kind of opportunities that we regard as our fundamental entitlements for themselves and their families? What are we really afraid of? The answer, I believe, is to be found in easily exploitable fears and prejudices which are perceived as so pervasive that few of our politicians dare to challenge them. Perhaps, one of the most offensive features of what has been happening since the days of the Tampa and the revolting children overboard incident is that far from being shamed by what took place, we have as a nation seemingly embraced the adoption of increasingly harsh regimes involving political gamesmanship and maneuvers that attract no credit to any of the participants.

It is more than mildly ironical that there is a real prospect that the outcome of the posturing of our representatives in this political theatre of the macabre will be a considerably more reasonable approach than was ever intended and that each side will heap abuse on the other as the cause.

What does our approach to this issue suggest about us as a community and our actual as distinct from our asserted values is a question that to a large extent is very carefully avoided. Coded language and a rhetoric chosen to depersonalise the real people involved have been employed to provide a semblance of principle to cover the abrogation of our human responsibilities.

Our approach to criminal justice has been similar in a number of respects and, to a substantial extent, influenced by similar considerations. Again, we search for images and labels that separate and depersonalise those who are subject to it. We are reluctant to acknowledge that they are not only part of our society but often the product of our own failures, injustices and, indeed, our real rather than our asserted values. Crime, it must always be borne in mind, represents a distorted mirror image of our society, to some extent revealing features that we do not want to recognize and some for which we do not want to accept responsibility.

Clearly, not all crime can be linked social disadvantage but it is no coincidence that our prison population is still largely drawn from the poor, the uneducated, the mentally impaired and the intellectually disabled, together with our indigenous people. These groups have traditionally been the major occupants of our gaol cells and not much has changed in that respect.

Disadvantage and discrimination have a wide range of practical consequences not only to those who are subject to them but to the community in general. The engagement in criminal activity is one of them. But there are many others that are also extremely damaging and costly.

To deal with that underlying disadvantage and thereby reduce these consequences requires the preparedness of the society concerned to address its various manifestations and to contribute on an ongoing basis to its alleviation.

I do not mean to suggest that we, as a community, are not mindful of these links or that we are not prepared to assist those in need. We can legitimately claim to do so and, I would add, very generously by international standards. But, as an affluent country, we have the capacity and should be prepared to do better if for no other reason than that it is in our interests.

I was never more acutely aware of the inadequacy of our approach to what we call criminal justice in this regard than, on one sunny morning many years ago, when walking to the Courthouse in Alice Springs. My task on that day was to present submissions in mitigation of penalty for an aboriginal man who had killed another in a drunken brawl in the Todd River. He was pleading guilty to manslaughter. I looked across the dry river bed to where a number of people were camped and saw a virtually identical fight in progress. The thought occurred to me that I could well return in a few months to represent the survivor of that dispute.

The ritual in which I was about to participate seemed to mock rather than represent justice. Was there real justice to the dead man in the punishment of the individual for whom I appeared and whose level of personal culpability could be fairly regarded as limited and there was plenty of guilt otherwise to spread around and many to share it.

The criminal justice system operating at its best is still a very blunt instrument that centrally relies on the threat and imposition of punishment to achieve its objectives. However, only a moment's thought is required to appreciate that there can be far better ways of reducing the incidence of the behaviours concerned, including dealing with the factors that have contributed to the engagement in such conduct in the first place. In the Alice Springs situation, there could be no doubt that we, as a society had not only long aware of the social circumstances in which the aboriginal people were living but were in very large measure responsible for them. We had also known for some time before this event that there had been far too many tragedies of a similar kind and that they would almost certainly continue to occur. In more than one sense, by not addressing known social conditions, we had contributed substantially to this and many other deaths. However, we would never be called upon to admit our own complicity. If we, as a relatively affluent society committed to the advancement of human rights and dignity, as we so often asserted, were seriously determined to reduce the incidence of this type of violence common sense indicated that attention was required to the well recognized underlying causative factors.

One group of prisoners that I found particularly concerning from this perspective of community responsibility and that I regularly encountered in the parole setting were those who had been in the care of the State from their early years. Commonly they came from broken or abusive families and had long histories of foster homes and institutional confinement. They trusted no one and looked at the other Board members and myself with disbelieving streetwise eyes. They had no sense of loyalty to the community and regarded any expressions of concern for their welfare as devoid of substance and truth. They saw no good reason to comply with society's rules, had no serious expectation that things would ever change for them and viewed themselves as outsiders. Usually, they had little education and no skills that would enable them to secure employment.

Yet, these were people for whom the community had assumed responsibility and had failed them miserably. It was unsurprising that they had little or no respect for society, its institutions or, and very importantly, themselves. They regarded the national rhetoric as fraudulent and hypocritical. Their major identification was with others like themselves. Most had become involved in drugs. The younger ones, often having spent much of their childhood and teenage years in environments that provided little opportunity for normal development had now reached adulthood and were already at considerable risk of becoming institutionalised criminals. It was apparent that if that outcome was to be avoided, even at that late stage, a great deal of assistance would have to be provided.

A humane society would seldom need to require its criminal system to deal with the consequences of its own failures in this regard as it would have adequate child protection measures and support structures in place to address the issues with which the young people were confronted at a much earlier stage.

What was required at the time at which I encountered these young people in the Adult Parole Board was a structured properly funded support program that was designed to help them develop the capacity to function and to give them a vision for the future which was realistically attainable from their perspective rather than what had become almost a meaningless threat of greater punishment if they offended. That structure has never been available.

The older prisoners in this group were often highly institutionalized, usually drug addicted and possessing limited capacity to function outside the prisons in which they served their lives in installments.

A sensible, even if not particularly humane, society recognizes that poverty and discrimination and the inadequacies in its child support, mental health and educational structures have inter generational consequences that impact upon the expectations and aspirations of whole communities, contributing to the development of destructive and, to some extent, independently continuing sub cultures of alcoholism, drug abuse, criminal activity and welfare dependency. These subcultures assume a power of their own that further entrenches alienation and inhibits aspiration. On one occasion, a young prisoner, in an attempt to impress the Board on which I was sitting said "Judge, you knew my father." I responded "Son, I knew your grandfather". That remark seems humorous until thought is given to what it conveyed. Another, when I naively enquired whether he had family support - I would have instantly recognized the names of many of his relatives- responded that without their support he would never have been in prison. As a practical proposition, little had been or was likely to be done to assist these young men. They would almost certainly be back. A society with a humane and effective criminal justice system would be concerned to avoid that and be prepared to provide the necessary resources. It would, in other words, endeavour to mitigate the damage of the past to reduce the potential for damage in the future.

The primary objectives of an effective criminal system must be to assist in the reduction of damaging anti social behaviour, to vindicate the rights and values of the community generally and those who have been directly affected and to help provide a foundation for the rehabilitation not only of the individual but of victims and the affected society.

The last aspect of the proper role of rehabilitation in a humane criminal justice system is not often mentioned. A humane system is not only concerned with those who offend but with the broader impact of crime generally and the particular crime upon the community and those who may be directly or indirectly affected by it. Some years ago when imposing sentence upon an individual convicted of murder in truly dreadful circumstances, I explained in this context

"the process of social and personal recovery which we attempt to achieve in order to ameliorate the consequences of a crime can be impeded or facilitated by the response of the courts. The imposition of a sentence often constitutes both a practical and ritual completion of a protracted painful period. If the balancing of the values represented by the sentence is perceived as just, the process of recovery will be assisted. If not, there will be created within the minds of those directly affected by the crime and the wider community generally a sense of injustice and hurt and failure of the system that may never be removed".

A humane and effective criminal justice system accepts responsibility to ensure that accused, victims and witnesses are treated with dignity and respect for their rights and

respective situations throughout the whole process. Police stations and courts, in particular, are intimidating places for most people and it is often forgotten how traumatic that involvement in a crime or its aftermath can be. Much needs to be done to improve the situation in Victoria in this regard.

An important aspect of the notion of social rehabilitation in a humane system is the imposition of just punishment upon those who are culpable. Although I have placed great emphasis on the social factors that contribute to criminal behaviour, I am not to be taken as in any way suggesting that those who choose to break our laws are not to be held as other than accountable for their decisions and the consequences of their actions. They do have to be placed in an appropriate context, but there are choices made often with a clear appreciation of the seriousness of the conduct involved and quite independently of any disadvantage to which they had been or were then subject. The community reasonably expects that deliberate disregard of its values and the infliction of injury, loss and damage upon persons entitled to its protection will result in the imposition of just punishment reflecting the seriousness of the conduct and the blameworthiness of the perpetrator.

The objectives of punishment in a criminal justice system are, as I see them, in part to effect retribution for the hurt sustained, to vindicate the rights and values of the community and the directly affected individuals and to operate as a general and specific deterrent to future conduct of a similar kind.

But punishment is only one of the objectives of a humane and effective system and it may not, in a particular case be the most important. Indeed not all of those reasons for imposing punishment may be present in a given case and the significance that should be given to them can vary substantially. Sentencing judges regularly encounter public criticism in making this assessment and the weight attributed the various considerations that need to be taken into account. It is easy to understand how the balance struck can sometimes become the subject of considerable public reaction, particularly when viewed from the perspective of a grieving family member or a victim whose life has been irrevocably altered.

Our criminal justice system despite its obvious limitations has always been intended and expected to function in as humane and effective fashion as is reasonably possible and to accommodate a whole range of sometimes competing considerations that include the social factors discussed and apply them to the circumstances of the specific cases and individuals before the courts. And I think that it can be fairly confidently said almost everyone involved in it approaches their specific function in that fashion.

However, there is a shortage of resources at every level that restrict what can be achieved. There are substantial delays in the processing of cases, including, for example, backlogs in the examination by an overstretched Police Forensic Science Centre that result in substantial delays before cases can be listed for hearing. The Office of Public Prosecutions operates under similar difficulties. There are then insufficient judges to deal with them.

The combined effect of these and other blockages is that it is by no means uncommon for criminal cases to take in excess of eighteen months before being heard.

I noticed a newspaper report within the last week drawing attention to the perennial and long since identified problem of overcrowded conditions in the remand centre resulting, it

was said, in the detention of persons in unsuitable conditions in watch houses for up to two weeks and often without any natural light or exercise. As the secretary of the Police Association is reported to have stated, "you don't have to be a human rights expert to know that a police cell is not a suitable environment for inmates."

In a humane and effective justice system, detention prior to the determination of guilt would be permitted only when it could be seen as necessary to secure the appearance of the charged person at trial, to guard against a reasonable risk of interference with witnesses or the commission of other offences. Any period of such detention would be kept as short as possible and the conditions, of course, would be as humane as was reasonably achievable. Lengthy periods of detention of the kind to which we have become accustomed would not be tolerated.

From the viewpoint of a person who may well be subsequently acquitted and for whom the process can easily take three years from the time of arrest, the lengthy delay can occasion real injustice. If he or she is held on remand in the meantime, the personal consequences hardly require elaboration.

Viewed from the position of witnesses and others who find themselves caught up in the process, the situation can be very stressful and damaging.

Obviously, and far too often, victims and their families who are already badly affected are subjected to additional extreme stress and anguish as they await the resolution of the case, which may then be subject to appeal. If the overall economic costs alone are taken into account, the community can be seen to be paying a very high price indeed for these delays. They would not be tolerated in a humane system.

It is regrettable that there does not seem to be much public concern about the length of time involved in the handling of criminal cases in this State. Not long before I retired, I was a member of the Court of Appeal that heard the appeals of a number of young Vietnamese men who had been found guilty of the murder of other young Vietnamese following a dispute in a South Yarra night club. The process had taken six years during when they had been in custody before we concluded that, in the cases of three of them, the evidence was clearly insufficient to sustain a conviction. There was some reference to this very lengthy period in the newspapers in the day or two following but, seemingly, no real sense of disturbance that these young men had been incarcerated for such a long time before being acquitted, nor for the situation of the families of the young men who had been killed or the witnesses who gave evidence in the case. Whatever may have been the reason for this apparent lack of interest, it is, in my view, quite disturbing that the whole process occupied over six years.

There is another and very practical dimension to this issue of lack of resources and delay from the perspective of an effective system. Although forensic evidence is becoming increasingly important in the investigation and prosecution of criminal offences, our trial process depends to a very substantial extent upon evidence orally given of direct observations by witnesses. These include actions seen, identifications made and statements heard by them. Evidence of this kind is always susceptible to error due to a number of factors, including contamination or lapse or distortion of memory due to the passage of time. For a number of reasons, including concerns about the reliability of the information on which verdicts will be reached, it is extremely important that the period of time between the commission of an offence and any court determination should be no

longer than is practically necessary. A properly functioning justice system would not permit delays of the kind to which we have regrettably become accustomed to occur.

One very influential impediment that I see as standing in the way of affecting improvements and increasing understanding so that we can move further towards a humane and effective criminal justice system is the limited and sometimes skewed information provided to the public concerning what happens in our courts.

The operating principles and decision making processes of a system that is directed to the achievement of individualised justice taking into consideration all of the factors relative to the circumstances of the particular offence and the offender concerned cannot be conveyed in a few simplistic clichés of the kind that have great attraction to the media.

It is evident that there is much misunderstanding, in particular, of the purposes of sentencing that has certainly not been removed or reduced by a recent survey conducted by one of our daily newspapers. Readers were presented with a number of very briefly described offences and a few pieces of information about the offenders and then asked to give their view of the appropriate sentence. It was an extraordinary superficial exercise that unfortunately appears to have had Government support and may well influence policy in this area and lead to a more punitive system that is neither humane nor effective.

It is deeply regrettable that, as Professor Freiberg, the Chair of the Victorian Sentencing Council, recently said, "The public has relatively little knowledge of the process of sentencing, available sanctions, sentencing levels, patterns and trends. What knowledge people have is often obtained through sources whose purpose is not to provide accurate information but to entertain or alarm, or pursue a particular...agenda."

I wish to make clear that there is no implied criticism in this statement of ordinary members of the public. They are not involved in the process and understandably rely upon the media for information about such matters. However their confidence is too often sadly misplaced and their legitimate concerns exploited in the pursuit of undisclosed objectives.

Mindful that a person who quotes himself is almost certainly relying on a very poor source, I made the comment in a recent article that I wrote for the Age newspaper that The broader community, who generally will have only the limited knowledge of the many matters that the judge has been required by the law to take into account and who are rarely provided with a complete and accurate description of the events involved, the circumstances in which the offence was committed those relating to the offender, may be dismayed at the seeming naïveté of the judges involved and wonder- who are these people? Don't they live in the "real" world with the rest of us?

However, most judges and magistrates have immense knowledge of the "real" world of crime and human behaviour of a kind that relatively few in the community ever have occasion to acquire. It is sometimes forgotten that there pass through the doors of our criminal courts on a daily basis an amazing array of individuals and that judges and magistrates deal with most imaginable forms of behaviour. The people range from the very unfortunate to the hideously evil and their conduct from the stupid or pathetic to the sickening.

This is not to be interpreted as a defense or justification for all that is said and done by judges in the course of sentencing. Sometimes, as a barrister appearing in the courts, as

Chair of the Adult Parole Board or as a judge sitting in the Court of Appeal, I have asked myself the same questions in relation to individual decisions made. What they really raise is the reality that, unless we apply arbitrary standards to all cases regardless of the individual circumstances related to the particular under consideration, there will be room for both reasonable disagreement as to the appropriate just response and, of course in a very complex system, the making of mistakes.

The individualized justice that encompasses all of the relevant circumstances and considerations and which lies at the heart of a humane and effective system cannot be achieved by the setting of mandatory periods of imprisonment nor the development of standards through the use of absurdly simplistic newspaper surveys of the kind to which I have referred.

The criminal justice system in our society operates to an important extent on the premise that conduct which is perceived as socially dangerous or damaging can be restricted in its incidence through the imposition of penalties that reflect the seriousness attributed to the conduct involved. There is an assumption that, if the possible penalty attached to the prohibited behaviour is sufficiently high, it will operate as a deterrent, and rational individuals will accordingly choose not to engage in it. Whilst in broad terms, this has worked reasonably well, there can be little doubt upon consideration of our prison populations that it rests upon assumptions of perceived choice, understandings and value judgements that are often inapplicable in any real sense to the individual concerned.

There is, I believe, in the community a widely held but unjustified confidence in the deterrent effect of the handing down of heavy sentences. As Professor Freiberg also pointed out in the Sentencing Council's recently published annual report, "The deterrent effect of the criminal justice system generally, and sentencing in particular, seems obvious. Yet the reality is more complex, and the fact that deterrence is one of the primary purposes of sentencing does not mean it is effective."

There is a plethora of research conducted in different jurisdictions over many years that shows that simply increasing sentences has only a very limited effect on crime rates. The question is not whether sentences are heavy or light but whether they can be accepted as appropriate taking into account all of the relevant information concerning both the offence and the offender. Considered against this background, identical conduct could reasonably require the handing down of very different sentences according to the circumstances. This is why, in a humane and effective system, there can be no mandatory sentencing. Yet, it seems reasonably clear that the idea of imposing what are likely to operate as effectively fixed minimum periods of incarceration for some offences is taking hold and disturbing that, if introduced, this will apply to young persons whether or not the term is appropriate in all of the circumstances.

It is, to put it mildly, disappointing that such a primitive response to a complex situation is even being contemplated. The setting of effectively fixed periods which discount important parts of the matrix of factors that provide the framework for a just outcome is not only likely to constitute a potential cause of injustice in some situations but may be counter to the long term interests of the community.

Turning then to the place of imprisonment in a humane and effective criminal justice system, it is, I think clear that however well they are structured and operated, prisons are

inherently isolating and potentially destructive institutions. A sensible society recognizes this and employs the use of incarceration as the sanction of last resort.

Detention in a youth facility or an adult prison even for a very short period and the associated stigma can have profound impact upon the later lives of the individuals concerned. It constitutes a physical and symbolic separation from the community the potential damaging impact of which, particularly upon young people, hardly needs elaboration. I recall one superintendent of a juvenile detention centre who described his function as endeavouring to ensure that the already disturbed young people who were sent to his institution did not leave in a worse state than they arrived.

My own experience in this area leads me to believe that the calls for a more punitive response to offending by young people, and which it appears are being heard by Government, is very short sighted whether considered in terms of the interests of the community or the individual. As I interviewed them either as counsel or in the course of my Parole Board work I was conscious of the unfortunate backgrounds, immaturity, sense of alienation and distorted perspectives of almost of those that I encountered within this group. Few had experienced normal relationships during important formative years and now, unless there was some undoubtedly difficult intervention, faced the prospect of spending their early adulthood behind bars in a very abnormal environment that would almost certainly direct and constitute the future pattern of their lives.

A sensible, even if not particularly humane, society would be concerned in its own interests to avoid the economic and social costs of imprisonment where possible and, in those situations where the sanction had to be imposed would ensure that the periods of imprisonment were the minimum required in the circumstances.

It would also endeavour to reduce the personal destructive effects of incarceration as far as reasonably practicable and to put in place programs and support structures to assist in the reintegration of offenders into the community upon their release. This would include the provision of adequate drug and alcohol treatment facilities, mental health services, educational and employment training opportunities. It would be complemented by the establishment of a reintegration prison which would operate under very flexible arrangements to assist offenders who were approaching the end of their sentences to seek employment or accommodation, gain work experience or training, re establish family relationships and so forth.

Acknowledging the high incidence of mental disorders and drug addiction in our prison populations, a sensible society would ensure that there were adequate resources available to prisoners whilst in custody and on release. We have never even remotely approached providing such support. The issues of mental health and intellectual disability have fortunately received much more public and political attention over recent times and hopefully that interest will be maintained. As I earlier remarked, the engagement in criminal conduct is only one of the consequences of the deficiencies in this and other areas.

Obviously, a humane and effective system would have adequate structures in place to assist prisoners on release. For many, particularly those who have served long periods, the transition can be extremely difficult. Frequently, they will have nothing other than the unsatisfactory supports or associations that they had at time that they offended or that they developed whilst in prison. They are likely to encounter a whole range of problems and

experience severe bouts of depression that may well lead to further breaches of the law and more gaol.

There is also a range of other issues that would be handled more appropriately in order to protect the community and assist in the successful reintegration of offenders in a humane and effective system. There would certainly be more support services and programs dealing with drug and alcohol addiction, sexual and violent offending, mental health issues, housing and employment.

It would require all of the aspects that I have touched on and many that I have not mentioned to be incorporated before a system could be appropriately described a humane and effective as I conceive it. For many reasons, that the achievement of such a system will remain an aspiration for the foreseeable future. However, it is important that it should be our objective as it is an integral feature of a genuinely decent and properly functioning society.

*Frank Vincent QC AO - former Victorian Supreme Court Judge*