

Jesuit Social Services National Justice Symposium
“What does a humane and effective justice system look like?”
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Sentencing and Restorative Justice

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This session asks us to shed light on what a humane and effective justice system should look like in the context of sentencing and restorative justice. There are many progressive and regressive processes that apply to both categories here in Victoria of which a few I will touch on today.

Two elements underlie the failings of the justice system to operate in a way that is humane and effective: the failure of Government to respond to evidence before it and the absence of a willingness to implement justice measures that include the communities for which they are designed.

I am sure you are all aware that this year marks 20 years since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) handed down its findings and recommendations. Some may wonder why it is that we are still talking about a Commission from 20 years ago. Others ask why we are continuing to see an increasing over-representation of Aboriginal and Torres Strait Islander peoples in the justice system. These are in fact linked. The continual failure of Governments to implement the recommendations of the RCIADIC can be directly attributed to the sorry state of affairs that is our Aboriginal and Torres Strait Islander community in high contact with the justice system.

The RCIADIC not only investigated the circumstances surrounding certain deaths in custody. In finding that Aboriginal and Torres Strait Islander deaths in custody was so high due to the sheer high number of Aboriginal and Torres Strait Islander contact with the justice system, the Commission undertook an investigation into what leads to this high contact. This approach was to look at the causes of the problem – not the symptom. Not only was the RCIADIC promoting **effective** options for reform to the justice system based on an enormous body of **evidence**, but looked broadly to the factors that have eaten away at the **humanity** of the Aboriginal and Torres Strait Islander community and therefore leads to contact with the justice system.

Their recommendations are still relevant today, for example: decriminalising public drunkenness; prison as a last resort; diversion and cautioning; cultural awareness training of police, etc. These are few of many recommendations that remain unimplemented in Victoria and across the country – and people wonder why things are not getting better.

There is a concerning trend currently afoot in Victoria in terms of reforms to the sentencing regime that are likely to be **ineffective** in achieving their stated aims, and **inhumane** as they restrict access

to restorative justice options while simultaneously criminalising children. It is not new for Governments to revert to law and order politics in order to gain popular support, as they have done in the current Victorian Government's case. The unfortunate irony is that punitive approaches to crime and punishment are likely to hurt the community, not protect it.

It would be hard to cover the various sentencing reforms to which I refer in depth today. These include: abolition of home detention (directly contradicts a RCIADIC); removal of suspended sentences (currently for minor crime with a plan to extend to all criminal matters); and notably minimum sentencing, of which I hope to touch on today.

Statutory Minimum Sentencing

Under the Government's proposal, the offence of intentionally or recklessly causing serious injury when committed with "gross violence" (which is notably not defined) will attract a mandatory minimum sentence of 4 years for adults and 2 years for 16-17 year olds. In brief, these proposed laws will:

- **Impact judicial discretion**/discretion of the courts;
- **Contravene human rights** treaties to which Australia is party: i.e. restricting the courts' capacity to ensure the punishment is proportionate to the seriousness of the offence and the principle of proportionality; sentencing of children should focus on rehabilitation, not punishment. There are of course implications for children's rights as contained within the Victorian Charter of Human Rights and Responsibilities – the fate of which is currently uncertain.
- **Contradict RCIADIC** (for example, rec 92: that governments legislate to enforce the principle of imprisonment as a last resort
- **Increase imprisonment rates**;
- **Not deter criminal activity**: the Sentencing Advisory Council has argued that caution be exercised when imprisonment is justified as a means of deterrent;
- **Increase offending**: Prisons act as a criminal learning environment; prisons have a labelling effect; and prison is an inappropriate response to the criminality of most offenders where there is a failing to treat the underlying causes of criminal behaviour.
- **Increase Cost**: more defendant contests to avoid mandatory prison term; increased demand on legal services, clog up courts due to longer resolution periods, increased prison population, increased stress on victims;
- **Undermine existing programs** that aim to address the underlying causes of crime, i.e. restorative justice and therapeutic jurisprudence and therefore the rehabilitation advances

of Koori offenders. An example close to the heart of the Victorian Aboriginal Legal Service is the likely effect of minimum sentencing on the operation of the **Koori Courts** which can only be accessed by someone who pleads guilty. I doubt very much that anyone will plead guilty to this new offence of gross violence and therefore will not be eligible to receive the restorative options available through the Koori Court. Even if the Koori court could hear not-guilty pleas, the therapeutic benefits of the court would be undermined by the removal of the discretion of the court to apply a tailored approach to the circumstances of the parties before it.

- **Goes against current practices.** The focus on the rehabilitation and reintegration of juveniles who come into contact with the criminal justice system undermine the administration of the justice system itself and are embodied in the *Children Youth and Families Act 2005 (Vic)*. For instance, the Children's Court is a unique environment for sentencing with the focus always on rehabilitation of young people and looking at the factors that are going to prevent them from moving towards a life of increased criminality.

I fail to see anything related to minimum sentencing that resembles something you could call **effective** or **humane**. Evidence warning against mandatory sentencing practices is voluminous and is not limited to Aboriginal and Torres Strait Islander peoples – this will affect the entire community. Similar sentencing regimes in other Australian jurisdictions and across the world have shown negative impacts and outcomes counter to the stated purpose for their implementation.

One would think that the Government has been, and will be, made aware of these potentialities when the Sentencing Advisory Council (SAC) hands down its report later this year. This would more likely be the case had the Victorian Government not specifically required the SAC to **not investigate the merit of such a sentencing regime**, but instead ask for advice for how such a scheme could be made a reality. Herein lies the deeper problem – **there is no attempt being made to be effective on the basis of evidence, nor humane with regard to protecting our advances in restorative justice and therapeutic jurisprudence locally or our human rights obligations in this State and as they apply internationally.**

A humane and effective justice system, in short, would base its assumptions for reform on evidence; and in considering the merit of such reform, use as a measure of viability the effect such reforms will have on the most marginalised and disenfranchised members of our community.

A humane and effective justice system can be described in one word = small. If governments could recognise all the socio-economic factors that can often lead to offending and show the political will to invest in those areas, there would be less need for police, courts and prisons. If we as a society

focused on investment at the front end and looked to the wellbeing of people in a holistic way, we would significantly reduce the factors that lead to offending. Evidence demonstrates that healing is more effective than punishment, life skills and education are of more benefit to the community than fines and move on powers, self-esteem and community connectedness are what will set someone up for life where as marginalisation and disadvantage will tear people and communities down.

One example of the way in which we are missing the mark in this regard is the criminalisation of people with mental health and cognitive disabilities. We as a community should be identifying the needs of these people as early as possible, and when detected in the justice system there should be an absolute attempt at diversion and effective services to help this person live their best life with the condition they have. Instead we have police, courts and prisons that have significant levels of contact with people with mental health and disability problems, and in failing to identify their needs, they come into contact with the justice system. Through further failing, we let them stay within the justice system. There is nothing that prison can provide a person with mental health or cognitive disabilities to benefit them or the community. This is an example of how our system is not only ineffective, but inhumane.

Additional info if needed: Case Study

“Jo”

Jo is a person aged between 16-17 charged with recklessly causing a serious injury in circumstances that would likely equate to “gross violence” (should the term be defined). The plea was heard in the Children’s Koori Court. Jo told by the Magistrate that custody would be the likely outcome given the nature of the offending. However, sentencing was deferred to enable Jo to engage in a detoxification program, and link in to education, training and employment programs with the supervision of Youth Justice. During the deferral period, Jo successfully completed a detoxification program. Jo then enrolled in TAFE, and was engaged in a program with an Aboriginal organisation. Jo, with the support of family, successfully participated in training with this organisation, and now has prospects of on-going, paid employment through the organisation. The matter returned for sentencing, and the Magistrate was impressed with Jo’s progress. The Magistrate emphasised the seriousness of the offending and noted again that Jo was at serious risk of being placed in custody. However, the Magistrate decided to place Jo on a Youth Supervision Order, which requires on-going supervision from Youth Justice, continued engagement with the training program, TAFE and drug and alcohol counselling. The Magistrate did, nonetheless, record a conviction to reflect the serious nature of the offending.

It is clear that the discretion afforded to the Magistrate in relation to this matter enabled Jo to access programs and support that addressed the causes of the offending, and were directed at reducing the risk of re-offending in the future. The sentence was also in line with the sentencing considerations set out in the *Children, Youth and Families Act*, in particular, in having regard to the need to “continue the child’s education, training and employment,” and “strengthening and preserving the relationship between the child and the child’s family.”

Had this offending attracted a mandatory sentence of imprisonment, the programs critical to Jo reconnecting with culture, gaining skills for meaningful employment and addressing drug and alcohol use would not have been available.