22 December 2017

Victorian Sentencing Advisory Council
Via email: contact@sentencingcouncil.vic.gov.au

Dear Sentencing Advisory Council

Jesuit Social Services welcomes the opportunity to put forward our views on the Sentencing Advisory Council's issues paper on the creation of a sentencing guidelines council in Victoria.

About Jesuit Social Services

Jesuit Social Services works to build a just society by advocating for social change and promoting the health and wellbeing of people, families and communities with multiple and complex needs.

For 40 years we have accompanied people involved, or at risk of becoming involved, in the criminal justice system. In Victoria we work with people to prevent and divert involvement in the justice system and support people exiting prison and youth justice facilities. This includes the Corrections Victoria Reintegration Program in North and West Metropolitan Melbourne (Reconnect), the African Visitation and Mentoring Program (AVAMP), Next Steps and Perry House residential programs, Youth Justice Community Support Service and Group Conferencing, and Barreng Moorop in partnership with the Victorian Aboriginal Childcare Agency and the Victorian Aboriginal Legal Service.

Cornerstones of our judicial system

Jesuit Social Services values and respects the long standing principles of our judicial system, including:

- The independence of the judiciary
- The presumption of innocence
- The protection of the public, including victims of crime
- The speedy resolution of issues regarding a person's detention
- Prison as a last resort.

With this in mind, we support the intention of the sentencing guidelines as not detracting from a judicial officer's ability to impose individualised sentences, and that the court maintains the ability to exercise discretion (1.23). Building on this, we regard the following as fundamental to the implementation of the new Council:

- Courts must not be left with such little discretion that an outcome is effectively pre-determined (1.23).
- The foundational principles of the *Charter of Human Rights and Responsibilities Act 2006* must remain: the right to equality, right not to receive a greater penalty than that applying at the time of the offence, and right to a reduced penalty in certain circumstances (1.49).
- That a model promoting transparency in sentencing is to be favoured (like the UK model) but only if it maintains independence and discretion for the court (2.14).

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- That Section 5 of the *Sentencing Act 1991* – which already sets out factors that must be taken into account when sentencing – must not be eroded by the guidelines.
- Broad consultation is an indispensable component in the development of a sentencing guideline (4.27).
- That judicial discretion to depart from a guideline is maintained wherever 'substantial and compelling reasons' exist (5.23)
- Retrospectivity does not apply (i.e. a guideline operates only from the date it came into effect and is operative at the date of the offence)
- Guidelines will need to over-rule common law (otherwise they will have not have the intended effect).

Composition of the Council (Question 6)

We note that the Koori Court is not included in the list of proposed representatives of the Council. Given the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, **we believe the Council must include a representative from the Koori Court, preferably as co-Chair.**

We also call for the composition of the Council to include a legal representative with strong sector background and experience relating to vulnerable groups – e.g. children and young people, people with an acquired brain injury or cognitive impairment, those with alcohol, drug and/or mental health problems (3.28).

In terms of consultations with the community and interested groups (4.36), we recommend the council engage with a wide range of groups to ensure the views of those working alongside or on behalf of vulnerable groups is incorporated as central to the council's process.

Impact or resource assessment (Question 6)

We believe that a requirement to publish an impact or resource assessment alongside any draft or final guideline is critical.

As shown in our *States of Justice: Criminal justice trends across Australia* report[i], It is clear that vulnerable Australians – in particular people with cognitive impairment, indigenous people, those who are unemployed, those who have not completed secondary school, and those experiencing poverty – are over-represented in our prisons. This disadvantage becomes more deeply embedded as people progress from early contact with the criminal justice system through to, in the most severe cases, imprisonment, with many vulnerable young people becoming caught in a lifelong pattern of cycling in and out of the justice system.

In particular, Jesuit Social Services believes the unacceptable over-representation of Aboriginal and Torres Strait Islander peoples in the adult and youth justice systems needs to be at the forefront of every debate and decision. There is a need for widespread agreement that any policy, practice or legislative change that has the potential to adversely affect Aboriginal and Torres Strait Islander peoples be thoroughly assessed and reviewed. Racial Equity Tools are a promising mechanism to begin addressing this issue, and also stand to bring benefit to new and emerging CALD communities that may be over-represented in the justice system.

Racial Equity Tools

As outlined in our #JusticeSolutions report[1], one of the measures being used in the US to address this overrepresentation is the adoption of 'Racial Equity Tools', which we were introduced to during meetings with Seattle University and the City of Seattle[2]. Racial Equity Tools provide a structure for institutionalising the consideration of racial equity and involve assessing (in several ways and at several stages) racial elements of any new proposals (see Appendix A, which contains an outline of a Racial Equity Tool). The tools are designed to integrate explicit consideration of racial equity in decisions, including policies, practices, programs and budgets. The tool is both a product and a process. Use of a Racial Equity Tool can help to develop strategies and actions that reduce racial inequities and improve outcomes for all groups.

Racial Equity Tools promote data and evidence-based policy decisions that also target specific geographic areas, critical if we are to address locational, entrenched disadvantage. They promote targeting of our responses to the most vulnerable members of society and they encourage governments to recognise the unintended consequences of their decisions and to partner with disproportionately affected communities to achieve long-term positive change.

Racial Equity Tools may be useful in the Australian context, particularly for addressing the over-representation of Aboriginal and Torres Strait peoples in the criminal justice system, and also for broader application to consider the impacts on vulnerable groups.

People with an Acquired Brain Injury (ABI)

We would also like to highlight that people with an ABI form a particularly vulnerable group in our community. The symptoms of ABI can severely impact on a person's experience of the justice system. The justice system can be daunting and difficult to navigate for those without a disability; however, for those with ABI who may struggle to engage in everyday tasks, this can be nearly impossible.

As outlined in Appendix B, Jesuit Social Services, together with RMIT University's Centre for Innovative Justice, recently published a report entitled *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (accessible at: https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/)[4]. The Enabling Justice project interviewed 21 people affected by ABI who had been in contact with the justice system in order to better understand how they experienced the system, and to identify 'missed opportunities' where alternative responses may have led to more positive outcomes. Guided by the need to increase

[1] *#JusticeSolutions: Expanding the conversation*, available at https://jss.org.au/justicesolutions-expanding-the-conversation/

[2] In the US, African-Americans are overrepresented in both child welfare and juvenile justice populations compared with the general population (46 per cent and 38 per cent compared with 17 per cent respectively).

[3] Jesuit Social Services and RMIT University Centre for Innovative Justice (2017) *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*, https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/

[4] Jesuit Social Services and RMIT University Centre for Innovative Justice (2017) *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*, https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/

recognition, respect and support for people with ABI within the criminal justice system, we identified a range of recommendations for future action aimed at improving access to justice for people with ABI in Australia.

Conclusion

Jesuit Social Services would welcome the opportunity to expand further on any of the matters raised in this submission.

Yours sincerely

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Appendix E: Racial Equity Tool

A Racial Equity Tool recognises that many current inequities in our society are sustained by historical legacies, structures and systems that repeat patterns of exclusion. Without intentional intervention, institutions and structures will continue to perpetuate racial inequities.

Seattle's support for Racial Equity Tools acknowledges that Government has the ability to implement policy change at multiple levels and across multiple sectors to drive larger systemic change.

A Racial Equity Tool:

- proactively seeks to eliminate racial inequities and advance equity
- identifies clear goals, objectives and measurable outcomes
- engages community in decision-making processes
- identifies who will benefit or be burdened by a given decision, examines potential unintended consequences of a decision, and develops strategies to advance racial equity and mitigate unintended negative consequences
- develops mechanisms for successful implementation and evaluation of impact.
- can be used at multiple levels to increase impact and effectiveness, such as:
  - *government staff*: the routine use of a Racial Equity Tool by staff provides the opportunity to integrate racial equity across the breadth, meaning all governmental functions, and depth, meaning across hierarchy.
  - *elected officials*: elected officials have the opportunity to use a Racial Equity Tool to set broad priorities, bringing consistency between values and practice.
  - *community organisations*: community based organisations can ask questions of government about use of Racial Equity Tools to ensure accountability. In addition, community based organisations can use a similar or aligned Racial Equity Tool within their own organisations to also advance racial equity.

The Racial Equity Tool is a set of six steps and questions:[ii]

Step 1. Proposal

- What is the policy, program, practice or budget decision under consideration?
- What are the desired results and outcomes?
- What does this proposal have an ability to impact?

Step 2. Data

- What's the data? What does the data tell us?
- Will the proposal have impacts in specific geographic areas (neighborhoods, areas, or regions)? What are the racial demographics of those living in the area?
- What does population level data tell you about existing racial inequities?
- What does it tell you about root causes or factors influencing racial inequities?

Step 3. Community engagement

- How have communities been engaged?

- Are there opportunities to expand engagement?
- Who are the most affected community members who are concerned with or have experience related to this proposal? How have you involved these community members in the development of this proposal?
- What has your engagement process told you about the burdens or benefits for different groups?
- What has your engagement process told you about the factors that produce or perpetuate racial inequity related to this proposal?

Step 4. Analysis and strategies

- Who will benefit from or be burdened by your proposal?
- What are your strategies for advancing racial equity or mitigating unintended consequences?
- Given what you have learned from the data and stakeholder involvement, how will the proposal increase or decrease racial equity? Who would benefit from or be burdened by your proposal?
- What are potential unintended consequences? What are the ways in which your proposal could be modified to enhance positive impacts or reduce negative impacts?
- Are there complementary strategies that you can implement? What are ways in which existing partnerships could be strengthened to maximise impact in the community? How will you partner with stakeholders for long-term positive change?
- Are the impacts aligned with your community outcomes defined in Step #1?

Step 5. Implementation

- What is your plan for implementation?
- Is your plan: realistic? adequately funded? adequately resourced with personnel? adequately resourced with mechanisms to ensure successful implementation and enforcement? adequately resourced to ensure on-going data collection, public reporting, and community engagement?

Step 6. Accountability and communication

- How will you ensure accountability, communication, and evaluation of results?
- How will impacts be documented and evaluated? Are you achieving the anticipated outcomes? Are you having impact in the community?
- What are your messages and communication strategies that are will help advance racial equity?
- How will you continue to partner and deepen relationships with communities to make sure your work to advance racial equity is working and sustainable for the long haul?

Appendix B: *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*

Our Enabling Justice Report

Jesuit Social Services, together with RMIT University's Centre for Innovative Justice, recently published a report entitled *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (the Enabling Justice Report – accessible at: https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/)[5]. Focused on criminal justice issues confronting people with ABI, this report identifies the obstacles that Australians with disability face in accessing justice. Listening to people who have experiences of the criminal justice system and identifying and responding to their needs is critical to developing effective responses. The Enabling Justice Report captured these experiences and identified three key needs for people with an ABI: recognition, respect and support.

Acquired brain Injury and the criminal justice system

People with disability tend to have a high level of interaction with the criminal justice system. Taking Victoria as an example, in 2011 Corrections Victoria reported that 42 per cent of men and 33 per cent of women (in a sample of the Victorian prison population) had been diagnosed with an ABI; this compares with just two per cent across the general population.[6] The extraordinary overrepresentation of people with ABI in prisons reflects a broader failure of the criminal justice system to recognise and respond to the needs of people with ABI. In fact, ABI is not well-recognised within the justice system, and the basic supports accepted as essential for people with other kinds of disability in other contexts are lacking—leaving people with ABI to fend for themselves in a system that most people without ABI would find overwhelming.

The term 'ABI' refers to a 'disability arising from any damage to the brain acquired after birth, regardless of cause'[7]. Causes may include traumatic head injuries (such as through assault, traffic accidents, family violence, etc.), stroke, brain infection, brain tumour and prolonged alcohol or drug use.

People affected by ABI can experience physical problems such as 'headaches, fatigue, seizures, poor balance, visual and hearing disturbances, chronic pain and paralysis.' Most significantly, they may also suffer 'cognitive problems, including poor memory and concentration, reduced ability to plan and problem solve and inflexible thinking, and psychosocial/emotional problems, such as depression, emotional instability, irritability, and impulsive or inappropriate behaviour'[8].

People with ABI form a particularly vulnerable group in our community; they are often caught up in a complex interplay of social disadvantage and disability. Commonly, people with ABI experience

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[5] Jesuit Social Services and RMIT University Centre for Innovative Justice (2017) *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*, https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/

[6] Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland, 'Acquired Brain Injury in the Victorian Prison System' Corrections Victoria Research Paper Series Paper No. 04 April 2011, 6; http://assets.justice.vic.gov.au/corrections/resources/36d7e731-e819-4ed3-972d-269b829b952d/acquired_brain_injury_in_the_victorian_prison_system.pdf

[7] Australian Institute of Health and Welfare, 'Disability in Australia: Acquired Brain Injury', Bulletin 55: 2007, 2

[8] Australian Institute of Health and Welfare, 'Disability in Australia: Acquired Brain Injury', Bulletin 55: 2007, 3

multiple and complex needs, such as alcohol or drug addiction, mental illness, homelessness and family violence.

The symptoms of ABI can severely impact on a person's experience of the justice system. Having ABI can compound an already intimidating experience of the legal system, limit the ability to comply with sentencing orders and even exacerbate offending behaviour. The justice system can be daunting and difficult to navigate for those without a disability; however, for those with ABI who may struggle to engage in everyday tasks, this can be nearly impossible.

Key issues identified by project participants

The Enabling Justice project interviewed 21 people affected by ABI who had been in contact with the justice system in order to better understand how they experienced the system, and to identify 'missed opportunities' where alternative responses may have led to more positive outcomes.

For Enabling Justice project participants, feeling ignored, fearful, disrespected, confused and unsupported were remarkably common experiences. Participants described feeling:

- **Unrecognised**: That the criminal justice system was not set up to identify or accommodate their needs. As a result – particularly when they were in prison or serving sentences in the community – their ABI-related symptoms were sometimes misconstrued as 'trouble-making' or evidence of drug usage. Their disability was often not recognised nor consistently dealt with across various justice processes.
- **Confused**: The symptoms of ABI, together with the use of complicated legal jargon and inconsistent processes, made the justice system particularly confusing.
- **Unsupported**: For some participants, having ABI limited their ability to comply with community corrections orders, as these presumed a functioning memory and comprehension of relatively complex requirements. Yet the level of support they needed to understand and comply with orders was simply not available. They could not openly report their disability for fear of it being exploited by police, corrections officials or other offenders. When their disability was self-reported, it was often not taken into account nor deemed to warrant special consideration or assistance.
- **Disrespected**: Experiences of being treated disrespectfully by police, magistrates, custodial and community corrections officers caused participants to lose respect for the law and to disengage.
- **Fearful, anxious and afraid**: For many, their ABI exacerbated experiences of anxiety and vulnerability in the face of a complex justice system they could not comprehend and which did not make support available to assist them through it.

To participate fully and equally in the justice system, people with ABI clearly need increased recognition, respect and support.

- **Recognition**: A number of interviewees felt that their disability was under-recognized within the justice system: "…not many people know, it does need more flyers, a few things put out there so people do know…Any other type of injury a person can get, ABI needs a bit more recognition too."[9] For ABI to be recognised as a disability within the criminal justice system,

[9] Justice User Group meeting, April 2016

the system must acknowledge ABI as a disability even though it often occurs alongside other forms of disability and disadvantage. The system must also recognise that a person with ABI may have additional communication and support needs. People working within the system must have an awareness of the causes, symptoms and common support needs of people with ABI. The system must make those supports known and available to people who have or are suspected of having ABI. Where their ABI is recognised, people can feel more confident to disclose their ABI and access services suited to their needs.

- **Respect:** Project participants reported the significance of being treated with respect in their contact with the justice system. One interviewee described an encounter with a magistrate who demonstrated sincere respect and concern: "[S]he took a lot of time to see how you were going and what was happening in your life and why you were in jail. And I think, because I was on heroin at the time, she actually got me off heroin. She…inspired me to get off heroin….She could've just closed her book on me."[10] This experience motivated the person to fully cooperate with the process and make positive life changes. A more respectful justice system should take a 'solutions-focused', constructive and therapeutic approach which promotes reintegration into the community. Whether they are offenders or prisoners or victims or witnesses, people with ABI are entitled to respect. This includes treating people with dignity and enabling them to participate meaningfully in processes that affect them. In the criminal justice system, this can take many forms, including the use of plain English to ensure people with ABI can understand and meaningfully participate in their legal processes.
- **Support:** People with ABI require more support to access justice within and outside the criminal justice system. Many participants felt they were 'set up to fail' due to the lack of disability-specific services available, both within the justice system and in the broader community. A number of simple measures of support have the potential to make significant differences: "…a lot of people are just a bit confused, if they're put in the right direction, they'll change, they will."[11] Interviewees reported insecure housing as a significant factor in their cycles of offending. Supporting people with ABI to access secure housing would make a significant difference in promoting their stability, facilitating long-term support and ultimately reducing recidivism.

Key recommendations

Guided by the need to increase recognition, respect and support for people with ABI within the criminal justice system, we identified the following recommendations as the highest priorities for future action aimed at improving access to justice for people with ABI in Australia:

- Governments in all Australian jurisdictions must take concrete steps to raise awareness about ABI, including its causes, known risk factors, symptoms and how to seek help.
- All people who work within the criminal justice system must be educated about the circumstances and needs of people with ABI, and trained to be able to recognise people with ABI and respond appropriately.
- Access to appropriate support and programs must be offered to people with ABI at the earliest possible opportunity.

[10] Participant interview dated 7 June 2016

[11] Participant evaluation interview 7, dated 8 December 2016

- Governments in all jurisdictions must fund criminal justice advocacy and support services which offer support to persons with a cognitive disability or complex needs at any point of their interaction with the criminal justice system, including police, courts, corrections and prison.
- Written and verbal communication in the criminal justice system must be made more accessible, including by making sure that plain English is used in all documents of a legal nature as well as during court proceedings.
- Legal aid providers must structure their services to ensure that clients have adequate time to speak with a lawyer (in an appropriate manner and environment) about their case and their personal circumstances.
- Governments in all jurisdictions must increase funding for legal aid providers so as to reduce the demands on lawyers (especially duty lawyers), enabling them to spend sufficient time with clients to identify relevant personal circumstances, including ABI.
- Government must make available a larger number of properties to community support organisations that are accessible to people with an ABI and/or complex needs being released from prison.
- Governments – in partnership with community support providers – should establish housing support programs targeted towards people in contact with the criminal justice system with an ABI or complex needs living in or reintegrating back into the community.
- Governments to provide long term and increased funding to homelessness and tenancy support services to provide assistance to people who have exited prison and who reside in public and social housing, to sustain their tenancies and provide support to address underlying issues that may place their tenancies at further risk.

[i] http://jss.org.au/wp-content/uploads/2016/12/States-of-Justice-December-2016-FINAL-1.pdf

ii Nelson, J. & Brooks, L. (2015). *Racial Equity Toolkit - An Opportunity to Operationalize Equity.* United States: Government Alliance on Race and Equity. Retrieved from http://racialequityalliance.org/wp-content/uploads/2015/10/GARE-Racial_Equity_Toolkit.pdf

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