



RESEARCH, POLICY AND ADVOCACY UNIT

SUBMISSION

**Sentencing Advisory Council:
Submission about Baseline Sentences**

October 2011

For further information, contact:

Julie Edwards, CEO, Jesuit Social Services

Phone: (03) 9427 7388 Email: Julie.edwards@jss.org.au

Summary of Recommendations

When considering resolution to the questions posed about the operation of baseline sentences Jesuit Social Services recommends:

Principles to be adhered to are:

1. Provide the greatest possible protection for the most vulnerable people
2. Maximise the expression of judicial discretion responsive to individual needs and circumstances
3. Provide the greatest possible transparency
4. Be as simple and straightforward as possible to avoid complicating and protracting the legal and Court processes
5. Provide the least possible upward pressure on the already over burdened prison system;

Given the over representation within the prison systems of vulnerable, disadvantaged people , all sentencing practices to ensure the strong weighting of 'mitigating factors' to ensure the judiciary maintains flexibility to take full account of disadvantage, including age and all forms of disability, in sentencing.

With specific reference to the submission question: What should be the relationship between the median and the baseline:

Jesuit Social Services strongly recommends against the setting of the baseline sentence midpoints by arbitrary mechanisms that impose pronounced increases compared to current median sentences. This will force commensurate matched increases in pressures on the legal/court and prison systems, with greatest adverse impact for the most disadvantaged people within these systems. As detailed through this submission, the current system is already operating under great stress and is in no position to cope with this additional pressure. Human right obligations for the care of prisoners within the prison system are highly likely to be breached, a position of unacceptable risk for the government.

Jesuit Social Services further recommends:

That Victoria await the outcome of the review by the NSW Attorney General of the NSW standard non-parole period (SNPP) scheme prior to considering which offences will be subject to, and levels of, baseline sentences in our jurisdiction.

Full modelling of the impacts on the legal, court and prison systems, including for overcrowding and for the delivery of health, education and rehabilitation programs, to be undertaken prior to any further consideration of baseline (and other reforms to) sentences to avoid unintended negative consequences of sudden and sharp increases in court and prison numbers.

Jesuit Social Services therefore further recommends that protection is provided to ensure that the operations of any baseline sentence regime does not negatively impact on the 'dual track' system for young people 18-21 years by forcing sentence lengths beyond eligibility for detention in youth justice centres.

1 Introduction

Jesuit Social Services welcomes the opportunity to make a submission to the Victorian Sentencing Advisory Council about Baseline Sentencing.

The evolution of Jesuit Social Services is intrinsically linked with the Victorian justice system. In 1977 the Jesuits began our formal involvement in the justice system, opening Four Flats, a hostel in Hawthorn for young people, 17-21 years released from custody. Foundational to this was the recognition that being young and just released from custody, with no place to call home, no money and no friends is a terrible place to be. In 1981 Four Flats moved to Collingwood and developed as an outreach and supported accommodation model. By 1987 the numbers of young people in need of support had grown. A larger building was purchased in Sydney Road, Brunswick, just a tram ride from Pentridge Prison. It was now called the Brosnan Centre in honour of Fr John Brosnan who had been the Catholic Chaplain at Pentridge Prison for thirty years (Dunin, 2009). From this base, Jesuit Social Services has continued to grow to provide a range of social services, working to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged people, families and communities.

Our contribution to the baseline and wider sentencing debate in Victoria is therefore from the context of advocating for community safety from the perspective of the needs of our program participants - some of the most disadvantaged people in our community. For our program participants, multiple layers of disadvantage combine to adversely shape pathways both to and from the justice system. The voice of this marginalised group, and their human experience, must be at the fore of government and societal considerations of all reforms to the Victorian justice system in order to promote community safety.

The Victorian justice system is looked upon by the other Australian jurisdictions, and indeed other jurisdictions around the world, as being an enlightened and modern approach to keeping crime and imprisonment rates low. This approach has a strong crime prevention and diversionary aspect and does not rely solely on imprisonment as a means of dealing with offending behaviour. The principle of therapeutic jurisprudence lies at the heart of the existing approach and ought to be maintained and strengthened. Jesuit Social Services fully endorses these directions.

Jesuit Social Services firmly believe in the importance of providing interventions aimed at treating the offending behaviour at the source and addressing the underlying issues that may have contributed to offending behaviour. In the case of offenders that have been sentenced to prison providing an environment that is conducive to rehabilitation, furthering education or addressing health needs is paramount to this. While there will always be a cohort of people who can only be dealt with through imprisonment – this should always be the option of last resort.

From our foundation of nearly 35 years of experience in this field of work and relationships with thousands of people who have contact with the justice system, Jesuit Social Services holds serious reservations about the impact of baseline sentences on the effective operations of the justice system. This includes adverse consequences for trial lengths and prison over-crowding, as well as for the rehabilitation and well-being of detainees, within prison and on release. This will be elaborated on as follows.

2 Who we are and what we do

Jesuit Social Services works to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged people, families and communities. Our service has its origins in work with disadvantaged young people involved with the youth and adult justice systems in Victoria.

We do this by intervening directly to address disadvantage and by influencing hearts and minds for social change. We strengthen and build respectful, constructive relationships for:

- Effective services - by partnering with people most in need and those who support them to address disadvantage
- Education – by providing access to life-long learning and development
- Capacity building – by refining and evaluating our practice and sharing and partnering for greater impact
- Advocacy – by building awareness of injustice and advocating for social change based on grounded experience and research.
- Leadership development – by partnering across sectors to build expertise and commitment for justice

Jesuit Social Services values every person and seeks to engage with them in a respectful way, that acknowledges their experiences and skills and gives them the opportunity to harness their full potential. Jesuit Social Services works where the need is greatest and where it has the capacity, experience and skills to make the most difference.

Jesuit Social Services works in the following areas:

- Justice & Crime Prevention - People involved with the justice system;
- Settlement & Community Building - Recently arrived immigrants and refugees and disadvantaged communities
- Mental Health & Wellbeing - People with multiple and complex needs, and

Providing access to education, life-long learning and development underpins all that we do.

Our services presently include:

- *Brosnan Youth Services*: Supporting young people and adults in the justice system, including Youth Justice Community Support Services for those most at risk.
- *Intensive Transitional Support programs*: Supporting community re-integration of offenders with moderate-to-high risk of re-offending and associated moderate-to-high transitional needs, including the Aboriginal specific program Konnect.
- *Group Conferencing*: Restorative justice approach to sentence deferral legislated by the Children Youth and Families Act 2005
- *Residential services for young people exiting prison*, including *Perry House*, a living skills residential program for young people with intellectual disabilities who are involved with the adult criminal or youth justice systems

- *Jesuit Community College*: increasing opportunities for people constrained by social and economic disadvantage to participate in education, work and community life and reach their full potential.
- *Artful Dodgers Studios*: Providing pathways to education, training and employment for young people with complex and multiple problems associated with mental health, substance abuse and homelessness.
- *Connexions*: Delivering intensive support and counselling for young people with mental health, substance and alcohol abuse problems.
- *The Outdoor Experience Program (TOE)*: Offering a range of outdoor intervention programs for young people who have or have had issues with alcohol and/or other drugs.
- *Refugee Services*: case management support to unaccompanied asylum seeking minors in community detention.
- *Community Programs*: Working with people, including the African Australian and Vietnamese communities, on public housing estates across metropolitan Melbourne.
- *Community development* activities in the area of Mount Druitt, Western Sydney.
- *Community development and capacity building* activities in Alice Springs.
- *Support After Suicide*: Supporting people bereaved by suicide.



3 Aboriginal Acknowledgement

Jesuit Social Services recognises the well documented over representation of Aboriginal people within the both the youth and adult justice systems.

Specifically, as of 30 June 2010, 6.2% of male prisoners and 8.6% of female prisoners identified themselves as Aboriginal or Torres Strait Islander (Corrections Victoria, 2011b, p. 50) . Dramatically, the Indigenous imprisonment rate per 100,000 Indigenous adults was 2,482.5 of men and 245.9 for women, as compared to the population wide rates of 200 per 100,000 male adults and 14.3 for women (ibid). The Productivity Commission, 2011 Report on Government Services reported Indigenous adults were imprisoned at 13.3 the rate of non-indigenous people in Victoria (2011, p. 8A.4).

The most recent Australian Institute of Health and Welfare (2011) data reports that in 2009-10 “Indigenous young people were over-represented in both community-based supervision and detention in Victoria, although the level of over-representation was higher in detention. Around 12% of those under community-based supervision and 16% of those in detention were Indigenous... An Indigenous young person aged 10–17 years was 12 times as likely to be under community-based supervision on an average day and 22 times as likely to be in detention as a non-Indigenous young person aged 10–17 years.” (p. 162). This higher rate of detention increased from 17.9 times the non-Indigenous rate in 2008-09 (p. 120).

All recommendations in this submission apply equally, and more so, to the needs of the Aboriginal community given this over-representation and in recognition of their unique culture, and historical and continuing experience of disadvantage, including through direct interventions of the Corrections and Community Service sectors.

4 Rationale for response

Jesuit Social Services 35 years experience in the justice system positions us to provide a strong contribution to this submission process about the human experience of offenders, and the impacts for community safety of the relative success or failure of the justice system to offer effective rehabilitation. By contrast the legal expertise of other stakeholders will better position them to submit about a number of the more technical questions posed.

Jesuit Social Services therefore recommends general principles that we believe should be adhered to when considering resolution to the questions about the operation of baseline sentences posed for these submissions. These principles are that the sentencing regime:

1. Provide the greatest possible protection for the most vulnerable people
2. Maximise the expression of judicial discretion responsive to individual needs and circumstances
3. Provide the greatest possible transparency
4. Be as simple and straightforward as possible to avoid complicating and protracting the legal and Court processes
5. Provide the least possible upward pressure on the already over burdened prison system

Jesuit Social Services observes that the models of baseline sentences described in the issues paper, coupled with the intentions stated in the Baillieu government's pre-election media release for baseline sentences to increase median sentence lengths, may negatively impact on sentencing outcomes in terms of these principles.

There appears to be little concrete evidence that supports the efficacy of the model of baseline sentences over that of the current method utilised in Victorian sentencing of 'instinctive synthesis' (see Issues paper for definition). As noted by Hoel and Gelb (2008), judges and magistrates in Victoria currently receive significant guidance in relation to sentencing through legislation, the Victorian Sentencing Manual and the Sentencing Advisory Council. A judge or magistrate must also provide justification for the sentence they impose and this is open to public scrutiny. They also note, in cases where there is concern regarding the consistency of sentencing, there is an available appeal process to both prosecutor and offender.

Moreover, of greatest concern in the Victorian context is the statements accompanying the Government's proposals to introduce baseline sentences of parliamentary imposed median sentence lengths (125% and 33% greater than current medians) coupled with a regulatory role of the Court of Appeal to enforce these medians over time (this will be returned to in detail later). Combined these mechanisms will have pronounced deleterious effects for the health of the Victorian legal, court and prison systems.

Specifically, baseline sentence models are prescriptive and proceduralised, detracting from judicial discretion and the capacity to flexibly match sentences to the individual attributes and circumstances of the person being sentenced. The procedural nature may complicate rather than expedite sentencing. The likelihood of increased sentences may mitigate against guilty pleas,

extending trial lengths and trial wait times, as well as impose increased burden on victims who will be increasingly required to give evidence.

Perhaps most worrying, is the additional pressure longer sentences will place on the already over crowded prison system. This is particularly concerning given the wide ranging documentation of current over-crowding and inadequacy of health, education and welfare services in Victoria's adult prisons and youth justice centres. The worst of these impacts will fall upon the most disadvantaged and marginalised within our community – the mentally ill, intellectually disabled, Indigenous and young people.

Given these concerns, Jesuit Social Services, will therefore concentrate on the final question of the Sentencing Advisory Council issues paper – relationship between median and baseline, as, unless a just solution is imposed in this regard, the legal, court and prison systems will be placed under unacceptable stress, with the disadvantaged people who we represent being the most imperilled.

5 Detailed Response

Question relevant to the relationship between the median and the baseline: What should be the relationship between the median and the baseline?

The Sentencing Advisory Council's issues paper outlines the directives provided by the Attorney General in implementing a baseline sentencing regime:

*The terms of reference state that the baseline should indicate the sentence that the parliament expects will be the **median or mid-point of minimum sentences** imposed for cases involving that offence.*

The baseline sentencing regime is to operate so that, over time, the Court of Appeal will be able to determine whether or not the median levels of minimum sentences being handed down are in fact aligned with the baseline sentences specified by the parliament and, if not, to require changes accordingly in sentencing practices. (2011a, p. 20) (2011a, p. 20)

The issues paper further notes:

"The government has stated by way of example that a 10 year baseline sentence should apply to the offence of trafficking in a large commercial quantity of drugs, and a 20 year baseline sentence should apply to the offence of murder." (2011a, p. 3) (2011a, p. 3)

These sentence lengths represent a clear departure from current sentencing practice by the Victorian judiciary. Specifically, the Sentencing Advisory Council's "Sentencing Snapshot" data outlines that the 2009/10 median non-parole sentence for trafficking in a large commercial quantity of drugs was 4 years and 5 months and the median non-parole sentence for Murder was 15 years (Sentencing Snapshots). The indicative proposed Coalition government baseline sentences therefore equate to a 125% and 33% increase to the respective sentences.

There are real questions to be raised about how the baseline level is to be determined. It appears from the Government's statement above, that the baseline is to be 'specified by the parliament' with the indicative baselines established independently of current sentencing practices as indicated by current median sentences. After operating their equivalent system since 2003, it should be noted that the NSW Attorney General has requested the examination of the NSW standard non-parole period (SNPP) scheme (see Appendix 1), including with specific reference to the fourth term of the inquiry:

Establishment of a transparent mechanism by which a decision is made to include a particular offence..., and by which the SNPP is set; (NSW Sentencing Council, 2011)

Given the established experience of NSW in operating its equivalent scheme, Jesuit Social Services recommends that Victoria await the outcome of this review prior to considering offences subject to and levels of baseline sentences in our jurisdiction.

The above recommendation however, assumes that an evidence based solution is sought to inform the establishment of the baseline sentence levels. This does not appear to be the case - with the

driving determinant of government being the intent to increase sentence lengths, as indicated by the proposed 20 and 10 years levels described above.

This intent is further evidenced by the policy described in a Coalition Media Release during the November 2010 State Election, titled *Coalition to Set Minimum Sentence Standards for Serious Crimes* (National Party Victoria, 2010). The media release affirmed the intent for baseline sentences to increase sentence lengths:

“Victorians are sick and tired of seeing offenders receive hopelessly inadequate sentences time and time again when they destroy the lives of young people with drugs, or commit the most horrific of murders.

“Too often, current sentencing laws fail to result in penalties for offenders that protect the community and deter would-be offenders...

*“However, crucially, courts will be required to adjust sentences upwards just as much as downwards, instead of sentences being skewed in favour of criminals as they are at present”
Mr Baillieu said.*

The sum effect of the introduction of baseline sentences therefore is to ensure an increase in minimum sentence lengths by, firstly, parliament specifying median or midpoint sentences that, if the examples cited are indicative, are greatly inflated compared to current median sentence lengths, and secondly, by ensuring that the prescribed medians are maintained as the median through the Court of Appeal.

Moreover, the introduction of Baseline Sentences is to be only one source of increases to Victorian sentencing practices. A number of other sentencing reforms will combine with baseline sentences to provide cumulative upward pressure on numbers and lengths of prison sentences including:

1. Introduction of minimum mandatory sentencing
2. Abolition of suspended sentences
3. Abolition of home detention
4. Introduce a single Community Corrections Order, that may be used in combination with a jail sentence of up to 3 months, as well as include a new ‘contravention offence’ for failure to comply with the terms of the order that will include a maximum penalty of three months jail (Clark, Second Reading Speech, 2011)

Jesuit Social Services strongly contests this outcome of cumulative upward pressure on prison numbers and/or sentence lengths. The legal, court and prison systems are already overburdened by long delays, inadequate access to Legal Aide, over-crowding and inadequate provision of health, education and rehabilitation programs to existing detainees. The system is not equipped to deal with the type of influx that could be anticipated if the prescribed sentence lengths increase by the order of the 30% to 125% above current median sentence lengths as indicated by the Government. Jesuit Social Services is unaware of any modelling of projected increases in bed numbers – nor of commensurate increases in health, welfare and rehabilitation services – to cope with the duress of the baseline (and other) sentence increases.

As stated by Minister McIntosh, Minister for Corrections and Crime Prevention, in opening the recent Jesuit Social Services National Justice Symposium:

“You’ve got to remember that our prisons are funded on the basis of some 90 to 95% capacity... we have a legacy where we now have 96% capacity in our prisons. We have a significant problem with overcrowding in our prisons. There is an enormous amount of double bunking, not dual occupancy, but double bunking. I believe, and whether you agree or not, we should be operating our jails in a humane way. If we are to roll out sufficient programs in relation to rehabilitation, whether its employment opportunities, whether its education or addressing the actual offending behaviour, if you don’t have proper facilities to house prisoners, all of that will fall to naught. We’ve inherited a track record of the lowest recidivism rates of the major states, and that’s something we can all be proud of as Victorians. It was certainly driven by the former government, but that is in jeopardy, and indeed all of the education and rehabilitation programs are about providing appropriate accommodation. Without that you will not get the outcomes, and that’s why we’re rolling out those additional beds”. (Taped proceedings, National Justice Symposium, October 2011)

Given these concerns – elaborated and extended through the sections to follow – Jesuit Social Services calls for full modelling of the impacts on the legal, court and prison systems, including for overcrowding and for the delivery of health, education and rehabilitation programs, to be undertaken prior to any further consideration of baseline sentences (and the other sentencing reforms with additional impacts on sentence numbers and/or lengths) to avoid unintended negative consequences of sudden and sharp increases in prison numbers and sentence lengths.

In sum, Jesuit Social Services strongly recommends against the setting of the baseline sentence midpoints by arbitrary mechanisms that impose pronounced increases compared to current median sentences. This will force commensurate matched increases in pressures on the legal/court and prison systems, with greatest adverse impact for the most disadvantaged people within these systems. As detailed below, the current system is already operating under great stress and is in no position to cope with this additional pressure. Human right obligations for the care of prisoners within the prison system are highly likely to be breached, a position of unacceptable risk for the government.

While at another level in terms of incarceration rates, such a breach of rights has lead to a rapid decrease in US prison numbers:

Facing an unprecedented order from the Supreme Court to decrease its inmate population by 11,000 over the next three months and by 34,000 over the next two years, California prisons last week began to shift inmates to county jails and probation officers, starting what many believe will be a fundamental and far-reaching change to in the nation’s largest corrections system.

Last spring, the Supreme Court ruled that over-crowding and poor conditions in state prisons violated inmates constitutional rights and, in a first, ordered a state to rapidly decrease its inmate population” (New York Times, 9 October 2011, p.14)...

The remaining sections of this submission will highlight potential adverse impacts of introduction of baseline sentences. These impacts represent the risk to government of proceeding with the introduction of the baseline (and other) sentencing reforms without adequate resourcing of facilities and services commensurate to the anticipated increases in burden on these systems and people.

5.1 Adverse impacts for legal and court systems

The pressures experienced by current Victoria legal and court systems is evidenced by findings of the most recent productivity report and various media reports. The government is already under scrutiny for the performance of these systems and services. This pressure will heighten under the upward pressures of the cumulative impacts of the various sentencing reforms, including baseline sentences, as described below.

Current underperformance

Court delays

The most recent edition of the Productivity Commission's Report on Government Services (2011) outlines that the Victorian system is far from meeting the National standards across most of the performance targets in relation to Court 'backlog indicators'. With respect to criminal matters in the District/County, Supreme and Higher Courts, Victoria has one the worst records of all the States and Territories (see Backlog indicator in Appendix 2).

Further, the performance of Victoria's court system and the weight of its current caseload was raised as an issue by the Attorney General, Robert Clarke in his position of Shadow Attorney General. Mr Clarke made the following comments in a press release dated 2nd February 2010, when he said in relation to the Victorian courts caseloads in the 2010 Report on Government Services:

"Years of delays are creating trauma and distress for victims, their families and witnesses, while thousands likely to be found guilty of violent crimes are walking free and unpunished," Mr Clark said.

"Long delays are undermining respect for the law and public confidence in the justice system.

"These delays mean the community is not being protected from violent thugs, sentences applied long after the crime are having little deterrent effect, and any rehabilitation measures are years too late.

"Delays increase the chances of guilty persons escaping justice due to witnesses' memories fading or other evidence being lost, while on the other hand innocent people can have serious charges hanging over their heads for years. (Clark, Victoria's Court delays worst in Australia under Labor, 2010)

While there has been a slight reduction . between the 2010 and 2011 figures, Victoria's caseload still remains some 38% higher than NSW (Productivity Commission, 2011, p. 7A.17).

Accused held in unfit cells – The Age – 16/10/11

“People on criminal charges are spending up to two weeks in police cells - often without access to exercise yards, natural light and visitors - because of chronic overcrowding in Victoria's remand prisons.”

“Police and Legal Aid have raised serious concerns about the response by Corrections Victoria and Victoria Police to a 2006 Ombudsman's report that uncovered appalling conditions in police cells. Some lock-ups failed to reach minimum standards set by the United Nations. The State Coroner called the Melbourne Custody Centre "totally inappropriate, inhumane and completely unacceptable in a modern society"

Post code justice in regional Victoria – ABCNews – 18/08/11

Chief Magistrate Ian Gray says support programs for people involved in the Magistrates Court are not uniform across the state.

"While I would love there to be the best of our programs across the state, we all would, the Magistrates would dearly love it, it's impossible from a planning and funding point of view in the end to have everything available everywhere," Mr Gray says.

His comments follow a report from Deakin University's law school that finds a lack of local mental health, youth, counselling, domestic violence and drug and alcohol services increases the likelihood a regional offender will be placed in remand or reoffend. The report, "Postcode Justice", funded by the Victorian Law Foundation, also says many regional court buildings have inadequate space and privacy.

Mr Gray acknowledges there is a disparity between the condition of courts across regional Victoria.

"Some are grossly inadequate, and the State Government is highly aware of which ones they are," he says.

Lawyers threaten legal aid ban over pay rates – The Age – 21/11/10

“Victorian courts could face chaos as solicitors threaten to ban basic legal aid work for criminal cases in protest over low pay rates.

“The proposed bans - expected to be debated tonight at an annual meeting of criminal lawyers - are likely to lead to court delays and cost increases throughout the state.

“The proposal follows a report published last month in which Victorian barristers described legal aid fees as "enforced poverty for lawyers", and said they would prefer to do legal work for free than be insulted by the low payment.”

Lawyers flee legal aid 'in droves' – The Age – 16/07/09

“Legal aid in Victoria has reached crisis point, and this could soon lead to substantial increases in aborted trials and appeals if Canberra does not reverse decades of inadequate funding.

“John Digby, QC, chairman of the Victorian Bar Council, said yesterday that expert criminal lawyers were abandoning legal aid work in droves as those working in the magistrates courts struggled to make a living on a \$36,000 wage.”

Increased burden through baseline (or other reforms to) sentences

As mentioned previously, there is concern that the highly procedural nature of the baseline sentence regime may complicate rather than expedite sentencing, as well as constrain judicial discretion and transparency. The likelihood of increased sentences may mitigate against guilty pleas, extending trial lengths and trial wait times, as well as impose increased burden on victims who will be increasingly required to give evidence. These and other ways in which baselines sentences may complicate and extend trial lengths, will further add to the already unacceptable backlogs in Victorian Courts, as well as pressure on Legal Aide, as further described to follow.

- **Increased burden on court system-** In the instance where a statutory minimum sentence or an overall increase to expected median or baseline sentence is applied the expectation must follow that ‘benefit’ of an early guilty plea is greatly diminished resulting in greater use of court time and resources. This will place considerable time and energy burdens on a court system that is arguably already under resourced.
Taking the example of the offence of Reckless or Intentional Cause of Serious Injury with Gross Violence which it is proposed will have a statutory minimum sentences as well as a baseline applied, the current rate of guilty pleas being entered for the charge of Reckless and/or Intentional Cause of Serious Injury is 89.8 %, according to the most recent figures from the Sentencing Advisory Council (Sentencing Snapshots). While it must be noted that not all offences in category are subject to the further condition of Gross Violence this figure is indicative of the rate of Guilty Pleas being entered.
- **Reduced reliability of evidence** - 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. In the case of trial taking more than the accepted benchmark time to be heard, considerable and warranted scrutiny of admissibility of witness accounts further diminishes efficiency of the courts operation.
- **Difficulty in gaining representation** – Disadvantaged people are over-represented in the justice system (see below). If more cases require court time, more legal representation will be required, with the majority of the burden falling to Legal Aid. Insufficient funding means that currently one person in five who seeks Legal Aid is turned away (Milovanovic, 2009).
- **Police prosecutors forced to provide more resources** – as it should be, all individuals are afforded the principle of being innocent until proven guilty. At trial, as opposed to an out of court early guilty plea, police prosecutors will need to utilize more resources to provide proof beyond reasonable doubt to the court.
- **Increased traumatisation of victims** – with an increase in cases going to trial victims of crime will be increasingly called upon to testify. This is an experience that can be traumatizing,

especially when added to a situation where the offence committed has already put significant emotional and mental stress on the victim.

- **Increased stigma on offenders** – in the case of offenders, particularly those with mental illness, intellectual disability or substance addiction an experience in the justice system can lead to the situation where an offender with the hope of rehabilitation is sufficiently stigmatized to the point of greatly diminishing the possibility of a normal existence when the trial and/or sentence is completed. As mentioned earlier, what is often overlooked is the fact that the majority of all prisoners re-enter society when they have completed their sentence.
- **Reduce transparency and discretion** - with the increase in prescribed sentences – whether this be baseline or mandatory minimum - discretion will increasingly shift from judges and magistrates to prosecutors through plea bargaining prior to court. For example, someone up on trafficking may be able to negotiate a guilty plea to a lesser charge rather than plead guilty to a charge which has significant baseline sentence. The net effect for the legal system is less transparency in sentencing outcomes the more discretion is shifted to prosecutors.

5.2 Adverse impacts for prisons

The stress on the justice system is not isolated to the court component. The prison or correctional facilities are under significant stress that is similarly documented both in the media and acknowledged by both formal reporting mechanisms and decision makers. Again this stress will be exacerbated by increased prison number and/or length of sentences as illustrated again, by the following reports. These evidence the entwined impacts of current and future likely duress of the prison system. For example:

Annual Report Department of Justice

The most recent annual report of the Department of Justice (2011), the issue of prisoner numbers growth and ‘managing demand’ is reported:

“At 30 June 2011, Victoria’s 13 prisons and one transitional centre housed 4737 prisoners, representing an increase of 4.4 per cent on the previous year. Between 2006 and 2011, Victoria’s prisoner population grew by 21.3 per cent, well ahead of population growth of about 1.9 per cent per annum. Corrections Victoria projections indicate that the prison population will continue to grow into the future. Sentencing reform – such as the abolition of home detention and suspended sentences, as well as the proposed mandatory minimum sentencing for certain serious offences – is expected to be the main driver of growth in prison bed demand.” (2011, p. 29)

Corrections Commissioner

The Corrections Commissioner, Bob Hastings, cited in the Ombudsman Victoria’s *Investigation into Prisoner Access to Health Care* stated in relation to concerns about accommodating the rising prison population that:

“...We’re saying by 2016 we won’t cope” (2011, p. 29).

Super jails to cost billions – The Age – 11/06/11

“Victorians face a multibillion-dollar bill for a "critical" prison expansion program that was confidentially hatched under the former Brumby government and is set to get even bigger and more urgent because of the Baillieu government's tough-on-crime policies.

“The Saturday Age has obtained cabinet documents and other confidential reports from the Baillieu government and its predecessor revealing details of proposed public-private partnership schemes for what would be Victoria's largest male and female prisons.

“The documents show that Corrections Victoria, within the Justice Department, has been pressing since 2008 for a new men's prison to ease pressure on jails that have been operating at 105 per cent of the capacity for which they were designed.”



Report Warns of prison bed crisis – The Age – 02/09/11

“Victorian Prisons will be unable to cope with rising inmate numbers within five years, with the Baillieu government's justice department attributing rising numbers to the Coalition's law and order policies.”

“[Coalition] sentencing reform – such as the abolition of home detention and suspended sentences, as well as the proposed mandatory minimum sentences for certain serious offences – is expected to be the main driver of growth in prison bed demand,” the department wrote.

5.3 Adverse impacts for the most disadvantaged people

As stated, the greatest concern to Jesuit Social Services is that the worst of these impacts to the court, legal and prison systems will fall upon the most disadvantaged and marginalised within our community –including young people, as well as the mentally ill, intellectually disabled, poorly educated, poor and Indigenous people who are all over-represented within the justice system. Integrated, multi-disciplinary, cross-sector services supporting an holistic approach to people and their problems is required to tackle the ways in which multiple layers of disadvantage combine, often across generations, to adversely shape pathways both to and from the justice system. Jesuit Social Services firmly believe in the importance of providing interventions aimed at treating the offending behaviour at the source and addressing the underlying issues that may have contributed to offending behaviour. In the case of offenders that have been sentenced to prison providing an environment that is conducive to rehabilitation, furthering education or addressing health needs is paramount to this.

At Jesuit Social Services, we further believe that there is mutual benefit to both the offender and the community as a whole, when the emphasis in law and order is on crime prevention and diversion,

rehabilitation and redirection away from incarceration. While there will always be a cohort of people who can only be dealt with through imprisonment – this should always be the option of last resort. For people who are imprisoned, Government has a duty of care to ensure people are treated with dignity, their health and welfare is protected from further harm, and rehabilitation is provided – for the sake of the individual prisoner and to best ensure community safety once prisoners are re-integrated in the community.

The Victorian Ombudsman (2011) in his *Investigation into Prisoner Access to Health Care* makes this clear:

“Prisoner rights are legislated in the Corrections Act 1986 which states that prisoners have the right to access reasonable medical care and treatment necessary for the preservation of health. The Charter of Human Rights and Responsibilities Act 2006 states that ‘all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person’”.

This goes to the heart of the risk to government of over-crowding and lack of obligatory services.

Over-representation of disadvantaged, high needs people within the prison system.

Research of Jesuit Social Services, *Community Adversity and Resilience* (2004), which mapped the distribution of social disadvantage in Victoria and New South Wales, showed a very strong connection between the most disadvantaged suburbs and the postcodes of the Victorian prison population. Almost identical findings were replicated by the more recent research *Young People on Remand in Victoria* (Vinson & Erikson, *Young People in Remand in Victoria*, 2010) with 2.1% of Victoria’s postcodes account for 25% of the remand cases; 15% of the cases from 1% of postcodes (p. 54) The findings of these reports confirm that the most disadvantaged postcode areas in Victoria are being mined more and more deeply by the instrumentalities of an expanding criminal justice system.

The human experience of this disadvantage shows itself in the over –representation within the prison populations, including the youth justice centres, of marginalized sub-groups. Specifically:

Over-representation of Indigenous people:

As previously stated the Productivity Commission, 2011 *Report on Government Services* reported Indigenous adults were imprisoned at 13.3 the rate of non-indigenous people in Victoria (2011, p. 8A.4), while the most recent Australian Institute of Health and Welfare (2011) data reports that in Victoria in 2009-an Indigenous young person aged 10–17 years was 22 times as likely to be in detention as a non-Indigenous young person aged 10–17 years.” (p. 162).

From the Youth Parole Board and Youth Residential Board Annual Report 2010–2011 (2011, p. 20), the profile of young detainees included:

- 35 per cent had previous child protection involvement
- 16 per cent had a current child protection order
- 55 per cent were victims of abuse, trauma or neglect prior to incarceration
- 66 per cent had been suspended or expelled from school

- 34 per cent presented with mental health issues
- 28 per cent had a history of self harm or suicidal ideation
- 27 per cent presented with issues concerning their intellectual functioning
- 14 per cent were registered with Disability Services
- 89 per cent were alcohol users
- 86 per cent were drug users
- 88 per cent of cases had alcohol or drug use related to their offending
- 12 per cent were parents.

From evidence compiled from numerous studies by *Smart Justice* about the adult prison population:

- Around 90% of male prisoners and 80% of female prisoners have not completed secondary schooling;
- 60% of male prisoners and 76% of female prisoners were unemployed when they entered custody;
- 50-80% of prisoners have a drug or alcohol dependence;
- 85% of women prisoners in Victoria suffered from a mental disorder 87% of women prisoners were victims of sexual, physical or emotional abuse, with the majority being victims of multiple forms of abuse. (Smart Justice Australia)

Corrections Victoria fully acknowledges this over-representation: “The offender population comprises disproportionate numbers of individuals with mental health issues, cognitive impairment and a history of alcohol and other drug use. Individuals in prison will often present with lower levels of education, higher levels of unemployment and homelessness, have living skill deficits and will often lack any enduring positive family and/or social supports” (Corrections Victoria, 2011b, p. 51).

Given the over representation within the prison systems of vulnerable, disadvantaged people, Jesuit Social Services further recommends that all sentencing practices to ensure the strong weighting of ‘mitigating factors’ to ensure the judiciary maintains flexibility to take full account of disadvantage, including age and all forms of disability, in sentencing.

Capacity of current prison system to provide effective support and rehabilitation

Concern at not being able to provide support to prisoners commensurate to their needs is strongly expressed in recent Ombudsman Victoria reports. This capacity will deteriorate further if prison numbers increase as anticipated under the cumulative weight of the proposed sentencing reforms, including the 125% and 33% increases for drug trafficking and murder sentences mooted by the government under the baseline sentences regime.

Recent Victorian Ombudsman reports Investigation into Prisoner Access to Health Care (2011) and Investigation into conditions in the Melbourne Youth justice Precinct (2010) expose serious flaws in current standards at current levels of over-crowding.

Specific concerns raised by this report include:

“As the prison population grows so too does the need for prisoner medical care. My investigation established that while extra beds are being placed in prisons, the burden this places on prison facilities has not been addressed” (p. 6)

“As well as impacting on bed capacity, the increasing prisoner population has placed a significant burden on the health services provided in prisons... while extra beds are being added to prisons, the corresponding health services are not being updated.” (p. 29)

Further, (pp. 3-8):

There is a revolving door between our prisons and our community. In 2010, the Australian Bureau of Statistics reported that 49 per cent of Victorian prisoners surveyed had previously been imprisoned in the adult system and 41 per cent of Victorian prisoners were serving a sentence between one and five years.

With such high rates of recidivism, the health of Victoria’s prisoners can have significant impacts on the broader community and it is imperative that this impact is minimised by providing prisoners with a reasonable standard of health care.

Studies have repeatedly shown that the prevalence of communicable diseases within the prisoner population is significantly greater than in the wider community. The National Prison Entrants’ Blood-borne Virus and Risk Behaviour Survey 2004 & 2007 (the national survey) identified that:

- *41 per cent of Victorian prisoners have Hepatitis C (compared with one per cent of the general population)*

Improving the health of prisoners has important public health consequences ...

Of grave concern to Jesuit Social Services are the findings of the ombudsman in his Investigation into conditions at the Melbourne Youth Justice Precinct (2010, p. 8). Among a litany of damning findings relating to the conditions for detainees, the investigation revealed that:

(T)he dirty, unhygienic and ill-maintained conditions reflect poorly on the management and staff at the Precinct. These conditions are clearly in breach of:

- *the United Nations Rules for the Protection of Juveniles Deprived of their Liberty*
- *the Australasian Juvenile Justice Administration Standards for Juvenile Custodial Facilities*
- *recommendations arising from the Royal Commission into Aboriginal Deaths in Custody*
- *Government health regulations, in particular the Food Act 1984.*

And that:

(T)he conditions in the Precinct reflect little regard for human rights principles. The Charter of Human Rights and Responsibilities Act 2006 (the Charter of Human Rights) places particular importance on the circumstances of children in the criminal justice process and the protection of children in general.

Non-compliance with the Charter of Human Rights is worsened by the problem of overcrowding, which I have identified as a considerable issue in the Precinct, in particular the Justice Centre...

It is clear from the unacceptable conditions that the department has failed to meet its

statutory obligations under the Act and human rights principles.

The recent apologies issued to the Stolen Generation and Forgotten Australians required by the State and Commonwealth Government because of past failures in care for children and young people provides salutary warning to the Government of failures to provide adequate care and protection for people under its watch. To this extent, the description of Senate Committee of the actions of previous administrations in the Forgotten Australian report have resonance for the current findings of the Victorian Ombudsman with respect to aspects of both the adult and youth detention centres:

...wide scale unsafe, improper and unlawful care of children, a failure of duty of care, and serious and repeated breaches of statutory obligations. (Community Affairs and Reference Committee of the Senate, 2004)

The Government exposure to risk from failure to adequately provide for prisoners health, welfare and rehabilitation is pressing under current conditions and, as stated will only increase as prison numbers increase. Jesuit Social Services repeats our recommendation for full modelling of the impacts on the prison systems, including for overcrowding and for the delivery of health, education and rehabilitation programs, to be undertaken prior to any further consideration of baseline (and other reforms to) sentences to avoid unintended negative consequences of sudden and sharp increases in court and prison numbers.

5.4 Impacts for young people

Jesuit Social Services is further concerned at the potential for increased sentence lengths to negatively impact upon the functioning of the Victorian 'dual track' system, that provides for young people 18-21 years to be detained in youth justice sentence not adult prisons. Recognition of the vulnerability of young people in general and specifically within the adult prison system is at core of this fundamental protection, as legislated within the Children Youth and families Act 2005 (CYFA). Specifically:

32. Youth justice centre or youth residential centre order

- 1) *Subject to subsections (2A) and (2B), if a sentence involving confinement is justified in respect of a young offender a court may make a youth justice centre order or a youth residential centre order if it has received a pre-sentence report and-*
 - a. *it believes that there are reasonable prospects for the rehabilitation of the young offender; or*
 - b. *it believes that the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.*

Section CYFA s32 further legislates:

- 3) *The maximum period for which a court may direct that a young offender be detained in a youth justice centre or youth residential centre is-*
 - a. *if the court is the Magistrates' Court-2 years; and*
 - b. *if the court is the County Court or the Supreme Court-3 years.*

Sentences beyond the 2 or 3 year limits legislated for confinement in a youth justice centre will preclude young people from this important protection enabled through the 'dual track' system. Jesuit Social Services therefore further recommends that protection is provided to ensure that the operations of any baseline sentence regime does not negatively impact on the 'dual track' system for young people 18-21 years by forcing sentence lengths beyond eligibility for detention in youth justice centres.

Finally, the potential impact for young people of baseline sentences requires further clarification. This was not directly addressed in the Sentencing Advisory Council's Issues Paper. As some offences identified for baseline sentencing come under the jurisdiction of the Children's Court it is uncertain how these are to be dealt with, and what the intended relationship is with the sentencing principles within the Children Youth and Families Act 2005 (s362). Given the previously described poor health of the Youth Justice Precinct as reported by the Victorian Ombudsman above, any upward pressure on the youth justice system would have extremely deleterious impacts.

APPENDIX 1

STANDARD NON-PAROLE PERIODS AND GUIDELINE JUDGMENTS – NSW SENTENCING COUNCIL TERMS OF REFERENCE (NSW Sentencing Council, 2011)

In March 2009 the Attorney General requested that the Council examine standard non-parole periods and guideline judgments, in accordance with the following terms of reference:

1. Identification of any sexual offences not contained in the Table of Standard Non-parole Periods (SNPPs), which possibly should be included at a later date;
 2. Standardisation of SNPPs for sexual and other offences within a band of 40-60 per cent of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto;
 3. Identification of potential additions to the SNPP scheme, involving the level or levels at which SNPPs might be appropriately set;
 4. Establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the SNPP is set; and
 5. Identification of sexual offences that might justify an application for a guideline judgment.
- The Council is to report to the Attorney General in 2011.

APPENDIX 2

BACKLOG INDICATOR, BOX 7.8 DEFINITIONS AND TABLE 7.9 STATE-BY-STATE COMPARISON OF CRIMINAL MATTERS PENDING SOURCE: 2011 REPORT ON GOVERNMENT SERVICES, PRODUCTIVITY COMMISSION, CHAPTER 7, COURT MATTERS, WWW.PC.GOV.AU

Box 7.8 Backlog indicator

The 'backlog indicator' measures the age of a court's pending caseload against nominated time standards. The number of cases in the nominated age category is expressed as a percentage of the total pending caseload.

The following national standards have been set:

The Federal Magistrates Court, magistrates' and children's courts:

- no more than 10 per cent of judgments pending completion are to be more than 6 months old
- no judgments pending completion are to be more than 12 months old.

Supreme courts, the Federal Court, district/county, family and coroners' courts and all appeals:

- no more than 10 per cent of judgments pending completion are to be more than 12 months old
- no judgments pending completion are to be more than 24 months old.

Performance relative to the time standards indicates effective management of caseloads and timely accessibility of court services.

Time taken to process cases is not necessarily court administration delay. Some delays are caused by factors other than those related to the workload of the court (for example, a witness being unavailable).

Data reported for this indicator are not directly comparable.

Data quality information for this indicator is under development.

Table 7.9 Backlog indicator — all criminal matters, as at 30 June 2010

	Unit	NSW ^a	Vic	Qld	WA	SA	Tas	ACT	NT
Higher^{b, c} — appeal									
Pending caseload	no.	1 684	1 850	393	187	79	17	82	17
cases > 12 mths	%	1.6	17.0	10.4	3.7	2.5	11.8	15.9	—
cases > 24 mths	%	0.4	2.8	0.5	—	—	—	3.7	—
Higher^{b, c} — non-appeal^c									
Pending caseload	no.	1 772	1 959	2 811	1 166	1 625	321	398	157
cases > 12 mths	%	6.0	26.6	16.0	5.9	23.3	12.1	38.4	8.3
cases > 24 mths	%	0.5	7.6	5.8	0.8	5.8	4.0	9.5	—
Supreme^{c, d} — appeal									
Pending caseload	no.	236	569	156	187	79	17	82	17
cases > 12 mths	%	7.6	38.1	5.1	3.7	2.5	11.8	15.9	—
cases > 24 mths	%	3.0	6.0	0.6	—	—	—	3.7	—
Supreme^{c, d} — non-appeal^e									
Pending caseload	no.	75	108	540	52	50	321	398	157
cases > 12 mths	%	16.0	30.6	17.2	5.8	14.0	12.1	38.4	8.3
cases > 24 mths	%	1.3	8.3	3.7	—	2.0	4.0	9.5	—
District/County — appeal^f									
Pending caseload	no.	1 448	1 281	237	..	..	..	..	..
cases > 12 mths	%	0.6	7.6	13.9	..	..	..	..	..
cases > 24 mths	%	—	1.3	0.4	..	..	..	..	..
District/County^e — non-appeal									
Pending caseload	no.	1 697	1 851	2 271	1 114	1 575	..	..	..
cases > 12 mths	%	5.6	26.4	15.7	5.9	23.6	..	..	..
cases > 24 mths	%	0.4	7.5	6.3	0.8	5.9	..	..	..
Magistrates^g									
Pending caseload	no.	21 859	30 506	29 503	11 276	18 703	8 543	1 450	3 040
cases > 6 mths	%	11.1	26.6	29.8	22.8	29.6	33.1	19.6	43.1
cases > 12 mths	%	2.3	8.4	14.1	7.9	11.9	14.7	7.2	30.2
Children's									
Pending caseload	no.	2 550	4 157	2 504	1 934	1 811	847	223	385
cases > 6 mths	%	8.4	16.5	24.6	23.9	18.8	27.9	16.1	29.1
cases > 12 mths	%	0.9	3.5	9.9	7.8	5.2	10.9	8.1	17.4

^a Extraction and validation of data from the NSW Justicelink database is still in development. Data provided for 2009-10 include actual and estimated data. ^b Higher refers to supreme and district/county courts combined. ^c In NSW, the criminal caseload of the Supreme Court is principally murder and manslaughter cases and therefore not directly comparable with supreme courts in other states and territories. ^d During 2009-10, the Supreme Court of Victoria implemented a new Case Management system and associated Courts Data Warehouse. This has required changes to work practices in registries and judges' chambers and introduced new systems and opportunities for data analysis. ^e For Queensland supreme and district courts, the age of non-appeal cases is calculated from the date the court record was first created in the computerised case management system in the supreme or district court, not from the date of the committal order in the magistrates' court. ^f There is no criminal appellate jurisdiction in the district courts in WA or SA. All criminal appeals from magistrates' courts go directly to supreme courts in these states. .. Not applicable. — Nil or rounded to zero.

Source: State and Territory court administration authorities and departments (unpublished); table 7A.17.

Bibliography

Australian Institute of Health and Welfare. (2011). *Juvenile Justice in Australia 2009-10*. Canberra: Australian Institute of Health and Welfare.

Clark, R. (2011, September 15). Second Reading Speech. *Sentencing Amendment (Community Corrections Reform) Bill 2011*. Victoria.

Clark, R. (2010, February 2). Victoria's Court delays worst in Australia under Labor. Melbourne.

Community Affairs and Reference Committee of the Senate. (2004). *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*. Canberra: Commonwealth Parliament.

Corrections Victoria. (2011a). *Intellectual Disability within the Victorian Prison System*. Melbourne: Corrections Victoria.

Corrections Victoria. (2011b). *Intensive Transitional Support Grants 2011-2014*. Victoria: Department of Justice.

Department of Justice. (2011). *Annual Report 2010/11*. Melbourne: Department of Justice.

Dunin, J. (2009). *Doing Justice: Reflections from 30 years*. Melbourne: Jesuit Social Services.

Harper, J. D. (2011). Sentencing: Public Perceptions, the Reality and their Social Implications. *Kerferd Oration*. Beechworth.

Hoel, A. a. (2008). *Sentencing Matters*. Melbourne: Sentencing Advisory Council.

National Party Victoria. (2010, November 23). Coalition to Set Minimum Sentence Standards for Serious Crimes. Melbourne.

NSW Sentencing Council. (2011). *Current Projects*. Retrieved from NSW Sentencing Council: http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_current_projects

Productivity Commission. (2011). *Report on Government Services 2011*. Canberra: Productivity Commission.

Sentencing Advisory Council Victoria. (2011a). *Baseline Sentences: Issues Paper*. Melbourne: Sentencing Advisory Council Victoria.

Sentencing Advisory Council Victoria. (2011b). *Causing Serious Injury - Recklessly and Intentionally: Current Sentencing Practices*.

Sentencing Advisory Council Victoria. (n.d.). *Sentencing Snapshots*. Retrieved 2011, from Sentencing Advisory Council Victoria: [www.http://sentencingcouncil.vic.gov.au/page/about-sentencing/sentencing-statistics/sentencing-snapshots](http://www.sentencingcouncil.vic.gov.au/page/about-sentencing/sentencing-statistics/sentencing-snapshots)

Smart Justice Australia. (n.d.). *Fact Sheets*. Retrieved October 2011, from Smart Justice Australia: http://www.smartjustice.org.au/cb_pages/factsheets.php

Victorian Liberal National Coalition Media Release. (2010, November 23). Coalition to Set Minimum Sentence Standards for Serious Crimes. Melbourne.

Victorian Ombudsman. (2010). *Investigation into conditions at the Melbourne Youth Justice Precinct*. Melbourne: Victorian Ombudsman.

Victorian Ombudsman. (2011). *Investigation into prisoner access to health care: August 2011*. Melbourne: Victorian Ombudsman.

Vinson, T. (2004). *Community adversity and resilience: the distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion*. Melbourne: Jesuit Social Services .

Vinson, T., & Erikson, M. (2010). *Young People in Remand in Victoria*. Melbourne: Jesuit Social Services.

Youth Parole Board and Youth Residential Board . (2011). *Annual Report 2010–2011*. Melbourne: Youth Parole Board and Youth Residential Board .