



Victorian Aboriginal Legal Service Co-operative Limited (VALS)

Statutory Minimum Sentences for Gross Violence

Submission to the Sentencing Advisory Council (SAC)

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About the Victorian Aboriginal Legal Service Co-operative Limited

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973 to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Aboriginal and Torres Strait Islander peoples to empowerment, identity and culture;
- c) Ensure that Aboriginal and Torres Strait Islander peoples enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islander peoples.

For further information about VALS, please see our website: www.vals.org.au



Imprisonment has its place in the criminal justice system...in light of the empirical evidence, however, it is critical that the purposes of sentencing be considered independently – according to their own merits – and caution be exercised when imprisonment is justified as a means of deterring all crimes and all kinds of offenders.

Sentencing Advisory Council, 2011¹

Introduction

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes the opportunity to respond to the Sentencing Advisory Council's investigation of *Statutory Minimum Sentences for Serious Injury Offences Involving Gross Violence*. VALS acknowledges that the Terms of Reference do not pertain to the merit of the Baillieu Government's introduction of statutory minimum sentences. VALS has grave concerns and strongly opposes the introduction of statutory minimum sentencing as it applies to juveniles aged 16-17 as well as adults – notably those aged 18-21 for whom the courts can currently utilise the dual track sentencing option.

Since the announcement of the Government's plans to introduce mandatory sentencing laws in Victoria there has been widespread concern within the community legal sector about the high potential for negative outcomes for marginalised and disadvantaged communities, the justice system itself, and the wellbeing of community at large. Community Legal Centres, NGOs and other community services have long been pointing to the consistent evidence about what factors leads to, and what prevents, offending and reoffending. The clear message that the research tells us is that reducing crime cannot be achieved by looking to the symptom alone, you must address the cause.

There appears to be a broad trend by the Victorian Government and Governments in other jurisdictions towards increasingly punitive approaches to crime and punishment. Within this debate, Chris Cunneen contends that one of the most fundamental points to grasp is that rising imprisonment is not directly related to increases in crime.² VALS considers a society where increased imprisonments are not a function of increased levels of crime³ to be a society that has lost sight of what is proportional, reasonable, and just.

Other Australian jurisdictions with mandatory and/or minimum sentencing laws have high imprisonment rates with no evidence showing reduction in crime or recidivism. VALS contends that because these punitive sentencing laws do not allow for the causes of crime to be addressed, they fail to deter offending, let alone rehabilitate offenders.

VALS believes the absence of mandatory sentencing practices in Victoria has been one element within the justice system that has helped maintain a relatively low incarceration and crime rate compared to other jurisdictions. Together with the evolution of Victoria's justice system through initiatives such as the creation of specialist courts and court integrated services, the flexibility of the

¹ Sentencing Advisory Council, 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence' (2011) p. 23.

² Chris Cunneen, 'Fear: Crime and Punishment' (2011) UNSWLRS 10, at <http://www.austlii.edu.au/au/journals/UNSWLRS/2011/10.html>

³ *Id.*

judiciary helps ensure tailored sentencing to deliver the most appropriate outcome that balances punishment, rehabilitation and community safety.

VALS is cautious to acknowledge that the offence for which this proposed sentencing law is targeted is serious, and our comments about statutory minimum sentencing should not be taken to condone acts of gross violence. VALS believes that the judiciary are best placed to make appropriate decisions, taking into account all the information before them, when a case of gross violence comes before the court. As highlighted in our recent media release,⁴ there is an unsettling insinuation by Government that the judiciary are not making appropriate findings in cases as serious as this. There is clearly a critical question about the separation of powers between parliament and the judiciary that needs to be addressed by SAC in this Inquiry. It has been argued that the shackling of Victoria's magistrates and judges through mandatory sentencing in *any* form is an assault by the executive and the Parliament 'on the only arm of government power in our society that is designed to uphold justice.'⁵

VALS believes that it is critical that the judiciary retain discretion in sentencing and urges the Government to focus policy implementation towards addressing the conditions in society that contribute to violent offending. This is the most effective way to address crime rates and has been heavily researched in recent times, including the Inquiry by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system (to which VALS made a submission⁶).

The current submission focuses on the experiences of mandatory sentencing on Aboriginal and Torres Strait Islander communities in other jurisdictions; a case for retaining judicial discretion in matters involving gross violence; the implications when considering the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) and other human rights instruments; and the most recent call to action for all governments to address as a matter of urgency and national priority, the increasing overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.

While VALS strongly opposes the introduction of statutory minimum sentencing laws of any description, we are mindful of the importance of commenting on such measures should they be introduced. For this purpose VALS endorses the recommendations contained within Youthlaw's submission⁷ as follows:

Recommendation 3: A separate offence of intentionally/recklessly cause serious injury (gross violence) be created to reflect the more serious nature of the offence and the more punitive nature of the penalty.

Recommendation 6: That the offence must result in more than just a 'serious injury', given the broad range of injuries that may be included under current legislation and case law.

⁴ <http://vals.org.au/law-reform-and-policy-development/media-releases/post/mandatory-sentencing-will-bring-harm-not-community-safety/>

⁵ Greg Barnes, 'Mandatory jail terms for young offenders undermine the pillars of our democracy,' *On Line Opinion* (9 June 2011).

⁶ <http://vals.org.au/law-reform-and-policy-development/submissions/post/high-level-contact-of-indigenous-juveniles-and-young-adults-with-the-criminal-justice-system/>

⁷ Draft, as at 29 June 2011

Recommendation 7: That this offence only applies in relation to principal offenders, and not those who are merely present.

Recommendation 8: That exceptional circumstances should be broadly defined and left to judicial discretion.

VALS also endorses recommendations of the Law Institute of Victoria (LIV)⁸ as follows:

Recommendation 2: a new offence of “gross violence” must be defined to preclude first time offenders.

Recommendation 3: mandatory sentencing should not apply to juvenile offenders.

Recommendation 7: should the provision of “gross violence” be introduced, a “special circumstances” provision be included to include mental illness or impairment as a reflection of the well understood common law position.

LIV recommendation 7 is critically important to VALS and our clients considering that in addition to a 2009 survey of 164 young people in custody that indicated high levels of mental health issues, history of self harm, issues with intellectual functioning, previous contact with child protection, and offending was related to drug use; over 25% of Aboriginal and Torres Strait Islander people within the parole system are registered as intellectually disabled.⁹

Statutory minimum sentencing laws will cause harm

Instead of delivering community safety, VALS argues that statutory minimum sentencing laws will cause harm on a number of fronts:

Statutory minimum sentencing laws are discriminatory

Mandatory sentencing was introduced in the Northern Territory in early 1997 and was repealed in 2001. By late 1997 the prison population in the Northern Territory had increased by 42% as a result of mandatory sentencing.¹⁰ One aspect of the campaign that influenced the repeal of mandatory sentencing focused on the disproportionate impact of mandatory sentencing on Aboriginal and Torres Strait Islander peoples. The laws themselves were not directly discriminatory as they did not distinguish between Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples. However, there was indirect discrimination in that the application of the law had the unintended consequence of primarily effecting Aboriginal and Torres Strait Islander peoples.

⁸ Law Institute of Victoria, ‘Sentencing Advisory Council – Statutory Minimum Sentences for Gross Violence’ Submission to the Sentencing Advisory Council (29 June 2011).

⁹ Youth Parole Board, ‘Annual Report 2009-10’ Department of Human Services.

¹⁰ Linda Alexander, ‘Letter to the Editor; Why mandatory sentencing is wrong’ *The Australian* (29 January 2000).

As a senior VALS Criminal Law Solicitor states:

It frustrates me how blind state governments can be – surely they could learn some wisdom from other states and territories that have implemented such schemes and bore witness to their atrocious outcomes. Instead of attacking the democratic judicial system, the government should be trying to tackle the causes of violence in society; poverty and dis-empowerment foremost among them.

Discretion is removed from the courts

As argued by a senior VALS criminal law solicitor, the removal of any discretion on the part of individual magistrate or judge makes a mockery of the separation of judicial and legislative powers in Australia's model of democracy. Not only does it restrict the courts' capacity to ensure that punishment is proportionate to the seriousness of the offence, minimum sentences contravene the Convention on the Rights of the Child (CROC) in the case of juveniles. The removal of judicial discretion in sentencing can lead to penalties disproportionate to the crime. Article 40 of CROC states that the most fundamental principle for sentencing for juvenile offenders is the principle of proportionality. The principle of proportionality is described in the commentary to the Beijing Rule 5 as an instrument for curbing punitive sanctions where the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances of the offender (e.g. social status, family situation, harm caused etc).¹¹

VALS notes the previous mandatory sentencing laws in Victoria relating to driving offences. Thankfully those laws have since been removed, however during their operation there was at least a number of options for how the offender could serve the mandatory sentence. The current proposal does not appear to allow for even this small amount of discretion by the courts.

VALS acted in one case where had the proposed laws been in place, the absence of discretion of the court would have had extremely negative consequences for not only the offender but their family.

Case Study: "Terrie"

Terrie is a parent to a mentally ill daughter who has children. Terrie is approximately 60 years of age and is a prominent figure in their community and holds a significant caregiver role to their extended family in addition to their daughter. Terrie has an intervention order against an ex-partner. At a family gathering at their home, Terrie's ex-partner arrives intoxicated and refuses to leave. In an attempt to protect the family in attendance, Terrie stabs their ex-partner inflicting a non-life threatening wound.

Terri had no prior offending and was convicted with a requisite offence to that currently proposed. The court found to place Terrie on a good behaviour bond under supervision of the court. Terrie's mentally ill daughter subsequently passed away. Had Terrie not been able to be released into the community - an option that would have been unavailable to her under the proposed laws - their grandchildren of their now deceased daughter would be in state care. Terrie never came back before the attention of the court. Terrie was no threat to society.

¹¹ In Human Rights and Equal Opportunity Commission, 'Human Rights Brief: Sentencing Juvenile Offenders' (1999)

Mandatory sentencing laws do not deter criminal activity

The suggestion by the Government that statutory minimum sentencing will deter crime and therefore increase community safety is not only misguided, it stands in complete contradiction with what we know about criminality and the experiences of other jurisdictions under similar laws. One VALS solicitor contends that examples from the Northern Territory and Western Australia show that mandatory sentencing in itself is an attack on civil liberties and will simply result in longer sentences and not a reduction in the crime rate.

In SAC's own research into imprisonment as a deterrent, harsher punishments were not linked to reduced rates of offending. SAC found that at best, imprisonment did nothing to reduce the chance of re-offending.¹² Furthermore, SAC notes that in *H v Rowe*,¹³ Forrest J affirmed that general deterrence is not a relevant sentencing principle as the principle of specific deterrence is incorporated within the *Children, Youth and Families Act 2005* (Vic) as it instructs with the aim of protecting the community.

Prison results in a greater rate of offending

More than failing to deter people from offending, minimum prison sentences have the potential to increase the rate of offending.¹⁴ This occurrence can be explained for three main reasons: 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.¹⁵

Statutory minimum sentencing laws are costly

Mandatory sentencing is expensive as court costs increase when more defendants contest charges to try to avoid mandatory penalties. This is in addition to the cost of housing large numbers of offenders imprisoned. There are more cost effective methods of addressing offending behaviour and protecting the community such as prevention, early intervention and notably justice reinvestment.¹⁶

Inconsistency

Mandatory sentencing creates inconsistency because the 'inherent impression in statutorily defining offences means very unequal offenders can receive the same sentence'.¹⁷ Jordana Cohen, a lawyer from Youthlaw, addresses the question of inconsistency with reference to what the Government seems most concerned with: community expectations. She asks if the community 'expect a violent thug who inflicts premeditated gross violence on innocent victims to get the same sentence as the intellectually disabled boy who stuck around tough guys and did what he was told? Or the good kid ... who found themselves in the wrong group of friends on the wrong day when an argument

¹² Sentencing Advisory Council (2011) *op cit*.

¹³ *H v Rowe* [2008] VSC 369.

¹⁴ Sentencing Advisory Council (2011) *op cit*.

¹⁵ Nagin, Cullen and Jonson (2009) in *Id*.

¹⁶ Roche Declan 'Mandatory Sentencing, Trends and Issues in Crime and Criminal Justice no 138, Australian Institute of Criminology' (1999)

¹⁷ *Ibid*, p 3.

suddenly got out of hand?’¹⁸ Jordana Cohen further highlights how under the proposed laws, the minimum sentence will be the same as the maximum possible sentence for a single offence in the Children’s Court, ‘meaning that the worst of the worst gets the same result as the least culpable offender.’¹⁹

Undermines existing programs

Mandatory sentencing is ‘fundamentally inconsistent with the underlying approach of diversionary programs. That approach embodies flexibility, the use of discretion, and regard to the particular circumstances of each person, and each case.’²⁰ VALS strongly supports initiatives that are focused around restorative justice, therapeutic jurisprudence, holistic responses to complex needs, and rehabilitation. VALS recommends the Government invest in programs that seek to address the causes of offending and divert people from contact with the criminal justice system, such as:

- The ROPES program
- Koori Youth Justice Program
- Koori Intensive Bail Support Program
- Group Conferencing

Victoria also currently has a dual track system that allows 18-20 year old offenders to be sentenced to a youth justice or a youth residential centre order if the judge finds that there is reasonable prospects of rehabilitation. This option is designed to take into account the level of maturity of the offender as well as the vulnerability of the offender for alternatives to being placed in an adult prison. As the proposed law imposes anyone of the age of 18 convicted of gross violence a 4 year term in prison, the utilisation of the dual track system is seriously undermined and limits opportunities for young adults to access rehabilitative programs in an environment appropriate for their age.

Overlooks Royal Commission into Aboriginal Deaths in Custody

Mandatory sentencing overlooks the Royal Commission into Deaths in Custody (RCIADIC) that reported the causes of, and made recommendations to reduce, Aboriginal and Torres Strait Islander deaths in custody. It found that whilst Aboriginal and Torres Strait Islander people were not more likely to die in prison, they were more likely to be imprisoned. In order to prevent future deaths in custody, recommendations were made in order to reduce the over-representation of Aboriginal and Torres Strait Islander peoples in prison. As mandatory sentencing is likely to increase the number of Aboriginal and Torres Strait Islander peoples in prison, it is inconsistent with the findings and recommendations of the RCIADIC.

Breaches human rights

Mandatory sentencing laws do not comply with human rights and arguably breaches the Convention on the Rights of the Child (CROC), the Convention on the Elimination of Racial Discrimination (CERD)

¹⁸ Jordana Cohen, ‘Jailing children will just make them better criminals’ *The Age* (3 June 2011).

¹⁹ *Id.*

²⁰ Central Australian Youth Justice, “Prevention is Better than Detention” (Response to the Joint Commonwealth and Northern Territory Statement on Mandatory Sentencing made on 10 April 2000), 12 July 2000, p. 1.

and the International Covenant on Civil and Political Rights (ICCPR).²¹ The Committee on the Elimination of Racial Discrimination has previously expressed its concern about the mandatory minimum sentencing schemes enacted in Western Australia, and in particular in the Northern Territory. 'The mandatory sentencing regime appears to target offences that are committed disproportionately by indigenous Australians, *especially juveniles*, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends the State party to review all laws and practices in this field (italics added).'²²

VALS urges SAC to review the 'National Inquiry into Children in the Legal Process' jointly published by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC) in 1997. This report criticised the Northern Territory and Western Australia Laws because, in contravention of ICCPR and CROC, the laws violated the principle of proportionality in sentencing, did not represent a sentence of "last resort" and the sentences were not reviewable by a higher court.

It has also been noted that incarceration is not only a sentencing option, but has the capacity to cause harm. This runs contrary to the obligation to protect the wellbeing of children and therefore must be subject to 'stricter scrutiny' before it is adopted.²³ As summarised in the commentary to Beijing Rule 19:

*Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalisation...the many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only the loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stages of development.*²⁴

The reality of incarceration causing harm to children has been known for decades and was brought into the headlines in early 2010 when an Ombudsman's report²⁵ revealed the horrific conditions in the Melbourne Youth Justice Precinct.

For example, it was alleged that staff:

- incited assaults between detainees;

²¹ Rile Mark, 'What UN really though' *The Age* (17 March 2000).

²² United Nations 'Report of the Committee on the Elimination of Racial Discrimination' fifty-sixth session (6-24 March 2000), fifty-seventh session (31st July to 25th August 2000), General Assembly (fifty fifth session – Supplement No 18 A/55/18) Page 19, Paragraph 39 as at <http://www.un.org/documents/ga/docs/55/a5518.pdf>

²³ Human Rights and Equal Opportunity Commission (1999) *op cit*.

²⁴ In Human Rights and Equal Opportunity Commission, 'Human Rights Brief: Sentencing Juvenile Offenders' (1999) p. 5.

²⁵ Ombudsman G E Brouwer, 'Whistleblowers Protection Act 2001: Investigation into conditions at the Melbourne Youth Justice Precinct' (2010) at http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_conditions_at_the_Melbourne_Youth_Justice_Precinct_Oct_20101.pdf

- assaulted detainees;
- restrained detainees with unnecessary force;
- supplied contraband to detainees, including tobacco, marijuana and lighters; and
- stole goods and consumables.

There were also allegations relating to general mismanagement of the Justice Centre, overcrowding, poor adherence to operational procedures and an organisational culture that fostered unethical conduct. During site visits, the Ombudsman officers observed many design features within the Youth Justice Precinct that did not appear suitable for a custodial environment for juveniles, including hanging points throughout the Precinct and land-fill which results in pieces of glass rising to the surface. Investigation also identified the following concerns:

- Overcrowding has resulted in mattresses being placed in isolation rooms with young people having to go to the toilet in buckets.
- The number of beds in the Precinct is not sufficient for the number of remanded or sentenced detainees that the Precinct is required to accommodate. As a result, undesirable mixing of detainees of widely varying ages and different legal status occurs.
- Remanded detainees are being placed in units with sentenced offenders which has presented a significant problem. Mixing of remanded and sentenced detainees of varying ages occurs despite section 22(2) and 23(1) of *the Victorian Charter of Human Rights and Responsibilities 2006* and section 482(1)(c) of the *Children, Youth and Families Act 2005*. Both the Charter of Human Rights and the Act discuss the separation of persons accused of an offence from persons convicted of an offence.

In the Ombudsman's view, the conditions of the Youth Justice Precinct in Victoria reflect little regard for human rights principles for children in custody.

International human rights law also dictates that where detention is the only appropriate sentencing option, it must be for the shortest appropriate period of time. This is an expression of the broader principle that juvenile offenders should generally be subjected to the least possible intervention or restriction.²⁶ The question of what is an appropriate sentence length is ultimately, then, subject to the sentence's discretion. The introduction of statutory minimum sentencing clearly runs contrary to human rights law and will be discussed further below.

²⁶ *Id*

Impact of statutory minimum sentencing on VALS' clients and their community

VALS' criminal law solicitors Jill Prior and Ellie Pappas have publically spoken about how these proposed laws will play out for offenders and their communities.²⁷ Jill Prior, Executive Officer of Legal Practice, has worked at VALS for 8 years and has witnessed the growth of initiatives such as the Koori Courts and other sentencing practices which aim to address the gross overrepresentation of Aboriginal and Torres Strait Islander peoples in custody.

Ms Prior is concerned that the proposed sentencing amendments will seriously undermine advances that have been made in the State of Victoria in the rehabilitation of Koori offenders.

Since this announcement...and a raft of other changes that the current Government has proposed, its caused ripples of concerns within our organisation because of what has been enjoyed over recent years in terms of very conscious decisions to tackle sentencing particularly of our clients...with a view to therapeutic sentences and more holistic sentences which look to the reasons that people repeatedly come before the court and looking to redress some of those socio-economic factors that combine to put Aboriginal and Torres Strait Islander people before the courts at a much more significant rate than other members of the community.²⁸

Ms Prior notes the irony of the timing of the announcement of the proposed sentencing amendments occurring 20 years since the Royal Commission into Aboriginal Deaths in Custody. 'It is in stark contrast that we now talk about taking away the discretion of magistrates and judges to look at the whole of the person in sentencing.'²⁹ Ms Prior notes how 'colleagues in other States and Territories have endured the horrific outcomes of mandatory sentencing...there is nobody anywhere that sees any benefit in this aside from increasing the population of jails.'³⁰

VALS' solicitors are concerned with mandatory sentencing as it applies to adults, but particularly as it applies to juveniles. It is widely recognised, internationally as well as domestically, that because of their lack of developmental maturity, young people are entitled to special protections within the justice system. This concept is recognised domestically by the very existence of the Children's Court and other specialised services and institutions in dealing with juvenile offenders. The focus on the rehabilitation and reintegration of juveniles who come into contact with the criminal justice system underpin the administration of the justice system itself and are embodied in the *Children Youth and Families Act 2005* (Vic). Ms Pappas notes that 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: 'Unfortunately this proposal would remove any discretion that a magistrate would have in certain cases to have a look at the wider picture and really try address those factors that have lead to the offending.'³¹ VALS provides the following case study by way of example.

²⁷ Done By Law 3CR Radio, 'Mandatory Sentencing' (June 28 2011) at <http://www.donebylaw.org/2011/06/28/mandatory-sentencing-28-june-2011/>

²⁸ *Ibid.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

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. The young person was 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. At the time of the offending, Jo had been a daily user of marijuana, and was not enrolled in school or any educational program. Nor was the young person employed.

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 organisation will also provide support in relation to ongoing TAFE studies. Further, Jo has access to ongoing drug and alcohol counselling 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.

The program that Jo was enrolled in was culturally appropriate and assisted Jo in re-engaging with community and family. This was critical for a young person who had been estranged from their wider family members. It is notable that the magistrate found it important that Jo remain in community with access to their tailored program. As Ms Pappas notes:

In the magistrate's view this was the best way of dealing with this particular case to ensure the young person had support around them and could function within the community ... with what's proposed a magistrate will no longer have that discretion.³²

It's not to say that young people won't have the risk of custody. As the law stands now there's always that possibility in relation to certain crimes ... the problem with what's

³² *Ibid.*

*proposed is that it removes the discretion of the magistrate to ... really address the cause of the offending.*³³

When asked about systemic discrimination in the context of mandatory sentencing and the connection between the mandatory sentencing proposals and rates of Aboriginal and Torres Strait Islander overrepresentation in the criminal justice system, Ms Prior points to RCIADIC recommendation 92 - that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.

*This regime flies in the face of that recommendation 20 years ago, when we knew then that Aboriginal people are over-represented in the justice system...it's a confluence of issues that are present and go back generations and present today where people that come before the courts, in general terms, are people who are suffering from socioeconomic disadvantage. Aboriginal people are more often in those groups than mainstream community and those groups are more often than others before the court. So in terms of how this (mandatory sentencing) plays out on Aboriginal and Torres Strait Islander peoples specifically, the answer is right there in my view.*³⁴

There are currently options for juveniles in the Koori Court, and also for adults under the age of 21 (under Victoria's dual track system) to have their matters deferred and engage with community services. And while there is a particular focus on rehabilitation for all Children's Courts in Victoria, the Children's Koori Court which operates in Mildura and Melbourne delivers a unique approach to sentencing. Ms Prior notes that when one looks at a child going through the mainstream courts versus the Koori Court, the difference in positive outcome is obvious:

*...the benefits...so obvious to see because the focus very much not only falls to the child...that focus then broadens out and becomes part of a community focus where the Aboriginal community in that area, whether it be in Melbourne or Mildura, draws in members of the community who are Elders or Respected persons sitting in the court, but also are members of the community who are there in assisting the young person to reconnect with the people they need to reconnect with or to link in with the assistance they need...*³⁵

Interaction with sentencing practices and human rights

VALS considers the introduction of statutory minimum sentencing laws in Victoria to be at odds with not only the *Children, Youth and Families Act 2005* (Vic), but with Victoria's *Charter of Human Rights and Responsibilities 2006*, and international instruments to which Australia is party such as the *Convention on the Rights of the Child* (CROC) and the *International Covenant on Civil and Political Rights* (ICCPR).

Mandatory sentencing laws are at odds with the ICCPR which entered into force for Australia on 13 August 1980, and prohibits arbitrary detention (Article 9) and provides that prison sentences must in

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

effect be subject to appeal (Article 14). Mandatory sentencing laws are also at odds with CROC which ratified by Australia on 17 December 1990 and came into force on 16 January 1991. Ratification was preceded by a detailed process of consultation with State and Territory governments and was the subject of unanimous agreement by all Australian governments. CROC applies to persons under the age of 18 and requires that in dealing with children, courts should have the best interests of the child as the primary consideration (Article 3), detention must be used as a last resort and for the shortest appropriate period (Article 37) and sentences must be proportionate to the circumstances of the offence and must be subject to appeal (Article 40).

Mandatory sentencing is also at odds with the way society generally determines when a child becomes an adult. VALS' criminal law solicitor, Ellie Pappas, notes that this is why we have different sentencing regimes for the two groups. She thinks it's as if the government is creating a kind of halfway house to say that once you're 16 all of a sudden you lose the benefit of those sentencing mechanisms that would take account of your age as a juvenile.³⁶ The *Children, Youth and Families Act 2005* requires sentences address the circumstances of the child; minimise stigma; ensure that the child bears responsibility for their actions; preserves relationships between the child their family; and considers detention as a last resort. As it stands, the *Children, Youth and Families Act 2005* (Vic) upholds human rights enshrined in both international and domestic instruments. With the introduction of contradictory statutory minimum sentencing laws, this will all be thrown into question.

Furthermore, criminal proceedings pursuant to the *Victorian Charter of Human Rights and Responsibilities 2006* are not only supposed to take account of a person's age, but also when a child is charged with a criminal offence, they have the right to a procedure that takes into account the desirability of promoting the child's rehabilitation.³⁷

Under the Charter there is also a right of appeal for juveniles and adults in relation to criminal sentencing.³⁸ With the introduction of mandatory sentencing, this human right is in a way curtailed, or may be limited, as an appeal court can only look so far in terms of the appropriateness of the sentence. The ICCPR, on which the Charter is based, provides that everyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher court.³⁹ CROC repeats this universal rule for application to juveniles.⁴⁰

VALS therefore considers the Government's proposed statutory minimum sentencing laws to be not only at odds with its own sentencing laws and practices, but in breach of its own Human Rights Charter as well as international human rights law.

³⁶ *Id.*

³⁷ s25(3).

³⁸ s25(4)

³⁹ Article 14.5

⁴⁰ Article 40.2(b)

Community expectations

The Standing Committee on Aboriginal and Torres Strait Islander Affairs ('the Committee') recently tabled the *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* report.⁴¹ This report acknowledges that 20 years since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), the rate of Aboriginal and Torres Strait Islander imprisonment is now worse whereby Aboriginal and Torres Strait Islander juveniles are 28 times more likely than non-Aboriginal and Torres Strait Islander juveniles to be incarcerated.

Noting the contribution Aboriginal and Torres Strait Islander social and economic disadvantage makes towards contact with the criminal justice system, this report calls for the application of principles and 40 recommendations to effect change in the area of Aboriginal and Torres Strait Islander disadvantage and disproportionate incarceration rates. A principle that the Committee calls on Government to apply is to 'focus on early intervention and the wellbeing of Indigenous children rather than punitive responses.'

Attorney-General, Robert McClelland, has commented that 'Governments of all persuasions, both state and federal, need to renew and redouble our efforts to turn around these alarming statistics.'⁴² The Committee notes that while states and territories are responsible for developing and administering criminal justice policy, 'a national approach is required to address the causes of young Indigenous people coming into contact with the criminal justice system.'⁴³ The Committee contend that overcoming Aboriginal and Torres Strait Islander disadvantage requires ongoing commitment and collaboration between all levels of government working in partnership with Aboriginal and Torres Strait Islander peoples, the corporate sector and community organisations. They suggest this national approach is represented by the Council of Australian Government's (COAG's) Close the Gap program.

*Close the Gap requires governments to address decades of ineffective investment in services and infrastructure in ways that are specifically designed to directly benefit Indigenous Australians.*⁴⁴

The Commonwealth Attorney-General further notes that while social and health factors are a contributing factor, changes to bail and sentencing laws are also putting more Aboriginal and Torres Strait Islander people in jail and is urging State and Territory Governments to introduce more flexible sentencing laws:

The point is that all the evidence suggests that particularly once a young person has experience with the justice system, they are more likely to reoffend. By not adopting a more

⁴¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 'Doing Time – Time for Doing' (2011) Parliament of the Commonwealth of Australia, at <http://www.aph.gov.au/house/committee/atsia/sentencing/report/fullreport.pdf>

⁴² Milanda Rout, Lauren Wilson, '20 years on, black kids still fill jails parliamentary committee finds' (2011) *The Australian* at <http://www.theaustralian.com.au/news/nation/years-on-black-kids-still-fill-jails-parliamentary-committee-finds/story-e6frg6nf-1226078813207>

⁴³ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit.

⁴⁴ Ibid, 19

*sophisticated approach we're actually adding to the increase in future prison population and we need to break the cycle.*⁴⁵

Mr McClelland has said that because sentencing laws are largely State responsibility, he will pursue this issue through the Council of Australian Governments (COAG) with his Ministerial colleagues and through the Indigenous Law and Justice Framework.

The Victorian Aboriginal Justice Agreement Phase 2 (AJA2) aims to reduce Koori overrepresentation in the criminal justice system by improving justice-related programs and services and the removal of inequalities in the justice system.⁴⁶ This includes diversion and alternatives to prison. Victorian Attorney-General, Robert Clark, has attended an Aboriginal Justice Forum this year and publically voiced his support for successful initiatives that have arisen from the forum. VALS takes this to include those contained in the AJA2 and hopefully the yet to be launched AJA3.

The Government's current sentencing proposals are clearly out of step its own policies and initiatives as well as Commonwealth policy. VALS recommends that the Victorian Government scrap their statutory minimum sentencing policy and instead align policy with the findings of the recent *Doing Time- Time for Doing* report, all recommendations of the Royal Commission into Deaths in Custody, and the AJA in order to deter offending and rehabilitate to prevent reoffending. VALS believes that in the Victorian Government aligning its policies with the aforementioned, the Aboriginal and Torres Strait Islander community will not solely benefit through reduced contact with the criminal justice system. Instead, there are gains to be made for the whole community through a sophisticated and responsive justice system and increased community safety.

⁴⁵ Robert McClelland, 'Interview with Naomi Woodley on AM' (2011) at http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts_2011_SecondQuarter_2_1June2011-InterviewwithNaomiWoodleyonAM.

⁴⁶ Victorian Government, 'Victorian Aboriginal Justice Agreement Phase 2' (2006).