

**Submission to the Sentencing Advisory Council
on
Mandatory minimum sentences for gross
violence**

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Introduction

The Mental Health Legal Centre (MHLC) welcomes the opportunity to provide a submission to the Sentencing Advisory Council on the introduction of statutory minimum sentences for offences of gross violence. The MHLC is a specialist community legal centre with over 20 years' experience providing legal advice and representation for people with mental illness where their legal issue relates to their mental illness. This casework expertise, combined with significant research and systemic policy work including for people with mental illness in the criminal justice system, means the MHLC is well-placed to comment specifically on the impact the Government's proposal will have on people with mental illness.

We understand that the Government has committed to introducing a statutory minimum sentence for the offences of intentionally or recklessly causing serious injury when committed with gross violence with a four year minimum sentence (ie, non-parole period) for adult offenders, and a two year minimum detention sentence for juvenile offenders aged 16 or 17. We understand the minimum sentence is to apply save in tightly defined exceptional circumstances, such that the circumstances of the case are so unusual that the court is entitled to assume Parliament could not have intended those circumstances to be covered.

The Terms of Reference request the Sentencing Advisory Council's (SAC) advice on the following matters:

- How the exceptional circumstances in which a court may impose a non-parole period of less than the statutory minimum should best be specified;
- How the factors making the offence of gross violence to which the minimum sentence is applicable should best be satisfied;
- The likely effects of the recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the number of persons serving custodial and non-custodial sentences;
- Any other matters the council considers relevant.

We are disappointed that the Terms of Reference are thus restricted and leave no room for the SAC to provide advice or an assessment on the merits of the Government's proposal outlined above (the proposal).

It is clear that, even with provisions for "exceptional circumstances", the proposal is one which establishes a mandatory sentencing regime. The MHLC has long opposed mandatory sentencing as a harsh policy which can disproportionately adversely affect people with mental illness. This "one size fits all" approach to sentencing is particularly unjust as it prevents the criminal justice system, through Judges and Magistrates – impartial and independent judicial experts – from properly addressing the issues underlying offending behaviour in individual cases. In particular we point to circumstances where the offender's mental illness significantly contributed to the commission of the offence and where, in our strong view, incarceration and custodial and non-custodial sentences are not necessarily the most appropriate disposition.

The MHLC endorses the views, in broad terms, of the Law Institute of Victoria (LIV) and the Federation of Community Legal Centres (FCLC) and other law societies in making clear its unequivocal objection to the proposal. However, we wish to highlight submissions that pertain in particular to people with mental illness who may be affected or impacted by the proposal.

Background

A person's mental illness can have a profound impact on sentencing, particularly if the person was unwell at the time of the offence. Not only may it reduce a person's moral culpability, it may render general and specific deterrence inappropriate objectives in sentencing and a particular disposition may have a more harsh impact on a person because of their mental illness.¹ In the MHLC's view, judicial discretion in these matters must be retained.

¹ R v Tsiaras [1996] 1 VR 398, 400

We note that guidelines developed by the National Justice CEOs Group also recognise the importance of mental health diversion and support programs in advancing national reform efforts in mental health.² The guidelines highlight the importance of taking into account a range of factors that contribute to offending behaviour, particularly given the paucity of empirical evidence supporting the effectiveness of punitive sanctions such as imprisonment as a specific deterrent to future offending.³

In October 2010, the MHLC published a report, 'Experiences of the criminal justice system – the perspectives of people living with mental illness' (MHLC report).⁴ The report documents the experiences of people with mental illness in the criminal justice system in Victoria, as well as the experiences of other stakeholders such as Magistrates, Judges, Police and legal advocates. The research is the first of its kind in Australia, which focusses on people with mental illness at different stages in the criminal justice system – from first contact with Police, in the hearing, right through to post-sentencing. Our submission draws on the findings and recommendations of this report.

Specific submissions on the structure of the mandatory sentencing proposals:

Whilst we reiterate our strong opposition to the proposal in its substance, we nevertheless address the following matters on which the SAC has requested specific submissions. We reiterate that this should not be taken in any way as an endorsement of the proposal.

- **How the exceptional circumstances in which a court may impose a non-parole period of less than the statutory minimum sentence should best be specified, and what sorts of cases should fall into exceptional circumstances and why?**

The MHLC is adamant that mental illness must be specified as one of the "special circumstances" which Magistrates and Judges must take into account in sentencing. This is consistent with the findings and recommendations of the MHLC Report and the submissions of the LIV and the FCLC.

The MHLC Report reinforced the vulnerability, alienation, fear and lack of understanding felt by many people with mental illness throughout the process.⁵ It also highlighted the fact that people may have been unable to access appropriate mental health services for some time prior to their contact with the criminal justice system, and the importance of recognising the impact of not only the person's mental illness, but also this lack of support, on their offending behaviour and hence the outcome of the process.⁶

The Report found that the experiences of the criminal justice system of people with a mental illness were, more often than not, characterised as negative. The Report recommended better use of a full range of diversion options at various stages in the process to divert people in appropriate circumstances away from the criminal justice system.⁷ Critically, the report highlights the need for judicial discretion to take into account the impact of a person's mental illness on their offending behaviour, to be not only preserved, but enhanced. We strongly oppose any move to fetter this discretion, which, in our view could result in criminalising the conduct of a person when unwell and where the provision of appropriate care, treatment and support services would be a more appropriate

² See 'Diversion and support of offenders with a mental illness: Guidelines for best practice', Justice Health, Victorian Department of Justice, August 2010, at p 2. Available at:

http://www.aic.gov.au/crime_community/communitycrime/mental%20health%20and%20crime/~/_media/aic/njceo/diversion_support.pdf

³ Above n 2 at p 18.

⁴ Available at:

http://www.communitylaw.org.au/mentalhealth/cb_pages/images/Experiences%20of%20the%20Criminal%20Justice%20System%20Report.pdf (accessed 30 June 2011)

⁵ Above n 2, at page 45.

⁶ Above n 2. See also Ogloff, J., et al. 2007, *The identification of mental disorders in the criminal justice system*, Trends and Issues in Crime and Criminal Justice no. 334, Australian Institute of Criminology, Canberra, Available at:

<http://www.aic.gov.au/publications/tandi2/tandi334.html>

⁷ Above n2, at page 46.

outcome than incarceration in prison. This is all the more troubling in light of the evidence that mandatory sentencing does not achieve its stated aims of reducing crime rates or leading to more consistency in sentencing.⁸

- **The likely effects of the Government’s proposal on the number of persons serving custodial and non-custodial sentences**

We are concerned about the already disproportionately high rate of people with mental illness in prison,⁹ which points to the role of prisons in “warehousing” mentally ill offenders.

The findings of the MHLC Report indicate a lack of appropriate provision of mental health services in prison as well as a lack of awareness of the issues surrounding mental illness of service providers such as corrections officers.¹⁰ Regardless of the exceptional or special circumstances provisions, the proposal is likely to increase in the number of people incarcerated in prison¹¹ and, necessarily also the number of people with mental illness who are incarcerated. We would much rather see the increasingly higher costs of penal detention of people with mental illness diverted towards the provision and accessibility of alternative, viable community services that address the mental health needs of offenders. Such measures are proven to be more effective in reducing offending rates by addressing the underlying causes of such offending.

In any event, we are concerned about the provision and accessibility of appropriate mental health and support services for people with mental illness in prison and we urge the SAC to recommend the Government commit to funding adequate provision of mental health and other support services for prisoners.

⁸ See LIV submission to the Attorney-General, ‘Mandatory Minimum Sentencing’ June 2011

⁹ Ogloff (2007) above n 4.

¹⁰ Ibid at page 48.

¹¹ See LIV submission to the Attorney-General above n 7, at p 15.