Meaningful Sentencing of Low-level, Indigent Offenders

Report for the Winston Churchill Memorial Trust of Australia

Jelena Popovic
2011 Churchill Fellow
The Winston Churchill Memorial Trust of Australia

Report by JELENA POPOVIC, 2011 Churchill Fellow

Meaningful Sentencing of Low-level, Indigent Offenders

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Signed: Jelena Popovic

Dated 11 September, 2012
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1 Introduction

“...(As a judge) you need to impose a sentence that is meaningful to the accused – something that will make them take responsibility and to atone for what they have done. Sometimes you have to consider all of the circumstances of an individual – punishments have to fit the individual as well as the crime.”

In our community, as throughout the world, there are persons who offend at a low level but for whom current sentencing laws and practices are not effective due to factors that affect their lives. These factors include chronic poverty, homelessness, illness and mental impairment. Many offenders in this cohort do not have the capacity, both financially and practically, to pay fines. For some, their lives are too chaotic for them to undertake community work or to promise not to reoffend. Penalties such as fines are often unpaid resulting either in there being no effective penalty or deterrent to future offending, or in costly penalty enforcement procedures which do not yield results. Community-based dispositions such as the imposition of community work hours are often breached, as are promises to be of good behaviour. The imposition of these dispositions is meaningless; none of the purposes of sentencing are achieved.

The question for judicial officers is how to impose fair penalties which are adhered to, lead to behaviour modification to reduce further offending, and which engender confidence in the community that there has been redress for the offending behaviour.

Much has been written about innovative courts and practices around the world, but little has been published in relation to sentencing outcomes. My Fellowship enabled me to travel to see court hearings, and to interview and ascertain the views of judges, court officials, corrections officers, policy makers and academics. It quickly became apparent to me that my aim to make a few practical recommendations for sentencing alternatives was extremely naïve. The issue of unpaid fines is not limited to the cohort I set out to study; it is altogether broader and more complex. Additionally, ‘penalising’ these offenders is a ‘whole of criminal justice’ issue, not one which is limited to judicial officers sentencing in court proceedings. My report ranges and makes recommendations across the criminal justice system.

I have returned from my travels with a renewed sense of privilege to be a magistrate serving the Victorian community. Criminal justice in Victoria, compares very favourably to overseas jurisdictions. Victoria’s Sentencing Act 1991 provides more sentencing alternatives than comparable legislation around the world. Victoria’s commitment to solution-focussed, therapeutic justice as the norm rather than being restricted to specialist courts is unique. It sets the standard in best practice. Victoria’s approach, and in particular the Court Integrated Services Program, was envied by everyone I met during my travels.

I cannot express the depth of my gratitude to the Trust for providing me with this opportunity. I have returned reinvigorated, and determined in my resolution to impose ‘meaningful’ sentences. I am committed to widely encouraging the utilisation and implementation of meaningful approaches to sentencing among my judicial colleagues and legal policy makers.

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1 Judge Marguerite Church, William Lake, British Columbia, Canada, 15 May, 2012.
My thanks to Chief Magistrate Ian Gray for his support and for granting me study leave, and to my colleagues who have demonstrated such interest, notwithstanding that they had to absorb the extra work generated by my absence! Thanks also to Professor Arie Frieberg for his interest and support in this study.

I wish to acknowledge and thank each individual whom I met for their time, candour, generous sharing of knowledge and resources and hospitality. I wish to especially acknowledge: Judge Tom Smith and Midge Smith of Williams Lake, British Columbia for their extraordinary generosity and hospitality and Tom’s continued provision of information and helpful advice; Brett Taylor from the Centre for Court Innovation for arranging my site visits in New York; Honourable Judge David Fletcher of Liverpool Community Justice Centre and Janet Fletcher, and Anton Shelapanov for devoting 3 days to taking me around London to meet with so many stimulating people and organisations.

Many thanks to Aranea Carstairs for her attentive editing and helpful advice in the writing of this report, and to Liz Quonoey and Sharon Hughes for their assistance in the formatting.

Most importantly, I also wish to thank my husband Tony Trood, and our children Kristina and Michael, for their unwavering encouragement and affirmation, without which this study tour would not have been contemplated, let alone achieved. My gratitude to Marina McAlpine for always being there. My parents, Dusan and Christa Popovic, who came to Australia in 1950 to provide better prospects for the family they hoped to establish, instilled and nurtured in me a determination to strive for social justice and I will always be grateful to them for all the opportunities, and the values, they provided me.
Meaningful Sentencing of Low-level, Indigent Offenders

Jelena Popovic, Deputy Chief Magistrate, Melbourne Magistrates’ Court, GPO Box 882G, Melbourne, Victoria. 3000. 
jp@magistratescourt.vic.gov.au

Sentencing impoverished, mentally or physically impaired or homeless offenders whose offences are not serious presents difficulties. It often results in unsatisfactory penalties being imposed. Most offenders in this category are not able to comply with the sentencing orders which are imposed. Typically, they do not have the financial means or the wherewithal to pay fines, and because of their circumstances, it is not possible for them to maintain a promise to be of good behaviour. Their lives are likely to be too chaotic to be able to attend appointments for community work, supervision and treatment arranged for them on Community Corrections Orders.

The aim of this research was to devise alternative sentencing orders or approaches to provide more meaningful sentencing outcomes for offenders – fair outcomes which could be complied with, would be relatively inexpensive to administer, would not result in enforcement costs, would provide impetus for behaviour change so as to reduce potential future offending and would satisfy the community that offenders are being dealt with appropriately.

I visited countries which apply the common law or adversarial system (Canada, USA, Scotland and England) as well as countries which apply the inquisitorial system of justice (Sweden, Finland, the Netherlands and France) with a view to observing and learning how and which sentences are imposed, and the effectiveness of the sentences. It is evident that meaningful sentencing is an issue that concerns jurisdictions around the world and that many judges and policy makers are grappling with it. It is also evident that cultural factors, individual to a country or even a region in a country, play a significant role in the sentencing approaches and their efficacy.

My study tour was exhilarating and reinvigorating. The benefits of the opportunity to have access to best practice courts, committed individuals and organisations and to the best thinkers, and to have the luxury of being able to re-examine and analyse the Victorian criminal justice system and my own work for 6 weeks, cannot be over-stated. The time away as a whole was enormously intellectually stimulating and exciting.

HIGHLIGHTS

- Staying with Judge Tom Smith in William Lake British Columbia, Canada and Judge David Fletcher in Liverpool, UK and being ‘embedded’ in the courts at William Lake and Liverpool, and having discussions with all the stakeholders in the criminal justice system, (judges prosecutors, police officers, court staff, probation officers)
- Visiting the Courts in Brooklyn, New York, and Newark which are assisted by the Centre for Court Innovation, and conversing with the judges and other stakeholders
- The whirlwind London tour of courts and organisations arranged by Anton Shelupanov of the Centre for Justice Innovation
- Attending the European Forum for Restorative Justice Conference in Helsinki

MAIN LESSONS

- Australia lags behind much of Europe and Scotland in the application of restorative justice approaches. There is a significant body of writing and research about restorative approaches to justice including evaluations of successful programs that could be incorporated into our criminal justice system practically and inexpensively.
- Restorative justice processes can be applied at several points in the criminal justice system commencing at the time of apprehension by police, through mediation programs, and at pre and post sentence stages.
- There should be an emphasis on low cost approaches which do not criminalise social misbehaviour.
- Fines must be perceived by citizens to be fair, the process of payment and enforcement of fines must be simple.
- Community work should be meaningful, provide participants with a sense that they are making a contribution and should provide skills training. Skilled volunteer retirees should be utilised in the provision of community work.

DISSEMINATION

- Presentation, National Judicial College of Australia Phoenix Magistrates’ Program 30 August 2012.
- Presentation, Judicial College of Victoria 11 September 2012.
- Journal article will be submitted to the Journal of Judicial Administration for consideration.
- Direct presentations to:
  - Victorian Attorney-General, Honourable Robert Clarke
  - Attorneys-General for States and Territories
  - Chief Magistrates for States and Territories
  - Justice Department legal policy officer
  - Assistant Commissioner Lucinda Nolan, Victoria Police
  - Commissioner for Corrections
  - Minister for Corrections Andrew McIntosh
  - Directors for Public Prosecutions, States and Territories.
  - Presentation to Victoria legal Aid.
  - Presentation to Smart Justice & Federation of Community Legal Services.
### Programme - 12 May to 22 June 2012

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<td>Minneapolis, Minnesota, USA</td>
<td>Professor Richard Frase, University of Minnesota.</td>
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<td>- Jessica Henderson, Head of Education, Judicial Studies</td>
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<td>Anton Shelupanov, Centre for Justice Innovation</td>
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<td>- Peter Chapman, Chairman, Sentencing Committee, Magistrates’ Association.</td>
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<td>- Roma Hooper, Director, Make Justice Work.</td>
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<td>Judge Tuen van Os van den Abeelen, Den Hague.</td>
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<td>Reims, France</td>
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<td>Anthony Manwaring, Prosecutor and lecturer, Ecole Nationale de la Magistrature.</td>
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4  Explanations of some of the terms which are used in this report:

Adjourned undertaking to be of good behaviour

An adjourned undertaking2, known in other states and territories as a good behaviour bond, is a promise to the Court that the offender will not offend for the duration of the undertaking and that the offender will fulfil any conditions attached to the undertaking.

Court Integrated Services Program (CISP)

CISP provides multi-disciplinary support for persons who have been charged with offences and present any/or a combination of factors such as homelessness, drug and/or alcohol dependency, acquired brain injury, mental impairment, intellectual disability or other factor which contributes to them coming before the criminal justice system. After the assessment process, an individualised plan is devised, and appointments made with the agencies and services required. A CISP officer who specialises in the individual’s main presenting problem is assigned as their case manager, supervises them throughout the 4 months that they participate in the program and prepares update reports on a monthly basis for presentation to the court. Usually, the individual is monitored on a monthly basis by the same magistrate. CISP operates from 3 Victorian Magistrates’ Courts: Melbourne, Sunshine and La Trobe Valley.3

Community Based Dispositions

A community based disposition is a sentencing option which takes place in the community and is sometimes imposed instead of a prison sentence. Every jurisdiction in Australia has such a rehabilitative sentencing option; in Victoria this is a Community Corrections Order4. Conditions which can be imposed vary from state to state and generally reflect the seriousness of the offending. Consequences flow from the breach of a community based disposition by either unsatisfactory compliance or by further offending.

Community work

Most jurisdictions provide community work as an alternative to the payment of fines. Community work can also be imposed by a sentencing judicial officer as a punitive component to a community based disposition. These are generally administered through each state and territory’s Corrections Offices.

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2 Sentencing Act (Vic) 1991, s. 72 & s. 75.
4 Sentencing Act (Vic) 1991, s. 37
Penalty Infringement Notice (PIN)

A PIN is commonly known as an ‘on-the-spot’ fine issued by a police officer, by-laws officer or other authorised officer such as a public transport officer, environment protection officer etc.

Restorative Justice

Restorative justice is an extremely broad concept and takes a variety of forms. It generally provides the opportunity for the victim of a crime to have some input into response to the offence, and usually provides the victim an opportunity to meet the offender, if they wish to do so, and to express to them the effect that the offending has had on them. It provides an opportunity for the offender to reflect on their actions, to express remorse and to atone for their offending.

Restorative justice interventions usually take one of four forms:

- By police officers prior to any charges being laid;
- Once charges have been laid, as part of a court process but before sentence is imposed, conducted by court officers or accredited mediators appointed by the court;
- As part of the penalty imposed at sentence, conducted by court officers or accredited mediators appointed by the court;
- After court process has been concluded. The rationale is to give victims closure and also to give the offender the opportunity to apologise for their behaviour. This is usually arranged and conducted by Corrections staff.

This definition encapsulates the concept:

“A restorative justice philosophy promotes the restoration of justice through constructive dialogue between victims, offenders, and their communities, with a focus on healing the victim and his/her suffering, healing the offender and his/her moral character, and healing the group as a whole and the relationships within it. In practice, restorative conferencing is diverse but typically involves the meeting of the affected parties in an open dialogue, with the goal of reaching a consensus about the offense, the implications of its harm, and how to effectively restore justice and reintegrate the offender”.5

Therapeutic Jurisprudence

Therapeutic jurisprudence involves using the offender’s contact with the criminal justice system as a means of ascertaining the causes of their offending, to put strategies in place to address those issues, and as a consequence, reduce reoffending. This gives the offender the opportunity to change their behaviour. Generally, the authority of a judicial officer is utilised to encourage the offender towards behaviour modification. Therapeutic Jurisprudence is the jurisprudential philosophy which underpins problem solving courts such as Drug and Mental Health Courts, and Community Legal Centres.

5 Dr. Tyler G Okimoto http://www.okimoto.com/research/restorative.htm
Circle sentencing

Circle sentencing is a term applied to aboriginal sentencing courts in Canada and parts of Australia. These courts often take place around a table or with seating which is placed in a circle. It encourages all in the circle, including police, victims, the offender, offender’s family, elders, community members, corrections staff, support staff, lawyers and judicial officer, to have a voice in and to participate equally in the court proceedings.

Justice Plan

In Victoria, an assessment for a justice plan may be ordered by a judicial officer who is considering sentencing an intellectually disabled person to either an Adjourned Undertaking or a Community Corrections Order. A justice plan sets out available services which would be put in place to reduce the likelihood of the offender committing further offences.\(^6\)

\(^6\) Sentencing Act (Vic) 1991 s. 80.
5 Why does the sentencing of indigent offenders require study?

As a magistrate of over 20 years standing, I face a daily challenge of imposing penalties on low-level offenders who I am certain do not have the capacity to comply. Many of the offenders who appear in courts around the country are poor, homeless, suffer from mental impairment or have drug or alcohol dependencies. It is often these very factors which bring them to the attention of law enforcers. The level of offending does not warrant a term of imprisonment, however most in this cohort are not able to pay a fine or their lives are too chaotic to comply with community based dispositions. Due to their lifestyles, it is highly likely that they will breach adjourned undertakings or suspended sentences by reoffending which would return them to court on breach charges and for re-sentence.

The community and law enforcers expect and require a response, in the form of a penalty, as a consequence of offending behaviour. Imposing a penalty simply because it is a function that is required to be undertaken, and finalises the matter from a court perspective, is not an optimal outcome. It is, however, a daily occurrence. Imposing a fine that one knows an offender does not have the capacity to pay does not provide a consequence for the offending behaviour. It may also result in fruitless further expenditure in an attempt to enforce payment.7

I have called the imposition of penalties where an offender does not have the capacity to comply “meaningless” sentencing.

The following are examples of situations where current sentencing options provide a less than optimum sentencing outcome:

Kylie

Kylie was charged with driving while her licence is suspended. She has a previous conviction for this offence, which puts her in the category where imprisonment is an option. The period of licence suspension has expired by the time her case is before the court. Kylie is a single parent of three children under 7 years of age and does not receive any support, including financial, from her former husband. She is in receipt of a part Supporting Parents Benefit and works as an administrative officer 3 days a week. By the time she pays rent, childcare and living expenses, there is not much disposable income left. During the plea in mitigation, the court is advised that she is currently on a payment plan for out-standing traffic fines.

Currently, the types of penalties a magistrate could consider are:

- Imposing a fine (additional to the fines currently being paid off). This would be likely to impact negatively on the family given the difficult financial situation they currently experience.
- An adjourned undertaking to be of good behaviour. This may not reflect the seriousness of the offence; and if a financial contribution

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was imposed, the likelihood of Kylie being able to pay it is negligible. This would result in her being in breach of the Adjourned Undertaking, being issued with a summons to attend court for the breach and being resented (at more cost to her and the community).

- Ordering that Community work be performed. The reality is that Kylie doesn’t have the time available to her to perform work hours.
- Imposing a term of imprisonment (which could be suspended). To impose this penalty could be considered to be disproportionately harsh.

Jack

Jack was charged with possession of one foil of heroin. He has a long-standing heroin dependency. Jack’s criminal history is limited to minor drug charges. He is homeless and leads a transient life-style generally couch-surfing or sleeping in squats. Due to his homelessness and lack of bank account, he is not in receipt of government benefits.

In terms of penalty:

- Jack does not have the means with which to pay a fine.
- It would be futile to ask him to enter an undertaking to be of good behaviour as he would be in breach of it as soon as he obtained or used the next heroin deal.
- Jack would have the time to perform community work, and it would be a benefit to him socially and in terms of obtaining skills. The reality is that his lifestyle is too chaotic for him to engage in work. He would need some form of assistance to get him to the work place. It is also uncertain whether appropriate work could be found for him to do. The delay between the imposition of the sentence and the commencement of work would in all likelihood result in Jack not commencing work.
- Gaol would be a disproportionately harsh penalty.

Jeremy

Jeremy was charged with criminal damage on a bottle shop. He is aged 37 years and has a moderately severe intellectual disability. He is under a Guardianship order which means that his financial affairs are managed by Public Trustees; he is limited to $15.00 per day for spending money. He has a criminal history spanning many years which involves similar offending. He resides in supported accommodation. Jeremy is also a chronic alcoholic. Jeremy has broken windows at the same coffee shop on several prior occasions in order to obtain alcohol after trading hours. The bottle shop proprietor, and his insurer, are becoming increasingly annoyed and frustrated by Jeremy’s behaviour.

Again, the sentencing options available to the sentencing magistrate are unlikely to provide a meaningful sentence, either to the Jeremy or the bottle shop proprietor.

- A fine would be paid out of the monies managed by Public Trustees and would not have a deterrent effect.
- He is well supported in the community through Department of Human Services Disability Services. It would be unnecessary to place him on a
Justice Plan. He would be unlikely to be able to remain offence free, rendering an adjourned undertaking an inappropriate sentencing option.

- His level of intellectual disability combined with his alcoholism render him unsuitable for a Community Corrections Order.
- Again, gaol would be unjust and disproportionate in the circumstances.

This report is not directed towards serious crimes such as assault causing injury, home invasions, high-value thefts or sexual offences. What it seeks to emphasise is that the penalties for low level offences should be separated from the trend towards harsher sentencing for serious crime. The opportunity to rehabilitate and achieve behaviour modification at the lower end of offending is important in reducing reoffending. Imprisoning these offenders when they are not able to comply with the lesser penalties imposed is not an equitable or financially viable outcome, however ordinary members of the community have the right to expect that unlawful behaviour is penalised and that wrongdoers are held accountable.

Obviously, the opposite to ‘meaningless’ sentencing is ‘meaningful’ sentencing. Meaningful sentencing ensures that there is a realistic consequence for the offending behaviour which addresses the basic tenets of sentencing:

- that the penalty be proportionate to the offending
- that the offending is ‘penalised’
- that it reduces further offending.

It became apparent to me as I spoke to judges and academics, that those who set sentencing policy rarely consider how the sentences will impact on impecunious offenders and offenders without the capacity to comply with orders. When I spoke with Professor Frase about this, he recounted the early thinking about penitentiaries. He said that penitentiaries were set up by Quakers as a quiet space for offenders to think about their wrongdoing, in the way that a Quaker might reflect if he or she had done something wrong. The early Quakers did not have the notion that other people might not sit reflectively and think about their own wrongdoing! Similarly, the current range of sentencing options have little meaning, purpose or effect on people of low income. The challenge of this report is to make recommendations about how to deal with these offenders in a way that is meaningful to them and satisfies members of the community that the offending behaviour has been addressed in an appropriate manner.

Over the course of my study trip, it became increasingly apparent that solutions to the issue of the meaningful penalising of low-level offenders are not limited to penalties imposed in court by magistrates. A ‘whole of criminal justice’ response is required.

5.1 What does a lay person need to know about sentencing to make sense of this paper?

In Victoria, the Sentencing Act 1991 (the Act) is a codification of the law of sentencing. Decisions of the Supreme Court of Victoria, the Court of Appeal and High Court of Victoria are codified in the Sentencing Act (Vic) 1991, s.80.


10 Interview with Professor Frase 18 May 2012.
Australia also lay down principles of sentencing. Principles which are derived from cases rather than in a piece of legislation are known as either case law or common law.

The purposes of sentencing are set out in Section 1 of the Act which is attached to this report as Annexure 1.

Section 5 of the Act sets out sentencing guidelines which provide, amongst other things, that sentences may only be imposed for one or more of the following purposes:

- To deter that offender or others from similar offending;
- To impose appropriate rehabilitative measures;
- To denounce the conduct;
- To protect the community from the offender.

Other factors to which a sentencer must have regard under the Act include not imposing a harsher sentence than is necessary to achieve the purpose of the sentence\(^\text{11}\), proportionality (that is, in the manner and to the extent that the sentence is appropriate)\(^\text{12}\), and imposing imprisonment only if no other sentence is appropriate\(^\text{13}\).

The Act sets out matters pertinent to the individual offender which should be taken into account when sentencing including: prior convictions, general reputation of the offender and any contribution made by the offender to the community\(^\text{14}\) and whether or not the offender indicated remorse for the offending\(^\text{15}\) (such remorse is generally demonstrated by a plea of guilty).

The common law expands on this list to include, among others, factors such as a person’s financial capacity, parity with other offenders sentenced for similar offending, culpability and degree of responsibility, mental impairment, aggravating features, impact on victims and the effect on the offender’s family.

5.2 What are the problems associated with fines?

Offenders (including drivers who violate traffic laws or people who contravene by-laws) who have an income or savings available to them are not the subject of this report: the fact of the matter is that they are in a position to manage the payment of fines. People on low incomes, whose lives are in chaos or who labour under a disability are often not a position to manage fine payment.

A recent newspaper article cited research commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs in 2008 which found, inter alia, that:

- 22% of people on Newstart Allowance were unable to get medical treatment if needed;
- 16.7% of people on Newstart were not able to buy prescribed medicines,

\(^{11}\) Sentencing Act (Vic) 1991 s. 5(3).
\(^{12}\) Sentencing Act (Vic) 1991 s. 5(1)(a)
\(^{13}\) Sentencing Act (Vic) 1991 s. 5(4).
\(^{14}\) Sentencing Act (Vic) 1991 s. 6.
\(^{15}\) Sentencing Act (Vic) 1991 s. 5(2C).
• 10% of people on Newstart are unable to obtain a substantial meal each day.
• 5% of people on Newstart are unable to heat their homes.\(^\text{16}\)

It is not difficult to extrapolate that for some people, paying fines is not within their financial capabilities.

In Victoria, for the year 2011-2012, the unpaid amount of court imposed fines was $233,633,350.69. This is a cumulative figure which includes all previous unpaid court fines which have not been otherwise disposed of. Overall, the percentage of court imposed fines which have been paid is 55.81%. Significantly, the percentage of paid fines for 2010-2011 was 64.69%. There was a 9% reduction in fines paid in a 12 month period\(^\text{17}\).

There are no figures available with respect to unpaid infringements. This is due to such complexities as the number of agencies involved and the costs of enforcement levied at various stages of the enforcement process.

It is evident from these figures that there are a large number of offenders who either cannot afford to pay fines or who do not see the payment of fines as a priority. Anecdotally, from my observations and from the observations of my judicial colleagues, there are also a number of offenders who amass such huge amounts in accumulated fines that they will simply never be in a position to pay them.

Interestingly, I was informed that the estimated percentage of fines paid in Glasgow, Scotland was approximately 3%, in the UK the rate is similar to Victoria at approximately 55% and in Stockholm, 98%. It appears that there are cultural factors which contribute to whether or not fines are paid. It is glaringly apparent that there is a need to instil an ethos in offending members of the community that payment of fines must be a priority in their lives. Professor Diesen’s view is that Sweden, as a social democracy, has instilled in it’s citizens an ethic that every person is a member of a community which cares for one another and that it is a citizen’s duty to ensure that if they have done the wrong thing, that they do what has been decreed to atone for their wrongdoing. His explanation for Sweden’s high rate of payment went further: Sweden’s citizens believe that the penalties are fairly imposed and are imposed in a fair amount.

In contrast, Australia’s tabloid press wage a constant war on traffic fines and it is evident that many citizens agree that the penalties are unfair. In 2006, the Victorian Government enacted legislation\(^\text{18}\) which set out to make fines issued by Penalty Infringement Notices (PIN) fairer and more easily enforced.

Guidelines were published at the time the legislation was enacted which set out the principles upon which the Act was based, namely:


\(^{17}\) These figures were extracted at my request by Magistrates’ Court of Victoria. I will make the full analysis available on request.

\(^{18}\) Infringements Act (Vic) 2006.
recognition of the authority of the State to set minimum standards of civil behaviour

the balancing of fairness (lower fine levels, convenience of payment, consistency of approach) with compliance and system efficiency (reduced administration costs, no need to appear in court, no conviction)

the provision of a rapid and certain response for lower level offences appropriate for infringements, with deterrence dependent on people being aware they are likely to be detected offending and dealt with through less severe penalties

an acceptance that offences can be dealt with through the efficiency of the infringement system or in open court

a requirement that individual circumstances be taken into account;

a recognition of genuine special circumstances, both at the time of infringement notice issue, and during the enforcement process

requiring improved public awareness of rights and responsibilities

the provision for regular review of the infringements system; and

stipulating the duty of external agencies to observe the policies and principles of the system in discharging their responsibilities.

Using these principles, the improved infringements system seeks to achieve:

improved protection for all individuals, as well as for people in special circumstances (that is, mental or intellectual disability, homelessness, serious addictions, those in genuine financial difficulty)

improved administration by enforcement agencies of the infringements environments they manage; and

firmer enforcement measures to improve deterrence in the system, and reduce ‘civil disobedience’ and the undermining of the rule of law.”

These laudable principles do not appear to be simple or practical to implement. There is no such scheme available for persons who do not comply with court-imposed fines.

The Attorney-General’s Annual Report on the Infringements System sets out the options for review pursuant to the Infringements Act and the results of the reviews. The report also sets out in detail arrangements for persons with special circumstances. In addition, the report also details the payment plans, payment orders and Community Work Permits which were entered into on the grounds of financial hardship. The regulatory scheme together with the Special Circumstances List conducted at Melbourne Magistrates’ Court operate to reduce hardship for impoverished or disadvantaged infringement fine defaulters. Notwithstanding those measures, it is evident that persons who would fit into the appropriate categories for special circumstances are either not aware of their rights or lack the wherewithal to navigate the system.

19 Attorney-General’s Guidelines to the Infringement’s Act 2006.
A significant issue with PINs is that the amount of the fine for each offence is regulated and there is no discretion on the person issuing the PIN in relation to that amount. Additionally, in Victoria, PINs issued for offences under State legislation are determined by way of penalty units which are annually adjusted.\(^{23}\)

In Victoria, the police have the discretion to impose PINs for a range of offences such as shop theft under $600\(^{24}\), drunk in a public place\(^{25}\), and wilful damage of property\(^{26}\). The amount of the fines is prescribed in the relevant legislation. Offenders may elect to have the matter heard in open court, either to contest the charge or to reduce the amount of the penalty. These matters are rarely remitted to open court. If a matter is found proven by a court, the charge becomes part of that offender’s criminal record as a finding of guilt by a court. As a PIN, there is no court record for the offence. However, the prescribed PIN amounts for these offences generally far higher than my judicial colleagues and I would impose had the matter been heard in open court. It is also noteworthy that PINs for public drunkenness are generally imposed following a period of hours for which person has been incarcerated in order to sober up and effectively constitute an additional penalty.\(^{27}\)

The African youths were positive about their dealings with the Footscray police, who they said were just generally doing their job, but they did not understand the logic in continually handing out fines for public drunkenness to people who had no capacity to pay them. One man pulled a crumpled copy of a $489 fine he had been given for drinking in public. “You scrape together money for a day to buy the alcohol and get drunk, so who is going to pay this?” he asked.\(^{28}\)

I have annexed the process map to demonstrate the complexity of the process for the enforcement of Infringements.\(^{29}\)

Upon my return to Australia, I was made aware that physically, paying fines presents an additional level of difficulty for the indigent offender due to limitations on the current computer systems. For example, if a fine is imposed at court, offenders must pay either directly at a court house, or by cheque or money order if paying by mail. There is no single system of payment of fines; it depends whether a person is fined by way of a court order or by way of a PIN, and if by PIN, which institution issued the fine.

In North Liverpool, I observed the Judges being able to call for an up-to-date, accurate statement of an offender’s outstanding fines, together with the amount of deductions from social security payments. This gave a clear indication of the offender’s outstanding liability and assisted Judge Fletcher in determining the appropriate penalty. At the time the fine was imposed, the offender was introduced to an officer who took them outside the court room, explained the nature of the penalty and made arrangements for payment. Additionally, the Judge had the ability to consolidate all fines, including the fine imposed by him in court on the day, so that the payment plan could apply to the entire amount of outstanding fines. In Victoria, the computer systems of the three

\(^{23}\) A Penalty Unit for the financial year 2012-2013 is $140.84, Government Gazette13, 29th March 2012.
\(^{24}\) Crimes Act (Vic)1958, s. 74.
\(^{25}\) Summary Offences Act (Vic), s. 13.
\(^{26}\) Summary Offences Act (Vic) s. 9.
\(^{27}\) Police issued PINs are further discussed at page 20.
\(^{28}\) Dan Oakes, The Age newspaper, Friday 13 July, 2012, p.11.
\(^{29}\) Annexure 2 at page 54 below.
institutions which are involved in the collection of fines, (Courtlink production system for courts, the Penalty Management Unit of the Infringement Court and the Infringement Management and Enforcement Services computer system) operate separately and do not share information about outstanding fines. There is no mechanism by which a court, let alone an individual, is able to ascertain from one source what amount is currently owed in fines. Therefore, obviously, it is not possible to obtain this information in court at the time of sentencing.

The complicated nature of the payment of fines is difficult to manage even for those who wish to make payments and is not conducive them being paid.

In France, offenders who are fined are encouraged to pay the fine at the time the judge imposes it. This is achieved by offering a 20% reduction if the fine is paid immediately. The response to my observation that this ‘discount’ discriminated against impecunious offenders was that their financial situation was taken into account by the sentencing judge and that they had already received a substantial discount.30

In the Netherlands, fines are strictly enforced by an agency under a Central Government Bureau which exists to pursue fines. Every citizen knows that the fine will be pursued, and that any costs of enforcing the fine will be added to the amount of the outstanding fine. Because of the Netherlands participation in the European Union, registered fines from anywhere in the Union can be pursued. Fines are administered electronically, and a person’s liability for fines can be immediately ascertained.31 Similarly, in Sweden offenders are aware that any fines will be vigorously enforced and that they will be tracked by their Social Security number.32

Anecdotally, my magisterial colleagues and I preside over cases which involve the non-payment of many thousands of dollars of infringements incurred by single fine defaulters. It is not unusual to have a fine defaulter in court on a penalty enforcement warrant for amounts from $14,000 to $18,000. I have personally presided over cases involving defaults of over $70,000, and have had colleagues tell me of cases involving in excess of $150,000. Some involve dozens if not hundreds of failures to pay road tolls and the accompanying costs of enforcement.

SNAPSHOT
Melbourne Magistrates’ Court is the largest and busiest of the 52 Magistrates’ Courts in Victoria. Penalty Enforcement Warrants are returnable at the Magistrates’ Court nearest to where the offender resides. On Friday 7 September, there were three Penalty Enforcement Warrants listed at Melbourne Magistrates’ Court: one involved 25 infringement notices totalling $8,191.20; one involved 209 infringement notices totalling $54,144.80; and one involved 32 infringement notices and totalled $9,301.80. On Monday 9 September, two Penalty Infringement Warrants were listed: one for 248 infringement notices totalling $76,765.80 and one for 46 infringement notices totalling $13,119.20.

What my colleagues and I would like to see in place is an intervention to stop the infringing behaviour put into place as soon as it is apparent that an individual is

30 This formed part of my discussion with Professor Martine Herzog-Evans, 20 June, 2012.
31 Judge Tuen Os van den Abeelan, interview 18 June 2012.
32 Professor Christian Diesen, interview 11 June 2012.
33 Cases C10157435, C10570330, C12063191, C10032686 and C10514422.
committing repeated offences. If all infractions, infringements and fines were collated by a single agency, any pattern of low level offending leading to the issuing of infringements could be easily ascertained. The agency would be in a position to arrange contact with the offender in an attempt to stop the offending behaviour. From speaking with offenders who have accumulated enormous debt, there appears to be a common reaction that the greater the fines are, the greater the sense of being overwhelmed by the debt, and the greater the sense of resignation to continuing the behaviour and amassing even more fines.

Recommendations:

1. That the amounts of the fines imposed on Penalty Infringement Notices (PINs) be reviewed to make them more affordable.
2. That consideration is given to simplifying the procedure for having the amount of the PIN reviewed.
3. That once imposed, collection and enforcement of all fines be managed by an amalgamated, newly established agency.
4. That the agency be on hand at court to explain the fine and payment options, and to accept payment.
5. That there be an urgent overhaul to computer systems to:
   - have one computer system to deal with all matters pertaining to fines, which could provide details of an individual’s outstanding fines to the offender, and importantly, also to the sentencing judicial officer.
   - enable payment with modern payment methods including BPay, debit and credit cards, internet banking
6. That the enforcement agency contact persons who are accumulating infringements and fines through repeated offending in an effort to intervene and prevent further accumulation of debt.
7. That a discount be offered for immediate payment of fines.
6 Criminal Justice processes

As previously mentioned, it became apparent to me that the imposition of penalties which are incapable of being complied with requires a ‘whole of justice’ response and that it is simplistic to think that a revised sentencing approach by magistrates will suffice.

6.1 At the time of apprehension by police

The courts, judges and academics I visited and spoke to advocated approaches that took as many matters as possible out of the court system. It was seen to be cheaper, more expeditious, fairer and more effective to deal with these matters at the time of apprehension.

Red Hook Community Justice Centre runs a program called the Dual Action Respect Team (DART) which is run by Judge Calabrese and is directed at building bridges and building mutual respect between the police and young people. North Liverpool Community Justice Centre have now implemented a similar program with considerable success.

Victoria Police has several commendable programs directed at not criminalising low-level offending behaviour. One of these programs is SupportLink, which is a community service organisation which aims to “work with emergency services to accelerate early intervention opportunities for vulnerable families and individuals”\(^34\). It was trialled in Melbourne, Swan Hill and Mildura from October 2010, and a more limited trial was commenced in 34 locations throughout Victoria in 2011. SupportLink provides police officers with a framework to refer persons they come into contact with (including offenders) who have unmet needs to the social support sector. A recent evaluation of the SupportLink project found that it had increased police productivity, increased the breadth and number of social support referrals made by police (particularly with regard to victims, young people, non-acute mental health and alcohol abuse) and increased police officers’ job satisfaction.\(^35\)

Another program, Police and Community Triage (PACT), is currently being piloted at Moorabbin Police Station. It is aimed at offenders, victims or community members who come into contact with the police who are experiencing issues such as mental health, dual diagnosis, welfare concerns, drug and alcohol abuse, family violence, homelessness, aged care and social isolation. For these people, PACT aims to break the nexus between police contact and the criminal justice system by connecting them to the appropriate support services. This is achieved by the establishment of a single entry point from the police to the service system and by co-ordinating multi-agency responses to these complex and systemic issues.\(^36\) An evaluation of the program has recently concluded but the evaluation report was not available at the time of writing this report.

A third pilot, which commenced in a metropolitan station in 2009, is the PACER (Police, Ambulance & Crisis Assessment Early Response) unit. It is also aimed at providing an effective and appropriate multi-disciplinary response to the needs of people in crisis. The

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\(^{34}\) Victoria Police, SupportLink Project Brief, 2010.


unit is staffed by a police officer and a mental health clinician and the unit responds to situations involving people believed to have a mental illness who are in crisis or presenting welfare concerns. According to Victoria Police, "results to date indicate prompt onsite clinical assessments, referrals to a broad range of services, avoidance of unnecessary transports to hospital, timely re-deployment of the divisional vans to other callouts, and development of response plans tailored to the specific needs of the individual."37 I was not able to locate any published evaluation at the time of writing.

While in Glasgow, I was made aware of ‘Police Restorative Warnings’ and ‘Police Restorative Warning Conferences’ which have replaced ‘Senior Police Officer’ warnings throughout Scotland. They are one aspect of a suite of preventative, diversionary and intensive measures being implemented with respect to young people who are coming to the attention of police. The idea behind restorative warnings is that they will encourage participants to consider the consequences of their actions and the likely impact on individual victims as well as communities. The main objective is to deter participants from committing further offences. A secondary objective is to identify participants who are at risk of committing further and more serious offences. The procedure also aims to identify and intervene in any welfare concerns. Restorative processes have been used in Scotland for some years, and restorative warnings are being introduced on the basis that restorative approaches demonstrably more effective in diverting young people than traditional warnings.

The Restorative Warnings consist of a formal warning by a trained officer and the process should be undertaken as soon practicable after the offending behaviour comes to light. During the course of the warning, the impact of the offending on the victim, community and participant’s parents is addressed with the participant. The participant is encouraged to take responsibility for their action and to understand the implications of future offending. The victim, if they wish, has the ability to make the impact of the offence known to the participant and be apprised of the outcome.

Less frequently, a Restorative Warning Conference may be scheduled. Conferences have the same aim as Warnings, but involve many more people, including a trained, non-police facilitator and generally include greater participation by the victim.38

Provided that participants give informed consent to having their matter proceed in this way, there are obvious benefits to this approach. It keeps first time offenders out of the criminal justice system by providing an appropriate intervention through the application of problem solving approaches to the offending, it saves the community the cost of legal proceedings, saves the police time in preparation of briefs, and provides victims with a voice.

A similar program for extremely low-level offending is run in North Liverpool and is known as "Street RJ". John McIlveen, Senior Probation Officer at the North Liverpool Community Justice Centre told me that it leads to ‘out of court’ disposal of matters by encouraging the participants to reach agreements. His observation of Street RJ is that it keeps young people out of the criminal justice system, reduces court work by reducing the number of young people being brought to court on charges and is considered to be hugely successful.

37 Victoria Police Annual Report, 2010-2011 at page 51.
The State of Vermont runs several Restorative Justice programs. One such program is the Restorative Justice Alternative Program in Montpelier which aims to provide the offender and those affected by the offending a non-legal resolution to criminal offending. It is operated in partnership between the Washington County State's Attorney and the Montpelier Police Department. If an offender has not been charged and completes the Restorative Justice process, the offender will not be charged. If a charge has been laid, it will be withdrawn upon successful completion.\footnote{http://www.montpelier-vt.org/group/295.html}

British Columbia in Canada does not have a formalised legislative framework for Restorative Justice or circle-sentencing, however it is practised informally at a local level by police officers in victim-offender reconciliation. There are a number of Restorative Justice programs operating throughout British Columbia. Typically, the local senior sergeant arranges the conferences. Restorative justice is not practised widely throughout the community; it is generally applied in relation to aboriginal offenders.

I was told of an instance where a victim-offender reconciliation conference was facilitated by the local dentist. An offender was a cleaner employed by an aboriginal community agency. He was apprehended for the theft of a small amount of cash from a premises that the agency was contracted to clean. The primary victims in this matter were not the person from whom the money was stolen, but the offender’s co-workers and members of the aboriginal agency who suffered through the loss of trust engendered by the offender’s actions.

Through the process, the offender was fully appraised of the impact of his offending and demonstrated genuine remorse. He wrote letters of apology. The victims demonstrated that they were satisfied that the matter had been appropriately dealt with, and that they believed that the process was positive and beneficial.\footnote{Sandy Bunton, Probation Service, BC, Canada, 14 May 2012.}

In the Victoria, Australia, in addition to some non-traffic offences being punishable by the issuing of PINs\footnote{See page 15 above.}, police apprehending persons for the first time in possession of illicit drugs have the discretion to refer those persons to drug information sessions. If the apprehended persons undertake the drug information session, no charges are issued. However, if they do not attend the program, they are charged with possession of illicit drugs. There are no available statistics available from Victoria Police to inform us of how many persons are referred to drug information sessions, how many of these attend and how many fail to attend. Crime statistics for 2010–11 record that 401 adults charged with ‘shop steal’ and 3,046 adults charged with ‘possess/use drug’ received a caution (these statistics include offenders referred to drug diversion). The crime statistics do not specify how many persons receive PINs for shop theft; as matters categorised as ‘other’ include
withdrawn charges, ‘insane’ or deceased alleged offenders and warrants for arrest issued.\(^{43}\)

In addition to the disproportionate monetary value of police issued PINs, there is little scope for therapeutic or problem-solving intervention if a PIN is issued and little opportunity for the review of a police officers’ discretion in either issuing a PIN or declining to issue a PIN.

At the time of writing this report, I was not able to locate any evaluation of the drug diversion programme operated by Victoria Police. It appears to me to be an imminently sensible way of keeping these offenders out of the criminal justice system and giving them an opportunity to change their behaviour. I see no logical reason why this scheme should not be extended to cover alcohol diversion. This would reduce the number of PINs issued for public drunkenness and start to address alcohol related offending.

Victoria Police also participates in a number of culturally specific community activities which break down barriers, promote trust, provide mentorship and role-modelling and pro-social activities and are to be encouraged.\(^{44}\)

I was extremely privileged to spend an afternoon with Judge Tuen van Os van den Abeelen of Den Hague, Amsterdam, who is the equivalent of an appellate court judge in Australia. The Judge has undertaken training as a conciliator and in addition to presiding over appellate cases conducts high-level conciliations. As a civic function, the Judge volunteers on a roster with his local police station and is called upon to mediate disputes which have resulted in low level offending. These police arranged mediations are highly successful throughout Amsterdam. The judge told me that the offending is usually the end product of some other dispute which he is able to uncover and assist the parties in resolving. The judge reports on the mediation to the police who referred the parties. If the matter is successfully resolved at mediation, no further police action (for example, charges being laid) is necessary. The Judge told me that he finds this volunteer work very satisfying; he feels that he is putting something back into the community by resolving disputes amicably. This approach gives the victims a substantial and restorative role in the outcome, and in the Judge’s opinion achieves much more positive outcomes for all concerned.

In Finland,\(^{45}\) pre-prosecution mediation has had a huge impact on the criminal justice system and is used extensively. In order to ensure equality before the law, that is, to ensure that mediation was not offered capriciously, a law was passed with mandated municipal councils to use mediation. Approximately 12,000 mediations take place per year in a population of approximately 5.4 million. The success rate is estimated at 60 per cent. Finland has the most widespread use of mediation of any European country.

Professor Lappi-Seppala explained that the Finnish criminal justice system is extremely legalistic and provides little in the way of rehabilitative options. It was therefore necessary to implement an alternative approach.

Victoria now has 1,300 trained volunteer mediators; the only ongoing costs are engagement of an organisation which oversees and coordinates mediations, volunteers training and expenses. Successful mediation can lead to waiver, prosecution withdrawal


\(^{44}\) For example, Onside Victoria, Harmony Day in Robinvale Victoria and the Murray River Marathon.

\(^{45}\) Professor Tappio Lappi-Seppala, interview 13 June, 2012.
or police not charging, and may also be used in mitigation. However, the question remains whether all offences are suitable for a restorative justice approach. For example, many contend that domestic violence cases not suitable for mediation.

**Recommendations:**

1. That Victoria Police programs such as SupportLink, PACT and PACER be rolled out throughout Victoria.
2. That a restorative justice approach is implemented for police warnings for both juveniles and adults similar to the Scottish model of police warnings.
3. That Victoria Police keep and publish statistics which particularise alternative outcomes (that is, other than charges being laid).
4. That the drug diversion program is expanded by adding an alcohol diversion program.
5. That a pilot program where police could refer matters to a trained volunteer mediator for mediation or restorative justice conference is implemented. In the event that the matter was resolved, charges would not be preferred. Consideration could also be given to offering Justices of the Peace mediation training to enable them to become volunteer mediators.
6. That any increase in police discretion be subject to review and the option to refer matters to open court.

### 6.2 Pre-court Restorative Justice and diversionary programs

Having had the opportunity to attend the European Forum for Restorative Justice, attending several sessions and meeting many of the delegates informally, it is evident that restorative justice is widely practised in Europe with considerable success.

North Liverpool Community Justice Centre operates restorative justice programs for both adults and young offenders. In terms of the adults referred to restorative justice in North Liverpool, the largest uptake is in the area of family violence between adult children and their parents. I was informed that commonly offenders in the 18-22 year bracket misuse drugs and alcohol, and when their parents indicate that the behaviour is not to be tolerated, the young offender abuses the parent either physically or verbally. The parents do not want their children to go through the criminal justice system, but want the abusive behaviour to stop and the alcohol or drug misuse to be addressed.

An 84 year old man’s car was stolen by a young offender. The victim wanted to meet the offender, however the offender did not want to meet the victim but was prevailed upon to do so. At the Restorative Justice conference, the victim proposed that part of the penalty imposed consist of the offender working in the community garden at the centre where the victim attended. The offender worked in the garden solidly for two weeks. The victim attended the community garden while the young offender was working there, and a rapport was established between them. The pair now have a good relationship and still keep in touch. As a result of his work in the community garden, the youth secured full-time employment as a landscape gardener, and won a national horticultural award for the garden.
The entire process was supervised by youth probation officer, Tony Forshaw.

In the Children’s Court Victoria, pre-court restorative justice takes the form of group conferencing. Group conferencing endeavours to strengthen the young offender’s family and community supports and identifies ways of restoring the harm associated with the offending behaviour. Victims or their representatives are invited to participate. Other participants may include the charging police officer, the young person and their family and lawyer. Specialist convenors are trained to conduct the conferences and a report, with a recommendation, is prepared for the sentencing judicial officer. If successfully completed, the sentencing judicial officer is required to impose a lesser sentence than he or she would have made had the young person not participated in the group conference.

An evaluation of group conferencing found that:

- 75 per cent of participants were placed on non-supervisory orders, thereby being diverted from further progression in the youth justice system
- participants who undertook group conferencing were less likely to reoffend in the 12 to 24 months following the conference
- all victims’ and participants’ families, and most young offenders were satisfied by their involvement in the conference
- for every dollar invested, more than a dollar was saved in diverting young people from supervisory programs and the cost associated with re-offending.

Redhook Community Justice Centre uses the Safe Horizon Mediation Project to mediate predominantly in disputes where both parties have been arrested. There is a joint desire to mediate the dispute as both face criminal sanctions. As often as possible, mediation occurs within hours of arrest. Successful mediation results in charges being withdrawn or protection orders being dismissed.

The indigenous courts (or circle sentencing) throughout Australia, Canada and New Zealand also utilise restorative justice principles in conjunction with traditional court approaches and sentencing to great effect. The elders and respected persons contribute in a culturally significant and important manner in addition to fostering community inclusion in the sentencing process.

Given the proven success of group conferencing in the Children’s Court and extensive use of similar approaches throughout Europe, it is timely to consider similar approaches in the adult courts.

The Magistrates’ Court of Victoria conducts a Criminal Justice Diversion program. The program is available for any first offender charged with any offence which can be heard in the Magistrates’ Court. The victim is notified that the offender has requested that the matter be dealt with by diversion. If victim objects, the matter cannot be diverted. The apprehending police officer and the station sergeant must also agree to the matter being dealt with by diversion. The police make recommendations about conditions they consider appropriate.

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47 *Criminal Procedure Act (Vic)* 2009, s. 59.
If a magistrate agrees that the matter is suitable for diversion, the he or she has wide discretion in relation to the conditions imposed as part of the diversion plan. The proceedings take place informally, often around a table with the offender’s family in attendance. Upon the successful completion of the diversion plan, the charges are removed from the court and the matter is marked ‘discharged’. If the plan is not completed, the matter is returned to open court to be dealt with traditionally.

Diversion is an established part of the Court’s core business and has been utilised for more than 10 years. It is widely utilised and successful, however two significant issues require attention:

- although there is legislation in place to enable the process to occur, it is not considered to be a sentencing option
- it is subject to the discretion of the police and there is no accountability or review as to the use of that discretion.

In France, prosecutors have enormous discretion to decline to prosecute on the basis that there is no benefit in prosecuting the matter. Reasons must be supplied where this discretion is exercised.

There are four forms that the discretion not to prosecute may take:

- Conditional non-prosecution, where the prosecutor informs the offender that the matter will not be prosecuted if the offender complies with conditions such as repayment of the cost of damage, attending rehabilitation and such like
- The prosecutor may issue a warning
- Penal mediation, which is generally utilised in neighbourhood and family disputes. For this approach, prosecutors rely on their own store of resources, such as volunteer mediators they know (often retired magistrates and prosecutors) who they approach when they consider it appropriate
- The prosecutor may impose a ‘penalty outcome’ of ‘work of general interest’. This has to be by agreement of all parties and can be imposed in lieu of imprisonment. The community work must be of general interest, that is, of benefit and assistance to the community in specified projects. When imposed in lieu of imprisonment, the minimum work hours a prosecutor may impose is 20; the maximum 210.

All of these approaches are recorded on police record, but expunged after 5 years. They are designed to reduce the workload of the court.\(^{48}\)

Before implementing of restorative justice programs, it is necessary to carefully consider issues of transparency, fairness, the types of matter suitable for referral to Restorative Justice programs. The form programs should take and how they will be evaluated and implemented. Tom Smith referred me to an excellent article which raises the issues which need consideration.\(^{49}\)

\(^{48}\) Anthony Manwaring, interview 22 June 2012.
Recommendations:

1. That a pre-court restorative justice and mediation process be piloted, similar to the Children’s Court group conferencing or the North Liverpool model for matters where charges have been laid.
2. That Criminal Justice Diversion be considered a sentencing disposition and be included in the Sentencing Act (Vic) 1991.
3. That the views of apprehending police officers of the appropriateness or otherwise of matters being dealt with by way of Criminal Justice Diversion be ascertained and taken into account by presiding judicial officers, but that the police veto be removed.

6.3 At court and sentencing stage

“This court is about qualitative judging, not quantitative judging.”

“The ethos of the Red Hook Community Justice Centre is individualised justice; especially individualised justice in sentencing.”

From my observations in William Lake, Canada, New York at Brooklyn Mental Health Court, Red Hook Community Justice Centre, Newark Community Solutions and Midtown Community Court and North Liverpool Community Justice Centre it was apparent that judicial officers do the best they can with limited sentencing options by being creative and innovative. Judge Calabrese of Redhook Community Justice Centre calls this individualised approach to sentencing “finding the way”, that is, finding the way to ensure that the punishment fits the crime and the special needs of the offender. Judge Nunes expressed his concern that prescribed or mandated punishments are so punitive that they don’t address the needs or circumstances of the individual. Judge Nunes advocates the creative use of under-utilised sentencing options.

There was also an expectation on prosecutors and defence lawyers in these jurisdictions to come up with creative, individualised responses which took into account the nature of the offence and the individual offender’s presentation and capacity. Many of the judges I spoke to relied on prosecutors exercising their discretion not to lead evidence in matters or apply to have charges struck out.

The two legally trained prosecutors at North Liverpool Community Justice Centre have absolute discretion in relation to which charges they proceed with and applying for withdrawal of charges. Additionally, the North Liverpool Justice Centre has available to it police officers who liaise directly with the apprehending police officers and the prosecutors. In applying prosecutorial discretion, the prosecutor must be satisfied of both elements of a two tier test:

- Is there a reasonable prospect of conviction?
- Is it in the public interest to prosecute?

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50 Chief Judge Richard Nunes, Newark District Court, New Jersey, 23 May 2012.
51 Brett Taylor, Centre for Court Innovation, Red Hook, Brooklyn 21 May 2012.
52 Known in the United Kingdom as ‘Absolute Discharge’.
The prosecutor I spoke to at the Centre told me that the ethic of his work at North Liverpool Community Justice Centre was “less about the game and more about getting things resolved for a long term solution.”53 His view was that all the professionals involved in an individual’s case should work collaboratively to obtain the best long term outcome rather than to ‘win at all costs’.

In respect of the prosecutorial approach adopted at North Liverpool Community Justice Centre, Judge Fletcher said “things happen much more quickly and there is much more flexibility. That is, magic can happen.”

Judge Nunes’ view is that the attitude of the prosecution is the key: “if the prosecution understand the needs of the individual, all else will follow”.

I observed a number of sentencing options which differ from the Victorian sentencing options in use:

<table>
<thead>
<tr>
<th>PLACE</th>
<th>NAME OF DISPOSITION</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scotland, UK.</td>
<td>Admonishment</td>
<td>Follows a finding of guilt. The ‘admonishment’ is delivered by the Sheriff (the Scottish equivalent of a judge), from the bench, and no further penalty was imposed. In practice it is part of a suite of other dispositions, including imprisonment, for other offences in the same case where additional penalty would be superfluous. It was not applied in any ‘single’ charge matters I observed.</td>
</tr>
<tr>
<td>New Jersey and New York</td>
<td>Conditional release</td>
<td>Akin to a good behaviour bond or adjourned undertaking, but without the component of promising to be of good behaviour. Conditions are imposed which must be complied with. Once completed, the conditional release is expiated. This disposition carries with it a finding of guilt and conviction.</td>
</tr>
<tr>
<td>New York</td>
<td>“Adjourned in contemplation of a dismissal (ACD)”</td>
<td>This is not a sentencing disposition per se. The matter is adjourned upon the judge setting out a list of things he or she says the offender needs to complete prior to coming back to court on the adjourned date. This might take the form of an essay (with the judge stipulating the topic), a letter of apology, community work or undergoing a program. On the adjourned date, provided the judge’s set tasks were completed, the offender’s plea of guilty is vacated and the prosecution applies to have the charge either withdrawn or dismissed. This is an example of significant prosecutorial discretion. During the period of my observations, this was the most commonly</td>
</tr>
</tbody>
</table>

53 Interview with Rob Girvan, North Liverpool, 30 May 2012.
<table>
<thead>
<tr>
<th>PLACE</th>
<th>NAME OF DISPOSITION</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Liverpool</td>
<td>Absolute discharge</td>
<td>Prosecution applies for the withdrawal of the charge.</td>
</tr>
<tr>
<td>France</td>
<td>Dispense de piene</td>
<td>A rarely used option, which may be applied where the court rules that an offender is guilty of the offence charged, but no sentence will be imposed for any-one of the following reasons;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- the damages have been paid;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- the offending behaviour has completely ceased;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- the offender is completely rehabilitated.</td>
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</tbody>
</table>

Of these sentencing approaches, two could be applied in Australian courts of summary jurisdiction. The ACD would have particularly utility as a sentencing disposition for low-level, impecunious offenders. It falls somewhere between Victoria’s criminal justice diversion, deferred sentence and adjourned undertaking. It could be an option in addition to criminal justice diversion should the diversion not have taken place for any reason, and be utilised in matters that do not require a 6 month adjournment as currently contemplated by deferred sentencing. It differs from a criminal justice diversion in that it could be available in open court. The adjournments could be for periods of a few days, and the tasks set at a level which can be accomplished by the offender. Additionally, it would fit well with the current pre-sentence programmes offered in Victoria, CISP and CREDIT/Bail. The incentive for offenders would be the ultimate dismissal of the charge.

Admonishment could also be useful, however it would take the form of an actual admonishment denouncing the behaviour, rather than by simply announcing the words “I admonish you”. It would follow a finding of guilt and would not carry a conviction.

It should also be mentioned that the Magistrates’ Court of Victoria conducts an Assessment and Referral Court (ARC) for mentally impaired persons who meet eligibility criteria. Upon referral to ARC, an individual support plan is prepared for the offender and the offender may participate on the ARC program to complete the individual support plan for up to 12 months. Upon participation or completion of the individual support plan to the satisfaction of the court, the Court may discharge the accused without any finding of guilt.

A sentencing disposition of this nature, namely, the dismissal of charges without a finding of guilt after satisfactory participation in a program would be extremely useful and apposite in the disposal of low-level offences committed by impoverished or disadvantaged offenders.

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54 Article 768, French Penal Code, 1791.
55 Sentencing Act (Vic) 1991 s. 83A. This option is only available for offenders aged between 18 and 25 years.
56 Magistrates’ Court Act (Vic) 1989, s. 4T
57 Magistrates’ Court Act (Vic) 1989, s. 4Y(2).
In New South Wales, it is open to the court to make an order directing that the relevant charge be dismissed if the court is satisfied that it is inexpedient to inflict any punishment (other than nominal punishment) on the person.\(^{58}\) In addition the NSW sentencing legislation makes provision for an order discharging a person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program\(^{59}\). An order of this nature may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.\(^{60}\) These options would also be useful in dealing with minor offences for this cohort of offenders.

Professor Frase\(^{61}\) mentioned the concept of ‘conditional leniency’ which he thought would be apposite to the cohort of offenders who are the subject of this report. Professor Frase’s view is that there should be a flexible, asymmetrical spectrum of penalties for this cohort which is not limited to retributiveness. A sentencing disposition which was mentioned by Professor Frase was ‘Pre-Adjudication Probation’. If an offender completed the tasks which were considered to be appropriate by the presiding judicial officer, the prosecutor would have the discretion to withdraw the charge or charges. This approach is similar to the ‘Adjournment in Contemplation of Dismissal’ (ACD) described above.

The Community Justice Centres all had programs running from their centres. Low-level offenders are able to participate in the programs to expiate fines and penalties, or to have their charges either dismissed or withdrawn. The table below is not a complete list of the programmes available but is indicative of the types of programmes provided:

<table>
<thead>
<tr>
<th>LOCATION</th>
<th>PROGRAM</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Red Hook</td>
<td>Treatment readiness</td>
<td>To prepare for a treatment program. These involve 3 to 5 sessions to orientate offenders into the treatment process covering topics such as reflection, goal setting and what the treatment process will involve.</td>
</tr>
<tr>
<td></td>
<td>Quality of Life</td>
<td>Instructions on how to live a better life. Covers issues such as the impact of their behaviour on others, how and why they violated the law, what law they breached, what the disposition was, what they are required to do, what will happen if they reoffend. It also identifies any problems which need addressing.</td>
</tr>
<tr>
<td></td>
<td>Photography Program</td>
<td>An art therapy program in which the participants are taught photography skills and photographs taken by the participants are displayed on the walls of the public areas of the Justice Centre.</td>
</tr>
<tr>
<td>High School Equivalence</td>
<td>To enable offenders to graduate from high school.</td>
<td></td>
</tr>
<tr>
<td>Midtown</td>
<td>Project Enterprise</td>
<td>Financial literacy program. Provides business skills and resources. It assists with opening bank accounts, drawing business plans and advises</td>
</tr>
</tbody>
</table>

\(^{58}\) *Crimes (Sentencing Procedure) Act* (NSW) 1999, s.10(1)(a).
\(^{59}\) *Crimes (Sentencing Procedure) Act* (NSW) 1999, s.10(1)(c).
\(^{60}\) *Crimes (Sentencing Procedure) Act* (NSW) 1999, s.10 (2A).
\(^{61}\) In my discussions with him on 18 May, 2012.
what the consequences are of repeat offending (for example, deportation).

### LOCATION | PROGRAM

| WISE Women’s Independence Safety Empowerment | Specialised program for street prostitution. Run in several languages |
| Times Square Ink | Job training/parenting program with elements of cognitive behaviour therapy assists in obtaining and retaining employment. It also assists in expiating child support payments for periods of unemployment. |
| T for C | A cognitive behaviour therapy program of 22 sessions. It aims to assist men to improve personal relationships and how to interact better with people generally. Primarily aimed at how to manage work conflicts to be able to stay in jobs longer. |

Newark
- Father’s groups
- Women’s groups
- Violence programmes
- Veterans’ groups
- Psycho-educational groups

In response to criticisms that services are only available to offenders, Red Hook also has a housing support clinic which is open to all residents.

Several of the people that I spoke to considered it imperative that the programs offered are available without delay. People who were sentenced in court were immediately directed up to a group which would start in a few minutes. “You don’t have to go to some other address to get an appointment in 6 weeks time to see someone somewhere else.” At Midtown I was told that there were as many as 20 programs operating from the centre, with up to 40 groups taking place on any given day.

The real efficacy of these programs is that they are run on site and immediately. Generally, mainstream courts in Australia do not have the facilities to run groups on site. It would be ideal to be able to send the cohort of offenders who are the subject of this report to groups and programmes such as those outlined but it is a practical impossibility. A program for fare evaders in Victoria involved a group discussion about the obligations to pay fares. Fare evaders participated in the group discussion as part of an adjourned undertaking to be of good behaviour. This penalty was imposed in lieu of the fines. However, one of the difficulties with the program was that the participants were given appointment times some time in the future. One option would be to have a Court Advice and Support Officer at each Magistrates’ Court who could run small groups covering ‘Quality of Life’ issues in an interview room at the court. Alternatively, consideration

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63 Sentencing Act (Vic) 1991. s.72 with conviction, s.75 without conviction.
could be given to collaborating with other organisations such as Court Network and the Salvation Army to deliver similar group sessions.

It was a privilege and inspirational to observe the Canadian judges in court in William Lake. The courts do not have any pre-court, therapeutic, early intervention programmes available to them. The offenders coming before them were a similar cohort to the group who are the subject of this report: complex, drug and/or alcohol abusing, mentally impaired, poor, unemployed, suffering generational disadvantage. Much thought went into the sentencing of each offender. The sentencing disposition most relied on was probation in my observation. Yet many probation orders were breached and the breaching offences took up a substantial portion of the court’s time. The judges demonstrated concern for offenders who appeared mentally impaired. The judges went to considerable effort to explain the processes and the sentencing dispositions imposed.

Lateral and creative sentencing was evident:

My host in BC, retired Judge Thomas Smith is well-read and well-informed in regard to mental impairment and has a special interest in Foetal Alcohol Syndrome Disorder (FASD). As a result of his reading, Judge Smith is aware that persons with FASD may not develop consequential thinking (the concept of cause and effect) and that neither specific nor general deterrence have any effect on their future conduct. He has also recognised that persons with FASD are not able to manage ‘negatives’. When dealing with offenders with FASD, he endeavoured to speak with them in positives – for example “you stay away from the bar” instead of “you must not go to the bar”.

Judge Smith recounted sentencing a dour, mentally impaired offender, possibly with FASD who was well known to the criminal justice system for constant low-level offending. Judge Smith sentenced him to a probation order with two conditions: first, that at each supervision appointment he provide his probation officer with examples of good deeds he performed during the week (for example, carrying an older person’s bag for them); and second, that he smile at his probation officer.

The offender came back before Judge Smith for a review. The report described a long list of ‘good deeds’ and no reoffending. Additionally, the offender was smiling at people, engendering a better response from others, and contributing to his offence free status. Five years after sentencing, this offender has not committed any further offences.

What is interesting about this anecdote is that it is indicative of a thoughtful, meaningful sentencing response tailored to the abilities and special circumstances of the offender. It is not setting the offender up to fail - he is able to accomplish what is required of him. It has also met the key sentencing objectives; a penalty has been imposed (the offender is subject to a probation order and is required to do good deeds and has to smile at his probation officer), and has not reoffended.
There are a number of diversionary and restorative justice programs in British Columbia. I was made aware of an instance where restorative justice was utilised effectively as part of a sentencing disposition without reference to a program:

_In a remote northern outpost of British Columbia, a judge presided over a case where a drunk fisherman had assaulted his drunk neighbour during a disagreement. Both men were poor. The judge ordered the offender to dig up a bucket of razor clams (I am reliably told that razor clams are considered a delicacy) the next day and give it to his neighbour._

Minneapolis courts provide restorative justice approaches at sentencing stage, although there is no legislative basis for restorative justice. The judge oversees any restorative justice discussion and only deals with matters if all parties (including victims, the offender and the prosecution) agree. The judge has a veto power any with respect to any proposed restorative justice intervention. The matters go before a Restorative Justice Council which provides report to the judge at the conclusion of the process. The report contains recommendations which do not fetter the judge’s discretion to deal with the matter as the judge considers appropriate.

Chief Judge Nunes reiterated that under-utilised sentencing options should be revisited and examined to see if they could be employed more creatively and with better outcomes.

I observed an interesting Restorative Justice approach employed by Judge Victoria Pratt at Newark. One of the standard techniques in her Restorative Justice armoury is the imposition of essay writing conditions on some offenders. Judge Pratt sets the topics. On the day I observed Judge Pratt, the topics included:

- ‘How I want to be remembered’
- ‘Why I need to make appropriate decisions in my life’
- ‘How my bad decisions impact on my child’

Interestingly, the offenders were less than impressed when told by Judge Pratt that they were to write essays. The offenders were able to obtain assistance at the court with writing the essays. The offenders who were returning to court with essays displayed a level of pride in their accomplishment. Judge Pratt did not read the essays aloud, but commented on the contents to the writers.

A further example of Judge Pratt's approach is that her main impetus is to improve the physical health of the offenders who come before her. After years of working with the Newark community, she observed that offenders did not have regard for their health and that this was having severe impact on their behaviour. Judge Pratt recounted an anecdote relating to a man who had not been to see a doctor in many years. He presented with a substantial lump on his head. He was consistently coming to the attention of the police. She mandated that he go to see a doctor, who had him assessed for an acquired brain injury (ABI). He was found to have an ABI from a workplace accident and is now receiving appropriate treatment. Judge Pratt routinely imposes orders directing people to see a doctor.

64 Department of Justice Canada, Community Based Justice Programs, British Columbia, [http://www.justice.gc.ca/eng/pi/ajs-sja/prog/bc-cb.html](http://www.justice.gc.ca/eng/pi/ajs-sja/prog/bc-cb.html)
Minnesota Department of Corrections. [http://www.corr.state.mn.us/rj/Default.htm](http://www.corr.state.mn.us/rj/Default.htm)
In Victoria, judicial officers have considerable scope for lateral approaches with undertakings to be of good behaviour which can be imposed either with or without conviction, for a maximum period of 5 years (with no a minimum period) and with no limitation of the conditions attached to the undertaking. We also have the ability to make a finding of guilt but unconditionally dismiss a charge, although this will be recorded as a finding of guilt on an offender’s criminal record. These options provide the ability to make Restorative Justice orders. Discussions would need to take place with court administrators about whether court officers could follow up the conditions.

The challenge for judicial officers is to utilise sentencing options laterally to craft sentences which are within the ability of the offender to achieve and incorporate some form of penalty, but do not bring the court (or the judicial officer) into disrepute.

Recommendations:

1. That sentencing options similar to ‘Admonishment’ and ‘Adjournment in Contemplation of Dismissal’ be introduced
2. That the ability to provide on site, immediate groups or programs such as those outlined on pages 28 and 29 be investigated
3. That judicial officers reconsider the manner in which existing sentencing dispositions can be utilised to provide better sentencing outcomes
4. That the Sentencing Act (Vic) be amended to include provision of a sentencing option of ‘dismissal without finding of guilt’ upon satisfactory completion of a program
5. Alternatively, that the Sentencing Act (Vic) be amended to include provision of a sentencing option of a complete dismissal if the court is satisfied that it is inexpedient to inflict any punishment (other than nominal punishment) on the person.
6. That section 83A of the Sentencing Act (Vic) be amended to apply to an offender of any age without being restricted to offenders under the age of 25 years.
7. That the Sentencing Act (Vic) include provision of a probation type order to facilitate and supervise restorative justice conditions imposed by a sentencing judicial officer which do not necessitate a full community corrections order.

6.4 Post-sentence and Community Corrections

In some countries I visited, probation or other services similar to Community Corrections in Victoria have a role in supervising and administering less intensive orders than Victoria’s rehabilitative Community Corrections Orders. This enables judicial officers to make short orders with non-programmatic conditions attached.

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66 Sentencing Act (Vic), s72.
67 Sentencing Act (Vic), s.75.
68 Sentencing Act (Vic), s.76.
70 Sentencing Act (Vic) 1991 Part 3A.
71 See Judge Tom Smith’s example on page 30 above.
Judge Tom Smith posits that probation orders need to be tailored to the abilities and personal circumstances of individual offenders, and that the conditions imposed should be kept as simple as possible, even though the sentencing judge and assessing probation officer may be aware that the person would benefit from intervention and treatment. The more conditions imposed and the longer the duration of the order, the less likely an offender will be able to comply\textsuperscript{72}.

I was fortunate to have the opportunity to speak with Professor James Bonta\textsuperscript{73} who is the architect of change in the probation system in British Columbia. The new approach in probation is that probation officers are encouraged to plan out a strategy before each interview with an offender to promote behaviour change and the living of more pro-social lives. The supervision interviews are more structured, and encourage rapport building. Professor Bonta also suggests that offenders spend more time with the probation officers and advocates that conditions be kept to a minimum.

Professor Bonta’s view was that if there are too many conditions, the probation officers spend the time checking whether the offender is observing the conditions. It does not help to build rapport and prepare people for treatment. If all available time is used to monitor conditions, there is insufficient time left to deal with an offender’s criminogenic needs. Professor Bonta urges that judicial officers should be more mindful of what conditions were necessary to meet the criminogenic needs of the offender and that conditions with no relevance to the criminological need of the offender not be imposed.

It is very tempting as a judicial officer to who is sentencing a drug dependant, psychologically disturbed, abusive, unemployed offender to tick every condition box – that is, imposing that the offender be assessed for supervision by a corrections officer, drug treatment, psychological counselling, anger-management and community work. However, it may be that person does not have the wherewithal to comply with all the appointments required to comply with the order.

It appears to me that Community Corrections officers, at least in Victoria, have assumed a purely supervisory role and have lost any opportunity to engage meaningfully with offenders with the aim of effecting long-term behaviour change. Having spent time with probation officers in Canada and North Liverpool, I am starkly reminded that we have lost the opportunity to foster rapport and mentorship between corrections officers and offenders. It may be time to consider an honorary role for retired professionals such as teachers to take on mentoring responsibilities, and at the same time providing assistance with literacy and numeracy and job readiness to reinforce an enhance the role of corrections officers.

In the UK, I was made aware of the work of the criminologist Shadd Maruna whose area of study is recidivism, or more precisely, what stops offenders from reoffending. Professor Maruna’s work emphasises the need to impose sentences which provide offenders with life skills and employment skills to build social capital for both the individual and the community as a whole. Community work (or community payback as it is known in the UK) is a means by which this aim could be achieved. Professor

\textsuperscript{72} Tom Smith: “Sentences that Work”, available as an Annexure to Tom Smith: Outline For Reasons For Sentencing, [PDF] www.law.arizona.edu/depts/upr.../sentencing_outline_tom_smith.pdf

\textsuperscript{73} Dr James Bonta, Telephone Interview 15 May 2012. Dr Bonta is the director of correction research for Public Safety and Emergency Preparedness, Canada.
Maruna’s work concludes that offenders respond much better to sentencing impositions which made them feel that they were useful and making a contribution. His work also touches on the inter-generational factors which influence how and why an offender may be offending, and the importance of providing an offender with the tools and knowledge to be able to create a new identity and to change their story.  

Vicki Helyar-Cardwell of the Criminal Justice Alliance suggested that one approach might be to ask the offenders what type of community work they would like to be engaged in, and what would make them feel useful. Ms Helyar-Cardwell also touched on an issue which profoundly resonated with me, particularly in my work with young Koori men who appear as defendants in the Koori Court – namely that many offenders who have a deprived background and life present with a ‘stamp of hopelessness’. Providing these offenders with hope is more significant than any other factor in achieving a reduction in reoffending. A programme mentioned by Ms Helyar-Cardwell is the “Family Man Program” for young offenders who are fathers. It aims to make the young men stronger to enable them to be good fathers, to feel better about themselves, provide hope for the future and to make them feel that they are making a useful contribution to their family.

The principles espoused by Professor Maruna are clearly in use in New York and Glasgow. At Red Hook and Midtown the community, through community meetings, advises the Justice Centres what parts of their borough require work to be done on them or what buildings require work. The projects undertaken by the work crews have beautified these areas and made them more functional, and in the process have instilled pride in the offenders, provided them with new skills and increased community confidence.

Red Hook has partnered with Groundswell Community Mural project which aims to “beautify neighbourhoods, engage youth in societal and personal transformation, and gives expression to ideas and perspectives that are underrepresented in the public dialogue”. While young people are involved in the mural projects they work with artists and are introduced to new media such as computer programs.

One young person who was mandated to attend Groundswell by Judge Calabrese at Red Hook said “After I did my mandated service, I wanted to do more at Groundswell so I volunteered on a mosaic for two or three months. I then took part in the summer program and worked on a traffic safety mural. I learned a lot about working with a team and expanded my horizons about different types of art. Groundswell has helped me build a portfolio and develop my skills. I am very grateful.”

I met with the Director of Glasgow Community and Safety Services (GCSS), Phil Walker, in a new building which houses government services, including GCSS. The tables and chairs which furnish the café on the ground floor of the building and the large boardroom table at which the meeting took place were made by offenders on community

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74 Dr Maruna has published extensively in this area. A full list of his publications is available at [http://www.shaddmaruna.com](http://www.shaddmaruna.com).
75 Interview on 7 June 2012.
76 The Criminal Justice Alliance is a lobby group set up in the 1990’s representing 67 member groups involved in the criminal justice system or criminal justice issues.
77 [www.groundswellmural.org](http://www.groundswellmural.org)
payback orders. A skilled carpenter was in charge of the projects and taught the offenders the skills required to make the furniture. Mr Walker reported that the offenders were delighted with the furniture they made and took great pride in showing the furniture to family and friends. The community benefited by these items being made, and the offenders felt they made a contribution to the community as well as learning new skills.

Judge Fletcher enthusiastically espoused the benefits of community payback in local communities. His view is that the North Liverpool Community Justice centre is able to respond quickly to the community’s request for work to be done in relation to a particular area or project.

In August 2006, during the legal vacation, the Lord Chief Justice Lord Phillips of Worth Matravers undertook a typical day’s community payback. The Lord Chief Justice has written about his experience in positive terms and concluded community payback is of benefit to the offender and to the community.  

I am not able to comment on the view of judicial officers in other states and territories. In Victoria, magistrates have little confidence that community work orders achieve anything other than imposing a punishment. Judicial officers are aware that offenders who are required to perform community work are enrolled in occupational health and safety courses and first aid courses. I always tell offenders in relation to whom I impose community work hours that they will undertake those courses and that they will be able to include them on job applications in the future. There is a concern that young people, or those early in their offending ‘careers’, ought not to be sentenced to community work hours as it exposes them to more seasoned offenders. Judicial officers are not imbued with any sense that the work will be meaningful, increase skills, enhance prospects of future employment, give any sense of hope or any sense that the offender is making a contribution to the community. In addition, community work, and community corrections orders in general, are often not an option for women who have childcare responsibilities, and the experience of magistrates presiding in country locations is that there is little in the way of work or work sites available to offenders who reside in the country.

The current structure and ethos of community work in Victoria requires a major overhaul and financial commitment. It is currently a lost opportunity to make a significant contribution to the community and difference in offenders’ lives. Effective, meaningful and properly structured community work would be an excellent option for a large number of offenders currently coming before the courts, and would be especially useful as a disposition for the subjects of this report. It goes without saying that such a change would need to be in consultation with the Commissioner for Corrections and would necessitate a reprioritising of the Corrections budget. There would need to be considerable thought given to how to make it work throughout Victoria.

Community restitution is an important aspect of the work at Midtown Community Court. It can take several forms. There is structured work for physically impaired persons such as stuffing envelopes for local charities. Community restitution crews are deployed in hot spots nominated by the community and the local business improvement network.

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80 Justice Reinvestment is discussed on page 40.

81 In Victoria, persons with physical impediments are excluded from being able to undertake community work.
This work may involve graffiti crews, food bank and sanitation. The Centre for Court Innovation adds up how many hours have been worked annually to demonstrate how much the community has benefitted from the community service:

“In 2011, defendants at Midtown completed over 28,600 hours of community service or the equivalent of over $207,000 of labor (sic), including cleaning the courthouse, painting over graffiti, stuffing envelopes for local non-profit organisations, and cleaning the streets of Times Square.”82

In Glasgow, GCSS administer the community payback scheme. They collect the offender from court on the day that the community payback is imposed. The offender is signed up immediately for work, appropriate work is identified, and the offender is told what their work will entail. There are no delays in the commencement of the order. If the offender is not able to access public transport, is unlicensed or does not have a car, he or she can be collected and driven to the work site. Phil Walker told me that the ‘ramping up’ of community payback was driven by government in response to community feedback indicating that there was confidence in the community payback scheme and what it represented. The work that is assigned to offenders involves skills based work training and support. It often takes the form of producing things from recycled wood such as planters and picnic benches which are installed in open spaces, such as the furniture mentioned above. There is also a reparative component to the community work where offenders contribute to “cleaning, maintaining and enhancing areas of Glasgow”.83

In France, the opinion of the community is sought regarding the type of work the community considers need to be done by the Work of Interest program. The needs of local communities are sought and established. Work communities have nominated includes the removal of tags (graffiti) and removal of rubbish from particular areas. Communities were pleased that their local problems were dealt with and that necessary work which had not previously been attended to was carried out.

An interesting model I came across was the “Civic Justice Corps” (CJC) model. It comes under the umbrella of the “Corps Network” which is a network of the US’s 151 service and conservation corps. The CJC, recruits people with criminal convictions to public service, assisting offenders to make the transition to independent, productive lives by skillling them in conservation related jobs. The strategy involves predominantly young offenders in community service that meets local needs. CJC members engage in visible and valuable service projects designed to improve community health, safety, beauty, and sustainability. Examples of how CJC members improve their communities include planting trees in bare urban landscapes, weather-proofing the homes of low-income community members, replacing footpaths on dilapidated streets, installing green roofs on local government buildings and generally assisting in the needs of their communities. The CJC draws on formal working relationships with justice agencies, employers and other partners.84

Similarly, in France there is a strong ethos that community work be both practical and of benefit to the wider community, projects and outcomes. This form of community work is

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82 Centre for Court Innovation, Midtown Community Court: Documented Results. 2012
known as 'work of general interest'. The French community wants to see worthwhile and tangible projects and outcomes. One example is the reforestation by prisoners and persons on community service orders of a decimated forest. The participants were trained in reforestation, which resulted in post-release and post-community service employment. It was reported favourably in the press. Another example community engagement with offenders in France is the 'Inmates Tour De France', which brings together offenders on community orders and community work, prison inmates, prison officers and probation officers. Each year, they all do as much of the Tour as they can manage. It is a good news story and promotes health and rehabilitation as well as bringing these diverse people together.85

While it would be costly to set up these types of schemes and projects, the benefits to the community and the offenders would be enormous. The pool of skilled retirees who wish to “give back to the community” is enormous. I have spoken about this idea widely among friends and acquaintances either of or nearing retirement age who would welcome the opportunity to work with offenders. Obviously there would be costs involved in engaging skilled trades’ people, artists or art therapists and to train them to work with offenders. The cost of infrastructure such as workshops, occupational health and safety officers and vans would also carry significant expense. Moreover, a volunteer work force would need ‘supervision’ in the sense of having the ability to seek guidance and to debrief.

Corrections Victoria is involved in some excellent partnerships. The initiatives and partnerships are showcased annually in the Community Work Partnership awards.86 However, it appears to my judicial colleagues and I that many offenders miss out on meaningful work opportunities. Women, indigenous persons and persons who reside outside the metropolitan area report that there is a lack of availability and appropriateness of community work.

A regrettable situation has developed in Victoria whereby many of my magisterial colleagues have, perhaps undeservedly, little confidence in the rehabilitative and efficacy of Community Corrections Orders, or the viability of the work that participants on Community Corrections orders undertake. The reality is that magistrates deal with offenders who have breached orders, and do not learn of offenders who have successfully completed them. A solution to this would be that very brief exit reports be prepared for sentencing magistrates which outline what an offender has achieved on an order and whether or not the order was completed.

**Recommendations:**

1. That judicial officers give greater consideration to the conditions they impose on Community Corrections Orders so as not to overload offenders beyond their capabilities.
2. That the potential for the adaptation of the Canadian probation officer model be investigated in order to provide cognitive behaviour therapy and case management delivered by corrections officers. The opportunity to capitalise on the opportunity would both enhance the

85 Martine Herzog-Evans interview 20 June 2012.
work of Corrections officers and improve prospects for long-term behaviour change for offenders.

3. That volunteer retired professionals such as teachers are engaged to take on mentoring, literacy and numeracy and preparation for job readiness of offenders on Community Corrections order with a view to reinforce and enhance the role of Corrections Officers.

4. That a short completion report be provided to the sentencing judicial officer indication whether an offender has completed a Community Corrections Order and what programs and work had been undertaken

5. That community work be radically overhauling to render it meaningful, skill enhancing, productive and providing hope for the future, as well as making a greater contribution to communities.

6. That the engaging of retired trades' people, teachers, artists and other skilled retirees to provide skills training to offenders performing Community work be investigated.

7. That local communities be approached for their input into what projects they would like to see accomplished in their local neighbourhoods.

8. That Corrections officers in the capacity of Probation Officers be utilised to supervise restorative justice conditions. Skilled volunteer retirees who could also act as mentors would be ideally suited.
7 Additional Observations

During my trip, I was told about matters which did not specifically touch on the area I was researching, however they were of such significance that they ought to form part of my report. I will touch on them briefly and can be contacted via email should further information be requested.

7.1 Court Integrated Services Program (CISP)

Every interviewee I spoke to and every institution and court I attended expressed interest in the CISP program. There is no other multi-disciplinary, individualised program like it in the world and it was the envy of everyone I spoke to. I have forwarded copies to the Executive Summary Evaluation report to all the contacts I made overseas. Anton Shelupanov of the Centre for Criminal Justice expressed particular interest and will recommend that a similar program be piloted at North Liverpool Community legal Centre.

The extent of the interest in CISP led to me to consider how Courts Executive Service or Legal Policy in the Department of Justice might develop a program package to enable other jurisdictions to easily adapt such a program, similar to the work to the Centre for Court Innovation in New York and Centre for Justice Innovation in London. I was also prompted to consider the importance of expanding CISP to the courts in Victoria which currently do not have the full program.

Recommendations:

1. That the Department of Justice market and demonstrate CISP to Courts nationally and internationally.
2. That CISP be rolled-out CISP state-wide.

7.2 Foetal alcohol syndrome Disorder

Through Judge Tom Smith and in observing the judges in Williams Lake, I became aware that Foetal Alcohol Syndrome Disorder (FASD) is widely diagnosed in Canada and is given considerable weight in sentencing. In the two days I observed in court, several people were said to be sufferers of FASD. FASD has not been raised in any sentencing matters before me, although now that I am aware of it and the impact it has on persons who have it, I wonder what weight it should be given.

I have recommended to the Professional Development Committee that Victorian Magistrates be provided with education on the topic, particularly around what to look for, how to communicate with persons with FASD and what factors to take into account when sentencing.

Recommendation:

That judicial officers be provided with the opportunity to receive professional education with respect to Foetal Alcohol Syndrome Disorder and similar mental disorders.
### 7.3 Right on Crime and Justice Reinvestment

I was also made aware of the existence of the lobby group Right on Crime which advocates for “cost effective approaches that enhance public safety”. Among the patrons are Jeb Bush, former Governor of Florida and Newt Gingrich. In effect, Right On Crime advocates, for fiscal reasons, that prisons be reserved for serious and violent offenders and that the prison budget be redirected or reinvested into rehabilitation and problem solving. Their website sites the example of Texas, where the crime rate has dropped and one prison has closed since the introduction of the reinvestment of funds into rehabilitation.

The allied movement Justice Reinvestment is also noteworthy. It is summarised as:

> “…an emerging approach to over-imprisonment that diverts a proportion of corrections budgets to communities within the jurisdiction that have high rates of offending, giving those communities the capacity to invest in programs that will reduce criminal behaviour and the rate of recidivism.”

The savings of these initiatives, coupled with the demonstrable reduction in crime in the United States are significant and important, and ought to be considered by policy makers and the Department of Treasury and Finance in determining future corrections spending.

### 7.4 Media

I had the opportunity to meet with Roma Hooper, the director of Make Justice Work, who told me about several ways in which the media were positively engaged in reporting about criminal justice issues. Ms Hooper’s view is that it is imperative that journalists attend to witness first-hand what is being achieved in courts and on programs in order to engender positive reporting. Ms Hooper referred me to an excellent article by Jack Shaw, a Labour politician who had a strong ‘tough on crime’ agenda, which praised ‘alternatives to custody’, diversionary measures and community courts. It is evident from the article that Mr. Straw personally visited the courts and institutions about which he wrote in glowing terms.

Ms. Hooper told me that a few years ago, Jack Straw and David Rumsbottom mounted a vigorous ‘tough on crime’ campaign. In response, the Make Justice Work coalition set up a campaign focusing on the economic ramifications of gaol, showing how much it cost and how ineffective it was. The campaign, through a panel of ambassadors, lasted for 12 months and was concerned with demonstrating how community sentencing better serves the community through benefits to individual offenders and the community, in order to increase public confidence in community sentences.

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87 [www.rigthoncrime.com](http://www.rigthoncrime.com)
89 Melanie Schwartz, Building Communities Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment. (2010)14(1)AILR2. This article refers to a great deal of useful published material.
90 [www.makejusticework.org.uk](http://www.makejusticework.org.uk)
The panel consisted of a number of prominent people with strong ‘law and order’ views such as the former Chief of Police, victim support organisations, the Magistrates’ Association, NACRO, the MET Police Commissioner and it was chaired by the conservative-leaning editor of the Daily Mail newspaper. The panel has visited the intensive community centre for the 18 to 25-year-olds, the women’s centre in west Yorkshire, the drug and alcohol programme, and the mental health program. The site visits dispelled the notion that community sentencing is a soft option and demonstrated that it has significant benefits. The article mentioned above by Jack Straw is a case in point.

In Victoria, good examples of criminal justice successes need to be found and made known to the local press in order to raise public awareness and confidence in the successful alternative approaches which are being implemented. However, notwithstanding the importance of the position, the Magistrates’ Court of Victoria has not been able to secure funding for a full-time Media and Community Engagement Officer. The Australian Broadcasting Commission on Radio 774 held an ‘outside broadcast’ in May 2010 from the Melbourne Magistrates’ Court which was highly successful. The talkback callers were unanimously impressed by the work of the court.

The challenge is to keep the media reporting positively about the good outcomes that are being achieved in addressing reoffending and reducing of offending rates throughout the year, as opposed to these stand-alone special occasion reports during Law Week. Currently, the public are fed a constant diet of articles critical of the justice system and sentencing outcomes92. There is a constant call for ‘vengeance’ through sentencing notwithstanding that the laws relating to sentencing do not contemplate vengeance93. It is important that community members are given the opportunity to be properly informed about what is happening in the court’s and the criminal justice system.

Recommendation:

The Magistrates’ Courts, through their respective Departments of Justice invite ‘ambassadors’, including journalists from tabloid newspapers, on a panel, to better inform the community through positive newspaper articles.

7.5 Spent convictions

Most jurisdictions I visited in the UK and Europe had a scheme to expunge previous court convictions from a person’s criminal history. The ‘spent convictions’ schemes took various forms, related to different types of offences (though in the main related to low-level offences), and took effect after the expiration of different periods of time. The schemes seek to balance risk to the community and rehabilitation. Convictions have an enormous impact on a person’s ability to gain employment and such things as ‘working with children’ authorisations. It is of particular significance in minority communities where people may have come from a history of deprivation and are struggling to change their identities. With the exception of Victoria each state and territory in Australia, as well as

92 As I was scanning the newspaper on the day that I wrote this paragraph, the following article appeared: “Not tough enough: Community anger at sentencing over joey’s cruel death” Herald Sun Newspaper, Friday august 17, 2012.
93 The purposes of sentencing are contained in s.1 Sentencing Act (Vic) 1991 and set out in Annexure 1.
the Federal criminal jurisdiction, provides a scheme for spent convictions. I note that the Standing Committee of Attorney's-General (SCAG) developed a uniform national spent convictions scheme in 2009. The European Journal of Probation devoted an entire issue to an international study of spent conviction schemes and the importance of these schemes in the context of rehabilitation of offenders. Additionally, care must be taken that access to criminal records is closely monitored and protected.

Since returning to Australia, I have read with interest the work of Paterson and Naylor, who conclude:

“Positive support for the employment of ex-offenders should also be government strategy. Such support is needed to reduce disadvantage and enhance reintegration of this substantial labour pool, and in recognition of the fact that rehabilitation and community protection are not conflicting goals. In the meantime, a generous national spent convictions regime is an essential starting point.”

Recommendation:

That the issue of legislation to deal with spent convictions be enacted in accordance with the draft bill.

7.6 Suspended sentences

As a judicial officer, it would be improper for me to comment on current government policy. However, it is my view that it is entirely appropriate for me to inform readers of this report that Victoria’s move towards the abolition of suspended sentences is contrary to the world-wide trend. Countries I visited which have suspended sentences as part of their sentencing options rely on them heavily. Countries without suspended sentences are moving towards implementing them as sentencing options. The cost of incarcerating prisoners is a world-wide concern, and countries I visited are implementing as many alternatives to incarceration as possible to reduce the cost. Professor Diesen of Stockholm University told me that the Swedish government is planning to bring in measures in 2015 to do away with any prison terms under 12 months, and to substitute conditional suspended sentences. The conditions attached to these orders may involve the payment of fines, undertaking of community work and electronic monitoring. Suspended sentences are seen overseas as contributing to the lowering of incarceration rates (and the associated costs) and as a means of deterring re-offenders.

98 Professor Frase, in my discussion with him on 18 May 2012 stressed the importance of suspended sentences.
7.7 Procedural Justice

In reflecting on how the sentencing of indigent offenders should be approached, it is important to keep in mind the concept of procedural fairness. The work of Tom Tyler\textsuperscript{99} in this area is particularly apposite. Tyler’s research has found that how offenders are treated during the criminal justice process is more important to them than the sentencing outcome. The greater the perception of procedural fairness, the better the compliance with court requirements and sentencing orders.

Studies into procedural fairness in the community courts have also demonstrated the importance of the engagement of the judge: namely, the direct interaction between the judge and the offender. It is important that the offender believes that the judge is interested in him or her personally. The work of Greg Berman and Emily Gold lists several things that can be done to improve procedural justice.\textsuperscript{100}

- Humanise the experience
- Use plain English
- Engage participants in dialogue
- Focus on the case at hand
- Manage the courtroom to promote perceptions of justice.

A matter which took on increasing importance as my tour progressed was the cultural differences between countries. The countries which had a strong ethos of community care, such as the northern European countries, had a lower crime rate, lower rate of breach of court orders and a lower rate of non-payment of fines. Professor Lappi-Seppala told me that it was a long held Nordic view that prevention is the key, and that the Finns believe that the criminal law contributes to better behaviour, that is, the ‘normative compliance’ theory as espoused by Tom Tyler and Anthony Bottoms. Most people are law abiding and have internalised the norms – they appreciate their justice system and believe it is worth keeping. To that end, the Finns ensure that the punishment must be fair, predictable, equal and coherent. The Finnish and Swedish systems demand that all people are committed to the community as a whole.

7.8 The importance of immediacy

Brett Taylor of Centre for Court Innovations made a point which I have sought to emphasise in this paper; that is, the importance of engaging with offenders as quickly as possible after apprehension: “The studies are finding that success is reached when there is immediate engagement. The point of crisis is also the point of opportunity.”\textsuperscript{101} Any programmatic response should be made available as soon as possible to maximise the opportunity for engagement and to maximise the efficacy of the response. Many offenders do not engage if they have to make an appointment in the future. Immediacy not only maximises the probability that offenders will attend programs, it capitalises on the immediacy of their plight to facilitate behaviour change.

\textsuperscript{99} Tom Tyler “Why People Obey the Law”, 2006 Princeton University Press.
\textsuperscript{101} Brett Taylor, Red Hook Community Justice Centre, interview 19 May 2012.
7.9 Benefits of undertaking this study from a personal perspective.

This period of study has been of great personal benefit to me. The opportunity to watch judicial colleagues in court is not generally available to judges and magistrates. To be able to sit on the bench and see how others in similar roles to my own communicate with persons appearing before them and deal with the issues that confront them is a rare privilege, and one that one cannot fail to be enriched from.

After 23 years on the bench, the opportunity to reflect inwardly about the work I do on a daily basis has been extraordinary. It has been the only opportunity I have had during my judicial career to do so. None of my Magisterial colleagues have had the opportunity to reflect and learn as I have as Magistrates are not entitled to sabbatical (as judges of the Supreme and County Courts are after 5 years on the bench).

The travel itinerary and appointments I made, as well as the need to write up interviews on a daily basis kept me frantically busy while I was away. However, I returned completely refreshed and reinvigorated, eager to tell my colleagues what I have observed and to get back to the work I am passionate about. Before I went on this trip, I was thinking about winding down my work commitments, but the new energy the trip gave me has spurred me to keep pursing my interests in social justice.

I have changed my practices on the bench. Chief Judge Nunes' words ring in my ears. I am not allowing myself to race through court lists; I ensure that I am taking the time necessary to think through each case to ensure that I am imposing a 'meaningful' sentence. I am ensuring that my decisions are qualitative, not quantitative.

The benefits of the opportunity afforded to me by the Trust are incalculable: I believe that I have returned from the trip a better magistrate who will be able to serve my community for many years to come.

I have spoken with the Chief Magistrate of Victoria, Ian Gray, about the desirability of setting up a closed internet site to enable judicial officers to share innovative sentencing practices and to discuss sentencing issues. Such a site would build up a reference of cases and would also encourage best practice. The Chief Magistrate has given 'in principal' approval to the investigation of the form such a closed, information-sharing application may take, for example, a list serve or blog, and the associated cost.

Recommendation:

That the Magistrates’ Court of Victoria host a closed internet application for judicial officers throughout Australia to communicate with each other about sentencing issues and to keep a digest of solution-focussed sentencing outcomes.
7.10 Safety and emergency centre. Too good an idea not to mention.

At the dinner organised by Judge Tom Smith in William Lake, Canada on 14 May 2012, Trevor Barnes, former head probation officer attached to the courts at Williams Lake, and currently executive director, Canadian Mental Health, Cariboo Chilcotin Branch, told the assembled company of his vision for a Safety and Emergency Centre. He listed the current flashpoints where police are required to attend; homes, classrooms, hospital emergency departments and police stations. The pressure is currently on teachers, police officers and doctors and nurses. If we were to create a 24 hour Emergency Centre, it would take the pressure off these flashpoints.

He described a 24-hour service which would allow teams to bring protagonists in highly volatile or risky incidents to the Centre to make critical assessments and diffuse the high anxiety situations. Such an approach would keep people out of the criminal justice system. The Centre would involve family violence outreach and mental health outreach. It would be able to be used for any incidents involving family violence or mental health matters, and it would involve practitioners in mental health, family violence, police, ambulance and fire service. An emergency centre could have attached to it an on-call psychiatrist. Police would be required at the Centre to maintain safety and to retain order.

A multi-service, holistic Centre would enable victims and offenders to be connected with services and that the police did not have to sit around waiting for services to come into place. It would also ensure that people did not wait for many hours for access services. The Centre would not only deal with offenders, but will also include a victims’ service. It could be administered by the police watch commander who would have a multidisciplinary team available. It would make better use of the resources and would ensure that services respond more effectively.

The advantage of this type of approach is that it would reduce the number and intensity of high-anxiety situations dealt with by the police and would bring them back into the purview of community services. Another significant benefit from this model is that the redistribution of services could ensure that there were more services in small regional centres.

In the design of such a centre, thought could be given to the provision of discrete, safe overnight accommodation for victims of family violence, perpetrators of family violence, young people involved at either spectrum of family violence (that is, either as alleged perpetrators or victims) and victims of crime.

The aims of an Emergency Centre would be a reduction of conflict, provision of services, and a reduction of criminalisation.

Recommendation:

That the Department of Human Services, Victoria Police and other emergency services pilot a 24 hour, secure facility staffed by police, medical staff, psychiatric staff and welfare workers to provide emergency assistance in a safe environment for victims, alleged offenders and health workers.
8 Conclusion

When I set out to research my topic, I had the intention to be able to make a handful of recommendations to assist my judicial colleagues and myself in the complex and difficult task of sentencing.

However, I found that fair and appropriate penalties for disadvantaged low-level offenders which meet community expectations are not restricted simply to a sentence imposed by a judicial officer. A ‘whole of justice response’ is required. A similar conclusion was drawn by the Canadian Mental Health Association with respect to diversion programs for persons with mental disorders.102

It had also been my intention that the recommendations I would make would be inexpensive. In the current economic climate, fiscal responsibility and budgetary restraint are paramount. Some of my recommendations, especially around improvements in community corrections orders and the community work component of corrections orders, will require considerable expenditure. There are lessons to be learnt from the effectiveness of overseas community work programs and from the reinvestment of funds which would otherwise have been expended in housing prisoners.

With respect to poor, disadvantaged or special needs low level offenders, sentencing judicial officers, apprehending police officers and prosecutors considering a case must change their traditional practice of looking at the offence first, but should instead look at what the individual offender’s needs are and formulate a strategy with the offender in mind.

Changes in sentencing practices will require some experimentation, bravery and creativity by government and statutory authorities as well as by judicial officers. It will be important to bring the community, police, victim’s groups, prosecutors, defence practitioners and the press on board with these changes. To that end, the media should be invited to observe the criminal justice from within, rather than making comment from the outside.

I have made recommendations103 and propose to disseminate information about them and will strive to implement them where appropriate.

In order to give effect to my recommendations, consultations will need to take place with a view to collaboration with a number of organisations, including:

- Magistrates
- Aboriginal Justice Forum
- Koori Justice Unit, Department of Justice
- Penalty Enforcements Unit and Sheriff’s Office
- Police Command
- Police Prosecutions Division
- Office of Public Prosecutions
- Director of Public Prosecutions

103 Recommendations appear at the end of each section of this report and are listed at pages 49 - 52.
The reader may wonder: as a consequence of 6 weeks’ study travel overseas and almost 5 months in total of thinking about meaningful sentencing, how would I now sentence the three persons I mentioned in my introduction?

With respect to Kylie: When I sentenced Kylie earlier this year, I imposed fines which I knew she would either not be able to pay or would have to make arrangements to pay on instalments. If the sentencing options and programs were expanded pursuant to my recommendations, I would adjourn the matter in contemplation of dismissal to enable Kylie to undergo financial counselling and a free road trauma awareness course. Upon satisfactory completion, the charges would be dismissed without a finding of guilt recorded.

Utilising what is currently available to me, I would now consider adjourning her case for a period of 3 months to enable her to engage with the Court Advice and Support Officer (CASO), and through the CASO, to access a financial counsellor to assist her to consolidate her debts and fines. The financial counsellor would also be able to advise her on how to budget and maximise any government benefits to which she may be entitled. Additionally, I would order that she attend the Road Trauma Awareness Program. Attendance at that program incurs a fee of $150. On the date nominated for Kylie to return to court, subject to her completing the Road Trauma Awareness Program and engaging with the financial counsellor, I would impose an Undertaking to be of Good Behaviour104 for a period of 3 months.

With respect to Jack: When I dealt with Jack’s case earlier in the year, I fined him $100, again knowing that in all likelihood the fine would not be paid. Utilising what is currently available would refer him to either the CISP program or CASO to assist him to obtain identification documents and to reconnect with Social Security, link in with housing support agencies and drug treatment agencies. Upon satisfactory compliance, I would dismiss the charge105. It would be preferable to adjourn in contemplation of dismissal and dismiss the charge without a finding of guilt.

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104 Sentencing Act (Vic) 1991, s. 72.
105 Pursuant to s. 76 Sentencing Act (Vic) 1991.
With respect to Jeremy: When I dealt with his matter, I adjourned his case with conviction with him undertaking to be of good behaviour for a period of 6 months with conditions that he pay for the damage and not attend at or in the vicinity of the bottle shop. Ideally, I would once again utilise an adjournment in contemplation of dismissal, I would prefer that a mediation be set up between the shop proprietor, Jeremy and Jeremy’s guardian in order that

- Jeremy could be told how his behaviour is impacting on the shop proprietor,
- the shop proprietor be given the opportunity to gauge the level of Jeremy’s multiple co-morbidities,
- for the shop proprietor to have an input into ‘the punishment – for example, that Jeremy sweep up the front of the shop on 5 occasions.

Upon satisfactory completion, the matter would be dismissed without finding of guilt. At present, there is no ability for mediation of this nature to occur.

With the insight I acquired on my travels, the approach I would take with the options presently available to me, would be to adjourn the matter on a monthly basis for Jeremy to tell me what he had been doing, what activities he had been engaging in, and whether or not he had come under the attention of the police. I would also order that Jeremy provide the arresting police officer with a letter of apology (written with the assistance of the carer or guardian) to forward to the shop proprietor. Provided Jeremy remained offence free during the entire period of the adjournment, I would dismiss the charge.
9 Summary of Recommendations

Fines:

1. That the amounts of the fines imposed on Penalty Infringement Notices (PINs) be reviewed to make them more affordable.
2. That consideration is given to simplifying the procedure for having the amount of the PIN reviewed.
3. That once imposed, collection and enforcement of all fines be managed by an amalgamated, newly established agency.
4. That the agency be on hand at court to explain the fine and payment options, and to accept payment.
5. That there be an urgent overhaul to computer systems to:
   - have one computer system to deal with all matters pertaining to fines, which could provide details of an individual’s outstanding fines to the offender, and importantly, also to the sentencing judicial officer.
   - enable payment with modern payment methods including BPay, debit and credit cards, internet banking.
6. That the enforcement agency contact persons who are accumulating infringements and fines through repeated offending in an effort to intervene and prevent further accumulation of debt.
7. That a discount be offered for immediate payment of fines.

Police initiated diversionary measures:

1. That Victoria Police programs such as SupportLink, PACT and PACER be rolled out throughout Victoria.
2. That a restorative justice approach is implemented for police warnings for both juveniles and adults similar to the Scottish model of police warnings.
3. That Victoria Police keep and publish statistics which particularise alternative outcomes (that is, other than charges being laid).
4. That the drug diversion program is expanded by adding an alcohol diversion program.
5. That a pilot program where police could refer matters to a trained volunteer mediator for mediation or restorative justice conference is implemented. In the event that the matter was resolved, charges would not be preferred. Consideration could also be given to offering Justices of the Peace mediation training to enable them to become volunteer mediators.
6. That any increase in police discretion be subject to review and the option to refer matters to open court.

Pre Court and diversionary programs:

1. That a pre-court restorative justice and mediation process be piloted, similar to the Children’s Court group conferencing or the North Liverpool model for matters where charges have been laid.
2. That Criminal Justice Diversion be considered a sentencing disposition and be included in the *Sentencing Act (Vic) 1991*

3. That the views of apprehending police officers of the appropriateness or otherwise of matters being dealt with by way of Criminal Justice Diversion be ascertained and taken into account by presiding judicial officers, but that the police veto be removed.

**Court and Sentencing:**

1. That sentencing options similar to ‘Admonishment’ and ‘Adjournment in Contemplation of Dismissal’ be introduced

2. That the ability to provide on site, immediate groups or programs such as those outlined on pages 28 and 29 be investigated.

3. That judicial officers reconsider the manner in which existing sentencing dispositions can be utilised to provide better sentencing outcomes

4. That the *Sentencing Act (Vic)* be amended to include provision of a sentencing option of ‘dismissal without finding of guilt’ upon satisfactory completion of a program.

5. Alternatively, that the *Sentencing Act (Vic)* be amended to include provision of a sentencing option of a complete dismissal if the court is satisfied that it is inexpedient to inflict any punishment (other than nominal punishment) on the person.

6. That section 83A of the *Sentencing Act (Vic)* be amended to apply to an offender of any age without being restricted to offenders under the age of 25 years.\(^\text{106}\)

7. That the *Sentencing Act (Vic)* include provision of a probation type order to facilitate and supervise restorative justice conditions imposed by a sentencing judicial officer which do not necessitate a full community corrections order.

**Community Corrections Orders:**

1. That judicial officers give greater consideration to the conditions they impose on Community Corrections Orders so as not to overload offenders beyond their capabilities.

2. That the potential for the adaptation of the Canadian probation officer model be investigated in order to provide cognitive behaviour therapy and case management delivered by corrections officers. The opportunity to capitalise on the opportunity would both enhance the work of Corrections officers and improve prospects for long-term behaviour change for offenders.

3. That volunteer retired professionals such as teachers are engaged to take on mentoring, literacy and numeracy and preparation for job readiness of offenders on Community Corrections order with a view to reinforce and enhance the role of Corrections Officers.

4. That a short completion report be provided to the sentencing judicial officer indication whether an offender has completed a Community Corrections Order and what programs and work had been undertaken.

5. That community work be radically overhauling to render it meaningful, skill enhancing, productive and providing hope for the future, as well as making a greater contribution to communities.

6. That the engaging of retired trades’ people, teachers, artists and other skilled retirees to provide skills training to offenders performing Community work be investigated.

7. That local communities be approached for their input into what projects they would like to see accomplished in their local neighbourhoods.

8. That Corrections officers in the capacity of Probation Officers be utilised to supervise restorative justice conditions. Skilled volunteer retirees who could also act as mentors would be ideally suited.

9.1 Additional Recommendations

Court Integrated Services Program:

1. That the Department of Justice market and demonstrate CISP to Courts nationally and internationally.

2. That CISP be rolled-out CISP state-wide.

Foetal alcohol syndrome disorder:

That judicial officers be provided with the opportunity to receive professional education with respect to Foetal Alcohol Syndrome Disorder and similar mental disorders.

Media:

The Magistrates’ Courts, through their respective Departments of Justice invite ‘ambassadors’, including journalists from tabloid newspapers, on a panel, to better inform the community through positive newspaper articles.

Spent convictions:

That the issue of legislation to deal with spent convictions be enacted in accordance with the draft bill.

Judicial Officers’ information-sharing internet facility:

That the Magistrates’ Court of Victoria host a closed internet application for judicial officers throughout Australia to communicate with each other.
about sentencing issues and to keep a digest of solution-focussed sentencing outcomes.

24 hour emergency centre:

That the Department of Human Services, Victoria Police and other emergency services pilot a 24 hour, secure facility staffed by police, medical staff, psychiatric staff and welfare workers to provide emergency assistance in a safe environment for victims, alleged offenders and health workers.
10 ANNEXURE 1 – Sentencing Act (Vic) 1991 s.1

Sentencing Act (Vic) 1991
No. 49 of 1991

Section 1

Purposes
The purposes of this Act are—
(a) to promote consistency of approach in the sentencing of offenders;
(b) to have within the one Act all general provisions dealing with the powers of courts to sentence offenders;
(c) to provide fair procedures—
   (i) for imposing sentences; and
   (ii) for dealing with offenders who breach or contravene the terms or conditions of their sentences;
(d) to prevent crime and promote respect for the law by—
   (i) providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character; and
   (ii) providing for sentences that facilitate the rehabilitation of offenders; and
   (iii) providing for sentences that allow the court to denounce the type of conduct in which the offender engaged; and
   (iv) ensuring that offenders are only punished to the extent justified by—
      (A) the nature and gravity of their offences; and
      (B) their culpability and degree of responsibility for their offences; and
      (C) the presence of any aggravating or mitigating factor concerning the offender and of any other relevant circumstances; and
   (v) promoting public understanding of sentencing practices and procedures;
   (e) to provide sentencing principles to be applied by courts in sentencing offenders;

*(g) to provide for the sentencing of special categories of offender;
(h) to set out the objectives of various sentencing and other orders;
(i) to ensure that victims of crime receive adequate compensation and restitution;
(j) to provide a framework for the setting of maximum penalties;
(k) to vary the penalties that may be imposed in respect of offences under the Crimes Act 1958;
(l) generally to reform the sentencing laws of Victoria*
Meaningful Sentencing of Low Level Indigent Offenders

**ANNEXURE 2 – Current Enforcement System**

<table>
<thead>
<tr>
<th><strong>CURRENT INFRINGEMENT SYSTEM</strong></th>
<th><strong>ENFORCEMENT STAGE</strong> (56 days)</th>
<th><strong>WARRANT STAGE</strong> (up to 5 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INFRINGEMENT STAGE</strong> (112 days)</td>
<td>Infringement Notice 28 + 14 days (legislative)</td>
<td>Sheriff serves 7 day notice 7 days</td>
</tr>
<tr>
<td></td>
<td>Penalty Reminder Notice 28 + 14 days (legislative)</td>
<td>Sanctions</td>
</tr>
<tr>
<td></td>
<td>Final Reminder Collection Activities</td>
<td>Execution</td>
</tr>
</tbody>
</table>

**OFFENCE is committed**
Most infringement offences are traffic offences detected by a road safety camera. A traffic camera infringement notice is issued only if Victoria Police is satisfied that an offence was committed. On-the-spot fines include public transport fines, parking fines and other local council issued fines.

**INFRINGEMENT NOTICEs issued**
Civic Compliance Victoria or the enforcement agency will send out an infringement notice that explains to the offender the date, time and nature of the offence they have committed and 28 days to pay the fine.

**PENALTY REMINDER NOTICE is issued**
If the fine is not paid, Civic Compliance Victoria or the enforcement agency will send out an infringement notice that reminds the offender of their offence, giving them another 26 days to pay the fine plus an extra fee (PRN fee).

**LOGDMET OF INFRINGEMENT with the Infringements Court**
If the fine is still not paid, the matter is lodged with the Infringements Court, which issues an enforcement order giving the offender another 28 days to pay the fine, the PRN fee, plus an enforcement order fee.

**ENFORCEMENT ORDER is issued by the Infringements Court**
If the matter is unresolved, the Infringements Court issues an infringement warrant, giving the Sheriff the power to enforce the fine. Immediately on issue of a warrant, the Sheriff may apply a wheel clamp or impose the registration non-renewal sanction.

**WARRANT is issued to the Sheriff**

**NOTICE OF INTENTION TO SUSPEND** is served
Personal service of the ‘seven day notice’ by the Sheriff is a precondition to applying sanctions and to executing a warrant.

**SANCTIONS are applied**
The Sheriff applies the following sanctions to enforce the fine:
- registration suspension
- driver licence suspension
- other sanctions available in the Act but are not used, including attachment of debt or earnings charge on land and sale of real property

**WARRANT is executed**
If the matter is unresolved seven days after the service of the seven day notice the Sheriff may execute the warrant. In executing the warrant the Sheriff may seize personal property for sale to cover the outstanding fine, arrest the offender or issue a community work permit.

**MAGISTRATES COURT considers matter under s199**
The Court may order that the offender be imprisoned, and/or reduce the fine or discharge the fine in full or make a community based order under the Sentencing Act 1991.

107 Process map prepared by Jennifer Anne, Senior Policy Officer, Infringement Management and Enforcement Services.
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