

Decarceration: Taking the prison out of the social justice equation

By Craig W.J. Minogue - 2008

‘A Prisoners Legal Service for Victoria ... Who Needs it?’ Is the question being posed by Community Legal Centres as part of a philanthropic research grant from the Reichstein Foundation to investigate the feasibility of and the need for a specialised community legal service for prisoners. The short answer is that the community as a whole needs such a legal service because all people should be treated with equality according to law and principles of justice, but what should be the aims of such a service?

‘Defending rights’ is the first thing that comes to mind, but is that the best thing? I will argue that defending rights without promoting a sense of moral responsibility that is translated into action, only perpetuates the personal, psychological and psychiatric problems faced by the majority of people who are likely to end up in custody. I will conclude that the underlying factors contributing to imprisonment should be the primary focus of a Decarceration Legal Service (“DLS”) rather than a Prisoners Legal Service (“PLS”) that focuses on individual rights, improving prison conditions and services to prisoners.

A ‘rights’ dialogue is gaining ground in Australia, if only rhetorically rather than legally, and many people resort to a claim of rights when they are acting in a rude, inconsiderate, immoral, unethical, and sometimes violent and criminal way towards others. This claim of rights, occasionally preemptive, is becoming a defensive tactic of the bully and it is often supported by authority types which have been enlisted through the rhetoric of the rights dialogue, e.g. regular and private police forces, the law and the Courts.

A PLS that focuses on defending the rights of prisoners can make the situation worse not better. This is so as defending rights can be seen as a might is right modality that is a one way transaction in a particular insistence – it is seen a victory and no moral lesson is learnt. I am not for a moment suggesting that the ‘getting their own back’ is appropriate or poetic justice or anything like that. What I am saying is, defending the rights of prisoners through the processes of the law may not help them or the community in the long run, as many prisoners see the law as just another might is right exercise.

Protecting rights of imprisoned people is a small part of the need that is manifested by crime and imprisonment. This is evidence by the facts, and they are that more than 90% of people who are in custody have not completed primary or secondary schooling, and do not have technical or trade qualifications, or tertiary or other post secondary qualifications.¹ But for the 2006-2007 financial year the Distance Education Centre Victoria that once allowed prisoners to undertake VCE studies free of charge, had their funding arrangements changed so as to ‘specifically exclude adult inmates’.² Distance Education Centre Victoria, their slogan being ‘Flexible learning for all’, advised that the ‘relevant [prison] TAFE’s now have sole responsibility for the delivery of education to adult

1 *Statistical Profile of the Victorian Prison System 2001-2002 to 2005-2006*. Office of the Correctional Services Commissioner, Department of Justice, Victoria 2007, Table 28, p.37.

2 Letter dated 6 February 2007 from the Principle of the Distance Education Centre Victoria.

inmates.³ The problem with this is that a review of the prison TAFE funding found that to distribute the student contact hours evenly the following factors would need to be addressed:⁴

- 968 additional prison cells had been added since the funding was last allocated;
- 619 additional prison cells were in use at five prisons which are operating over their design capacity by using doubled bunked cells; and
- historically, Deer Park Women's Prison had been 'short-changed on education funding.'

So the funding was evenly redistributed to the prison TAFE education centres. At Barwon Prison, the State's main maximum security men's prison, this meant a 50% cut across all TAFE educational services. The so called 'Prerelease Prisons' of Dhurringile and Langi Kal Kal were also hit hard due to their small numbers of 110 and 108 respectively. A fully operational TAFE Kitchen stands abandoned at Langi Kal Kal, a very well equipped computer room is left idle at Dhurringile because there is no funding for teachers.⁵ Of course education is not the only issue as more than 60% of prisoners were unemployed at the time of imprisonment,⁶ and more than 70% suffer from the public health problem that is drug addiction.⁷

The real issues for people who are likely to end up in custody and for the community are clear, and they are education, employment, drug treatment and mental health care. Therefore, a PLS would much better serve the interests of the community if it did not focus too intently on issues of disciplinary hearings conducted unlawfully, staff stealing prisoner's property, and the occasional bashing or sexual humiliation or assault of a prisoner by one of the few particularly brutal prison guards. Rather, while dealing with serious examples of the proceeding problems, the DLS should focus on advocating for prisoners and those people who are likely to end up in custody to receive the educational, employment, drug treatment and mental health care that they so desperately need in the community so as to address the underlying causes of why they are in prison or on their way to prison in their inevitable future. Improving access to community services could well break the cycle of imprisonment; this would be much more meaningful for prisoners and the community than defending rights in individual cases that do not have a general application in the key areas that I have identified.

Warehousing and not treating prisoners with personality disorders or mental illness, so they are free to create more victims in prison, and more when they are released, and more when they are returned to prison, and so on, does not serve anyone's interests. And it is in no one's interests to defend prisoners rights as a show of legal strength, without those who are being defended understanding that

3 Ibid.

4 *Corrections Victoria Sentence Management Manual*, Appendix I: Prison Profiles, Office of the Correctional Service Commissioner, May 2007.

5 All of the information in relation to the TAFE funding issue was provided to me via a private communication with a prison TAFE employee who asked to remain anonymous.

6 Op.cit., *Statistical Profile*, Table 29, p.38.

7 Peter Kirby, the *Report of the Independent Investigation into the Management and Operations of Victoria's Private Prisons* Department of Justice, Victoria October 2000, p.11.

rights cut both ways and that with personal rights comes a responsibility to act consistently with other's in relation to the rights they expect for themselves; *education, employment, drug treatment and mental health care could teach this lesson in a way that lawyers defending rights in the adversarial justice system could not.*

There is a PLS in Queensland and an active social justice network around issues of imprisonment and the criminal justice system called the 'INCorrections Network.' In 2006 the INCorrections Network released a paper titled: 'Decarceration: An argument for reducing prison numbers in Queensland'. A graphic design on the cover of the discussion paper goes to the heart of the issue. The design has a dozen social services represented as various doorways, there are schools, housing, health, youth, seniors, libraries, drug treatment, homeless shelter, parks, arts & culture, community service, and finally prisons. With the exception of the prison door which is wide open and inviting, all of the other doors are chained, locked and barred. Strangely though, the issue of unlocking these social services is not canvassed in the document.

I see from the Decarceration Discussion Paper by the INCorrections Network, and from material that is being circulated by the Victorian group looking into the issue of a PLS for Victoria that I need to be more explicit about what I mean by decarceration. When I use the term 'decarceration' I am not talking about tinkering at the edges of the increasingly harsh and failing system of imprisonment. I am not talking about 'a new range of sentencing options that lessen prison numbers', and which in turn extend the range of the criminal justice system in a driftnet like fashion. I am not talking about 'Front End Options' like orders for restitution and community work rather than imprisonment after an offence has been committed. Nor am I talking about 'Back End Options' like better programs in prison, parole and 'gradual release' through 'release to work' or anything like that. In my view, the so called 'Front' and 'Back End Options', and special Drug or Koori or Murri Courts are really no more than tinkering at the edges after an offence has been committed.⁸ I am not talking about turning the prison into a school, hospital or mental health facility, but that is not to say that these services do not need to be improved in prisons.

Making an argument for reducing prison numbers through different sentencing options is giving in to the inevitability of the prison being the social services and ideological hub of our society, a society that is changing from a civil society to a carceral society. A Decarceration Legal Service should focus at least half of its activities on directly advocating social policy change which address the underlying problems that contribute to people behaving in ways that lead them into the criminal justice system and prison.

As an example, when there is a stabbing incident and the issue of the mental health of the accused is mentioned in Court, the DLS should step forward and explain to the public via the media the direct link between de-institutionalization of mental health services and the corresponding short fall of funding for community based programs which means that untreated people end up in prison at a cost of \$80,000 a year, including the cost in trauma to the victim of crime. And this situation is the fault of the Government and its irresponsible funding priorities. When a person's family says outside Court that they are glad that their son or daughter is in custody for a serious crime because now they will get the mental health care they need (as they did in the case of a former world boxing champion), then the DLS should go on the media offensive and point out the failing of Government funding of

⁸ See generally 'Decarceration: An argument for reducing prison numbers in Queensland', State INCorrections Network, 2006 which suggest these options.

the mental health system has reached a point where the public think to get treatment you have to go to prison for a crime. Prisons are not in anyway appropriate for mental health treatment. Anecdotally there is ample evidence that many prisoners with mental illness go untreated in prison. So, no, its not good that their son or daughter is in prison for a serious crime that created victims, and no, they probably will not get adequate mental health treatment unless of course they are a famous sports person who has gone off the rails.

Who is in prison? Why are they in prison? These questions were answered above and the answers are well known to everyone in the criminal justice field. With the exception of the budding business people who have taken capitalism to the extreme in their drug dealing and the very rare individual who is a committed criminal outsider, the majority of people are in prison because of their personal and social circumstances of disadvantage. And most people in prison are not there for serious violent crimes; the vast majority of prisoners in Australia are serving sentences of less than 2 years.⁹

So, if there were:

- adequate drug/alcohol rehabilitation and detox beds on requests;
- adequate places for woman and children in emergency accommodation on request;
- adequate family violence intervention programs;
- adequate public housing places; and
- adequate educational and employments services for those in need and which pro actively seek to assist people (*and we all know who they are*).

If these social services were truly adequate and met the need for them, then more likely than not, the majority of crimes would not be committed in the first place; those being the crimes for which the majority of prisoners are receiving their sentences of 2 years and less. If crimes are not committed, then it is not a matter of diverting people from prison because prison is not in the social justice equation. If the contributing factors of offending have been addressed before they lead to actual offending, then any criminal justice process is irrelevant and this should be the aim of a DLS.

When faced with a Queensland Government decision to waste 5 billion dollars of public funds over the next 10 years on a super 4000 bed prison, the response should not be about options for reducing prison numbers through new sentencing laws, but rather a bald statement that such funding is an immoral act of fraud on the people.¹⁰ And it is fraud because if social services were properly funded, then the prison would not be needed – people need to find the courage to say it how it is. But, the State INCorrections Network discussion paper indicates that people have given up when they talk about people being involved in ‘Front End Options’ that do not involve imprisonment, but they are

9 In Victoria 51.1% of prisoners are serving less than 2 years in prison, Op.cit.,*Statistical Profile* Table 18, p.27. In Queensland 72% of prisoner admission in 2003-2004 were for people serving sentence of less than 12 months, see Department of Corrective Services QLD, 2006, ‘Myths and Frequently Asked Questions’, www.dcs.qld.gov.au.

10 Op.cit., State INCorrections Network, 2006, pp.16-17.

still referred to as 'prisoners'.¹¹

The threshold right not to be driven into custody by one's social circumstances and the right not to be a victim of crime are social justice issues that need to be addressed before the prison comes into view, and this should be the primary mission of a Decarceration Legal Service. To defend the idea of a civil society against the idea of a carceral society where every home has the capacity to be a prison and the rule *by* law allows arbitrary security zones to be declared and prison like lock-downs to occur in private and public spaces. What we as a society need more of, is obvious once you take the prison and the criminal justice system out of the social justice equation.

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11 Ibid., p.17.