

## OUTLINE OF SUBMISSIONS

### RELEVANT TO SENTENCE

#### COVID 19

Version 1, 20 March 2020<sup>1</sup>.

1. COVID 19 is a global pandemic virus. Locally in NSW it is an epidemic which is having a serious effect on the community at large. It is a virus with respiratory symptoms<sup>2</sup>. The community at liberty can individually take measures to protect themselves. Inmates cannot act for themselves.

#### FACTS ABOUT COVID 19 / CORONAVIRUS

2. COVID 19 has the following population features:
  - As of 11 March 2020 there were some 118000 cases worldwide, with a number of deaths falling at 4291 people<sup>3</sup>;
  - This amounts to a death rate of 3.6%.
  - When compared to influenza – Australian Bureau of Statistics Figures for influenza from 2017 suggest a death rate of around 0.5%<sup>4</sup>.
  - US figures for 2018-2019 suggest the comparable death rate for influenza is around 0.1%<sup>5</sup>.
  - COVID 19 is apparently between 36 and 72 times more deadly than influenza.
3. COVID 19 is not currently capable of vaccination. Influenza is capable of vaccination – which affects population rates of transmission and infection.
4. The Commonwealth Government information about COVID 19 describes people who are most at risk as follows<sup>6</sup>:

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<sup>1</sup> First draft prepared by Jeremy Styles, ALS solicitor, Redfern, with consideration of draft Public Defenders submissions on bail.

<sup>2</sup> "What you need to know about Coronavirus (COVID 19): <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19> - accessed 20 March 2020.

<sup>3</sup> <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> - accessed 20 March 2020.

<sup>4</sup> <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2017~Main%20Features~Deaths%20due%20to%20influenza~5> – accessed 20 March 2020.

<sup>5</sup> <https://www.cdc.gov/flu/about/burden/index.html> - accessed 20 March 2020.

In Australia, the people most at risk of getting the virus are those who have:

- recently been in a high risk country or region (mainland China, Iran, Italy or Korea)
- been in close contact with someone who has a confirmed case of COVID-19

Based on what we know about coronaviruses, those most at risk of serious infection are:

- people with compromised immune systems (such as people who have cancer)
- elderly people
- Aboriginal and Torres Strait Islander peoples (as they have higher rates of chronic illness)
- people with chronic medical conditions
- people in group residential settings
- people in detention facilities

## **PARTICULAR ISSUES FOR ABORIGINAL PEOPLE**

5. Aboriginal people in NSW are almost one-and-a-half times more likely to have a disability or long-term health condition than non-Aboriginal people — 53% compared with 29%<sup>7</sup>. Aboriginal and Torres Strait Islander people suffer disproportionately from diseases of the respiratory system, particularly pneumonia<sup>8</sup>.

## **COMMUNICATION OF DISEASE IN CUSTODIAL SETTINGS**

6. It is uncontroversial that disease transmission increases in residential and detention settings; the World Health Organisation noted the rate of tuberculosis in prisons in the Europe in 2002 was 84 times higher than in the general population<sup>9</sup>.

## **BANNING OF PERSONAL VISITS IN CORRECTIONAL SETTINGS**

7. Social visits to correctional centres are currently banned until Sunday 22 March 2020<sup>10</sup>. (FN:). This is expected to continue

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<sup>6</sup> “What you need to know about Coronavirus (COVID 19): <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19> - accessed 20 March 2020

<sup>7</sup> Judicial Commission Equality before the Law Benchbook Chapter 2 “Aboriginal People”, <https://www.judcom.nsw.gov.au/publications/benchbks/equality/section02.html> - accessed 20 March 2020.

<sup>8</sup> Williams, Gracey, Smith; “Hospitalisation of Aboriginal and non-Aboriginal Patients for Respiratory Tract Diseases in Western Australia, 1988 – 1993.” International Journal of Epidemiology, Vol 26, Np 4, pg 797

<sup>9</sup> [http://www.euro.who.int/data/assets/pdf\\_file/0017/231506/Good-governance-for-prison-health-in-the-21stcentury.pdf](http://www.euro.who.int/data/assets/pdf_file/0017/231506/Good-governance-for-prison-health-in-the-21stcentury.pdf) .

8. Access to family visits is a minimum standard for incarcerated prisoners. It improves social integration and this should improve prospects of rehabilitation and reintegration to community on release. It should improve recidivism.
9. Social visits reduce prisoner's social isolation. Social isolation increases maladaptive behaviours<sup>11</sup> along with reducing self regulation and pro social behaviours<sup>12</sup>.

## GENERAL JUDICIAL CONSIDERATIONS

10. Considerations of individual justice apply when considering the impact of COVID 19, and the particular situation of an individual should be considered (see *Bugmy v R* (2013) 249 CLR 571 at [41]). The increasing prevalence of the virus gives rise to three critical facts relevant to Court proceedings:
  11. FIRST, there is a demonstrable risk that incarceration exposes an inmate to a heightened likelihood of contracting COVID 19, in circumstances where there is a high mortality rate.
  12. SECOND, for people facing full time custodial sentences, there is an apprehended risk of infection and mortality.
  13. THIRD, there are current restrictions on the availability of personal visits to all inmates in NSW, which impact on the permissible social contacts for prisoners. It is a restriction on a right held otherwise.

## SENTENCE LAW APPLICABLE

14. Sentences of imprisonment are a measure of last resort: s5(1) Crimes (Sentencing Procedure) Act. Consideration of general sentencing principles will not be avoided by consideration of issues to do with COVID 19. All principles should be considered and balanced.
15. The increasing prevalence of COVID 19, and its epidemic status, can be considered as mitigating a sentence in a number of ways, including the following:

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<sup>10</sup> <https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/coronavirus-important-information-for-visitors-to-correctional-centres-.aspx> - accessed 20 March 2020.

<sup>11</sup> R.F. Baumeister & C.N DeWall, "The Inner Dimension of Social Exclusion: Intelligent Thought and Self-Regulation Among Rejected Persons" (2005) *Journal of Personality and Social Psychology*, 88, 589-504: See [Kentwell v R \(No 2\) \[2015\] NSWCCA 96](#) at [94] affirming [R v Gareth Mullaya LEWIS \[2014\] NSWSC 1127](#)

<sup>12</sup> Twenge [and Baumeiester] *et al*, [Social Exclusion Decreases Prosocial Behaviour](#), *Journal of Personality and social Psychology* 2007 Vol 91, No 1 56-66; Baumeister *et al*, [Social Exclusions Impairs Self Regulation](#), *Journal of Personality and Social Psychology*, 2005, Vol 88, No 4, 589 – 604.

## HEALTH ISSUES

16. The Judicial Commission Sentencing Benchbook says (At [10-450]; accessed 20 March 2020):

Generally, **ill-health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his or her state of health, or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health:** *R v Smith*, per King CJ at 317; *Bailey v DPP*; *R v Badanjak* at [9]–[11]; *R v Achurch* at [118]; *Pfeiffer v R* [2009] NSWCCA 145; *R v L* (unrep, 17/6/96, NSWCCA)...[Emphasis added].

In *R v Higgins* (2002) 133 A Crim R 385, the applicant suffered from the HIV virus. The court held that the criminal system could not give priority to the applicant's health and must tailor the sentence with an eye to the overriding concern of the welfare and protection of the community generally, as far as common humanity will allow: per Howie J at [32].

## HARDSHIP OF CUSTODY

17. By forceful analogy the hardship of an offender's custody (usually relating to protective custody) is relevant to sentence. In relation to COVID 19, a sentence of custody in the present medical climate is more onerous than a "normal" sentence. The Judicial Commission Sentencing Benchbook says (at [10-500] accessed 20 March 2020):

The hardship that will be suffered by a prisoner in gaol because he or she will be in protective custody, is a matter to be taken into account in sentencing. Protective custody can only be taken into account in mitigation in the determination of the sentence or in the finding of special circumstances where there is evidence that the conditions of imprisonment will be more onerous: *RWB v R* (2010) 202 A Crim R 209 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21]...

18. The approach should be evidence based: *R v Durocher-Yvon* (2003) 58 NSWLR 581; A mathematical approach is not appropriate: *Clinton v R* [2009]

## SAFETY OF PRISONERS IN CUSTODY

19. The hardship analogy extends to the safety of prisoners in custody; The Judicial Commission Sentencing Benchbook says (at [10-500]):

### *Safety of prisoners*

In *York v The Queen* (2005) 225 CLR 466, the High Court set aside a partially suspended sentence of imprisonment that had been substituted by the Court of Appeal of the Supreme Court of Queensland and reinstated a wholly suspended sentence that had been imposed by the sentencing judge. The

majority of the court had held that it would be bowing to pressure from criminals if the offender were able to avoid a custodial sentence because of the risk to her safety while in prison. **However, the High Court made it clear that the safety of a prisoner is a relevant consideration in determining an appropriate sentence. In the particular circumstances of this case, there was persuasive evidence before the sentencing judge that the prisoner could not be protected in the Queensland prison system.**

McHugh J said at [31] that:

the duty of sentencing judges is to ensure, so far as they can, that they do not impose sentences that will bring about the death of or injury to the person sentenced.

At [32] McHugh J further said:

Where a threat exists — as it often does in the case of informers and sex offenders — recommendations that the sentence be served in protective custody will usually discharge the judge’s duty. Here the learned sentencing judge concluded on persuasive evidence that no part of the Queensland prison system could be made safe for Mrs York. That created a dilemma for the sentencing judge. She had to balance the safety of Mrs York against the powerful indicators that her crimes required a custodial sentence. In wholly suspending Mrs York’s sentence, Atkinson J appropriately balanced the relevant, even if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her from the risk of her fellow inmates committing serious offences against her on the other side. In suspending the sentence, the learned judge made no error of principle. Nor was the suspended sentence manifestly inadequate.

It is the responsibility of the authorities, not the courts, to ensure the safety of prisoners in custody. The fact that prisoners will have to serve their sentences in protection is a very important consideration to be taken into account in fixing the length of the sentence but it should not usually be permitted to dictate that the custody should not be full time: *R v Burchell* (1987) 34 A Crim R 148 at 151; *R v King* (unrep, 20/8/91, NSWCCA).

## **A STATE OF UNCERTAIN SUSPENSE**

20. A Court should consider the hardship of custody where an offender bears a concern about the impact of COVID 19 on their health if (or when) incarcerated. The apprehension of risk and consequences of COVID 19 should be considered. This can be described as a “state of uncertain suspense”. This impact on sentence is a forceful analogy from delay cases. The Judicial Commission Sentencing Benchbook says (at [10-530]):

The “state of uncertain suspense” (Street CJ in *R v Todd* at 519) — where an offender experiences a delay following the initial intervention of the authorities

— is a matter which can entitle an offender to an added element of leniency: *R v Blanco* (1999) 106 A Crim R 303 at [11], [16] and *Mill v The Queen* at 64–66). Where an offender relies on such a mitigating factor, they must establish it on the balance of probabilities: *Sabra v R* [2015] NSWCCA 38 at [47], applying *The Queen v Olbrich* (1999) 199 CLR 270. In *Sabra v R*, the court held that the sentencing judge had erred in tending to the view that although the offender had evidently suffered anxiety and concern over the delay, greater consequences needed to be established before the delay could be taken into account: *Sabra v R* at [44]–[46]. ...

21. In respect of COVID 19, where there a state of uncertain suspense exists about transmission and consequences in custody, an offender should be entitled to “an added element of leniency” (after *Blanco*).

## **HARDSHIP TO THIRD PARTIES**

22. A Court may consider in exceptional circumstances the hardship to an offender’s family or dependants. It may be that factual scenarios arise where the hardship of custody where COVID 19 is present may be amount to exceptional circumstances. The Judicial Commission Sentencing Benchbook says (at [10-490]):

It is only where circumstances are “highly exceptional” — and where it would be inhumane to refuse to do so — that hardship to others in sentencing can be taken into account: *R v Edwards*...

If a custodial sentence is required but there is evidence of extreme hardship, a court may take into account the extraordinary features of the case by suspending the sentence of imprisonment, shortening the term of sentence and/or reducing the non-parole period: *Dipangkear v R* [2010] NSWCCA 156 at [34]; *R v MacLeod* at [49]. Each case will depend on the seriousness of the crime, whether there is a need for deterrence and the nature and degree of the impact of the sentence upon the third person: *Dipangkear v R* at [34].

## **CONCLUSION**

23. The impact of COVID 19 should be considered in sentence proceedings in NSW Courts.
24. COVID 19 must be considered within the matrix of evidence and principles applicable to sentence. Courts should consider that evidence in light of the following principles, where applicable:
  - a. The impact of health issues on sentence
  - b. The hardship faced by prisoners, including through the banning of personal visits to prisoners.
  - c. The safety of prisoner’s in custody
  - d. The state of uncertain suspense

e. Hardship to third parties.

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