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INQUIRY INTO VICTORIA'S CRIMINAL JUSTICE SYSTEM

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Prepared by: Law Institute of Victoria

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Contact:
Andy Kuoch, Policy Officer

T: [redacted]

E: [redacted]

W: https://www.liv.asn.au

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EXECUTIVE SUMMARY

The Law Institute of Victoria (**'LIV'**) welcomes the opportunity to provide a formal submission to the Legal and Social Issues Committee's ('**LSIC**') Inquiry into Victoria's Criminal Justice System (**'the Inquiry'**).

The LIV is the peak membership body for the Victorian legal profession, representing over 19,000 lawyers, students and people working in the law in Victoria, interstate and overseas. Its members are legal professionals from all practice areas, and work in the courts, academia, policy, all levels of government, community legal centres, and private practice.

The LIV commends the Inquiry's focus on the growing remand and prison populations and the strategies to reduce the rate of criminal recidivism. This submission draws on the work of our Criminal Law Section, who have direct experience of Victoria's criminal justice system, a unique insight into how the justice system has been operating, and an understanding of the effectiveness of reforms in adequately responding to crime and the barriers to timely and effective justice. Case studies and data in this submission have been provided by our members. Further, our recommendations stem from many other LIV submissions over the last decade, including the *Inquiry into Homelessness in Victoria* and the *Royal Commission into Victoria's Mental Health System*. These issues have also been canvassed in relevant sector stakeholder working groups, post-COVID-19 policies and strategies, and through our communication with relevant government departments and officials.

Remand and prison populations are growing and will continue to grow unless significant changes are implemented. It is concerning to see the growth in people held on remand – those who have not been found guilty or been sentenced by a court for their alleged offending. This growing population is comprised predominantly of marginalised and vulnerable communities. A disproportionately high number include Aboriginal and Torres Strait Islander people, children, women, and those who have cognitive impairments or are experiencing homelessness.

The COVID-19 pandemic has highlighted many issues in our justice system's response to crime. Significant changes in the operation of courts have been implemented to assist in moving matters through the court system; however, the fact that there is substantial backlog of cases, particularly in the lower courts, provides an impetus towards introducing and supporting measures to keep low-level crime out of the courts, favouring diversionary and therapeutic approaches.

Increases to the remand and prison population, associated lockdowns in custody centres, and concerns about the isolation measures in prisons have underscored the need for reform.

Key contributors to the rise in remand and prison populations include the amendments to the *Bail Act 1977* (Vic); standard and mandatory sentencing schemes; disproportionate responses to low-level crime that could otherwise be diverted from the criminal justice system; the continued resistance to raising the age of criminal responsibility; and the unmet need due to the under-resourcing in intervention and support services.

Some previously scheduled changes merit reconsideration in this new landscape, and may no longer be appropriate, such as the proposed abolition of de novo appeals and committal hearings. Conversely, the re-introduction of judge-alone trials may now be advisable if not necessary to continue to progress criminal trials through to final determination.

The sentencing knowledge and expertise of judges and Magistrates could also be improved, including by increasing training in cultural competency and trauma informed practice. The use of judge-alone trials re-affirms this greater need.

The LIV hopes that the issues canvassed in this Inquiry can lead to evidenced-based, holistic reform that addresses the shortcomings of current responses to criminal behaviour and the many opportunities to improve the operation of Victoria's criminal justice system.

RECOMMENDATIONS

This submission is informed by members of the LIV's Criminal Law Section. The LIV recommends:

Remand and Prison Populations

1. Increase funding to support increased access by prisoners to intervention opportunities such as therapeutic facilities, behavioural modification, treatment programs and mental health assessments.

2. Undertake a further review of protective quarantine in prisons, including the conditions, procedures and facilities.

3. Repeal both Schedule I and II and the two-step test under sections 4AA, 4A, 4C and 4D of the *Bail Act 1977* (Vic) to ensure that decisions about bail are made only on the basis of the unacceptable risk test.

4. Amend the *Bail Act 1977* (Vic)

   a) to include a presumption in favour of bail unless there are circumstances where there is a specific and immediate risk to the physical safety of another person

   b) to include a presumption in favour of bail where the offence before the court is unlikely to attract a term of imprisonment upon sentence

5. In the alternative to recommendation 3, review Schedule 2 of the *Bail Act 1977* (Vic) to remove low level offences which currently fall within the higher threshold and amend s4AA to remove the summons offences, offences alleged to be committed while subject to an Adjourned Undertaking, Community Corrections Orders and Parole Orders and repeal ss 1(a-e) of Schedule II.

6. In addition to or in the alternative to recommendation 5, review legislation to reclassify penalties for minor examples of certain indictable offences as summary offences. Examples include, *inter alia,* theft and possession of small quantity of a drug of dependence.

7. Expand public housing avenues and increase funding for supported pathways and housing for people on bail.

8. Expand funding for court-based services, specifically in relation to Court Integrated Services Program and Youth Justice Supervised Bail.

9. Amend section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility to 14 years.

10. Consider dealing with certain driving offences by way of Traffic Infringement Notices, as a temporary measure to address the COVID-19 backlog.

11. Abolish the offence of begging or gathering alms in section 49A of the *Summary Offences Act 1958* (Vic). Such behaviour should be directed to well-resourced welfare agencies to provide material and social supports.

12. Decriminalise minor, personal use and possession of illicit drugs and support alternative, health-based treatment options for problematic drug use.

13. Review Victoria's standard sentence scheme, with a view to considering its impact on sentencing outcomes and departure from the preservation of the "instinctive synthesis" model.

14. Review the effectiveness of Victoria's mandatory sentencing scheme, with a view to repealing the scheme allowing for greater judicial discretion and greater consideration of the individual circumstances of the offender.

15. Provide a more defined scope during a sentence indication beyond whether or not the Court would be likely to impose a sentence of imprisonment. Additionally, the LIV suggests removal of the requirement for prosecutors to consent to applications for a sentencing indication under section 208(2) of the *Criminal Procedure Act 2009* (Vic).

16. Implement a restorative justice diversion pilot to expand non-adversarial pathways to justice pre-plea for summary offences and offences triable summarily.

17. Repeal section 77C of the *Corrections Act 1986* (Vic) and replace it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served.

18. Reconsider the decision to abolish *de novo* appeals through evidence based, meaningful consultation during the deferral of commencement until 2023.

19. Retain committal hearings as an important case management function to assist with disclosure and discovery, shorter trials in the higher courts and the reduction of the backlog.

20. Establish a review of the use and oversight of forensic evidence in criminal trials, such as through re-establishing the Inter-Jurisdictional Forensic Evidence Working Group.

Rates of Criminal Recidivism

21. The relevant Diversion Matrices should be made readily accessible by practitioners on the Magistrates' Court of Victoria and Children's Court of Victoria websites to ensure that there is a consistent application of diversion criteria.

22. Diversion Criteria Matrices should be amended to better reflect the eligibility requirements specified in the *Criminal Procedure Act 2009* (Vic), including to define "serious concerns" and "exceptional circumstances".

23. Expand the use of cautions in relation to children and young people, including by ensuring there are no limits to the number of cautions a person can receive.

24. Explore the viability of a restorative justice diversion model, with a view to expanding the availability of diversion to certain offences, for example for family violence offences and sexual offences.

25. Amend 'Form D – Application for Diversion Hearing on the Papers' of the *Magistrates' Court Practice Direction No. 9 of 2020* to specify material particulars or arguments that could be included in the application.

26. Insert a provision in the *Criminal Procedure Act 2009* (Vic) to allow practitioners to request reasons for refusal of diversion from Victoria Police.

27. Remove the requirement for prosecutorial consent in section 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) and replace this section with a requirement for the magistrate to consider the recommendation of the prosecutor and/or the informant, and a right of reply for the accused.

28. In the alternative to Recommendation 27, implement a written protocol stipulating the steps to take to escalate a matter, in the event of disagreement where a diversion is refused.

29. Clarify the extent of the acknowledgement of responsibility by the accused under-section 59(2)(a) of the *Criminal Procedure Act 2009* (Vic), to preclude the exercise of the right to silence from being interpreted as an absence of remorse and a basis to refuse access to a diversion program.

30. Expand specialist courts and associated therapeutic justice interventions and programs to ensure greater availability and access.

31. Expand the Koori Court locations and consider the development of a new specialist sentencing court for Aboriginal and Torres Strait Islander people.

32. Expand the Assessment and Referral Court List to all suburban and regional courts.

33. Expand the availability of Therapeutic Treatment Orders from children who exhibit sexually abusive behaviours to children who exhibit violent or abusive behaviours.

34. Improve engagement with mental illness support services post-release, by pairing a prisoner with a case worker to connect them with support services, treatment and rehabilitation programs.

Knowledge and Expertise

35. Expand the availability of cultural competency and trauma informed training of judicial officers.

36. Review the operation and effectiveness of judge-alone trials and consider its utility as a permanent hybrid measure on an opt-in basis and with the agreement of both parties.

1. Remand and Prison Populations

1.1. The LIV commends the Inquiry's focus on identifying the factors that influence the growing prison and remand populations in order to determine appropriate solutions. The length of time spent on remand for unsentenced prisoners has increased with the delays and growing backlog in the Magistrates' Court of Victoria ('**Magistrates' Court**'). Limiting the need to appear in court must first start with limiting the charging of offenders and linking an accused with services aimed at reducing recidivism. Expanding the use of pre-charge cautions and dealing with certain offences via infringement notices can assist with the volume of matters that are contributing to the backlog, without necessarily requiring an appearance in court. Legislative changes are needed to Victoria's bail laws to limit the impact of minor offending on the growing remand population, which are significantly impacting this volume. Alternatives to imprisonment need to be explored and the impetus – whether that be compassion or efficiency – is clear from the rising populations in prison and on remand.

1.2. LIV members report that the single greatest contributor to the increase in the remand and prison populations has been the recent amendments to the *Bail Act 1977* (Vic). Other factors that are contributing to these growing populations include:

- People coming into contact with the criminal justice system for low-level crimes or minor offences, which could be better dealt with through a health-based response, pre-charge cautioning and diversionary programs;
- Mandatory and standard sentence schemes in which the sentencing exercise and judicial discretion is significantly impinged upon for certain offences;
- Standardised sentencing forcing judges to depart from the "instinctive synthesis" model and impose a fixed term that may be inappropriate in the circumstances; and
- Post-sentence measures, including the provision of secure housing and the use of time served sentences can be modified to assist in reducing the overall time spent in custody.

1.3. Other processes, such as de novo appeals and committal hearings, also have an impact on how matters progress through the justice system and correspondingly how long an accused may spend time on remand should bail be refused. While the abolition of *de novo* appeals under the *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) has not yet taken effect, LIV members are concerned that it will extend many contests and pleas, with further adjournments and longer, more contested hearings. It would also remove the safety net in the summary justice system by producing additional evidence in support of a more lenient

sentence, adding to the greater caseload and the risk of inconsistent and unjust outcomes.

Prison and Remand Statistics

1.4. The LIV is concerned about Victoria's growing remand and prison populations, particularly with the conditions in remand centres and prisons rapidly deteriorating, in part due to the COVID-19 pandemic and associated quarantine measures, isolation and restrictions.

1.5. According to the Sentencing Advisory Council of Victoria ('**Sentencing Advisory Council**'), between 2010-20, the number of prisoners on remand increased from 804 people to 2,484 people, comprising of a total of 35 per cent of all prisoners.[1] Between a five year period from 2014-19, the number of remandees increased from 1,139 people to 2,973 people.[2] The Sentencing Advisory Council also found that the increase in remanded children far exceeded any increase in the number of sentenced children in detention. The proportion of unsentenced children in custody on an average day more than doubled from 22 per cent in 2011-12, to 47 per cent in 2018-19.[3] Additionally, on an average day between 2010-19, an alarming number of children were held on remand, increasing by 106 per cent from 48 people to 99 people.[4] Further, in 2017-18, there were 442 children aged between 10 to 17 years old held on remand;[5] 15 per cent of these children were Aboriginal or Torres Strait Islanders.[6]

1.6. The rationale behind keeping these children in custody is significantly undermined by statistics in 2017-18, where 66 per cent of matters resulted in a non-custodial sentence, and the proportion of matters resolved because all charges were withdrawn or found not proven.[7]

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[1] Corrections Victoria, 'Profile of People in Prison', *Annual Prisoner Statistical Profile 2009-10 to 2019-20* (Infographic, December 2020) <https://files.corrections.vic.gov.au/2021-06/Infograpic_Profile_of_people_in_prison2020.pdf?VersionId=sU1fMoYZEAM.wuZEj1jUpoB1wPKjs7BT>.
[2] Sentencing Advisory Council of Victoria, *Time Served Prison Sentences in Victoria* (February 2020) 3 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf>.
[3] Sentencing Advisory Council of Victoria, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (September 2020) 1 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children_Held_on_Remand_in_Victoria.pdf>.
[4] Ibid ix.
[5] Ibid.
[6] Ibid.
[7] Ibid x-xii.

Further, only 9 per cent of children who were held on remand for a week or less received a custodial sentence, leading to the Sentencing Advisory Council to query whether:

> *some children held for short periods were remanded as an unacceptable risk not because of the seriousness of their alleged offending or their prior history but because they did not have access to the necessary support services at the time the decision was made to bail or remand them.*[8]

1.7. In relation to the prison population, between 2010-20, the total population increased from 4,537 people to 7,151 people, with the total number of people aged under 20 years old increasing from 60 people to 92 people.[9] In just one year from July 2020 to June 2021, while the total number of prisoners increased from 7,003 people to 7,249 people, the total number of unsentenced prisoners grew from 2,409 people to 3,185 people.[10] Across the same period, the number of prisoners that identified as Aboriginal and Torres Strait Islander increased from 710 people to 771 people,[11] as did the number of female prisoners, increasing from 391 people to 411 people.[12]

Conditions in Custody

1.8. Throughout the pandemic, LIV members have been concerned about the deterioration of conditions in custody, which will continue to be impacted due to concerns of COVID-19 spreading through the prison system, community transmission, and further lockdowns. This sentiment has been recognised by the courts in several judgments. For example, in *DPP v Bennett & Anor*,[13] Judge Gaynor accepted 'that the COVID-19 restrictions on programs and facilities in the prison system are making life harder for prisoners overall… [with] prisoners [being] prevented from making personal contact with family and friends which must be regarded as a particular hardship'.[14] Judge Gaynor further noted that 'most education and

[8] Ibid x.
[9] Corrections Victoria, 'Annual Prisoner Statistical Profile 2009-10 to 2019-20', *Annual Prisoner Statistical Profile 2009-10 to 2019-20* <https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20>.
[10] Corrections Victoria, 'Monthly prisoner and offender statistics 2021-22', *Monthly prisoner and offender statistics 2021-22* <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics>.
[11] Ibid.
[12] Ibid.
[13] [2020] VCC 737 [85].
[14] Ibid [61], [85].

training programs ha[d] stopped',[15] and in some instances, prisoners had 'very limited time outside [the] cell and that all programs, billet positions and training and exercised [were] further denied… [due to] the COVID-19 restrictions prevailing at the [particular] gaol'.[16]

(a) Early Intervention Programs

1.9. Currently, when a person is on remand there are limited opportunities to access early intervention programs, to address the underlying issues that have resulted in the person's offending.[17] This is primarily due to a lack of beds for individuals on remand at secure therapeutic facilities.[18] These facilities are specifically designed to assist in reducing substance abuse, mental illness, and other behavioural problems that are linked to offending and should therefore be readily accessible, where appropriate, for remandees.[19] The LIV submits that there must be an increase in intervention opportunities for remandees and increased access to therapeutic facilities and/or treatment programs while on remand.

1.10. The LIV also reiterates our concerns about the lack of resources that are available to address the significant delays in accessing risk and mental health assessments, diagnosis, appropriate medication and medical treatment for remandees.[20] A considerable number of offenders initially learn of their mental health diagnosis after coming into contact with the criminal justice system. The LIV recommends that funding for services offered by organisations be substantially broadened and increased.[21] Appropriately diagnosing and equipping individuals with the tools to manage their diagnosis could significantly reduce recidivist reoffending and prison numbers in the long-term.[22]

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[15] Ibid [45].
[16] Ibid [61].
[17] Law Institute of Victoria, Submission to the Royal Commission into Victoria's Mental Health System (20 May 2019) 10 [8.1].
[18] Ibid [8.2].
[19] Ibid.
[20] Ibid [8.3].
[21] Law Institute of Victoria, Formal Submission to the Royal Commission into Victoria's Mental Health System (5 July 2019) 22 [4.12].
[22] Law Institute of Victoria, Submission to the Royal Commission into Victoria's Mental Health System (20 May 2019) 10 [8.4].

Recommendation 1: Increase the funding to support increased access by prisoners to intervention opportunities such as therapeutic facilities, behavioural modification, treatment programs and mental health assessments.

(b) Protective Quarantine

1.11. The LIV acknowledges that protective and transfer quarantine systems are necessary throughout the COVID-19 pandemic, particularly to protect the health of incarcerated people and Corrections Victoria staff. However, the LIV submits that a further review into the protective quarantine system is necessary, as it was intended to be a temporary measure and was not purpose-built to be operational in the long term. Furthermore, the LIV, while supportive of the content in Corrections Victoria's *Statement of Conditions – Protective Quarantine, Transfer Quarantine, and Confirmed Case Isolation* ('***Statement of Conditions***'), are concerned about the adherence to these conditions in practice. Members report that there are issues with remandees and prisoners accessing communication with their family and legal representatives, as well as accessing treatment and support services while in protective quarantine.

1.12. Members have also likened the current conditions in the protective quarantine system to those which occur in solitary confinement.[23] In particular, the *Statement of Conditions* provide a very limited amount of time outside of cell – 12 minutes each day – for the purpose of making a phone call. While the *Statement of Conditions* mention that prisoners will be supported through 'printed exercise routines', there is no provision for exercise to occur outside of the cell.[24] The LIV have been monitoring the situation of their clients in custody during the pandemic, and have subsisting concerns about access to lawyers and facilitated appearances to appear remotely at hearings when in protective quarantine, due to an absence of facilities. The conditions in custody need to be improved through a further review of protective quarantine arrangements, given that quarantine will likely remain until the population is vaccinated and the spread of COVID-19 is sufficiently addressed.

[23] Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA, 70th sess, Resolution, UN Doc A/RES/70/175 (8 January 2016).
[24] Corrections Victoria, *Statement of Conditions – Protective Quarantine, Transfer Quarantine, Suspected Case Quarantine and Confirmed Case Isolation* (Statement, August 2021) 9.

(i) Access to Lawyers and the Court

1.13. Members have reported that some clients in protective quarantine at the Melbourne Remand Centre were unable to be accommodated to appear at hearings remotely. The LIV understands that the reason provided for this was that there was only one video link in the quarantine area. It is concerning that some remandees have been unable to appear remotely for their hearings, as following an appearance in person, a remandee is required to have their quarantine period reset and be placed into protective quarantine for a further 14-day period.

1.14. A member has also reported that their client in isolation at the Melbourne Assessment Prison had refused a COVID-19 test, and was then denied the ability to participate in a Jabber, as they were not permitted into the room with the necessary video equipment. The client was only allowed to appear in Court after consenting to the test. The LIV is concerned that had the client continued to refuse a COVID-19 test, Melbourne Assessment Prison would otherwise been unwilling, or unable, to present the client before a Court, which would be in direct contradiction to their obligations.

1.15. Additionally, one member has detailed that a telephone call appointment with their client was rejected, on the grounds that the client was in protective quarantine and therefore unable to have the telephone in their cell. The member further noted that the initial appointment was intended to be via video call, but due to protective quarantine, this was cancelled, and the member was directed to arrange a telephone appointment, which was later rejected by other prison officials. This instance directly conflicts with the *Statement of Conditions*, which specifies that '[p]rofessional visits, including access to lawyers, will be facilitated through in-cell phone or video calls… [and] protective quarantine areas have access to mobile phones (110 phones across the five protective quarantine areas) and tablets.[25]

(ii) Access to Communication and Supports

1.16. Members report that there is delay and difficulty across various prisons when confirming and approving a prisoner's phone list. Specifically, members note an instance where prisons are making unilateral decisions not to add individuals to a phone list, due to the presence of an

[25] Corrections Victoria, *Statement of Conditions – Protective Quarantine, Transfer Quarantine, Suspected Case Quarantine and Confirmed Case Isolation* (Statement, August 2021) 4.

intervention order; This was irrespective of exceptions being clearly stated in the intervention order to allow communication with a protected person about financial and property matters. An additional situation involved a young client, where it took approximately 10 days for the prison to confirm a visitor and phone call list and was only approved after escalation from the practitioner. The LIV is concerned that this conflicts with the *Statement of Conditions*, which indicates that 'prisoners will have increased access to personal video visits and in-cell phone calls… [along with an] 'email a prisoner' system to increase access to timely communication with family and social supports'.[26]

1.17. Members also note that ancillary legal support matters have been subject to logistical difficulties, as a result of protective quarantine requirements. For instance, members report that obtaining witnessed Power of Attorney forms has been practically non-existent, as these forms typically require two witnesses to be present and each must witness the other signing. The inability to facilitate ancillary legal support while in protective quarantine has caused considerable stress for clients, and their families, particularly in circumstances where they are trying to settle financial issues.

1.18. The LIV is also concerned about member reports regarding the difficulties in gaining access to mental health and drug treatment whilst in protective quarantine. Members highlight instances where clients have faced significant delay in accessing methadone, psychiatric medication and other Forensicare services. Further, there have been instances where programs in custody have been limited, such as mental health and alcohol and other drug counselling services. The limited access to rehabilitative services in protective quarantine is particularly concerning for prisoners who are required to complete mandatory programs, prior to applying for parole. Members report that some prisoners that have been eligible for parole have been unable to apply for it, solely on the basis that they cannot complete the required programs, such as the violent offender program.

1.19. The LIV is also concerned that COVID-19 restrictions at prisons are impacting access to other services, such as computers and canteen facilities. The impact of COVID-19 further reduces the ability of prisons to respond the needs of prisoners, exacerbated by a system that is seeing significant increases in the number of prisoners.

[26] Ibid.

Recommendation 2: Undertake a further review of protective quarantine in prisons, including the conditions, procedures and facilities.

Case Study 1

Devon's prison has limited the time prisoners can spend on a computer in the computer room, because of COVID-19. This has meant that Devon has a restricted period of time with which to read his e-brief, with a lot of time taken up trying to navigate the dated software on the computer. The dated software has also resulted in Devon not being to access or play some of his files.

Devon is also concerned about his privacy when reading his e-brief in the public computer room. This is because Devon is aware of other prisoners who have been subject to intimidation because their offences involve sexual assault matters or 'gangs' with rival members.

Case Study 2

Quon requested computer access to listen to the audio of his trial, including the opening, closing and charge. Quon also hoped to read the PDF's of the trial transcript; however, Quon's formal written request was not approved, with his prison requesting that the audio be typed out and sent in paper form.

Case Study 3

Jacob arrived at prison and was initially placed in isolation, tested for COVID-19, and quarantined for the required 14-days.

The prison policy is that Jacob is unable to attend the canteen and can only access this service through filling in a form. Jacob is illiterate and struggled to complete his form, ultimately not filling it out with his Corrections Reference Number. As Jacob only arrived to prison a short time ago, there was no money transferred and he could not access any services without the form. Without money, Jacob was unable to make any phone calls and could not go to the canteen.

(c) Administrative Leave

1.20. The LIV is concerned that the rising prison population has resulted in an increased health risk to prisoners, due to the COVID-19 pandemic. The harsh COVID-19 restrictions, which heavily rely on isolation periods, has negatively impacted the mental health of vulnerable prisoners. This is further reflected in recent scholarship analysing the effects of COVID-19 and self-harm in United Kingdom prisons.[27]

1.21. The LIV supports an expansion of the power of the Secretary of the Department of Justice and Community Safety to grant administrative leave permits under section 57A of the *Corrections Act 1986* (Vic). This expansion should include elderly people, people with chronic health conditions, disabilities and mental health conditions. Aboriginal and Torres Strait Islander people should also be considered for administrative leave given their particular vulnerabilities. These provisions could be used extensively across the system to reduce the number of people in the system.

(d) Emergency Management Days

1.22. The LIV supports a clear and transparent approach by the Secretary of the Department of Justice and Community Safety in exercising power to reduce the length of imprisonment through granting Emergency Management Days ('**EMDs**').[28] The LIV recognises that the deteriorating conditions in custody and prison necessitates the continuation of EMDs, particularly in view of any further anticipated lockdowns arising from COVID-19.

1.23. The policies for the processing of EMDs need to be appropriately conveyed to prisoners, given that in certain circumstances it is up to the individual prisoner to apply for their EMDs to be recognised. Members report that their clients are largely unaware of changes to the processing of EMDs. For example, the recent changes that occurred on 28 July 2021 specified that prisoners on remand are only eligible for EMDs after they receive their sentence, provided they have been of good behaviour and have suffered 'disruption or deprivation in relation to the COVID-19 pandemic, such as being placed in protective

[27] Thomas Hewson et al, 'The effects of COVID-19 on self-harm in UK prisons', *BJPsychBulletin* (July 2020).
[28] *Corrections Act 1986* (Vic) s58E.

quarantine'.[29] Previously, prisoners on remand who were eligible for EMDs were able to have these granted prior to receiving their sentence, and this time was applied to any sentence received.[30]

1.24. Members are concerned that these changes in policy have not been adequately communicated to prison staff, which resulted in the information provided to prisoners differing across each remand centre or prison. For instance, a member reported that their client was incarcerated on remand for two months, before breaching bail and placed back into custody. The client was informed that the EMDs granted in the two-month period had been wiped; however, only after escalation was the practitioner advised that the client is able to apply to have the EMDs reinstated. Members also query that the new change lacks transparency, given it is unclear under the changes what constitutes 'poor behaviour' and how Corrections Victoria will determine the granting of EMDs only after 'a person has been sentenced'.[31] LIV members report that this has caused confusion and uncertainty for their clients.

1.25. The LIV considers that the continued use of the power to grant EMDs must co-exist with increased post-prison supports, predominantly the provision of increased access to housing. Members have previously reported that their clients had not had their EMDs deducted from their sentence because transitional housing was difficult to secure.

Case Study 4

Phillip, a 35-year-old, that had experienced longstanding homelessness, appeared before the Magistrates' Court of Victoria on three separate occasions in 2020 for similar offending. Each occasion resulted in sentencing of a short-term of imprisonment. At the second last plea hearing, a nurse from the Royal Melbourne Hospital advised that Phillip would need to be sentenced to a term of imprisonment with the release date set at least 3 weeks from the date of sentence, to ensure that supports such as accommodation could be arranged. The Court imposed a sentence of 50 days of imprisonment, with 29 days already being served. The nurse was contacted and informed of the release date.

[29] Department of Justice and Community Safety, *Emergency Management Days – COVID-19* (Factsheet, 28 July 2021) 1.
[30] Ibid.
[31] Ibid.

Personal Circumstances

Phillip has a variety of mental health issues, with the primary diagnosis being schizophrenia and secondary diagnosis of mental and behavioural disorders, arising as a result of harmful use of psychoactive substances. Phillip has had an extensive history with state-wide mental health services, including 34 admissions to in-patient psychiatric unit facilities between 2004-17. Additionally, in total, Phillip has had 31 episodes of involuntary assessment or treatment under the *Mental Health Act 2014* (Vic), the most recent in 2014.

Phillip had priors for offences relating to begging alms, dating back to when he was 23 years old.

Emergency Management Days

Six emergency management days were granted, and Phillip's release date was brought forward. As part of the sentence, Phillip was placed on an adjourned undertaking, requiring him to contact the area mental health service on a particular phone number.

Despite this, it did not appear that the revised release date was relayed to any party, which meant that had he actually been released earlier, he would have no accommodation and area mental health services would not have followed up on the requirement for Phillip to call them.

Bail

1.26. Bail needs to be placed within the broader criminal justice environment in Victoria – a context that is characterised by ever-increasing prison and youth detention populations and an increasing proportion of incarcerated people being remandees. The LIV reiterates the Victorian Law Reform Commission's recommendation that '[good] policy should be informed by the broad range of cases that come before our justice system, not one particular type of case'.[32] Changes to the bail laws in 2017 and 2018 are the largest factor behind these increases, with many more people charged with a crime being denied bail. The Sentencing

[32] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007).

Advisory Council recognised that '[t]he increase in the number of people held on remand has largely been driven by legislative reforms designed to tighten bail eligibility'.[33]

1.27. Significantly, the amendments to the *Bail Act 1977* (Vic) included introducing a two-step test requiring that a person charged with a Schedule 1 offence show exceptional circumstances exist that justify the granting of bail, and requiring a person charged with a Schedule 2 offence show a compelling reason to justify the granting of bail.[34] This two-step test occurred alongside an increase in Schedules 1 and 2 offences, and the unacceptable risk test specified in section 4E of the *Bail Act 1977* (Vic). Essentially, the amendments expanded the circumstances where an offender was required to demonstrate exceptional circumstances or a compelling reason to justify the granting of bail, ultimately mandating a presumption against bail for a broader range of offences.

1.28. The LIV submits that an urgent amendment of the bail system is necessary to assist in reducing the increasing prison and remand populations. Members report that offenders are being placed on remand for offences that would not typically result in a term of imprisonment. Additionally, the amendments are having a disproportionate impact upon marginalised and vulnerable individuals of the community, such as women, children, Aboriginal and Torres Strait Islander people, culturally or linguistically diverse people, those who are homeless, have a mental health condition, are addicted to drugs or alcohol, and/or are of low socio-economic status.

(a) Two-Step Test

1.29. The LIV strongly recommends that the two-step test to show a compelling reason or exceptional circumstances be repealed and instead the granting of bail be based on the single unacceptable risk test. Members report that the broadened threshold of exceptional circumstances for Schedule 2 offences has resulted in an increase in numbers of individuals remanded in custody. Low-level offenders are particularly impacted by this amendment, due to the inclusion of offences that are alleged to have been committed while the accused is on

[33] Sentencing Advisory Council of Victoria, *Time Served Prison Sentences in Victoria* (Report, February 2020) 3 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf>.
[34] *Bail Act 1977* (Vic) ss 4AA-4E, schs 1-2.

bail.[35] LIV members also report matters where clients have been required to address the exceptional circumstances test in cases where shop theft of items of minimum value has occurred. In conjunction with delays in court proceedings as a result of the COVID-19 pandemic, the LIV also notes that clients are being remanded into custody without any indication of when a hearing date will be set, thus prolonging the total time an accused spends on remand.

1.30. The issue with the exceptional circumstances test is best demonstrated by the matter of *Hall v Pangemanan*,[36] where Mr Hall was remanded into custody after being charged with the summary offences of being drunk in a public place and contravening a condition of bail - that condition being a curfew associated with a previous bail related to a charge of public drunkenness.[37] Mr Hall's application for bail was refused by the Magistrates' Court, irrespective of his personal circumstances.[38] Mr Hall was born with a developmental disorder, had been diagnosed with an intellectual disability, and had previously been found unfit to stand trial.[39] He remained in care as a result of behavioural issues, and had a problem with alcohol abuse.[40] A majority of the previous offences he had been charged with relate to public drunkenness, with many charges being dismissed or discharged.[41] In discussing the matter, Judge Croucher remarked:

> *[t]he (extremely) unusual thing about this case is that, despite the very modest level of charges he faces, Mr Hall is in what is called an 'exceptional circumstances' position with respect to bail – which means that bail must be refused unless Mr Hall demonstrates exceptional circumstances exist that justify the grant of bail. This is the highest threshold for granting bail that the law imposes in this State.* ***It is the same threshold that applies to a person charged with murder or a terrorism offence or other very serious offences***.[42]

Judge Croucher ultimately found that exceptional circumstances justified the granting of bail, and that Mr Hall did not pose an unacceptable risk.[43] The reasons for finding that the

[35] Ibid sch 1 item 1(a).
[36] [2018] VSC 533.
[37] Ibid [2]-[3].
[38] Ibid [4].
[39] Ibid [7], [9].
[40] Ibid [7]-[8].
[41] Ibid [13]-[15].
[42] Ibid [16] (emphasis added).
[43] Ibid [29].

exceptional circumstances threshold was met included Mr Hall's personal circumstances, the three nights he had already spent in custody, and the supports and accommodation he was receiving from the Department of Health and Human Services.[44]

1.31. In addition to the repeal of the two-step test, the LIV considers that a presumption in favour of bail should exist, except in circumstances where there is a specific and immediate risk to the physical safety of another person. Members note that a presumption in favour of bail would reduce the total number of people remanded in custody for minor breaches of bail conditions, such as breaching curfews, contacting prohibited persons, failing to report for bail, shop theft, cannabis possession, or failing to attend court hearings.[45] Further, the LIV considers that the amount of people who have been unnecessarily remanded for offences that are unlikely to result in a sentence of imprisonment would also reduce. The LIV echoes the concerns of the Sentencing Advisory Council that '[w]hile remanding those people may have initially been appropriate… it is possible that some of them may have been unduly punished'.[46] Although the LIV acknowledges that the data relating to the number of remandees that later received a non-custodial sentence is limited,[47] it is reasonable to infer that a presumption in favour of bail in certain circumstances would reduce the number of people on remand in comparison to the number under the two-step test, without compromising the safety of the community.

Recommendation 3: Repeal both Schedule I and II and the two-step test under sections 4AA, 4A, 4C and 4D of the *Bail Act 1977* (Vic), to ensure that decisions about bail are made only on the basis of the unacceptable risk test.

[44] Ibid [19]-[29].
[45] Law Institute of Victoria, *Formal Submission to the Royal Commission into Victoria's Mental Health System* (5 July 2019) 39 [6.1].
[46] Sentencing Advisory Council of Victoria, *Time Served Prison Sentences in Victoria* (Report, February 2020) 5 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf>.
[47] Ibid; please note that 66 per cent of 567 case outcomes for children aged between 10 and 17 in 2017-18 resulted in a non-custodial sentence: Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) x-xii <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children_Held_on_Remand_in_Victoria.pdf>.

Recommendation 4: Amend the *Bail Act 1977* (Vic) to include a presumption in favour of bail unless there are circumstances where there is a specific and immediate risk to the physical safety of another person; and to include this presumption where the offence before the court is unlikely to attract a term of imprisonment upon sentence.

Case Study 5

Deana, a 29-year-old emigrant from Eastern Europe, was on bail for three counts of shop theft and assault-related charges. While on bail, Deana had been admitted to Monash Hospital in the Psychiatric Ward, due to mental health issues, completing a one-month stay before she was discharged.

Four months after Deana's admission to Monash Hospital, she was charged with committing an indicatable offence whilst on bail and subsequently remanded into custody. The charge related to theft, which occurred as a result of attending Woolworths and stealing various items including deodorant, socks, and moisturiser - all of which had a total value of $70.00.

Personal Circumstances

Deana was exposed to domestic violence from a young age following her parents' separation, the extent of which led to Deana and her siblings being moved into the care of her grandparents.

Deana left school in Year 10, after the birth of her first child at 16-years-old. She gave birth to her second child within the following two years and has a limited employment history, because she was the primary carer for her two children. Deana's relationship with her partner, the father of her second child, was marred by domestic violence. Whilst her children were placed in the care of another relative, Deana continued to reside with her former abusive partner, due to limited alternative housing options.

Deana was exposed to drug abuse by her step-father at an early age, which resulted in long standing issues of poly-substance drug and alcohol use, spanning approximately 10 years. She had also been using cannabis and amphetamines from 17 years of age.

Deana had her first psychotic episode at 22 years old and was since under the care of health professions. She was formally diagnosed with schizophrenia and borderline personality disorder (of a low-average range of intellectual functioning).

Deana's first appearance before a court was at 23-years-old for an assault related charge, a threat to kill, and breach of an intervention order. Deana received a Community Correction Order for the offending.

Bail

Deanna was remanded and placed in custody for the theft at Woolworths. Deana's matter required demonstration of exceptional circumstances and the unacceptable risk test, given that she had committed an indictable offence while on bail.

Ultimately, Deana was bailed, after exceptional circumstances were demonstrated and her unacceptable risk was addressed, due to the level of support she would be receiving from a caseworker in the Assessment and Referral Court, the provision of food vouchers and a myki ticket and her participation in the Court Integrated Services Program.

(b) Offences

1.32. The LIV recommends that in the alternative to the repeal of the two-step test, the offences specified in Schedule 2 of the *Bail Act 1977* (Vic) must be reviewed, so that fewer charges require a person to show a compelling reason or exceptional circumstances.

1.33. Members note that the offences listed in Schedule 2 Item 1 of the *Bail Act 1977* (Vic) are expressed in very broad terms that has resulted in low-level offenders remanded for far longer periods than they would have been sentenced to when their matters are finally heard.[48] LIV members also consider that the additional delays and increasing adjournments of matters due to the COVID-19 pandemic and associated lockdown restrictions further necessitate this amendment. Delay and lockdown have previously been recognised to assist in demonstrating that exceptional circumstances exist,[49] and this is not cured by the possibility of judge-alone trials, as unsatisfactory delays still exist.[50] Consideration ought to be given to the spread of COVID-19 into the prison system making it 'overwhelmingly likely that the prisons will be locked down in a way that will make time in custody very difficult for all prisoners'.[51] Preventing a person from being remanded keeps them out of the courts, while protecting the community and the individual. This will have the effect of reducing the

[48] Letter from the Law Institute of Victoria to the Hon. Martin Pakula (7 June 2017) 2.
[49] *Re Broes* [2020] VSC 128 [35]-[42].
[50] *Re Ashton* [2020] VSC 231 [65]-[61].
[51] *Re McCann* [2020] VSC 138 [40].

burden experienced by the court thereby better enabling it to work through the backlog of cases.

1.34. The LIV also recommends that other legislation be amended so that certain indictable offences are re-classified as non-indictable offences. The result would be that certain offences are no longer classed as a Schedule 2 offence and therefore no longer subject to the higher bail threshold. Specifically, the LIV considers that the following offences should be reclassified as non-indictable offences:

- Section 73 of the *Drugs, Poisons and Controlled Substances Act 1991* (Vic), relating to the possession of a drug of dependence; and
- Section 74 of the *Crimes Act 1958* (Vic), relating to theft, specifically where the amount does not exceed $500.00.

Recommendation 5: In the alternative to recommendation 3, review Schedule 2 of the *Bail Act 1977* (Vic) to remove low level offences which currently fall within the higher threshold and amend s4AA to remove the summons offences, offences alleged to be committed while subject to an Adjourned Undertaking, Community Corrections Orders and Parole Orders and repeal ss 1(a-e) of Schedule II.

Recommendation 6: In addition to or in the alternative to recommendation 5, review legislation to reclassify penalties for minor examples of certain indictable offences as summary offences. Examples include, *inter alia,* theft and possession of small quantity of a drug of dependence.

(c) Children

1.35. The LIV submits that the current bail system is largely ineffective at preventing the remand of children. According to the Sentencing Advisory Council, the number of children on remand each year consistently comprises of an over-representation of Indigenous children and children from culturally and linguistically diverse backgrounds.[52] Furthermore, there are a

[52] Sentencing Advisory Council of Victoria, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) 21 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children_Held_on_Remand_in_Victoria.pdf>.

variety of complex issues that children on remand face, including mental health issues, abuse, neglect and alcohol and drug addiction.[53] The Australian Institute of Health and Welfare ('**AIHW**') found that between 2016-20, the rate of children aged 10 to 17 years old in unsentenced detention remained stable at approximately 2 per 10,000 children.[54] Additionally, on an average night in the June quarter of 2020, 64 per cent of children aged 10 to 17 years old in detention were unsentenced, with 52 per cent of those identifying as Aboriginal or Torres Strait Islander.[55]

1.36. The LIV understands that there have been instances this year where children, including an Aboriginal child, were remanded in custody overnight. It was only with the efforts of practitioners, and the Court convening on a Saturday, that these children were released.

1.37. The LIV recommends that the LSIC consider the Sentencing Advisory Council's *Crossover Kids': Vulnerable Children in the Youth Justice System* reports, which analyses the backgrounds of children who are sentenced or diverted in the Children's Court of Victoria ('**Children's Court**').[56] The reports specifically address the proportion of children who identified as Aboriginal and Torres Strait Islander and children who have a background in the child protection or youth justice system.[57] The reports indicate a variety of measures that can be implemented to reduce the likelihood of a child spending time in custody and the

[53] Ibid.

[54] Australian Institute of Health and Welfare, *Youth Detention Population in Australia* 2020 (Report, 26 February 2021) 7, 11 <https://www.aihw.gov.au/getmedia/37646dc9-dc6f-4259-812d-1b2fc5ad4314/aihw-juv-135.pdf.aspx?inline=true>.

[55] Ibid 7.

[56] Sentencing Advisory Council of Victoria, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (Report One, 27 June 2019) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf>; Sentencing Advisory Council of Victoria, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria* (Report Two, 2 April 2020) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover_Kids_Report_2.pdf>; Sentencing Advisory Council of Victoria, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 3: Sentencing Children Who Have Experienced Trauma* (Report Three, 2 June 2020) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-05/Crossover_Kids_Report_3.pdf>.

[57] Sentencing Advisory Council of Victoria, *Crossover Kids in the Youth Justice System* (Web Page) <https://www.sentencingcouncil.vic.gov.au/current-projects-projects-progress/crossover-kids-youth-justice-system#:~:text=Crossover%20Kids%20in%20the%20Youth%20Justice%20System%20The,from%201%20January%202016%20to%2031%20December%202017>.

interventions at the initial stage of a child being charged with an offence before they are remanded. Significantly, the report recommended a variety of potential reforms, including:

> *introducing a pre-trial youth justice family group conferencing with the authority to recommend against commencing or continuing a child's prosecution while putting in place supports to address the causes of a child's offending.*[58]

(d) Bail Support Services

1.38. Amendments to the *Bail Act 1977* (Vic) must occur alongside an increase in bail support services, such as accommodation and court-based services, to allow more people to have the opportunity to receive bail and be assisted throughout this process. The LIV is of the view that an increase in supports, treatment solutions, and secure housing would increase the accessibility of bail and provide avenues to address the criminogenic factors that result in offending. Members report that many young people do not have the skills to navigate issues when they are placed on bail, whether that be because of a lack of engagement or a lack of support. As such, an increase in accommodation support and court-based services, including those that support young people, would ensure that more people receive bail and are supported whilst on bail.

(i) Accommodation

1.39. The LIV is concerned with member reports that people are prevented from obtaining bail due to a lack of accommodation, insecure housing, or homelessness. Specifically, LIV members note that it is difficult for a person without fixed accommodation to be granted bail, comply with their bail conditions, or comply with other responsibilities, such as reporting for bail or attending court hearings.[59] The LIV submits that the expansion of bail support services should extend to accommodation and public housing support, including by investing in the utilisation of public properties as a resource for bail accommodation, and expanding the

[58] Sentencing Advisory Council of Victoria, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 3: Sentencing Children Who Have Experienced Trauma* (Report Three, 2 June 2020) 53 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-05/Crossover_Kids_Report_3.pdf>.
[59] Law Institute of Victoria, *Formal Submission to the Royal Commission into Victoria's Mental Health System* (5 July 2019) 40 [6.5].

Atrium Health Housing Assistance program.[60] The LIV considers that funding supported pathway and housing for people on bail is essential to reducing the number of people on remand and in prison, particularly because the Adult Parole Board of Victoria ('**Adult Parole Board**') considers that a lack of accommodation is a major risk factor for re-offending.[61]

1.40. The LIV also notes that there is significant advocacy in the Victorian community that supports the increase of public housing services, including for bail applicants. The LIV specifically recognises the Homes not Prisons campaign,[62] which calls for an end to the expansion of the Dame Phyllis Frost Centre and instead recommends a re-allocation of the 1.8-billion-dollar budget to public housing support for woman and their children.[63]

Recommendation 7: Expand public housing avenues and increase funding for supported pathways and housing for people on bail.

(ii) Court-Based Services

1.41. The LIV considers that that court-based support service, such as the Court Integrated Services Program ('**CISP**') and Youth Justice Supervised Bail ('**YJSB**') are cost-effective mechanisms that are integral to supporting a person while they are on bail.[64]

1.42. CISP operates as part of the Magistrates' Court to assist people with issues related to intellectual disabilities or mental or physical illness, drug and alcohol misuse or dependency, inadequate social, familial, or economic supports, homelessness, and family violence issues.[65] To be eligible for CISP, the person must also have a history of offending or is likely to reoffend in future, be charged with a criminal offence and is on bail, summonsed, or on

[60] Law Institute of Victoria, *Inquiry into Homelessness* (16 March 2020) 4 [16].
[61] Law Institute of Victoria, *Formal Submission to the Royal Commission into Victoria's Mental Health System* (Submission, 5 July 2019) 55 [11.6]- [11.8].
[62] Homes not Prisons, *About the campaign* (Web Page, 2021) <https://homesnotprisons.com.au/>.
[63] Ibid.
[64] See for example Stuart Ross, Evaluation of the Court Integrated Services Program: Final Report (Web Page, December 2009) <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf>.
[65] Magistrates' Court of Victoria, *Bail Support (CISP)* (Web Page, 4 July 2019); Magistrates' Court of Victoria, *Submission to the Royal Commission into Victoria's Mental Health System* (Submission, July 2019) 14.

remand awaiting a bail hearing.[66] In 2017-18, 3,602 referrals where made to CISP, with 3,524 referrals made in 2018-19.[67] CISP was also extended to prisons to assist people on remand. The CISP Remand Outreach Program completed 954 assessments in 2017-18 and 1,220 assessments in 2019-20.[68] Additionally, CISP also operates at the Bail and Remand Court, completing 332 assessments in 2018-19.[69] The LIV recognises that there is a large proportion of accused people that have a variety of underlying issues which contribute to offending. As such, expanding funding for CISP will ensure that it is able to be accessed by more people who would benefit from its support.

1.43. LIV members have recently voiced concerns that YJSB for young adults will shortly cease to operate. YJSB operates to supervise and assist young people, including through referring young people to welfare and health services,[70] and is essential to supporting young persons at the time of offending and during a period on parole.

Recommendation 8: Expand funding for court-based services, specifically in relation to Court Integrated Services Program and Youth Justice Supervised Bail.

Raising the Age of Criminal Responsibility

1.44. The LIV has long advocated for an amendment to section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility from 10 years to 14 years. Medical research demonstrates that children aged 10 years to 14 years undergo significant cognitive development which impacts their 'impulsivity, reasoning and consequential thinking'.[71] In recognising that children's brains are underdeveloped, and are presumed to

[66] Magistrates' Court of Victoria, *Submission to the Royal Commission into Victoria's Mental Health System* (Submission, July 2019) 14.
[67] Ibid.
[68] Ibid 15.
[69] Ibid.
[70] Department of Justice and Community Safety, *Community Supervision* (Web Page) <https://www.justice.vic.gov.au/justice-system/youth-justice/community-supervision>.
[71] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017); Nicholas Lennings and Chris

be *doli incapax* before the age of 14 years, the current age of criminal responsibility subsequently fails to safeguard children.

1.45. The LIV recognises the broad impacts of imprisoning young children. The criminogenic cycle means that children involved with the criminal justice system at a young age are more likely to become entrenched in the system, resulting in poor future economic and social outcomes, and an increased long-term involvement in crime. Additionally, the LIV expressed its support for the *Children, Youth and Families (Raise the Age) Amendment Bill 2021* (Vic) was considered in Victorian parliament on 18 March 2021. During the second reading speech, Dr Samantha Ratnam emphasised that:

> *[t]he current age of criminal responsibility… causes irreparable damage to the heath and future wellbeing of the most disadvantaged children in Victoria; it further contributes to the shameful intergenerational family trauma and the resultant over-incarceration of First Nations Victorians; and, rather than imbue accountability and responsibility for offending, it is empirically demonstrated to drive children to higher rates of more serious and violent adult crime that is felt by the whole of society.*[72]

1.46. Although various submissions to the former Council of Attorneys-General Age of Criminal Responsibility Working Group supported raising the age,[73] the LIV understands that the Council of the Attorneys-General deferred the decision to raise the age of criminal responsibility, and the final report has not yet been publicly released.[74] Despite this, the Australian Capital Territory recently committed to raising the age of criminal responsibility and is currently in the process of determining how best to implement this amendment.[75]

1.47. Raising the age of criminal responsibility would also align Victoria with international perspectives on the rights of children. Currently, the age of criminal responsibility in Australia

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Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

[72] Victoria, *Hansard*, Legislative Council, 26 May 2021, 1854 (Dr Samantha Ratnam, Leader of the Victorian Greens).

[73] Law Council of Australia, *Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (Report, 2 March 2020) <https://www.lawcouncil.asn.au/docs/75d8d90e-385c-ea11-9404-005056be13b5/3772%20-%20CAG%20Review%20of%20age%20of%20criminal%20responsibility.pdf>.

[74] Shahni Wellington, 'Age of criminal responsibility to remain at 10-years-old', *NITV News* (online, 27 July 2020) <https://www.sbs.com.au/nitv/article/2020/07/27/age-criminal-responsibility-remain-10-years-old>.

[75] Australian Capital Territory Government, 'Raising the Age discussion paper released' (Joint Media Release, 22 June 2021).

is low when compared with other countries.[76] As of 2016, an international study of 90 countries revealed that 68 per cent had a minimum criminal responsibility age of 12 years or higher, with the most common minimum age being 14 years.[77] In 2019, the United Nations Committee on the Rights of the Child recommended that all countries increase the minimum age of criminal responsibility to at least 14 years of age.[78] The LIV notes that Australia has been criticised by international states because of the low age of criminal responsibility. In 2017, the United Nations Committee on the Elimination of Racial Discrimination recommended Australia consider raising the age of criminal responsibility, due to the disproportionate imprisonment of indigenous children.[79] The LIV notes that Australia's minimum age of criminal responsibility results in the over-representation of certain groups in the youth justice system.[80] Significantly, in 2020, Aboriginal and Torres Strait Islander young people were up to 21 times more likely than non-Aboriginal and Torres Strait Islander children to be detained in youth detention facilities.[81] Furthermore, as part of the United Nations Human Rights Committee's Universal Periodic Review in 2021, 31 United Nations member states called on Australia to raise the age of criminal responsibility.[82]

Recommendation 9: Amend section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility to 14 years.

[76] Australian Human Rights Commission, *Children's Rights Report 2016* (Report, 17 October 2016) 189 <https://humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf>.
[77] Ibid 187.
[78] United Nations Committee on the Rights of the Child, General comment No 24 (2019) on children's rights in the child justice system, UN Doc CRC/C/GC/24 (18 September 2019) para 22.
[79] United Nations Human Rights Office of the High Commissioner, *Committee on the Elimination of Racial Discrimination examines Australia's report* (Web Page) <https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx>.
[80] Susan Baidawi, Rosemany Sheehan,'Cross-over kids: Effective responses to children and young people in the youth justice and statutory Child Protection systems' (December 2019) *Australian Institute of Criminology* 11 <https://researchmgt.monash.edu/ws/portalfiles/portal/296794514/291875254_oa.pdf>.
[81] Sentencing Advisory Council of Victoria, 'Indigenous Young People in Detention' (Web Page, 14 July 2020) <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/young-indigenous-people-in-detention>.
[82] Oliver Gordon, 'Australia urged by 31 countries at UN meeting to raise age of criminal responsibility', (online, 21 January 2021) <https://www.abc.net.au/news/2021-01-21/un-australia-raise-the-age-of-criminal-responsibility/13078380>.

Decriminalisation of Low-Level Crime

1.48. The LIV maintains that the persistent use of imprisonment for minor crimes has significantly increased the prison and remand populations. Members report that the amendments to the bail system have resulted in more people being brought into the bail and remand system for low-level offending. In particular, LIV members express concern that offenders are held on remand for offences which would not typically attract a term of imprisonment, but under the current *Bail Act 1977* (Vic), the exceptional circumstances threshold had resulted in an insurmountable standard, even for low-level offenders. This is having a disproportionate impact on members of the community who commit low-level poverty related offences, who are Aboriginal or Torres Strait Islander, have diminished socio-economic status, are homeless, have mental health conditions or drug addictions.

1.49. The connection between low-level offending, bail and remand was also recognised by Justice Coghlan in his Second Advice to the Victorian Government, where he stated that 'from a practical and principled point of view, it is untenable to just remand more and more people without examining whether the right people are actually being held on remand'.[83] Members note that street-based drug users are often charged with the possession of illicit substances and low-level property offences that are not serious but still classified as indictable. Further, there have been instances where clients have been held on remand for offences that would not typically result in imprisonment, but custody has been used to 'dry out' the accused.

1.50. The LIV acknowledges that there are certain offences under the *Summary Offences Act 1966* (Vic) that disproportionately impact vulnerable individuals, specifically those who are homeless. The LIV considers that some low-level offences would be better addressed through alternative mechanisms, such as diversionary jurisprudence or infringement notices. The LIV further considers that revising the punitive measures imposed on certain low-level offences could not only ensure sanctions appropriately respond to the circumstances behind the offending, but also alleviate the burden on the courts. While the LIV acknowledges that further consideration is necessary to determine which low-level offences could be dealt with differently, the LIV is of the view that it is appropriate for certain driving offences to be dealt

[83] The Hon. Paul Coghlan QC, Bail Review: Second Advice to the Victorian Government (1 May 2017) 5.

with via Traffic Infringement Notices ('**TINs**'), and certain offences, such as summary offences or low-level drug offences, should be decriminalised.

(a) Driving Offences

1.51. The LIV considers that certain driving offences could be dealt with by way of TINs. These offences should include:

- Speeding (usually significantly over the speed limit);
- Drink driving (first or second offence);
- Drug driving (first or second offence);
- Driving whilst disqualified or suspended (first and second offences);
- Careless driving;
- Offences relating to learner and probationary drivers, including failing to display learner and probationary plates or failing to have an accompanying driver; and
- Failing to report an accident or failing to provide details to another driver.

1.52. The LIV acknowledges the potential problems with the above approach, including that:

- A TIN may not have the same deterrent impact as an appearance in Court;
- Offenders will not be able to put their individual circumstances to a Court;
- A TIN is not recorded the same as on a person's priors as a court appearance and therefore is not as significant a punishment;
- Police will not be able to pursue application for impoundment; and
- It will be harder for an accused to contest the matter or get legal advice.

1.53. However, the LIV notes that these issues could be mitigated if the TINs:

- Set out a clear process for the person to bring the matter to court if they want to contest the charges or have their personal circumstances considered by the Court;
- Indicated that the matter is being dealt with by a TIN due to the COVID 19 restrictions and ordinarily a court appearance would be required;

- Set out avenues for people to get legal advice as to their rights to contest the matters;
- Include a copy of the policy summary of what is alleged to have occurred; and
- Set out the consequences of not complying with penalties set out in the TIN.

1.54. The LIV believes that the offences specified above could be better addressed through a TIN, particularly because the penalty imposed would be akin to that which a court would impose. The LIV understands that low-level drink driving offences heard in the Magistrates' Court often result in a good behaviour bond or fine, with or without a loss of license. Furthermore, some offences, such as drink driving, or speeding 40km p/h over the limit, have mandatory disqualifications, including impoundment of the vehicle. Other offences also require mandatory minimum license suspension and where the license is not suspended, the demerit points attached to the charge will lead to loss of license for a specified period. Additionally, the main variation in sentencing relates to length and the amount of the fine, with regards to a person's financial circumstances. Accordingly, a TIN would provide an effective alternative to the court system for low-level traffic infringements. In situations where a fine is not appropriate due to financial circumstances, it may benefit to have the option of a fine or a work development permit scheme, to provide vulnerable and disadvantage people with a non-financial option to address their fine debt.[84]

1.55. The LIV also considers that the increase in TINs would assist in alleviating any resourcing issues or delays in the Magistrates' Court. The LIV understands that a large volume of matters heard in the Magistrates' Court are low-level driving offences. In 2019-20 there were 88,932 defendants finalised within Victoria, with 93 per cent finalised in the Magistrates' Court.[85] Out of the 81,880 defendants that had matters finalised in Magistrates' Court, the most common principal offence type related to traffic and vehicle regulatory offences, making up 35 per cent of defendants.[86]

Recommendation 10: As a temporary measure to address the COVID-19 backlog, consider dealing with certain driving offences by way of Traffic Infringement Notices.

[84] Department of Justice and Community Safety, 'Work Development Permit Scheme' (Webpage,15 July 2021) <https://www.justice.vic.gov.au/wdp>.
[85] Australian Bureau of Statistics, *Criminal Courts, Australia* (Catalogue No 4513.0, 25 March 2021).
[86] Ibid.

(b) Summary Offences

1.56. The LIV acknowledges that there are certain offences under the *Summary Offences Act 1966* (Vic) that disproportionately impacts people who are homeless. Members note that people who are homeless or have insecure housing live their lives without security or privacy and are subject to frequent police checks. Consequently, many people who are homeless are more likely to be charged for minor offending related to poverty related offences.

1.57. According to the Sentencing Advisory Council, since 1 July 2016 to 30 June 2019, 263 people have been charged with one or more offences that includes the offence of begging or gathering alms.[87] Ultimately, the large proportion of charges did not result in imprisonment or a fine.[88] The LIV considers that section 49A of the *Summary Offences Act 1966* (Vic), which prevents a person from begging or gathering alms, should be abolished. The definition of 'alms' includes ''something (such as money or food) given freely to relieve the poor as a charitable act''.[89] Notably, the case of *Newton v Carmichael*[90] found that begging alms, within the meaning of the New South Wales legislation, included approaching people who then freely give money. The LIV queries the appropriateness of this offence to stand as a criminal offence, with criminal penalties of up to 12-month imprisonment, for what is essentially non-criminal behaviour. Additionally, anything above a passive presence by those who are homeless could instead be captured under deceptive behaviour or unlawful assault if the begging is essentially a demand for money.

1.58. The LIV also considers that the abolition of the offence of begging or gathering alms could occur alongside additional reviews, such as those relating to the response by Victoria Police when engaging with a person who is homeless and the effectiveness of fines as a penalty for people who are homeless. Specifically, the LIV supports the recommendations made by Justice Connect, which include introducing a Protocol for People Experiencing Homelessness in Public Places to better guide the discretion of Victoria Police officers and encourage the use of cautions. Additionally, Justice Connect has also suggested that the

[87] Sentencing Advisory Council of Victoria, *SACStat Magistrates' Court* (Web Page, 31 October 2019) <https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/7405_49A_1.html>.
[88] Ibid.
[89] *Merriam Webster Dictionary* 'alms' (definition 1).
[90] (1935) 52 WN (NSW) 215.

Fines Victoria fines review process be amended, such as through introducing a reformulated special circumstances test.

Recommendation 11: Abolish the offence of begging or gathering alms in section 49A of the *Summary Offences Act 1958* (Vic). Such behaviour should be directed to well-resourced welfare agencies to provide material and social supports.

(c) Drug Offences

1.59. The LIV submits that personal involvement in minor offences related to possession and use of illicit drugs is best addressed as a health and social issue, as opposed to requiring harsh punitive measures. The criminalisation of illicit drugs has been largely ineffective at achieving its intended purpose in deterring use and has only increased recidivism. The punitive measures have overburdened specialist courts and programs aimed at addressing the underlying health and social issues that are often associated with problematic illicit drug use.

1.60. The LIV recognises that the prohibition of illicit drugs, while a contentious matter, has in some instances has resulted in a source of additional harm to society. In particular, prohibition has resulted in a greater array and availability of natural and synthetic drugs, and drugs of higher quantities and higher purities-all at a lower cost. The LIV is concerned that prohibition does not interfere with the supply and demand, serving to expand and support the illicit drug market. For instance, the Australian Criminal Intelligence Commission reported that between August 2018 and August 2019, Australians spent 11.3-billion-dollars on illicit drugs, that of which included 8.63-billion-dollars on 11.5 tonnes of methylamphetamine, 4.6 tonnes of cocaine, 2.2 tonnes of MDMA and more than 900 kilograms of heroin.[91] Further, the recent Drug Data Report from the Australian Criminal Intelligence Commission reported that for the 2018-19 period, the amphetamine type substance market (which primarily comprises of methylamphetamine in Australia) is large and expanding, the cannabis market remains large and stable (with cannabis accounting for 50 of drug seizures), the heroin market remains

[91] Australian criminal Intelligence Commission, 'Ninth Wastewater report reveals Australians spend over $11.3 billion a year on drugs (10 March 2020) <https://www.acic.gov.au/media-centre/media-releases-and-statements/ninth-wastewater-report-reveals-australians-spend-over-113-billion-year-drugs>.

small but is experiencing growth in some areas and the cocaine, anaesthetics and hallucinogenic market continues to expand.[92]

1.61. Various other jurisdictions around the world have recognised that personal drug use and possession should be treated with therapeutic interventions rather than punitive measures. Specifically, in 2001, Portugal decriminalised all drug use and possession in quantities consistent with personal use.[93] Jurisdictions such as Canada, Uruguay and a variety of states in the United States have decriminalised certain drug use. Within Australia, the Australian Capital Territory ('**ACT**'), South Australia, and the Northern Territory have each decriminalised cannabis use, to some extent. Most notably, on 31 January 2020, the ACT decriminalised the possession, use and cultivation of small amounts of cannabis,[94] and the *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) is currently before the Legislative Assembly – if passed, this Bill would further decriminalise other illicit drugs, such as cocaine and heroin, for personal use.[95] The LIV also commends the LSIC's recent Inquiry into the Use of Cannabis in Victoria and hopes that significant amendments can occur, based upon the overwhelming stakeholder views that supported decriminalisation. The LIV particularly notes Victoria Legal Aid's ('**VLA's**') Submission to the LSIC's Inquiry into the Use of Cannabis, which recommended that 'cannabis use, and possession of small quantities for personal use, should be decriminalised to reduce the disproportionate impact of arrest, remand, and conviction'.[96] Specifically, VLA detailed the link between the remand of individuals for possession of small quantities of cannabis and the impact on the court system, highlighting that 'these cases also clog up the courts and corrections system… given that half of all drug arrests in Australia are for possession of cannabis'.[97] The LIV considers that this link can also be expanded to exist between the remand of individuals for the personal use and possession of illicit drugs more generally. For instance, according to the Crime Statistics Agency, there were 39,946 total offences recorded in Victoria between March 2020

[92] Ibid.
[93] Drug Policy Alliance, 'Drug Decriminalisation in Portugal: A Health-Centered Approach' (February 2015).
[94] Australian Capital Territory Government, *Cannabis* (Web Page) <https://www.act.gov.au/cannabis/home>.
[95] Australian Capital Territory Government, *Bills List* (Web Page, 16 August 2021) <https://www.parliament.act.gov.au/parliamentary-business/in-the-chamber/bills/bills_list>.
[96] Victoria Legal Aid, Submission No 1373 to Legal and Social Issues Committee, *Inquiry into the Use of Cannabis* (31 August 2020) 2-4.
[97] Ibid 4-6; Victoria Legal Aid, *Our evidence to decriminalize the personal use of cannabis* (Web Page19 May 2021) <https://www.vla.vic.gov.au/about-us/news/our-evidence-to-decriminalise-personal-use-of-cannabis>.

and March 2021 that related to a drug offence.[98] Notably, of these offences, 32,154 offences related specifically to drug use and possession, with 11,520 of these related to cannabis use and possession.[99] It follows that 80.5% of drug offences recorded in Victoria between 2020-21 related to a drug use and possession charge, thus unnecessarily overburdening the criminal justice system.

Recommendation 12: Decriminalise minor, personal use and possession of illicit drugs and support alternative, health-based treatment options for problematic drug use.

Sentencing

1.62. Victoria's imprisonment rate has grown between 2010-20 from 107.2 out of 100,000 to 143.1 out of 100,000 respectively.[100] There was also a considerable increase in the imprisonment rate for Aboriginal and Torres Strait Islander people, where across the same period, the rate almost doubled from 971.8 out of 100,000 to 1848.0 out of 100,000.[101] Recent decreases of the prison rates in 2020 was largely attributed to the COVID-19 pandemic and the subsequent delays in court proceedings;[102] however, the Sentencing Advisory Council further indicated that the COVID-19 pandemic 'may have also influenced sentencing dispositions'.[103]

1.63. The LIV considers that sentencing and Victoria's remand and prison populations are intrinsically linked. A reduction in remand and prison populations could be assisted by maintaining judicial discretion, allowing for the individual circumstances of the offender to be considered when sentencing, and reviewing schemes that limit discretion, such as standard and mandatory sentencing requirements.

[98] Crime Statistics Agency, *Recorded Offences* (Web Page June 2021) <https://www.crimestatistics.vic.gov.au/index.php/crime-statistics/latest-victorian-crime-data/recorded-offences-2>.
[99] Ibid.
[100] Sentencing Advisory Council of Victoria, *Victoria's Imprisonment Rates* (Web Page 2021) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-imprisonment-rates>.
[101] Ibid.
[102] Ibid.
[103] Ibid.

(a) Discretionary Sentencing

1.64. The LIV considers that independent, highly qualified, professional, and experienced judicial officers are best placed to impose an appropriate sentence. The discretionary nature of sentencing could be improved through allowing recourse to a broader range of considerations relevant to the circumstances of the offender and that account for vulnerabilities in the prison population. Additionally, judicial discretion could be supported through reducing standard and mandatory sentence schemes, which require specific sentences to be imposed, irrespective of the circumstances of the case.

1.65. The LIV recognises the importance of maintaining the role of the sentencing judges and the principle of instinctive synthesis, with mathematical guidance and sentencing range by prosecutions being addressed by the High Court in *Barbaro v The Queen* ('*Barbaro*').[104] In *Barbaro,* the High Court noted that:

> *it is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution… considers should be reached or a statement of the bounds within which that result should fall*.[105]

(i) Standard Sentence Scheme

1.66. Introduced in 2018, the standard sentence scheme is intended to act as another guidepost, alongside the maximum penalty, for 13 serious offences. It represents the middle range of seriousness when just considering the offending and no other factors, such as the offender's circumstances, prior offending history or guilty plea.[106]

1.67. At present, judges are required to make an assessment of the offender's moral culpability. This is a nuanced task which is vitally important to an offender receiving the appropriate sentence. The LIV submits that any form of baseline sentencing scheme is simply a variation

[104] [2014] 253 CLR 58 [40]; cf *MacNeil-Brown* (2008) 20 VR 677, 678 [3(b))].
[105] [2014] 253 CLR 58 [39].
[106] Sentencing Advisory Council of Victoria, *Sentencing Schemes* (Web Page) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes>.

on the theme of mandatory sentencing – a concept which the LIV has consistently and strongly opposed.[107]

1.68. The standard sentence scheme deems certain offences in the *Crimes Act 1958* (Vic) and the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) to be standard sentence offences,[108] which means that 'the period specified as the standard sentence… is the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.[109] In determining the objective factors, the court must consider the nature of the offending and not the personal circumstances of the offender.[110] When considering the standard sentence scheme, the Court of Appeal in *Brown v the Queen* ('*Brown*')[111] noted that:

> *… a judge when sentencing for a 'standard sentence offence' must 'take the standard sentence into account as one of the factors relevant to sentencing'. This requirement:*
>
> - *is to be treated as a 'legislative guidepost', having the same function as the maximum penalty;*
> - *does not affect the established 'instinctive synthesis' approach to sentencing;*
> - *does not require or permit 'two-stage sentencing'; and*
> - *does not otherwise affect the matters which the court may, or must, take into account in sentencing.*[112]

1.69. The LIV opposed the standard sentence scheme that replaced the baseline sentencing scheme under the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic). The LIV recognises that the Supreme Court in *Brown* accepted that the while it was intended that the lengths of sentences should increase, this intent:

> *does not manifest in the text of the legislation… [meaning] there is no legislative provision that necessitates a higher sentence be imposed in any individual case… [and] [w]hile sentences might*

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[107] See, generally, Law Institute of Victoria, Submission to the Sentencing Advisory Council (8 February 2016) 10 <https://www.liv.asn.au/getattachment/faaf761c-89f9-435a-904a-e98a413825f1/submission-to-sentencing-advisory-council--sentenc.aspx>.
[108] *Crimes Act 1958* (Vic) sub-ss 3(2)-(3), 38(3), 49A(3), 49B(3), 49D(2A), 49F(2A), 49H(2A), 49J(2A), 50C(3), 50D(3), 318(1A); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) sub-s 71(2).
[109] *Sentencing Act 1991* (Vic) sub-s 5A(1)(b).
[110] *Sentencing Act 1991* (Vic) sub-s 5A(3).
[111] [2018] VSC 742.
[112] Ibid [40] (emphasis added).

rise as a consequence of courts considering the standard sentence as an additional sentencing factor, it is not an imperative to which I must have regard.[113]

1.70. However, while the legislation is expressed in a manner that does not bind judges– with various cases recognising that 'instinctive synthesis 'remans the correct approach where the standard sentencing scheme applies',[114] there is a real issue as to whether it has resulted in a two-stage sentencing practice, resulting in an artificial compression in sentencing towards the standard sentence.

1.71. Notwithstanding the intentions behind the scheme, the LIV submits that the requirement to consider the standard sentence as an additional factor has ultimately had the effect of an unwarranted rise in the length of sentences. For instance, the Sentencing Advisory Council has considered the sentencing trends for murder between 2015-16 and 2019-20.[115] Murder was recognised as a standard sentence offence if it was committed on or after 1 February 2018.[116] Over the period, 'the average length of imprisonment (excluding life) imposed on people sentenced for murder ranged from 20 years and 2 months in 2016-17 to 24 years and 2 months in 2019-20'.[117] Specifically, the average length of imprisonment (excluding life) was 22 years and 3 months in 2015-16, 20 years and 2 months in 2016-17, 23 years and 4 months in 2017-18, 21 years and 11 months in 2018-19 and 24 years and 2 months in 2019-20.[118] This data provides just one example of how the standard sentence scheme has impacted the length of sentences. This also aligns with members initial concerns that the standard sentence scheme would require judges to take into account a fixed sentence that may be entirely inappropriate in the circumstances.

Recommendation 13: Review Victoria's standard sentence scheme, with a view to considering its impact on sentencing outcomes and departure from preservation of the "instinctive synthesis" model.

[113] Ibid [56].
[114] *R v Robertson* [2019] VSC 145 [47] (Champion J).
[115] Sentencing Advisory Council of Victoria, 'Sentencing Snapshot', *Sentencing trends in the higher courts of* Victoria *2015-16 to 2019-20*, April 2021) 1 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-03/Snapshot_248_Murder_March_2021.pdf>.
[116] Ibid.
[117] Ibid 3.
[118] Ibid.

(ii) Mandatory Sentencing

1.72. Mandatory sentencing schemes provide fixed minimum penalties, as prescribed by legislation, for committing a criminal offence.[119] In Victoria, there exists mandatory imprisonment minimum terms of imprisonment s for Category 1 and Category 2 offences, which do not fulfil its stated aims nor provide marginal deterrent effects, reduce crime rates or provide consistency in sentencing. By their very nature, the mandatory sentencing regimes, and the subsequent "one size fits all" approach to sentencing, leads to unjust outcomes, as offenders with unequal capability and circumstances are sentenced to the same minimum sentences of imprisonment, or more.[120]

1.73. Category 1 offences refer to offences committed by a person who was 18 years of age or older at the time of offending and encompass a variety of offences, including murder, causing serious injury intentionally or recklessly, rape and trafficking in a drug or drugs of dependence of a large commercial quantity.[121] In sentencing Category 1 offences, a court must impose a sentence of imprisonment, without a community correction order, if a special reason under section 10A of the *Sentencing Act 1991* (Vic) does not apply.[122] Category 2 offences relate to offences committed by a person who was 18 years of age or older at the time of offending and refer to offences such as manslaughter, kidnapping, armed robbery and culpable driving causing death.[123] In sentencing Category 2 offences, a court must impose a sentence of imprisonment, without a community correction order, unless an exception applies, such as the offender having impaired mental functioning.[124]

1.74. Victoria's mandatory minimum sentence scheme specifies that for certain categories of offending in certain circumstances, a court must impose a sentence of imprisonment with a specific minimum non-parole period.[125] The categories of offending include manslaughter

[119] Sentencing Advisory Council of Victoria, *Sentencing Matters: Mandatory Sentencing Research Paper* (Report, August 2008) 2 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Mandatory_Sentencing_Research_Paper.pdf>.
[120] Law Institute of Victoria, Submission to the Sentencing Advisory Council – Sentencing Guidance Reference (9 February 2016) <https://www.liv.asn.au/getattachment/faaf761c-89f9-435a-904a-e98a413825f1/submission-to-sentencing-advisory-council--sentenc.aspx> 4.
[121] *Sentencing Act 1991* (Vic) s 3(1) (definition of 'category 1 offence').
[122] *Sentencing Act 1991* (Vic) sub-ss 5(2G)-(2GC).
[123] *Sentencing Act 1991* (Vic) sub-s 3(1) (definition of 'category 2 offence').
[124] See ibid sub-ss 5(2H) (a)-(e) for exceptions.
[125] Ibid ss 11-11A, 9B-10AE.

offences,[126] gross violence offences,[127] offences against protected officials,[128] contravention of certain supervision orders under the *Serious Offenders Act 2018* (Vic),[129] aggravated home invasion,[130] or aggravated carjacking offences.[131] The non-parole period is typically contingent upon the length of imprisonment,[132] and the Courts must set a non-parole period for a sentence of imprisonment of more than two years, unless it would not be appropriate due to the kind of offences committed, of because of the offender's criminal history.[133]

1.75. The LIV has long opposed mandatory sentencing schemes in Victoria.[134] Specifically, the LIV believes that mandatory sentencing is an ineffective deterrent to crime, increases congestion in an already overburdened courts as a result of an increase in contested hearings, and unfairly and disproportionately affects the most vulnerable people in our society, including Aboriginal and Torres Strait Islanders. The LIV is of the view that mandatory sentencing schemes overlook the circumstances of offending in favour of the same minimum sentence of imprisonment. In *Trenerry v Bradley*,[135] Justice Mildren expressed that:

> *Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.*[136]

1.76. The LIV submits that mandatory sentencing schemes limit flexibility at the sentencing stage and ultimately lead to outcomes which are inappropriate for individual offenders, reduce the

[126] Ibid ss 9B-9C.
[127] Ibid s 10.
[128] Ibid ss 10AA, 10AE.
[129] Ibid s 10AB.
[130] Ibid s 10AC.
[131] Ibid s 10AD.
[132] Ibid s 11; Sentencing Council Victoria, 'A Quick Guide to Sentencing' (5th ed, 2019) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/A_Quick_Guide_to_Sentencing_2019.pdf> 7.
[133] *Sentencing Act 1991* (Vic) s 11.
[134] See for example, Law Institute of Victoria, Submission – *Sentencing Guidance Reference to the Sentencing Advisory Council* (8 February 2016).
[135] [1997] 6 NTLR 175.
[136] Ibid 184 (Mildren J).

potential for rehabilitation and increased recidivism, which occurs as a result of incarceration. The LIV notes the recent case of *Esmaili v The Queen*,[137] that of which involved an appeal against a sentence related to manslaughter by a single punch. Due to the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic), without a special reason, the sentencing Court was required to fix a non-parole period of not less than 10 years.[138] In considering the sentence on appeal, Judges Priest and Kyrou recognised that 'unfettered by the shackles of section 9C [of the *Sentencing Act 1991* (Vic)], the sentencing judge would have imposed a head sentence with a non-parole period shorter than 10 years, potentially allowing for a much longer period of supervision on parole'.[139] Additionally, Justice Croucher stated that 'it would be far more conducive to [Mr Esmaili's] prospects of rehabilitation, and therefore more likely to achieve protection of the community in the longer run, if the trial judge had been allowed to fix a more conventional non-parole period of, say, seven or so years in custody',[140] but that due to the minimum non-parole period and the subsequent existing sentence, there would only be 'very little, if any, supervision post release'.[141] Significantly, Justice Croucher also noted that '[o]ther jurisdictions have tried similar approaches to sentencing and failed […] [i]t is a great pity that we are making the same mistakes'.[142]

1.77. The LIV is concerned that mandatory sentencing schemes may unfairly impact people with mental impairments or disabilities. There is a clear link between imprisonment and people with disabilities in Victoria. Specifically, the Victorian Ombudsman found that 40 per cent of the Victorian prison population have been assessed has having a mental health condition.[143] The LIV is of the view that mandatory sentencing schemes prevent a court from taking into account the individual characteristics of the offender, including any mental illness or intellectual disability, and in some instances, a court may not consider diagnosis and treatment orders that would address root causes of offending.

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[137] [2020] VSCA 63.
[138] *Sentencing Act 1991* (Vic) s 9C.
[139] [2020] VSCA 63 [63] (Priest and Kyrou JJA).
[140] Ibid [99].
[141] Ibid.
[142] Ibid [100].
[143] Victorian Ombudsman, 'Investigation into the rehabilitation and reintegration of prisoners in Victoria (September 2015) [186].

1.78. The LIV particularly notes the inclusion of offences against emergency workers by the *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic),[144] following *DPP v Warren & Anor* ('*Warren*').[145] In *Warren*, the accused were found guilty of assaulting an emergency worker, and on the appeal of sentences of imprisonment, Judge Cotterell found that special reasons applied to each of the accused,[146] and instead community correction orders were imposed.[147] Ms Warren was sentenced to serve a three year community correction order comprising of 150 hours of unpaid work, [148] and Ms Underwood was sentenced to serve a two year community correction order, comprising of 50 hours of unpaid work.[149] Both accused also had to engage in assessment and treatment for drug and alcohol use or dependence, and mental health issues.[150] The LIV maintains that these sentences were significant, as they involved an element of loss of liberty, along with rehabilitative treatment, and should not be touted as illegitimate or devoid of punishment. Accordingly, the LIV is concerned that reactionary amendments to impose mandatory minimum sentences for certain types of offences will remove the exercise of judicial discretion in appropriate cases and will lead to unfair outcomes for offenders and greater harm to the wider community.

Recommendation 14: Review the effectiveness of Victoria's mandatory sentencing scheme, with a view to repealing the scheme allowing for greater judicial discretion and greater consideration of the individual circumstances of the offender.

(b) Sentence Indications

1.79. The LIV is supportive of expanded powers for sentence indications under the *Criminal Procedure Act 2009* (Vic), where a magistrate or judge may indicate the sentence that may be imposed if an accused pleads guilty to the charge.[151]

[144] *Sentencing Act 1991* (Vic) ss 10AA, 10AE.
[145] [2018] VCC 689.
[146] Ibid [5]-[32] (Cotterell J).
[147] Ibid [42]-[44], [60]-[98] (Cotterell J).
[148] Ibid [60]-[89].
[149] Ibid [90]-[98].
[150] Ibid [42]-[44], [60]-[98] (Cotterell J).
[151] *Criminal Procedure Act 2009* (Vic) ss 60-1, 207-9.

1.80. The Sentencing Advisory Council's *Sentence Indication: A Report on the Pilot Scheme* assessed the operation of the sentence indication scheme pilot program.[152] The Sentencing Advisory Council found that 'in tandem with the numerous other initiatives implemented to bring forward late-resolving pleas, sentence indication could assist in decreasing the time taken for matters to be dealt with by the court without sacrificing fairness to the defendant'.[153] The LIV is of the view that an expanded sentence indication scheme would assist in addressing pandemic-driven backlog. The decision to retain the sentence indication scheme was influenced by a review undertaken by the Sentencing Advisory Council in 2010, which found that 85 per cent of defendants entered a plea of guilty following the indication.[154] The Sentencing Advisory Council also found that it was a 'positive indicator that sentence indication has the potential to facilitate the resolution of cases that might otherwise have been resolved at a later stage'.[155] The LIV considers there is utility to giving a more defined scope during a sentence indication beyond whether or not it would be likely to impose a sentence of imprisonment,[156] bearing in mind that sentence indications should only be given where there is an arguable/ contested point. To assist in the provision of sentencing indications, the LIV recommends removal of prosecutorial consent to applications for sentence indications under section 208(2) of the *Criminal Procedure Act 2009* (Vic).

Recommendation 15: Provide a more defined scope during a sentence indication beyond whether or not the Court would be likely to impose a sentence of imprisonment. Additionally, the LIV suggests removal of the requirement for prosecutors to consent to applications for a sentencing indication under section 208(2) of the *Criminal Procedure Act 2009* (Vic).

[152] Sentencing Advisory Council of Victoria, *Sentence Indication: A Report on the Pilot Scheme* (Report, February 2010) 10 [1.45] - [1.46] <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Indication_A_Report_on_the_Pilot_Scheme.pdf>.
[153] Sentencing Advisory Council of Victoria, *Sentence Indication: A Report on the Pilot Scheme* (Report, February 2010) 66 [4.10] <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Indication_A_Report_on_the_Pilot_Scheme.pdf>.
[154] Victorian Sentencing Advisory Council, 'Sentencing Indication: A report on the pilot scheme' (Report, 2010) 15.
[155] Ibid 23.
[156] *Criminal Procedure Act 2009* (Vic) s 208 (1).

(i) Restorative Justice

1.81. The LIV has long endorsed restorative justice approaches to criminal offending. The LIV recognises that restorative justice can bring together all relevant parties to discuss the impact of the crime and encourage offenders to take responsibility. Restorative justice programs have been found to greatly benefit the well-being of victims by ensuring that the harm that has been caused is acknowledged.[157] For instance, the participation of the victim in the International Criminal Court has been recognised as an effective way for the needs and interests of the victim to be heard.[158]

1.82. The LIV notes that restorative justice interventions have been used within Australia and international jurisdictions. Within Victoria, the Centre for Innovative Justice ('**CIJ**') has also piloted a restorative justice program for people who have been impacted by a serious motor vehicle collision. In analysing the results of the pilot, the CIJ found that the program substantially reduced the 'traumatic effects of the crime'.[159] The Tasmanian Sentencing Advisory Council has also recommended that restorative justice conferencing be available for culpable driving offences, such as negligence driving causing death or injury.[160] The conferencing was considered beneficial for matters relating to driving offences because not only can the victims and their families be encouraged to heal, but it also assists in rehabilitating the offender.[161]

1.83. The LIV particularly recommends consideration of the restorative justice interventions that New Zealand has implemented. Since 2014, New Zealand has required criminal cases to be adjourned, prior to sentencing, for the parties to engage in restorative justice programs.[162] Specifically, section 24A of the *Sentencing Act 2002* (NZ) requires the proceedings to be

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[157] Jane Bolitho, Karen Freeman, 'The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms', *Report for the Royal Commission into Institution Responses to Child Sexual Abuse'* (March 2016).
[158] Victorian Law Reform Commission, '*Alternative Criminal Justice Models'* (1 April 2020), <https://www.lawreform.vic.gov.au/content/3-alternative-criminal-justice-models> [3.26].
[159] Centre for Innovative Justice, Report on the CIJ's Restorative Justice Conference Pilot Program (October 2019) <https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf> 21.
[160] Sentencing Advisory Council of Tasmania, 'Sentencing of Driving Offences that result in Death or Injury: Final Report No 8 (April 2017).
[161] Ibid.
[162] Jim Boyack, Helen Bowen and Chris Marshall, 'How does restorative justice ensure good practice?' in Howard Zehr and Barb Toews (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004).

adjourned if the offender: appeared before a District Court, plead guilty to the offence, there were one or more victims of the offence, and no restorative justice processes had already occurred in relation to the offending.[163] The adjournment allows the matter to be assessed to determine if a restorative justice process is appropriate.[164] Under this model, there are no limitations upon the type of offending expressly excluded, including sexual violence offences. A recent study of victim's experiences with restorative justice conferencing in New Zealand found 84 per cent of victims were satisfied and willing to attest to its effectiveness as a form of reparation.[165]

1.84. The LIV recommends implementing a restorative justice diversion model to facilitate a non-adversarial pathway to justice, pre-plea, for criminal offending, focussing on the interests of the complainant and avoiding the need for cross-examination. This would include all summary offences and offences triable summarily, with a view to expanding the availability of diversion for offences that fall outside the existing diversion scheme. Features of a restorative justice diversion model would include:

- No cross-examination of the complainant;
- The harm caused by the accused to the complainant is validated, heard and believed;
- The experience of the complainant is acknowledged;
- The accused becomes accountable for restoring the complainant in the manner agreed without a formal entering of a guilty plea; and
- Upon a successful completion of the restorative justice diversion, the criminal matter will be finalised as a diversion and without a formal finding of guilt or conviction.

1.85. A restorative justice diversion would require informed consent of the accused and the complainant, including the potential for it to bring finality to proceedings, its implications and the availability of civil avenues of redress. Matters to be considered in arriving at the proposed conditions of the restorative diversion should include the below non-exhaustive list of factors:

- The need for individualised justice;

[163] *Sentencing Act 2002* (NZ) s 24A.
[164] Ibid.
[165] Ministry of Justice, New Zealand, *Restorative Justice Victim Satisfaction Survey* (Research Report, 2016) 4.

- The needs of the complainant, both financial and psychological;
- Proper acknowledgement of the harm caused by the accused through a formal and/or written apology;
- Assessment of the nature and extent of the impact and harm that the offending has caused to the complainant;
- Identification of the risk to the community through expert evidence/reports, having regard to the objective seriousness of the offence (ie. Static-99 and RSVP risk assessments for sexual offending);
- Identification of any complex needs of the accused;
- Whether the accused can make a financial contribution to the complainant's rehabilitation (without an accused being prejudiced on account of their means);
- Proportionality; and
- Matters relevant to the deterrence and rehabilitation of the accused.

Recommendation 16: Implement a restorative justice diversion pilot to expand non-adversarial pathways to justice pre-plea for summary offences and offences triable summarily.

Parole

1.86. Sub-section 77B(2)(b) of the *Corrections Act 1986* (Vic), specifies that where a prisoner's parole is cancelled or taken to be cancelled, any period during which the parole order was in force is not to be regarded as time served in respect of the prison sentence, unless a direction under section 77C of the *Corrections Act 1986* (Vic) applies. Section 77C of the *Corrections Act 1986* (Vic) specifies that the Adult Parole Board has discretion to direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is to be regarded as time served in respect of the prison sentence.

1.87. The *Corrections Act 1986* (Vic) does not specify the factors that may be considered in exercising discretion. According to the *Parole Manual – Adult Parole Board of Victoria*,[166] the Adult Parole Board 'is to consider each case after the prisoner has been arrested and returned to prison… [as] decided on [the case's] particular facts'.[167] In exercising discretion, the Adult Parole Board takes into account the difficulties that prisoners face in transitioning back into the community, such as 'drug addiction, institutionalisation and isolation from mainstream society'.[168] These difficulties are considered alongside the efforts the prisoner makes towards rehabilitation and engaging in the supports provided over the whole time they were on parole, such as supervision, programs and community work.[169] Further, the Adult Parole Board *Annual Report 2019-20* specifies that 'if the prisoner's parole is cancelled during the intensive parole period (generally the first three months of parole) or because of serious offending on parole, it is unlikely that they will receive any time to count'.[170] Accordingly, the internal guidelines and/or policies of the Adult Parole Board of Victoria appear to restrict the application of section 77C of the *Corrections Act 1986* (Vic) to prevent the contribution of time served due to some instances of reoffending on parole, despite any specific restriction in the *Corrections Act 1986* (Vic).

1.88. In 2019-20, the Adult Parole Board considered 215 time to count matters, with the discretion under section 77C of the *Corrections Act 1986* (Vic) not exercised to grant any time to count for 117 of these matters, specifically due to prisoner relapse into drug use.[171] While the Adult Parole Board granted at least some time to count in 75 cases, 23 cases were deferred, with the reasoning behind each of these decisions not known.[172]

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[166] Adult Parole Board of Victoria, *Parole Manual: Adult Parole Board of Victoria 2020 Edition* (Report, June 2020) <https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf>.
[167] Ibid.
[168] Ibid 31; Adult Parole Board of Victoria, *Annual Report 2019-20* (Report, September 2020) 27 <https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf>.
[169] Ibid 31.
[170] Adult Parole Board of Victoria, *Annual Report 2019-20* (Report, September 2020) 27 <https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf>.
[171] Ibid.
[172] Ibid.

1.89. The LIV considers that the time spent on parole should be credited to the prison sentence. The discretion to refuse to credit some or all of the period during which a parole order is cancelled is inconsistent with Drug Treatment Orders or other community-based sentences, where time spent on the order in the community is counted towards the sentence. The discretion for the Adult Parole Board under section 77C of the *Corrections Act 1986* (Vic) should be repealed and provide that time served on parole prior to a parole order being cancelled ought to count as time served, in line with the practices of other community-based sentences.

Recommendation 17: Repeal section 77C of the *Corrections Act 1986* (Vic) and replace it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served.

De Novo Appeals

1.90. De novo appeals allow criminal matters heard in the Magistrates' Court to be reconsidered in the County Court of Victoria ('**County Court**').[173] The *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) abolished *de novo* appeals from the Magistrates' Court to the County Court from 3 July 2021; however, the reform is delayed until 1 January 2023, per section 124 of the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic).

1.91. The LIV strongly opposes the abolishment of *de novo* appeals to the County Court. Instead, the LIV supports the Parliament of Victoria's Law Reform Committee recommendation that *de novo* appeals from the Magistrates' Court to the County Court should be retained, subject to minor procedural changes.[174] Specifically, the LIV endorses the Parliament of Victoria Law Reform Committee remarks that:

[173] *Criminal Procedure Act 2006* (Vic) s 236.
[174] Law Reform Committee, Parliament of Victoria, De Novo Appeals to the County Court (Final Report, 17 October 2006) 203.

> *Victoria's system of de novo appeal is both comparatively efficient— when seen in the wider context of its place within the criminal justice system—and comparatively fair… [with] de novo appeal[s able to] achieve a remarkable synthesis of justice and value for money.*[175]

1.92. The LIV submits that *de novo* appeals ought to be retained to allow the Magistrates' Court to hear matters efficiently. Particularly, the scope of matters in contention are typically narrow on appeal, as the non-contentious issues are resolved in the summary jurisdiction. This symbiotic relationship between the Magistrates' Court and the County Court ultimately balances the vast caseload that the Magistrates' Court faces and therefore allows it to operate effectively.

1.93. Given the backlog of criminal cases growing in the court system, the abolition of *de novo* appeals would extend many contests and pleas, with further adjournments and longer, more contested hearings. With the speed and volume of matters needing to be processed by the Magistrates' Court, errors would be inevitable. It would require proceedings to be finalised in the Magistrates' Court, meaning matters that are to be determined summarily will be approached as though they were indictable proceedings.[176] It would remove the safety net provided by *de novo* appeals with limited time frames to hear matters and the greater caseload, and detract from efficiency and present a higher risk of inconsistent and unjust outcomes for marginalised and disadvantaged defendants who have not received adequate legal advice to enable all material to be put before the Court.[177]

1.94. Members advise that for matters that could currently be heard and completed in less than an hour at the Magistrates' Court, would no longer be able to be heard with such efficiency if de novo appeals were abolished and a far greater proportion of matters would need to be "booked in" for full and extended hearing times. Magistrates' Court plea hearings would necessarily be treated more like County Court plea hearings, in all possible material has to be put before the court and every single submission and point of law must be carefully made, due to the right of appeal being limited to an "error " in sentencing by the judicial officer. Counsel would also need to be particularly thorough to ensure they introduce all witnesses, experts, reports, submissions, evidence and any other material perceivably relevant to the

[175] Law Reform Committee, Parliament of Victoria, De Novo Appeals to the County Court (Final Report, 17 October 2006) xvi (emphasis added).
[176] Michael Stanton and Paul Smallwood, 'Pause for Thought? The Case for Reversing the Abolition of De Novo Criminal Appeals' (Winter 2021) 46 <https://www.vicbar.com.au/sites/default/files/VBN169_Web.pdf>.
[177] Ibid.

matter, to ensure they have a proper basis for any subsequent appeal. Practitioners will therefore require the same level of preparation for matters in the summary jurisdiction as they would for a trial in the County Court of Victoria. This would subsequently require a review of Victoria Legal Aid's ('**VLA's**') funding for pleas in the Magistrates' Court, due to the considerable increase in preparation time.

1.95. Members foresee that from their trial experience, to undertake this approach in the Magistrates' Court would increase matters that can be completed in less than an hour to approximately six to seven hours. Not only would costs and delays be increased,[178] but the ability of the de novo appeal to rectify any issues or pressures in the Magistrates' Court that may result from the high caseload and stretched resources is lost.[179] Specifically, there are notable variations in sentencing across Victorian Magistrates' Courts, and without an open appeal system, these sentencing outcomes may not be sufficiently reviewed. Accordingly, the LIV submits that the abolition of de novo appeals will void efficiencies and place significant additional burdens upon the Magistrates' Court.

Recommendation 18: Reconsider the decision to abolish *de novo* appeals through evidence based, meaningful consultation during the deferral of commencement until 2023.

Committal Hearings

1.96. The LIV notes that the Victorian Law Reform Commission recommended the abolition of the test for committal in its recent 2020 report on committals and pre-trial procedures in indictable matters; however, the LIV considers that committal hearings should be retained to assist in alleviating the backlog in the County Court. The LIV recognises that higher courts are facing significant delays in the number of trials, primarily due to the COVID-19 pandemic, and issues with the operation of jury trials throughout COVID-19 restrictions.

1.97. Members have argued that committal hearings are useful to assist the backlog in that it may result in the prosecution discontinuing a matter, due to their evidence being tested before the court. Committal hearings play a fundamental role in disclosure, which acts to narrow the

[178] Ibid.
[179] Ibid.

matters in dispute. The key issues in dispute are also able to be more readily identified as a result of judicial intervention, also assisting in the early resolution of a matter. Additionally, where there is a strong case, the defendant will be more likely to plead, thus resolving the matter without proceeding to trial. As such, committal hearings are able to efficiently complement the Emergency Case Management system in order to improve the rate at which the backlog is addressed.

1.98. The LIV has also consulted with VLA and the Office of Public Prosecutions ('**OPP**') to support and assist the court in re-listing committal hearings. As a result of discussions, stakeholders were able to facilitate these matters and work out the issues between themselves, such as any priority issues beyond custody, client consent to committal via WebEx is obtained, revision to the estimate of duration in order to ensure time allocation is accurate, and any prospects of resolution to be discussed between the Crown and the defence practitioner.

Recommendation 19: Retain committal hearings as an important case management function to assist with disclosure and discovery, shorter trials in the higher courts, and to assist in reducing the backlog.

DNA Police Powers

1.99. Victoria Police are imbued with a variety of powers under the *Crimes Act 1958* (Vic) with respect to the collection of DNA. The LIV notes that the powers of particular concern arise out of the following sections of the *Crimes Act 1958* (Vic):

- Section 464SA (Senior police officer may authorise non-intimate compulsory procedure for certain adults);
- Section 464SE (Senior police officer may authorise the taking of a DNA profile sample from DNA person);
- Section 464T (Court may order compulsory procedure);
- Section 464U (Forensic procedure on child);
- Section 464V (Interim orders);

- Section 464ZF (Forensic procedure following the commission of forensic sample offence);
- Section 464ZFAAA (Forensic procedure following finding of not guilty because of mental impairment);
- Section 464ZFAB (DNA profile sample from registrable offenders under the Sex Offenders Registration Act 2004);
- Section 464ZFAC (Senior police officer authorisation – to take DNA profile sample from certain adults); and
- Section 464FAE (Senior police officer may authorise taking a DNA profile sample from certain adults and children who have previously provided a sample).

1.100. The LIV urges LSIC to consider a review of the DNA police powers, specifically those outlined above. The LIV also reiterates our previous position, where we welcomed the agreement reached by Attorney Generals in late 2019 to establish an inter-jurisdictional working group to report back to the Council of Attorneys-General. The LIV understands that the purpose of the working group was to consider the use, review and oversight of forensic evidence in criminal trials on a national basis; however, the LIV is aware that the national review of forensic sciences is not intended to proceed.[180]

1.101. The LIV considers the review to be necessary because of the inconsistent application processes of certain sections of the *Crimes Act 1958* (Vic), the utilisation of DNA as evidence generally and the subsequent impact this has on the criminal justice system.

(a) Application Processes

1.102. Members have noted specific issues with the sections outlined above due to the application process and the associated lack of court oversight. Applications for the taking of an intimate sample in these sections are signed by the applicant, who is usually a police officer, together with an authorisation signed by a Senior Officer of Victoria Police. LIV members have identified inconsistencies in the application process of certain sections of the *Crimes Act*

[180] Nino Bucci, 'Forensic examination: the case for a criminal review commission in Australia', *The Guardian* (online, 18 July 2021) <https://www.theguardian.com/law/2021/jul/18/forensic-examination-the-case-for-a-criminal-review-commission-in-australia>.

1958 (Vic) that may unfairly impact an offender, particularly due to the removal of court oversight.

1.103. Applications under section 464FAC of the *Crimes Act 1958* (Vic) are made post-conviction, in which it can be inferred that it was determined by the prosecuting agency (ie. Victoria Police or the OPP) not to make an application before the court upon the finding of guilt, or the application is made for an offence that pre-dates the 2019 legislative amendments. Significantly, under this section, if an adult is found guilty of an indictable offence after 1 July 2019, Victoria Police must apply for a Senior Police Officer Authorisation, to obtain a post-conviction DNA sample.

1.104. In making an application under sections 464FAC or 464FAE of the *Crimes Act 1958* (Vic), there are no requirements to set out the grounds upon which the application is based. Members note that understanding the grounds upon which an application is based on is important, particularly in circumstances where the related offending which the respondent has committed are not offences for which DNA would have assisted any investigation to detect, or assist in detecting, future offending of a similar nature. LIV members further highlight the inconsistencies in the application process of sections 464FAC and 464FAE of the *Crimes Act 1958* (Vic) through comparison with applications under sections 464SA or 464SE of the *Crimes Act 1958* (Vic). In the later sections, when an application is made, the circumstances that justify making the order are required, with the standard reaching beyond a mere repeat of the test: "I am satisfied that in all the circumstances the making of the order is justified".

1.105. Furthermore, members have noted that there is no opportunity to make representations that oppose the making of orders under the identified sections, even if the right to address the court is limited to matters referred to in sub-sections 464T(3)(a)-(h) of the *Crimes Act 1958* (Vic). In particular, an application pursuant to section 464T of the *Crimes Act 1958* (Vic) requires material to be found before the court can make orders to obtain a sample from an accused.[181] Comparatively, applications pre-charge at the time of arrest under sections 464SE and 464SA of the *Crimes Act 1958* (Vic), do not require this precondition.

1.106. The LIV is of the view that contemporaneous and consistent oversight by the court is vital to ensuring that the powers are used appropriately, balancing the interests of the public and of a suspect. In allowing broadened scope for Victoria Police to authorise the collection of DNA

[181] *Crimes Act 1958* (Vic) s 464T(3)(c)(i).

samples in some instances but not others, the LIV submits that this infringes upon the power of the court, and the rights of the offender. Additionally, members have raised concerns regarding the administrative burden on the justice system, whereby there is an increase of DNA samples taken, given the expedited application process that disregards the court. Without adequate oversight, considerable resources will need to be allocated to collecting, storing, analysing and destroying this increase. Accordingly, the better view is that the court should have oversight of all of the aforementioned powers, given the availability for all parties to fairly make representations and a transparent reviews or appeals process.

(b) DNA as Evidence

1.107. Members have raised concerns that the consequence of an influx of DNA samples will likely lead to an increased reliance on DNA as a form of evidence. The LIV has previously submitted that the experience in Victoria, as well as other jurisdictions, demonstrates that reliance on DNA evidence can result in miscarriages of justice if the evidence is contaminated, tampered with, or otherwise compromised. The LIV recognises that an increased availability of samples may also lead to an increase in DNA exoneration cases, whereby the accused is wrongfully convicted in instances where DNA has been transferred either intentionally or unintentionally, or new research questions the viability of forensic methods, such as what has occurred in cases related to 'shaken baby syndrome'.[182] The LIV considers that there may be people held on remand or in prison that would not be there, but for reliance on questionable forensic evidence.

1.108. Furthermore, as DNA matching technology develops, as in other jurisdictions globally, this technology may increasingly be used to link a sample to another family member, through kinship or familial matching. Through familial matching, a DNA sample can be linked to several people from the same family. There are considerable potential specific groups who are presently over-represented within the criminal justice system, such as Aboriginal people, to be unfairly affected. Accordingly, reviewing the processes associated with DNA police

[182] Nino Bucci, 'Forensic examination: the case for a criminal review commission in Australia', *The Guardian* (online, 18 July 2021) <https://www.theguardian.com/law/2021/jul/18/forensic-examination-the-case-for-a-criminal-review-commission-in-australia>.

powers, and the current insufficient oversight, will reasonably reconfigure the reliance on DNA as evidence and safeguard their use, where their use is necessary.

Recommendation 20: Establish a review of the use and oversight of forensic evidence in criminal trials, such as through re-establishing the Inter-Jurisdictional Forensic Evidence Working Group.

2. Reducing the Rate of Criminal Recidivism

2.1. According to Corrections Victoria, there were 9,241 prisoners discharged in 2017-18.[183] Within two years of release, 44.2 per cent of the 9,241 released prisoners returned to prison.[184] The high rate of recidivism related to the discharge of prisoners differs when considering offenders who have served a community correction order. In the same period, 13.9 per cent of offenders discharged from a community correction order had been sentenced to a new community corrections sanction within two years.[185] Further, it was estimated by the Sentencing Council that in 2017-18, the rate of community correction order contravention by serious offending was 1.6 percent, rising to 1.7 per cent in 2018-19 and 2019-20.[186]

2.2. The LIV maintains our previous position that imprisonment itself does not act as a deterrent for reoffending. Members have noted that strategies to reduce rates of criminal recidivism should emphasise rehabilitation. Any programs or initiatives that allow the court to avoid the imposition of a sentence, such as the imposition of therapeutic interventions, should be prioritised. Furthermore, any therapeutic interventions should instead be supported by pre- and post- sentence initiatives, to reduce the likelihood of repeat offending and to address the circumstances leading to offending.

Diversion Programs

2.3. The LIV considers that diversions are an indispensable tool in reducing recidivism amongst first time offenders. It provides a unique opportunity to identify any criminogenic issues affecting an offender, assess the causes of offending and to put in place support mechanisms to ensure that criminal offending is not repeated. The LIV recommends increasing the use of diversionary mechanisms to reduce the number of people needing to appear before the courts. This includes broadening the scope of diversions, removing the ability for prosecution

[183] Corrections Victoria, 'Monthly prisoner and offender statistics 2021-22', *Monthly prisoner and offender statistics 2021-22* (Web Page, July 2021) <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics>.
[184] Corrections Victoria, *Corrections statistics: quick reference* (Web Page, 30 June 2021) <https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>.
[185] Ibid.
[186] Sentencing Advisory Council Victoria, *Serious Offending by People Serving a Community Correction Order: 2019-20* (Report, 2021) 10 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-04/Serious_Offending_by_People_Serving_a_CCO_2019_20.pdf>.

to veto consideration for diversion and making diversion a sentencing option available to the Court.

(a) ***Victoria Police Diversion Criteria Matrices***

2.4. Members have identified various issues with the Victoria Police Diversion Criteria Matrices ('**Diversion Matrices**') when used to approve or reject, including where it is applied inconsistency and lacking transparency. LIV members note that the Diversion Matrices, and associated updates, are not widely disseminated or accessible.

(i) Accessibility

2.5. Members have noted that the various Diversion Matrices are not accessible by practitioners. Specifically, the most recent version of the Matrix that operates in the Magistrates' Court was reviewed on 11 December 2018, with an updated Matrix yet to be disseminated.

2.6. The LIV is concerned that some practitioners are not aware that Victoria Police are guided by the Matrix when assessing access to diversion. This reduces the transparency of decision making, particularly with respect to the factors that are considered in exercising the informant/prosecutor's discretion. As practitioners are unable to adequately address the factors applied under the Matrix, this ultimately creates unfairness when applying for diversion.

Recommendation 21: The relevant Diversion Matrices should be made readily accessible by practitioners on the Magistrates' Court of Victoria and Children's Court of Victoria websites to ensure there is a consistent application of diversion criteria.

(ii) Inconsistent Application

2.7. Currently, the Matrices provide broad guidance and predominantly rely on the discretion of the prosecutor and/or informant. Members have noted inconsistencies where, without guidance, they are concerned that approval or rejection of diversion becomes largely based

upon factors such as the personal experience of the prosecutor and/or informant, which leads to unfair and inconsistent outcomes.

2.8. The LIV Diversion Working Group surveyed practitioners across Victoria to compile data that shows the offences that are obtaining diversion, any anomalies in the process, and any inconsistencies relating to both informants and prosecutors.[187] The below data from LIV members demonstrates the inconsistency in the approval or rejection of diversion in Magistrates' Courts across Victoria. The LIV especially notes the inconsistency regarding the eligibility associated with family violence matters and concerns in specific courts, such as Ballarat, Bacchus Marsh and Broadmeadows.

2.9. In total, there were 59 matters across 23 courts that were considered (see Table 1). There were also a broad range of offences analysed, including 23 matters relating to offences against the person,[188] 18 matters involving family violence offences,[189] 17 matters involving property offences,[190] seven driving offences,[191] six offences classified as other,[192] two

[187] Karin Derkley, 'Criminal lawyers encouraged to participate in diversion survey', *Law Institute of Victoria* (Web Page, 21 April 2021) <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/April-2021/Survey-questions-diversion-refusals>.

[188] These included: 10 matters labelled as unlawful assault; four matters labelled as assault; two matters labelled as resisting police; one matter relating to three charges of assault; one matter involving unlawful assault, recklessly causing injury and intentionally causing injury; one matter relating to two counts of recklessly causing injury; one matter involving unlawful assault and threat to kill; one matter involving resisting police, hindering police, and behaving in an offensive matter; one matter labelled as affray; and one matter labelled as unlawful assault with a weapon.

[189] These included: seven matters labelled as family violence; six matters labelled as family violence and breach of IVO; three matters labelled as breach of IVO; one matter labelled as persistent breach of IVO and breach of IVO within 200 meters; and one matter was labelled as contravene IVO.

[190] These included: six matters involving shop theft; six matters involving theft; three matters labelled as criminal damage; one matter involving an armed robbery; and one matter labelled as dishonestly assisting in the retention of stolen goods.

[191] These included: two matters related to careless driving; two matters labelled as driving while suspended; one matter relating to failing to stop after an accident and failing to give a name; one matter involving careless driving and dangerous driving; and one matter relating to driving without an AID fitted.

[192] These included: one matter labelled as making a false statement; one matter labelled as failing to update address with VicRoads; one matter relating to using a false document; one matter relating to the possession of an imitation firearm; one matter relating to the possession of a prohibited weapon; and one matter relating to a charge of obtaining financial advantage by deception.

matters involving sexual offences,[193] and two matters involving drug offences,[194] with 20.3 per cent of all matters involving more than one charge (see case studies below).

2.10. Of the matters analysed, 66.1 per cent resulted in diversion, with 8.5 per cent of total diversions occurring on the papers ('**OTP**'); however, 22.1 per cent did not receive diversion, with 3.4 per cent of these matters resulting in a plea of guilty ('**PG**') and 3.4 per cent resulting in no conviction (see Table 1). Further, 1.7 per cent of matters had the charges withdrawn, and 10.2 per cent of the matters were not yet finalised ('**NYF**') at the time of the survey (see Table 1).

2.11. The data also included information related to the opinion of the informant, prosecutor, and magistrate. In particular, the decision of the informant was:

- Yes in 44.1 per cent of matters;
- Yes, despite being initially refused, in 1.7 per cent of matters;
- No in 27.1 per cent of matters;
- No, but overridden, in 1.7 per cent of matters;
- Bypassed in 10.2 per cent of matters; and
- Not available for 15.2 per cent of matters.

2.12. The decision of the prosecutor was:

- Yes in 67.8 per cent of matters;
- Yes, despite being initially refused, in 1.7 per cent of matters;
- No in 27.1 per cent of matters;
- Not available in 1.7 per cent of matters; and
- Not available, but escalated to the Sergeant who said yes, in 1.7 per cent of matters.

2.13. The decision of the magistrate was:

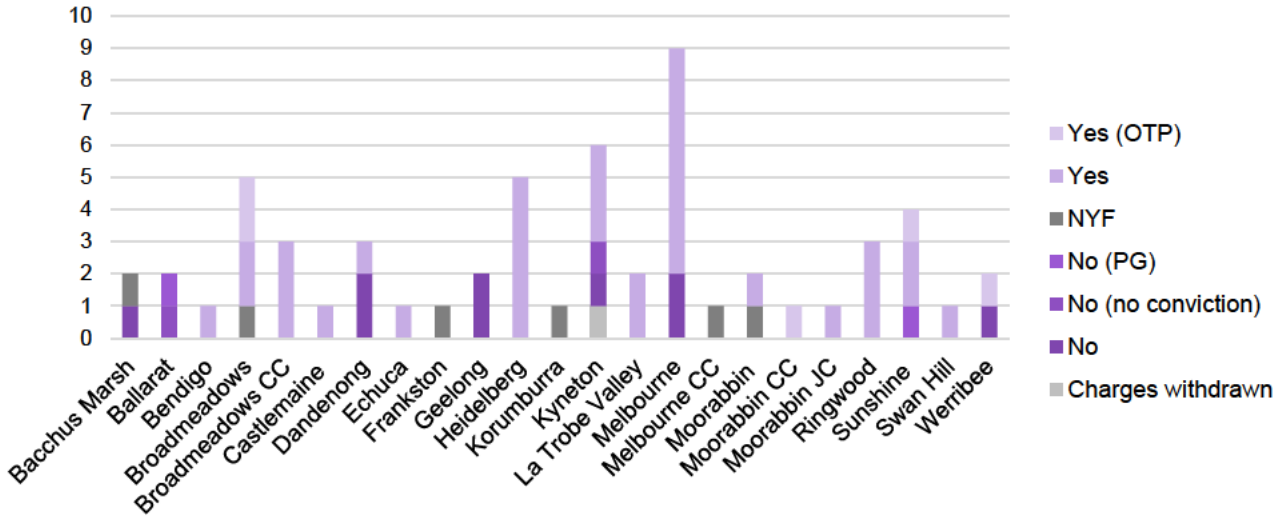
- Yes in 41 per cent of matters;

[193] One matter related to an indecent display in a public place and one matter related to indecent exposure.
[194] One matter was related to trafficking cannabis and the other related to possessing GHB, trafficking GHB and importing GHB.

- No in 8 per cent of matters; and
- Not available in 10 per cent of matters.

2.14. Significantly, 8.4 per cent of matters did not have prosecutorial consent but did have the approval of the magistrate. Of these, 5 per cent of matters resulted in diversion, despite not obtaining prosecutorial consent.

Table 1: Diversion by Court



Case Study 6

Samara was charged with unlawful assault, the breach of an intervention order, and driving whilst suspended.

Samara did not have any criminal priors. She also worked in health services, and supported her family, including four children.

The informant and prosecutor did not consent to diversion. Despite this, the Magistrate approved diversion.

Case Study 7

Nathan was charged with armed robbery of a train station, after he assisted a group of people he recently met. Nathan was not the aggressor, and he passed the weapon to the main offender, who made the demand.

Nathan was 15 years old at the time and was diagnosed with an intellectual disability. He had significant supports from his family and the community.

The informant and prosecutor did not consent to diversion; however, the lawyer raised the matter to the Magistrate. The Magistrate prompted the prosecutor to reconsider, after noting that the personal circumstances and level of involvement was low. Written submissions were then sent to the Senior Sergeant and the Magistrate.

Case Study 8

Carina was charged with breaching an intervention order (family violence) after she made five phone calls to her ex-partner seeking the return of pets. Carina was ejected from the house after being served with a family violence safety notice and was not permitted to take any personal items. There were no threats made and no violence involved.

Carina did not have any priors and was sleeping in her car as a result of the family violence safety notice. She was subsequently charged with animal cruelty against the pets, with the charges eventually withdrawn. There was also a history of domestic violence.

Case Study 9

Hasan was charged with contravening a family violence intervention order after a minor, non-violent breach. Hasan was separated from their partner.

The informant consented to diversion, as did the Magistrate, but the prosecutor did not consent. As such, diversion was refused.

***Case Study* 10**

Scott was charged with assault and the contravention of an intervention order. Scott was 38 years old at the time of the offence, was separated from his partner, and had two children. Scott was also employed full-time.

The informant consented to diversion, but the prosecutor did not; however, the Magistrate approved diversion and diversion was granted.

(iii) Restrictive Application

2.15. Members are concerned that the Matrices are too restrictive and contrary to the *Criminal Procedure Act 2009* (Vic). The *Criminal Procedure Act 2009* (Vic) contemplates eligibility as available for any offence triable summarily,[195] aside from certain offences.[196] The *Criminal Procedure Act 2009* (Vic) does not impose any further restrictions on the types of offences which are eligible for diversion.

2.16. In practice, and as demonstrated by the LIV survey data above, application of the Matrices has resulted in rigid rules surrounding eligibility. For example, family violence matters and driving while suspended offences are considered inconsistently. This results in practitioners being required to establish something akin to "exceptional circumstances" when seeking a diversion for family violence matters. Further, some low-level, otherwise technical breaches of family violence intervention orders are recommended for diversion, whilst others are not. Inconsistency also exists with driving while suspended offences, where one prosecutor at Kyneton recently refused diversion, citing "ineligibility" for that type of offence, whereas another prosecutor, in the same court and only a week prior, recommended a diversion for a young woman for the same offence.

2.17. Given the issues with inconsistent application, the LIV suggests that the Matrices ought to be updated to better reflect the legislative requirements within the *Criminal Procedure Act 2009* (Vic). Members recommend that a presumption in favour of diversion would better balance the discretion of prosecutors and/or informants by requiring submissions to be made before the Court. The LIV understands that the Matrices are supplemented by Victoria Police policy positions. In particular, the Victoria Police policy position with respect to the Matrix that

[195] *Criminal Procedure Act 2009* (Vic) s 59(2).
[196] Ibid s 59(1).

operates in the Children's Court stipulates that the prosecution may not consent to diversion on the basis of "serious concerns". The position with respect to the Magistrates' Court is that diversion should only be objected to where "exceptional circumstances" exist. Despite this, the Victoria Police Adult Diversion Policy specifies that "'[e]xceptional circumstances' and 'serious concerns' are to be interpreted according to their ordinary plain English meaning'". Beyond this, there is no further definition or explanation as to what these standards include, and no reasons for refusal to consent are required to be provided by the prosecutor and/or informant. As such, elaboration on the definitions of "serious concerns" and "exceptional circumstances" would allow practitioners to understand the particular factors that contribute to the rejection of diversion, as supported by the inclusion of reasons for refusal to consent.

Recommendation 22: Diversion Criteria Matrices should be amended to better reflect the eligibility requirements specified in the *Criminal Procedure Act 2009* (Vic), including to define "serious concerns" and "exceptional circumstances".

(b) *Diversion and Young People*

2.18. The LIV acknowledges that when a person comes into contact with the criminal justice system, this should be viewed as a significant opportunity for intervention.[197] That is, diversion can meet a person's needs through therapeutic or social intervention and may ultimately address the criminogenic causes of a person's engagement in criminal behaviours.[198] In particular, drug and alcohol abuse and mental illness are major contributors to criminal offending.[199]

(i) Availability of Diversion

2.19. Members argue that diversions should not necessarily be a 'one-time' offering, especially for low-level offending, exceptional offending, offenders that have committed an offence for the first time, offenders where a conviction or finding of guilty would significantly impact a

[197] Law Institute of Victoria, *Submission to Inquiry into Homelessness in Victoria* (16 March 2020) 10 [3.3].
[198] Ibid [3.4].
[199] Ibid [3.3].

person's employment and for offenders that are unfairly criminalised or where the reasons for offending should be addressed by rehabilitative support.

(ii) Cautions and Reoffending

2.20. There is a significant link between cautions and reoffending. When young people are diverted away from the criminal justice system, including through the issuance of a caution by Victoria Police, they are less likely to reoffend when compared to those who were charged. This finding was confirmed in a recent study by the Crime Statistics Agency, where alleged offences over the period of 1 April 2015 and 31 March 2016 were considered.[200] The study explored the factors that impacted whether a young person received a caution and the proportion of alleged offenders who recorded an additional offence, within one year.[201]

2.21. Of 7,320 children aged between 10 and 17 years old, 81.6 per cent were cautioned, and 18.3 per cent received a different outcome, including a warning or infringement notice.[202] Accordingly, 5,981 children who were cautioned or charged were analysed, with 56.3 per cent receiving a caution and 43.7 per cent receiving a charge.[203] Of the children who were cautioned, 35.9 per cent reoffended, whereas 47.8 per cent of children who were charged reoffended.[204] The children who were initially cautioned also reoffended at a slower rate than those who were initially charged.[205]

2.22. With respect to the characteristics of the children analysed, at the time of the alleged offence, the average age was 15 years, with the majority of alleged offenders identifying as male and 6.9 per cent identifying as Aboriginal and/or Torres Strait Islander.[206] Significantly, Aboriginal or Torres Strait Islander children were 2.1 times more likely to be charged, and children born

[200] Kimberley Shirley, *The Cautious Approach: Police cautions and the impact on youth reoffending* (Crime Statistics Agency, In Brief No. 9) 5 https://files.crimestatistics.vic.gov.au/2021-07/20170925_in%20brief9%20FINAL.pdf?XnLr6YuPWq5u9cSqXejH9THWr3WoP7OG=>.
[201] Ibid 1, 5.
[202] Kimberley Shirley, *The Cautious Approach: Police cautions and the impact on youth reoffending* (Crime Statistics Agency, In Brief No. 9) 6 https://files.crimestatistics.vic.gov.au/2021-07/20170925_in%20brief9%20FINAL.pdf?XnLr6YuPWq5u9cSqXejH9THWr3WoP7OG=>.
[203] Ibid 7.
[204] Ibid 16.
[205] Ibid 17-9.
[206] Ibid 7.

overseas were 1.6 times more likely to be charged, when compared to non-Indigenous children or children born in Australia.[207] Further, children with five or more prior offences were 29.2 times more likely to be charged when compared to children who did not have any prior offences.[208] Additionally, the study found that 'the younger the offender is at their first offence and the younger the offender was at their index incident increased the likelihood of reoffending'.[209]

Recommendation 23: Expand use of cautions and the availability of diversions for children and young offenders, including by ensuring there are no limits to the number of diversions or cautions a person can receive.

(c) *Restorative Justice Diversion*

2.23. The LIV supports the implementation of a diversion model that facilitates a non-adversarial pathway to justice, pre-plea, for criminal offending. The LIV understands that restorative justice diversion would address the necessity for the criminal justice system to better respond to the needs of victims involved in criminal proceedings. The LIV recognises that the use of restorative justice processes is better suited to address offences against the person, particularly because it ensures that the complainant is validated, heard, and believed. Members note that a restorative justice diversion model could remain within the framework of section 59 of the *Criminal Procedure Act 2009* (Vic). The sentencing guidelines outlined in sub-section 5(1) of the *Sentencing Act 1991* (Vic) could be utilised to formulate the conditions of diversion, similar to the conditions for community correction orders.

[207] Ibid 13.
[208] Ibid.
[209] Ibid 20.

Case Study 11

Khem was sexually abused by her sibling when she was a child. Khem informed her parents about the abuse, but they failed to acknowledge and prevent continued harm.

Legal proceedings were brought when Khem was an adult; however, there were evidentiary issues associated with the prosecution case. Also, Khem struggled throughout preparations for the matter, due to her mental health issues that arose from the trauma.

The Office of Public Prosecution and counsel for the defendant discussed what could be offered to Khem, instead of subjecting her to a committal hearing, trial, and cross-examination. Specifically, the needs of each party were discussed and the main issue that was identified was the failure of Khem's family to validate her claims and assist her in seeking support. Khem did not want her sibling to be imprisoned.

After discussion with the Magistrate, Khem and the offender, the parties believed that a diversion hearing using restorative justice principles would best address the needs of each party. Ultimately, the hearing was conducted with Khem linked into a courtroom that was attended by her sibling and family. Khem's sibling accepted responsibility for the offending and provided an apology. Also, Khem's family were able to acknowledge their role in her trauma. The outcome of the hearing was significant for all parties involved.

2.24. Members agree that restorative justice diversion is the appropriate mechanism with which to increase the scope of matters deemed suitable for diversion. In particular, family violence offences, sexual offences, and offences related to theft from an employer could be addressed through diversion. The LIV specifically draws the LSIC's attention to the CIJ's *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* report,[210] which extensively details the utility in applying restorative justice approaches to sexual offences.

Recommendation 24: Explore the viability of a restorative justice diversion model, with a view to expanding the availability of diversion to certain offences, for example for family violence offences and sexual offences.

[210] Centre for Innovative Justice, *Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community* (Report, May 2014) <https://cij.org.au/cms/wp-content/uploads/2018/08/innovative-justice-responses-to-sexual-offending.pdf>.

(d) ***Form D – Application for Diversion Hearing on the Papers***

2.25. The LIV Diversion Working Group has noted that the inconsistency of the approval or rejection of diversion could be improved by modifying the existing 'Form D – Application for Diversion Hearing on the Papers'. Further, specifying material that practitioners should include or arguments that could be made, allows greater consistency in applications to be achieved. Members agree that if arguments or materials are consistent across applications, Victoria Police prosecutors or informants would be better informed of the factors that support the approval of diversion.

2.26. Members recommend that when approaching Victoria Police to seek a recommendation for diversion, a uniform approach be made by all practitioners. For example, a form which specifically addresses some of the sentencing considerations of the objective seriousness of the offending and prospects for rehabilitation would allow assessment of these factors to occur at an early stage. It is important that Victoria Police look more carefully at the offending conduct, rather than just have a "tick the box" approach to certain offences.

2.27. The LIV Diversion Working Group suggest the following form ought to be considered, to promote consistency in decisions:

APPLICATION FOR DIVERSION (FAMILY VIOLENCE)

Hearing details

In the Magistrates Court at:	
Court Reference:	
Informant:	
Accused:	
Date of listing:	

Legal Representative

Solicitor name:	
Firm:	

Phone:	
Email:	

S59 legislative requirements:

Acknowledges responsibility for the offence:	
Minimum or fixed penalty:	
Accused consent to Diversion:	
Prosecutors consent to Diversion (name/rank):	
If Prosecutor does not consent, provide reasons:	

Matters for consideration

Age of accused:	
Employment/Education:	
Criminal history:	
Previous Diversion: If yes, give details	
Co-accused:	
Current intervention order: ** where applicable*	
Relationship with complainant: ** where applicable*	
Seriousness of offending:	• *Eg: Low level technical breach of IVO, no violence or threats* • *Driving suspended, no aggravation to driving, no drugs or alcohol.* • *Careless driving: no drugs or alcohol. No injuries, minor property damage only.* • *Theft: impulsive and unplanned. Need vs greed*
Efforts towards rehabilitation:	
Prospects of rehabilitation:	

Reparation already made to victim	• *Eg: Insurance claim, property returned*

Proposed conditions on Diversion Plan

Letter of apology	
Donation	
Offence specific course	
Private therapy	

Attachments:

References	
Doctors	
Counselling	
Courses:	

Recommendation 25: Amend 'Form D – Application for Diversion Hearing on the Papers' of the *Magistrates' Court Practice Direction No. 9 of 2020* to specify material particulars or arguments that could be included in the application.

2.28. Members further recommend that an additional form which also requests from Victoria Police the reason for the refusal would ensure greater accountability from prosecutors. Specifically, this may assist in having prosecutors think more critically about their reasons for refusal and would allow practitioners to escalate matters to the officer in command, where appropriate.

Recommendation 26: Insert a provision in the *Criminal Procedure Act 2009* (Vic) which allows practitioners to request reasons for refusal of diversion from Victoria Police.

(e) *Criminal Procedure Act 2009* (Vic)

2.29. The LIV Diversion Working Group has identified two key issues with the *Criminal Procedure Act 2009* (Vic) that should be amended.

(i) Prosecutorial Consent

2.30. The LIV upholds our previous position to remove prosecutorial consent in section 59(2)(c) of the *Criminal Procedure Act 2009* (Vic). Members recognise that the requirement for prosecutorial consent places Victoria Police in a quasi-judicial position by usurping the role of the court in preventing the magistrate from considering the viability of diversion. The LIV submits that it is inappropriate for the option of diversion to be conditioned on the consent of the prosecution, and it should instead be a matter for the magistrate to decide whether diversion is appropriate, with the submissions of the parties. The LIV supports the ability for the magistrate to take into account the recommendation of the prosecutor and/or the informant, which can occur administratively or remotely, if necessary. If this is implemented, the LIV suggests also including a right of reply for the accused.

2.31. While the LIV urges the removal of prosecutorial consent as a priority, the LIV proposes an alternative short-term solution associated with clarification of the escalation process. That is, members have noted that the escalation process, when a dispute as to eligibility arises, is largely unclear. In particular, there is a lack of clarity surrounding how to escalate matters, with the current experience reflecting that the process moves from informant, Sergeant, and then to Senior Sergeant. Further, the members have noted instances where a Notice of Diversion has been received from a member of Victoria Police, only to be vetoed at Court by the prosecution.

2.32. The LIV Diversion Working Group has identified the need for a clear written protocol which outlines who practitioners approach about diversion, in the first instance, and who the matter is escalated to, in the event of disagreement. This protocol should ensure that practitioners are able to negotiate the summary with the prosecution, for example if an objective assessment of the evidence does not support the charge. Further, the protocol should operate similar to a sentence indication process, where in the event of a disagreement, the Magistrate will be consulted, and if the Court indicates that diversion would be granted, the prosecution would agree to file the Notice of Diversion. Not only would this protocol clearly outline an escalation process, but it would prohibit the veto of diversion.

Recommendation 27: Remove the requirement for prosecutorial consent in section 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) and replace this section with a requirement for the Magistrate to consider the recommendation of the prosecutor and/or the informant, and a right to reply for the accused.

Recommendation 28: In the alternative to Recommendation 27, implement a written protocol stipulating the steps to take to escalate a matter in the event of disagreement where a diversion is refused.

(ii) Acknowledgement of Responsibility

2.33. Sub-section 59(2)(a) of the *Criminal Procedure Act 2009* (Vic) specifies that a requirement to participate in diversion includes that 'the accused acknowledges to the Magistrates' Court responsibility for the offence'. The *Criminal Procedure Act 2009* (Vic) draws a clear distinction between acknowledging responsibility for the offence, and a plea of guilty to the elements of the offence. In particular, section 59(3) of the *Criminal Procedure Act 2009* (Vic) provides that an accused's acknowledgment to the Magistrates' Court of responsibility for an offence is inadmissible as evidence in a proceeding for that offence and does not constitute a plea.[211] Further, an accused person may wish to exercise their right to defend a charge in the event diversion is refused.

2.34. The LIV is concerned with members reporting instances whereby Victoria Police has precluded an accused's participation in the diversion program where the accused has exercised their right to silence during a police interview, with the argument being that the exercise of that right indicates an absence of remorse. Members have further outlined that this "no comment conundrum" could be resolved through clarification of sub-section 59(2)(a) of the *Criminal Procedure Act 2009* (Vic), in order to preserve the right to silence and the right to defend the charge, if diversion is refused.

Recommendation 29: Clarify the extent of the acknowledgement of responsibility by the accused under-section 59(2)(a) of the *Criminal Procedure Act 2009* (Vic) to preclude the

[211] *Criminal Procedure Act 2009* (Vic) s 59(3).

exercise of the right to silence from being interpreted as an absence of remorse and a basis to refuse access to a diversion program.

Specialist Courts and Programs

2.35. In Victoria, there are several specialist courts that hear and determine matters involving specific groups of vulnerable people. These courts include the Children's Court, the Koori Court and several lists and program, such as the Drug Court, Assessment and Referral Court List ('**ARC List**') and the Neighbourhood Justice Centre ('**NJC**').[212] The LIV recognises that the therapeutic justice programs included in these services provide essential support to Victoria's most vulnerable and marginalised communities. Further, therapeutic jurisprudence is a practical method that can be used to improve the outcomes connected with participant wellbeing and offender rehabilitation, particularly because the issues underlying the causes for offending are addressed. The LIV also considers that there are a variety of additional specialised courts that should be considered to better respond to certain offences, such as a Homeless Court.

Recommendation 30: Expand specialist courts and associated therapeutic justice interventions and programs to ensure greater availability and access.

(a) ***Koori Court***

2.36. The Koori Court is available to Aboriginal or Torres Strait Islander people who have been charged with a criminal offence. The Koori Court involves a variety of parties that sit around the bar table.[213] Among others, these parties significantly include Aboriginal Elders, a Koori court officer, and the family of the offender.[214] The LIV emphasises that the Koori Court was developed and led by Aboriginal and Torres Strait Islander people to be 'more engaging,

[212] Magistrates' Court of Victoria, *Submission to the Royal Commission into Victoria's Mental Health System* (Submission, July 2019) 14.
[213] Magistrates' Court of Victoria, *Koori Court* (Web Page) <https://www.mcv.vic.gov.au/about/koori-court>.
[214] Ibid.

inclusive and less intimidating' than the mainstream court system.[215] As such, the LIV maintains our previous position that courts for Aboriginal and Torres Strait Islander people must continue to be developed and implemented. In particular, the LIV supports the recommendation of the Australian Law Reform Commission that specialist Aboriginal and Torres Strait Islander sentencing courts be developed.[216]

Recommendation 31: Expand the Koori Court locations and consider the development of a new specialist sentencing court for Aboriginal and Torres Strait Islander people.

(b) ***Drug Court***

2.37. The Drug Court assists offenders who have a drug and/or alcohol dependency by issuing a Drug and Alcohol Treatment Order ('**DATO**'). The DATO focuses on treating and rehabilitating offenders, including by attending educational programs or medical and psychological assessments.[217] The Drug Court currently operates at the Magistrates' Court and has recently been expanded to the County Court. Significantly, a 2014 review found that the DATOs issued by the Drug Court are not only cheaper than imprisonment, resulting in a 50-million-dollar saving in prison costs for Corrections Victoria, but they produce a 29 per cent reduction in recidivism over two years.[218]

2.38. The LIV also recognises that the range of therapeutic treatment approaches offered by the Drug Court are an essential support to offenders that struggle with drug and/or alcohol addiction. This support differs greatly from the punitive measures that are imposed in the traditional criminal justice system. This sentiment was also recognised in *Makrogiannis v Magistrates' Court of Victoria & Anor*,[219] where Justice Incerti noted that:

[215] County Court of Victoria and the Department of Justice, County Koori Court: Final Evaluation Report (2011) 49; Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017) 24.
[216] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017) 24.
[217] See for example, Magistrates' Court of Victoria, *Drug Court* (Web Page) <https://www.mcv.vic.gov.au/about_us/drug-court>.
[218] KPMG Government Advisory Services, Evaluation of the Drug Court of Victoria: Final Report – Magistrates' Court of Victoria (18 December 2014) 3.
[219] [2021] VSC 190.

> *[t]he juridical treatment of drug addiction has traditionally adopted a punitive and carceral approach… with the original decision to begin drug use viewed as voluntary and no mitigation attaching to the person's moral culpability for the crime. Yet this somewhat myopic attitude to the free will of offenders experiencing drug addiction fails to appreciate that addiction is frequently the product of a complex interplay of economic disadvantage, familial dysfunction, poor or missed educational opportunities, sexual or other forms of abuse, and other social or psychological issues*.[220]

2.39. The current court system is ill-equipped to adequately support offenders who have committed offences that have arisen out of a drug and/or alcohol dependency. The LIV considers that there is a need for less adversarial and more therapeutic approaches to justice, that of which can be achieved through expanding services like the Drug Court. For instance, the LIV considers that imposing sanctions with supports are a method that could be expanded to apply in mainstream sentencing. Increase the opportunities for early intervention is essential before the behaviour becomes more problematic and the nature of offending increases in severity.

(c) *Assessment and Referral Court List*

2.40. The ARC List specifically aims to assist people who have a mental illness and/or a cognitive impairment, including an intellectual disability or an acquired brain injury.[221] It also ensures eligible people receive a variety of support, such as psychological, welfare, drug or alcohol treatment, and housing services.[222] The LIV also considers that the ARC List is an effective mechanism to assist people who have a mental illness and/or cognitive impairment to manage their offending behaviours. Currently, the ARC List is only available at the Magistrates' Court in the Frankston, Latrobe Valley, Melbourne, Moorabbin, and Korumburra locations.[223] Accordingly, the LIV recommends that the ARC List is expanded to all suburban and regional courts. This would not only increase access to eligible people, but it would streamline more matters through the ARC List.

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[220] [2021] VSC 190 6 (emphasis added).
[221] Magistrates' Court of Victoria, *Assessment and Referral Court (ARC)* (Web Page) <https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc>.
[222] Ibid.
[223] Ibid.

Recommendation 32: Expand the Assessment and Referral Court List to all suburban and regional courts.

(d) *Neighbourhood Justice Centre*

2.41. The NJC supports offenders prior to or after their sentence by offering therapeutic and restorative justice approaches, consisting of a: 'multi-jurisdictional court, community lawyers, police prosecutors, a Community Correctional Services team, a broad range of treatment and support services, and specialist teas focused on crime prevention, justice innovation and education'.[224] Significantly, the Australian Institute of Criminology found that between May 2009 and March 2011, the recidivism rate for 187 clients that received support from the NJC was 25 per cent lower than offenders who received no therapeutic intervention because their matter was addressing in the Magistrates' Court.[225]

Pre-Offending Support

2.42. It is crucial for offenders, or people who have been identified as likely to offend, to have the opportunity to engage in support programs that prevent re-offending. The LIV considers that early intervention programs must be prioritised as an important service to treat the underlying behaviours of the offence and reduce the likelihood of reoffending.

2.43. The LIV reiterates our previous discussion relating to initiatives associated with the management of sex offenders. In particular, the CEM-COPE Pilot Program ('**Program**') aims to assist individuals to understand their risk where they have a history of accessing,

[224] Magistrates' Court of Victoria, *Submission to the Royal Commission into Victoria's Mental Health System* (Submission, July 2019) 14 <http://rcvmhs.archive.royalcommission.vic.gov.au/Magistrates_Court_of_Victoria.pdf#:~:text=The%20Assessment%20and%20Referral%20Court%20%28ARC%29%20List%20is,Latrobe%20Valley%2C%20Korumburra%20and%20Wonthaggi%29%20%28see%20Appendix%201%29>.
[225] Ibid 20.

possessing, and distributing child exploitation material.[226] In focusing on the behaviours of offenders who have engaged in image-based offences only, the Program teaches offenders to manage their emotions and fantasies, and ultimately ensures that the offending does not continue or progress.[227]

2.44. The LIV also emphasises the availability of programs that are aimed at addressing the problematic behaviours of young offenders. Within the context of sexual offences, the LIV notes the Refocus Program, which utilises cognitive behavioural therapy and family therapy to address problematic sexual behaviours or sexually abusive behaviours in children under 15 years old.[228]

2.45. Additionally, the LIV recognises that the eligibility for Therapeutic Treatment Orders ('**TTOs**') could be expanded from children who exhibit sexually abusive behaviours to children who exhibit violent or abusive behaviours also.[229] Currently, TTOs are only available to children aged between 10 years old and 18 years old where 'the child has exhibited sexually abusive behaviours'[230]. The LIV considers that a larger group of children are more likely to exhibit more violent repeated offending, often where their circumstances involve poverty, educational disengagement, or neurodevelopmental and learning difficulties, as occurring alongside mental health issues or exposure to family violence.[231]. The expansion of TTOs to strengthen early intervention opportunities for young offenders is also supported by Family and Relationship Services Australia, who recommend that sustainable and responsive government investment occur in relation to the delivery of TTOs.[232]

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[226] Marie Henshaw et al, Enhancing evidence-based treatment of child sexual abuse material offenders: The development of the CEM-COPE Program (Australian Institute of Criminology Report No 607, October 2020) 1, 8.
[227] Ibid.
[228] Alissar El-Murr, Problem sexual behaviours and sexually abusive behaviours in Australian children and young people: A review of available literature (Child Family Community Australia Paper No 46, 2017) 3, 10.
[229] Letter to Dr Tim Read Children, Youth and Families (Raise the Age) Amendment Bill 2021 (Vic) pg 4
[230] *Children, Youth and Families Act 2005* (Vic) s 248(1)(a).
[231] Susan Baidawi,Rosemany Sheehan,'Cross-over kids: Effective responses to children and young people in the youth justice and statutory Child Protection systems' (December 2019) *Australian Institute of Criminology* 11 <https://researchmgt.monash.edu/ws/portalfiles/portal/296794514/291875254_oa.pdf>.
[232] John W Toumbourou et al, 'Strengthening prevention and early intervention services for families into the future', *Deakin University and Family & Relationship Services Australia* (2017) 25 <http://frsa.org.au/wp-content/uploads/2018/01/FRSA-Research-Report-Printable.pdf>.

Recommendation 33: Expand the availability of Therapeutic Treatment Orders from children who exhibit sexually abusive behaviours to children who exhibit violent or abusive behaviours.

Post-Prison Services

2.46. The reduction of reoffending is closely linked to the availability of transitional support for prisoners in Victoria. The LIV reiterates the concerns raised by the AIHW, who indicate that leaving prison is a highly stressful period for individuals in the prison system, with the most common causes of distress for prisoners discharged in 2018 being: upcoming release, family or relationships in the community, issues surrounding alcohol and drugs, current imprisonment, physical health issues, mental health issues and relationships in prison.[233] The LIV considers that the main difficulties prisoners face when being released from prison includes access to secure housing and the continuance of treatment for mental illness. Accordingly, the LIV submits that the process for preparing a prisoner for release should commence well ahead of their release date, particularly to ensure that secure and appropriate housing is obtained, along with any necessary health arrangements.

(a) Housing Assistance

2.47. The AIHW found that people entering prison were 66 times more likely to be homeless or living in unstable housing than the general community.[234] Additionally, in 2017-18, 54 per cent of discharged prisoners were expected to be homeless upon release, either because the discharged prisoners did not know where they would stay, would sleep rough, or intended to sleep in emergency or short-term accommodation.[235] Specifically, 52 per cent of

[233] Australian Institute of Health and Welfare, *The health of Australia's prisoners* (Report, 2019) 34, 37 <https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true>.
[234] Ibid 22.
[235] Ibid 24.

Indigenous people, and 50 per cent of all young people aged 18 years old to 24 years old, were expected to sleep in emergency or short-term accommodation.[236]

2.48. The recent report from the Australian Housing and Urban Research Institute entitled *Exiting prison with complex support needs: the role of housing assistance* assessed the impact of housing support on released prisoners across Australia.[237] The report discussed the housing assistance that was available in Victoria, including public housing, priority housing, and the post-release services provided by Corrections Victoria.[238] Currently, the Corrections Victoria Reintegration Pathway provides a variety of pre- and post-release services. The post-release services include the ReConnect program and the ReStart program.[239] These programs assist prisoners that are assessed as requiring significant support to transition into the community, including where they have served a short sentence.[240] The 'ReConnect [program] can also grant access to the Corrections Victoria Housing Program, which provides transitional accommodation managed by community housing providers'.[241] The report also noted that the Forensic Disability Program offered limited support and accommodation for people who have a cognitive impairment, the Victorian Aboriginal Legal Service was working with Aboriginal Housing Victoria to provide post-release casework support and residential facilities, and G4S and Jesuit Social Services were working to reform the Maribyrnong detention centre into a residential facility to primarily house men who have been released from custody with no fixed address.[242] The LIV also notes that Justice Connect operates a specialist Closing the Revolving Door Prison Project, which aims to provide people in prison with legal support to increase access to housing upon release from prison.

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[236] Ibid.

[237] Australian Housing and Urban Research Institute, *Exiting prison with complex support needs: the role of housing assistance* (Final Report No. 361, August 2021) <https://www.ahuri.edu.au/__data/assets/pdf_file/0029/68636/AHURI-Final-Report-361-Exiting-prison-with-complex-support-needs-the-role-of-housing-assistance.pdf>.

[238] Ibid 29-30, 32.

[239] Corrections Victoria, *Transitional programs* (Web Page) <https://www.corrections.vic.gov.au/release/transitional-programs>.

[240] Ibid.

[241] Australian Housing and Urban Research Institute, *Exiting prison with complex support needs: the role of housing assistance* (Final Report No. 361, August 2021) 32 <https://www.ahuri.edu.au/__data/assets/pdf_file/0029/68636/AHURI-Final-Report-361-Exiting-prison-with-complex-support-needs-the-role-of-housing-assistance.pdf>.

[242] Ibid 33.

2.49. Despite these accommodation options post-release, the report outlined that on average, released prisoners can wait up to one year for priority housing, given the limited amount of available housing placements.[243] The report noted that there were 47 properties available through the Corrections Victoria Housing Program in 2015, with seven community housing properties also available. This meant that approximately 1.7 per cent of released prisoners could access these services,[244] a number that is in stark contrast to the estimated 40 per cent of discharged prisoners in 2015 that did not know where they would sleep, or intended to sleep rough or in short-term or emergency accommodation.[245]

2.50. Significantly, the Australian Housing and Urban Research Institute also found that access to public housing for ex-prisoners significantly reduced reoffending. In particular:

- *Police incidents: down 8.9 per cent per year.*
- *Court appearances: down 7.6 per cent per year.*
- *Proven offences: down 7.6 per cent per year.*
- *Time in custody: down 11.2 per cent per year.*
- *Time on supervised orders: following an initial increase, down 7.8 per cent per year.*
- *Justice costs: an initial decrease of $4,996, followed by a further $2,040 per year…*

2.51. The LIV also reiterates our previous comments regarding the link between securing parole and insecure housing. In 2019-20, the Adult Parole Board granted parole in 913 cases and denied parole in 487 cases.[246] Significantly, in the 63 per cent of cases that were denied, the absence of suitable accommodation was a factor considered by the Adult Parole Board.[247] This high percentage occurred irrespective of the Adult Parole Board's comments that

> *[i]f a prisoner is suitable for parole but has been unable to propose any accommodation or has proposed unsuitable accommodation, the Board will ordinarily request a further report to allow more*

[243] Ibid 29-32.
[244] Ibid 32.
[245] Ibid 30.
[246] Adult Parole Board of Victoria, *Annual Report 2019-20* (Report, September 2020) 24 <https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf>.
[247] Ibid 25.

time for the prisoner and CCS [Community Correctional Services] to continue to explore accommodation options.[248]

The Adult Parole Board also recognised that of the 13 per cent of prisoners who withdrew their application for parole, one of the most common cited reasons was the absence of suitable accommodation.[249] It is clear that secure accommodation also reduces the number of offenders in prison.

(b) Mental Illness Assistance

2.52. It is well established that mental illness is a significant factor that contributes to an individual's offending.[250] In 2018, 40 per cent of people entering prison and 37 per cent of people discharged from prison indicated that they were diagnosed with a mental health condition, including drug and/or alcohol use disorders.[251] Additionally, of the offenders on remand at Parkville and Malmsbury Youth Justice precincts in 2018-19, 48 per cent of detainees had mental health issues, that proportion increasing to 68 per cent in 2019-20.[252]

2.53. The LIV considers that the transition from prison to the community for people with mental illness is particularly difficult. There is minimal oversight to ensure that the referrals that are made for prisoners to continue the treatment they received whilst in prison continue when they are released. The lack of oversight is especially problematic for prisoners that are released on Community Based Orders which require supervision and treatment.

2.54. The LIV recommends that when prisoners are released into the community, they are paired with a case worker that understands the prisoner's unique circumstances and needs. This expanded process would ensure that the released prisoner is better connected with the support services that will not only continue to assist the prisoner but reduce the occurrence of reoffending. This process is integral to ensuring released prisoners who have been

[248] Ibid 24-5 (emphasis added).
[249] Ibid 25.
[250] Law Institute of Victoria, *Submission to the Royal Commission into Victoria's Mental Health System* (20 My 2019) 7.
[251] Australian Institute of Health and Welfare, *The health of Australia's prisoners* (Report, 2019), 28 <https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true>.
[252] Youth Parole Board, *Annual Report 2019-20* (Annual Report, September 2020), 29 <https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf>.

supported through treatment and rehabilitation programs for mental illness, whist in prison, continue to get the assistance they require out in the community.

Recommendation 34: Improve engagement with mental illness support services post-release, by pairing a prisoner with a case worker to connect them with support services, treatment and rehabilitation programs.

3. Sentencing Knowledge and Expertise

3.1. It is imperative that judges and magistrates are equipped with the appropriate knowledge and expertise when sentencing and dealing with offenders from a variety of different backgrounds and circumstances. Promoting greater understanding the factors that may contribute to offending and the causes of crime, such as how the criminogenic cycle can be maintained, would only serve to improve the sentencing exercise.

Training

3.2. The LIV considers that the expertise of judges and magistrates in dealing with offenders and in sentencing can be improved by increasing opportunities and requirements for training, including in relation to cultural competency and trauma informed practices.

(a) Cultural Competency

3.3. People from culturally and linguistically diverse backgrounds face unique challenges in the criminal justice system as a result of social and structural inequities. The LIV understands that there is limited data about the cultural diversity of prisoners in Victoria. Significantly, data about prisoners is only predominantly collected with respect to country of birth. As of 30 June 2019, there were 6,409 prisoners born in Oceania, 390 prisoners born in Europe, 436 born in Africa or the Middle East, 747 in Asia, 21 in the United States or Canada, and 99 born in other locations.[253] Further, according to the Sentencing Advisory Council, in 2017-18, 42 per cent of children on remand were from culturally or linguistically diverse backgrounds, being Sudanese (12 per cent) or New Zealand, Māori and Pasifika (12 per cent).[254]

3.4. Additionally, at 30 June 2020, there were 722 Aboriginal and Torres Strait Islander people in Victoria in prison, out of a total of 7,149 people.[255] Between 2019-20, the rate of Aboriginal and Torres Strait Islander children aged 10 to 17 years in detention was approximately eight

[253] Corrections Victoria, *Annual Prisoner Statistical Profile 2009-10 to 2019-20* (Web Page, December 2020) <https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20>.
[254] Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) ix <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children_Held_on_Remand_in_Victoria.pdf>.
[255] Australian Bureau of Statistics 'Prisoners in Australia' (Webpage, 2020) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

times the rate per 10,000 for non-Aboriginal and Torres Strait Islander young people.[256] Further, on an average night in the June quarter of 2020, the rate of Aboriginal and Torres Strait Islander Children in detention was 12 per 10,000.[257]

3.5. Due to the great variety in the cultural backgrounds of remandees and prisoners, and others coming into contact with the criminal justice system, the LIV considers that increased training in cultural competency would be effective. Promoting cultural competency beyond cultural awareness in training in the Koori Court,[258] benefit judicial officers in enabling them to better inform themselves of the circumstances relevant to the offender (and the victim) for the purposes of sentencing, as well as facilitating respectful and informed interactions with parties in the court environment. Judicial Indigenous Cross-Cultural training programs could be improved through immersive and interactive cross-cultural education, such as seminars, conferences, cultural immersion tours, site and community visits.[259]

(b) Trauma Informed Practices

3.6. The LIV considers that a significant proportion of people who encounter the criminal justice system have come from situations of abuse and trauma. These individuals also often have other issues with mental health and drug and/or alcohol dependency, all of which contribute to the circumstances of offending. The LIV recognises that judges, magistrates, and judicial officers could benefit from training in trauma informed practices, particularly to understand the complex situation that many offenders are subject to and how this can be considered when sentencing and engaging with the offender.

[256] Sentencing Advisory Council, 'Indigenous Young People in Detention' (Web Page) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/indigenous-young-people-in-detention>.
[257] Australian Institute of Health and Welfare, *Youth detention population in Australia 2020* (Report, 2021) 17 <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2020/contents/summary>.
[258] Vanessa I Cavanagh and Elena Marchetti, 'Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?' (2016) *Faculty of Social Sciences – Papers* 3683 54 <https://ro.uow.edu.au/sspapers/3683>.
[259] Ibid 57.

Recommendation 35: Expand the availability of cultural competency and trauma informed training of judicial officers.

Judge-Alone Trials

3.7. The *Omnibus (Emergency Measures) Act 2020* (Vic) was implemented to temporarily modify a variety of legislation in response to the COVID-19 pandemic. A significant amendment was the insertion of Chapter 9 of the *Criminal Procedure Act 2009* (Vic), which allowed the court to order indictable criminal matters be tried by the trial judge alone, without a jury, in certain circumstances.[260]

3.8. The LIV reiterates our previous position with respect to the continuance of judge-alone trials in certain instances, on an opt-in basis, to help address backlog in the courts. In particular, the LIV recognises that judge-alone trials would help reduce trial times and costs, and improve transparency, due to the requirement of judges to provide written reasons for their decisions. The LIV further supports this position through the comments of Chief Judge Kidd in *DPP v Combo*,[261] whereby in considering whether it was in the interests of justice to order the matter occurs by trial judge alone, His Honour commented:

> [50] Generally, the mode of trial – trial by jury or trial by judge alone – has been treated as a neutral consideration. That is, neither trial by jury nor trial by judge alone is to be preferred over the other, with each mode of trial having its own advantages and disadvantages, and strengths and weaknesses.
>
> [51] Juries have the strength of unanimity of decision, arrived at by a process of collective discussion and refinement of thinking. In a democratic society, the jury is a representative body of 12 randomly selected members of the community – bringing the community into the criminal justice system and giving its decisions legitimacy.
>
> [52] On the other hand, unlike juries, decisions by judges are utterly transparent, with full written reasons given. Judges are trained to bring an objective and dispassionate mind to frequently emotional subject matter, putting aside any prejudice.
>
> [53] I detect nothing in the Victorian legislation which would suggest that one mode of trial *per se* is to be preferred over the other. In this sense, it is generally a neutral consideration. As

[260] *Criminal Procedure Act 2009* (Vic) s 420D.
[261] [2020] VCC 726.

> I am about to explain, in this COVID-19 environment, one cannot consider the mode of trial in isolation from the issue of timing.

Recommendation 36: Review the operation and effectiveness of judge-alone trials and consider its utility as a permanent hybrid measure on an opt-in basis and with the agreement of both parties.

CONCLUSION

The LIV is grateful for the opportunity to provide this submission to the LSIC's Inquiry into Victoria's Criminal Justice System. Should you wish to discuss any aspect of this submission further, please do not hesitate to contact Criminal Law Section Policy Officer, Andy Kuoch, or Paralegal, Emma Genovese, [redacted]

Yours sincerely

Tania Wolff
President
Law Institute of Victoria