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Ms Fiona Patten, MLC  
Chair  
Legal and Social Issues Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Ms Patten

### **Inquiry into Victoria's Criminal Justice System**

Thank you for your recent letter inviting the Council to make a submission to the Committee's Inquiry into Victoria's Criminal Justice System.

As you may know, one of the Council's statutory functions is to conduct research on sentencing matters. A number of the Council's recent reports are relevant to the Committee's terms of reference and may assist you in preparing your report to Parliament.

#### **Terms of Reference 1 & 2:**

- **factors influencing Victoria's growing remand and prison population; and**
- **strategies to reduce rates of criminal recidivism**

It is possible to look at the Council's research through several different lenses. For the purposes of this submission, I have grouped the Council's research applicable to these two terms of reference into three categories: children and young people, young adult offenders and adult offenders.

#### **Children and Young People**

Research shows that a child's early involvement in the criminal justice system predicts ongoing involvement in crime. If we can effectively address their trauma, we can help avoid a lifetime of damage to children, their families and the community.

The Council's 2020 report ***Children Held on Remand In Victoria: A report on Sentencing Outcomes*** examined case outcomes for children held on remand and found that in the eight years to June 2019, the number of children more than doubled from 42 to 90. Remanded children made up nearly half of all children in detention in Victoria, compared to 22% in 2012. The increase in remanded children far exceeded any increase in the number of sentenced children in detention.

Among the report's findings are:

- two-thirds of the 442 remanded children (66%) did not receive a custodial sentence – 58% of outcomes were community orders and another 8% were other outcomes such as court-ordered diversion or all charges being dismissed
- the remaining 34% of remanded children received a custodial sentence – 29% required the child to spend more time in detention after they were sentenced, while 5% were 'time served' sentences
- despite this, remanded children were five times more likely to receive a custodial sentence than all children whose case was finalised in the Children's Court in 2017–

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- the vast majority of remanded children (89%) were male, but remanded female children tended to be younger – 30% of remanded female children were aged 14 and under compared with 15% of male children
- Aboriginal and Torres Strait Islander children were significantly over-represented, comprising 15% of remanded children
- children from culturally and linguistically diverse communities were also over-represented, comprising 43% of remanded children.

The report suggests possible strategies to reduce the risk of children entering remand, including:

- establishing a fully resourced, Victoria-wide, 24-hour bail system specifically for children
- expanding the specialised Children's Court to headquarter courts across Victoria
- continuing to ensure that specialist services and programs are designed both with and for Aboriginal and Torres Strait Islander children.

The Council has also published a series of reports on 'crossover kids'. These are children sentenced or diverted in the Children's Court of Victoria who are also known to the Child Protection Service. The Council's research found that children known to child protection are over-represented among sentenced and diverted children. The Council's third report in this series, ***Crossover Kids: Vulnerable Children in the Youth Justice System – Sentencing Children Who Have Experienced Trauma***, canvasses potential reforms to address these issues, including:

- amending legislation to clearly outline the relevance of factors such as childhood trauma and out-of-home care to sentencing children
- funding the expansion of the specialised Children's Court throughout regional Victoria
- introducing a 'crossover list' in the Children's Court to enable a more holistic approach to children with dual youth justice and child protection involvements
- introducing pre-trial youth justice family group conferencing to intervene early and address the causes of children's offending
- making information about a child's protection history readily available to sentencing courts
- empowering courts to order child protection workers to attend court in criminal matters where the Department of Health and Human Services (now the Department of Families, Fairness and Housing) has parental responsibility for a child
- ensuring that culturally appropriate specialist services are available for Aboriginal and Torres Strait Islander children and their families, including in regional and remote areas of Victoria.

The Council's 2016 report, ***Reoffending by Children and Young People*** examines prior offending and reoffending by the 5,385 young people sentenced in the Children's Court in 2008–09. The 5,385 young offenders were sentenced for 97,482 charges over the 11-year study period (from 1 July 2004 to 30 June 2015).

One of the key findings of this report is that the younger a child is at their first sentence, the more likely they are to reoffend (with any offence), to reoffend violently, to continue offending into the adult criminal jurisdiction, and to be imprisoned in an adult prison before their 22nd birthday. The six-year reoffending rate of offenders who were first sentenced at 10–12 years old (86%) was more than double that of those who were first sentenced at 19–20 years old (33%).

The report also found that:

- since 2008–09, there had been a steady decline in the number of young people sentenced in the Children's Court (and that trend has continued into 2019-20);
- 61% of the study group reoffended within six years of their 2008–09 sentence. This compares with the 40% six-year reoffending rate for the general criminal population (identified in ***Reoffending Following Sentence in Victoria: A Statistical Overview – see below***).
- prior offending predicts reoffending. While approximately half (51%) of offenders with no prior convictions reoffended, the reoffending rate was 72% for offenders with one prior sentence and progressively increased to 90% of offenders with five or more prior sentences.
- offenders sentenced for only transit (public transport) offences had much lower reoffending rates (30%) than those sentenced for other types of offences (69%).

- the two most common types of reoffending were road safety offences (36% of offenders reoffended at least once with this offence type) and offences against the person, such as assault (34%).
- 77% of young people in the study group were male. Differences in offending associated with age and gender included:
  - male offenders were more likely than female offenders to reoffend (67% compared with 39%).
  - for both males and females, the younger an offender was at their first sentence in the study period, the more likely they were to reoffend after their 2008–09 sentence. The difference between younger and older offenders was more dramatic for female offenders, with females who were first sentenced at age 10–12 being four times more likely to reoffend after their 2008–09 sentence than those first sentenced at 19–20.
  - reoffending varied depending on both age and gender. For example, the reoffending rate was 86% for males aged 10–14 at their first sentence. In contrast, less than 20% of females aged 18–20 when they first entered the criminal court system reoffended.
- 115 of the 5,385 children and young people in the study group were sentenced to a youth attendance order or a youth justice centre order, which are the two most serious options available to the Children's Court for 15–20 year old offenders (at the time the report was published). Of these 115 offenders, 83% reoffended, 79% continued into the adult criminal jurisdiction, and 53% were sentenced to a term of immediate adult imprisonment within the six years following their 2008–09 sentence.

Most children and young people do not commit offences. But the Council's research also shows that once children are in the youth justice system their reoffending rates are high.

We know that the relatively few children who start offending early are likely to have suffered trauma, abuse, or neglect. Many have witnessed family violence in their homes or have been victims of violent crimes themselves. The youth justice system recognises this, and the sentencing of children and young people is also informed by the knowledge that young people are still developing and learning to control their impulses and emotions.

This study suggests that sentencing alone cannot address the root causes of offending by young people. The best way to protect the community is to invest in measures that prevent or interrupt the criminal pathways of children who would otherwise go on to commit a disproportionately high volume of youth crime. Measures such as enhanced early intervention and resources to rehabilitate young offenders are the best way to steer at-risk children away from a life of crime and protect the community in the long term.

### Young Adult Offenders

Moving from children and young people to young adult offenders, the Council's 2019 report, *Rethinking Sentencing for Young Adult Offenders*, reviewed the scientific evidence and current law on sentencing young adults (aged 18 to 25 inclusive) in Victoria.

Young adult offenders are over-represented in Victoria's criminal justice system. They make up 15% of Victoria's adult population but constituted 22% of sentenced offenders in Victoria's courts in the five years to 30 June 2018. Offenders in this age group have relatively low compliance and completion rates on community sentencing orders, and they also reoffend at higher rates than older offenders.

The report reviews research demonstrating that young adults are still maturing. They can have an impaired understanding of consequences, be impulsive, have a disproportionate response to emotional arousal and be prone to peer pressure, all of which can contribute to offending. But the research also shows that, if managed well, many young adult offenders will grow out of this behaviour.

The report canvasses some new options for dealing with young adult offenders, including:

- adapting community-based sentencing options for adult offenders, for example, by tailoring community correction orders to allow for a specialised approach to young adult offenders
- expanding Victoria's dual track sentencing system and the availability of youth justice centre orders for offenders aged 21 to 25
- introducing specialist courts or court lists to facilitate the provision of services, and to assist young adult offenders to understand and engage with court processes, orders and programs.

## Adult Offenders

The Council's 2020 report, *Time Served Prison Sentences*, found that Victoria's remand population is driving the increase in prison sentences. The report examined the increase in Victorian courts' use of time served prison sentenced over the previous seven years. Key findings included:

- Between 2011–12 and 2017–18, the number of time served prison sentences imposed by Victorian courts each year rose 643%, from 246 to 1,828. They now account for 20% of all prison sentences imposed, whereas previously it was 5%.
- Just over half of all time served prison sentences were combined with a CCO, with the CCO taking effect upon the person's release.
- 96% of time served prison sentences were less than six months in length.
- Almost all time served prison sentences (95%) were imposed in the Magistrates' Court, while 5% were imposed in the County and Supreme Courts.
- Time served prison sentences accounted for 39% of the increase in prison sentences imposed in Victoria in the five financial years to 30 June 2018. There were 3,500 additional prison sentences imposed in 2017–18 than in 2013–14. Nearly 1,400 of those were time served prison sentences. This strongly suggests that Victoria's increasing remand population is causing courts to impose prison sentences more often, without actually requiring people to spend more time in prison.

The report flags important criminal justice policy implications arising from this increase in time served prison sentences, including:

- the limited opportunities for someone sentenced to a time served prison sentence to make transitional arrangements for their release (e.g. housing, employment, transport);
- the limited opportunities for the criminal justice system to provide targeted programs addressing offending behaviour to someone held on remand, given that they are presumed innocent until proven guilty;
- the extent to which a time served prison sentence is capable of achieving key sentencing purposes such as rehabilitation or community protection; and
- whether the increasing likelihood of receiving a time served prison sentence might inappropriately encourage some people on remand to plead guilty in the hope of being released earlier than if they proceeded to trial.

Although it is now somewhat dated, the Council's report *Victoria's Prison Population 2005 – 2016*, mapped trends in imprisonment in the ten years to June 2016 and still has some relevance today. This report shows that changes to detected crime, as well as changes to bail and sentencing practices, are having an effect on both the size and the composition of Victoria's prison population.

There was an increase in the prison population caused by an increase in detected crime, especially crimes against the person, including family violence. The overall percentage of all people sentenced who received a prison sentence stayed more or less the same over the 10-year reference period. However, more people were being sentenced, and so more people were going to prison.

The report reveals that the 67% increase in the adult prison population over the study period was unevenly spread across different groups of prisoners. For example, over the survey period, there was:

- a 154% increase in the number of unsentenced prisoners compared with a 46% increase for sentenced prisoners;
- a 147% increase in the number of Aboriginal and Torres Strait Islander prisoners (compared with a 62% increase for non-Indigenous prisoners); and
- a 75% increase in the number of female prisoners (compared with a 66% increase for males).

The percentage of all sentenced offenders sent to prison remained fairly steady over the reference period, but the average length of prison sentences decreased for some offence types since 2010–11. This is largely due to an increase in the use of sentences combining prison with a community correction order (CCO). For example, 38% of the sentences of imprisonment imposed in the Magistrates' Court for drug offences in 2014–15 also required the offender to comply with a CCO upon release.

The use of shorter prison terms, especially sentences combining prison with a CCO, led to a decline in the number of sentenced prisoners since 2014 (from 4,973 in 2014 to 4,637 in 2016). However, this small decrease was more than made up for by the increase in unsentenced prisoners.

Both the number of detected offences and the rate of detected offending as a proportion of the total population increased from 2010–11, after having been relatively stable since 2004–05. These increases were the result of an increase in 'unique alleged offenders' apprehended for offences against the person, such as cause injury offences. These results showed that, as might be expected, those charged with violent offending were becoming less likely to be granted bail.

The Council's 2015 report, *Reoffending Following Sentence in Victoria: A Statistical Overview* covered all age groups and found that in the ten years to June 2014, 55% of all offenders did not reoffend. If the original offence was not traffic-related, the percentage that did not reoffend rose to 66%. The report examined the reoffending patterns for 63,366 people sentenced in Victoria's criminal courts (both adult and children's).

The Council's research found that 81% offenders were male, 60% were aged 22 to 44 at the time of their first offence, and just over a quarter (26%) were aged 21 or younger. The research also found that:

- nearly half (47%) of reoffending occurred within the first two years following the initial sentence
- males had a higher reoffending rate (47%) than females (36%)
- offenders aged 10 to 17 years had a higher reoffending rate (64%) than older offenders (44%)
- traffic offences, including drink driving, were by far the most common offence category in the first and second sentencing event in the study (comprising 42% of offending in each event)
- the likelihood of offenders receiving imprisonment was more than four times greater on their tenth offending episode (37%) than in their first offending episode in the study period (7%)
- the majority (61%) of reoffenders committed different offences in their first and second episodes
- the offence most likely to be repeated was traffic offences (at a rate of 63%) while sexual offences (10%) and arson and property offences (9%) were the least likely to be repeated.

### **Terms of reference 3: how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime**

In 2016, the Council published its report, *Sentencing Guidance in Victoria* in response to terms of reference received from the then Attorney-General, the Hon Martin Pakula MP. The Council recommended a suite of reforms to the guideline judgment scheme. This enhanced scheme is intended to facilitate greater use of guideline judgments, which can provide comprehensive guidance on the sentencing of all offences and offence categories, including offences sentenced in the higher courts or the Magistrates' Court.

The Council recommended that numerical guidance on the appropriate level or range of sentences for an offence or offence category should be permitted within a guideline judgment. This would allow the Court of Appeal to provide guidance on what sentences would be adequate, not simply to declare that sentencing practices are inadequate.

The Council recommended that, in particular circumstances, the Attorney-General should have the power to apply for a guideline judgment, without the need for an appeal case. This power is intended to overcome the problem, for some offences, of sentencing judges being constrained by inadequate current sentencing practices and the Court of Appeal not having the opportunity to provide guidance on such practices, in the absence of a suitable appeal case. Changes were made to the guideline judgment provisions in the *Sentencing Act 1991* (Vic) in line with this recommendation but, to date, these provisions have not been used.

This report also canvassed an aspirational model for a sentencing guidelines council in Victoria and examined models operating in the United Kingdom. However, the report made no recommendations regarding establishing such a council.

In May 2017, the Victorian Government announced that it would introduce legislation in 2018 to establish a sentencing guidelines council, a body with a diverse membership of stakeholders that could develop and issue sentencing guidelines for use by the courts. In July 2017, the Attorney-General asked the Council to conduct broad consultation and advise him on the most suitable model for the

sentencing guidelines council in Victoria, with particular reference to the features of sentencing guidelines councils in the United Kingdom.

The Council's report, *A Sentencing Guidelines Council for Victoria* was published in 2018 and made 22 recommendations about the most appropriate features of the sentencing guidelines council, as well as the sentencing guidelines it would create. The primary function of the guidelines council would be to issue sentencing guidelines after broad consultation, which would include publishing draft guidelines for community comment.

The guidelines are intended to promote consistency of approach in sentencing by providing comprehensive and methodical guidance for sentencing courts to follow, while preserving judicial discretion – the court's ability to impose a sentence based on the specific circumstances of the case.

In the model recommended by the Sentencing Advisory Council, Victorian courts would be required to follow sentencing guidelines unless doing so would not be in the interests of justice. In this way, sentencing guidelines would promote a transparent and consistent decision-making process in sentencing, while also ensuring that judges and magistrates would be able to impose sentences appropriate to all the circumstances.

All of the Council's reports are freely available on its website should you wish to consider the findings in more detail: <https://www.sentencingcouncil.vic.gov.au/>

I trust this information will be of some assistance. Please don't hesitate to get in touch with me, or the Council's CEO Ms Cynthia Marwood, if you have any questions regarding the Council's research.

Yours sincerely



Professor Arie Freiberg AM  
Chair