VICTORIA POLICE

Reforming adjourned undertakings in Victoria

Consultation Paper

Victoria Police submission

Victoria Police (VP) thanks the Sentencing Advisory Council (SAC) for the opportunity to provide a submission in response to the *Reforming adjourned undertakings in Victoria Consultation Paper* (the Consultation Paper). This submission directly addresses the 23 questions contained in the Consultation Paper and provides general comments for SAC's consideration.

1. **Supplementary Purposes: Are the current supplementary purposes for imposing adjourned undertakings in section 70 of the *Sentencing Act 1991* (Vic) adequate and sufficient? If not, should they be amended and, if so, how?**

Section 70 of the *Sentencing Act 1991* (Vic) (Sentencing Act) provides that adjourned undertakings may be imposed:

- to support rehabilitation of an offender
- to take into account the trivial, technical or minor nature of an offence
- to allow an offender to demonstrate remorse in a manner agreed by the court
- in circumstances where it is inappropriate to record a conviction
- where it is inappropriate to inflict a punishment outside of a nominal punishment
- to address extenuating or exceptional circumstances that justify the court showing mercy to an offender.

In New South Wales, a sentencing court must have regard to a range of factors when deciding to make a conditional release order with a conviction. This includes 'any other matter that the court thinks proper to consider'.[1] VP suggests this could be considered for inclusion in the Victorian legislation to enable judicial discretion based on the contemporary guiding principles and practices of the court at the time.

2. **The term 'adjourned undertakings': Should these orders continue to be described as 'adjourned undertakings'? If not, what would be a more appropriate description?**

[1] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(2)(d).

VP suggests that 'good behaviour bond' is an appropriate description for adjourned undertakings. The term 'good behaviour bond' is already used in Victorian legislation in relation to children.[2] Similar language is also used, for example:

- in South Australia via the *Sentencing Act 2017* (SA)
- in the Australian Capital Territory via the *Crimes (Sentencing) Act 2005* (ACT).

VP suggests the term 'good behaviour bond' appropriately explains the expectations of the bond in a positive way and signifies the idea that it is a partnership, alliance or bond between parties. This term is also accessible and clear for people from culturally and linguistically diverse communities, and likely to be easier to translate than the current terminology.

3. A new combined order: Should the *Sentencing Act 1991* (Vic) be amended to specifically empower sentencing courts to impose a combined order of imprisonment and an adjourned undertaking? If so, how and why? If not, why not?

In circumstances where a short custodial sentence is considered necessary, VP considers it may be advantageous for a combined sentence inclusive of an adjourned undertaking. Rehabilitation is a key objective in sentencing and adjourned undertakings can facilitate access to rehabilitative programs and services. This can often be in a less criminogenic manner than Community Corrections Orders (CCOs) due to the reduced contact with the criminal justice system. Adjourned undertakings can also assist in transitioning out of a custodial setting assuming they are considered in the totality of the sentence.

However, VP cautions that an adjourned undertaking requires offenders to access and engage in rehabilitative programs at their own expense and through their own initiative. This contrasts with CCOs which include program funding, supervision and monitoring. For prison leavers without access to funds, housing and other resources, the obligations imposed by an adjourned undertaking may be inaccessible. As such, combined sentences may contribute to increased vulnerability and potentially poorer outcomes in community safety by entrenching further anti-social behaviour patterns.

If combined orders of imprisonment and adjourned undertakings are introduced, consideration of an individual's suitability for the scheme should be incorporated.

4. Rural and regional Victoria: Are there any issues with access to adjourned undertakings in regional Victoria? You may wish to consider whether there are certain resources that could be made available that would increase or improve the use of adjourned undertakings in specific regions.

VP is not aware of any issues restricting access to adjourned undertakings in rural and regional areas. However, access to the support services and programs which may be a condition of an adjourned undertaking, are very limited in rural and regional Victoria.

[2] *Children, Youth and Families Act 2005* (Vic) div 4.

Specialist health, family violence, and other therapeutic programs have waitlists and gaps in many rural and remote areas. Poverty and a lack of access to transport options can also reduce accessibility. This can compound the disadvantage experienced by rural and regional people who are subject to adjourned undertakings. Further, significant financial and other forms of disadvantage are well-known risk factors for family violence. As such, adjourned undertakings requiring access to specific programs in regional and rural Victoria can set offenders up to fail and decrease public safety.

The availability of support services may create an environment which is more conducive to rehabilitation and can support a more purposeful undertaking for all parties. Alternative conditions with regard to special considerations—such as reduced accessibility in regional and rural Victoria—may reduce the impact on offenders and services. For example, where there are limited programs available to an offender, an appropriate community service could be considered instead.

5. Marginalised groups: Are there reforms that could be made to adjourned undertakings that could reduce the disproportionate effect of the criminal justice system on marginalised groups? If so, what reforms would you propose and why?

In VP's experience, the inherent flexibility of adjourned undertakings seems to allow for customisation to better achieve appropriate sentencing outcomes for people belonging to marginalised groups. In addition to the issues highlighted in the response to Question 4, VP suggests consideration be given to the following:

- Alternatives to monetary conditions/penalties and self-funded programs. This could include judicial monitoring, referrals, and engagement with community services.
- Mandating specific considerations which the courts must have regard to when imposing conditions on adjourned undertakings. For instance, when a court imposes a financial penalty, it must consider the ability of an accused to make payment, and any disproportionate or detrimental effect that may manifest as a result.
- Ensuring referral is made to culturally specific supports as part of the sentencing process.
- In the family violence space, more resourcing could be directed to restorative justice case conferencing, family mediation and behaviour change programs. This would help to reduce waitlists for cognitive behavioural therapy (CBT) and similar programs supporting behaviour change in offenders.
- Providing for voluntary participation in programs prior to sentencing. If payment, accessibility, or waitlists have been a barrier, then funding within the adjourned undertaking could be provided. This could be like the way the CREDIT/Bail Support program or Assessment and Referral Court (ARC) operates, including a risk assessment component and an assessment around readiness to change.

6. Maximum length: Should the Sentencing Act 1991 (Vic) be amended to restrict the maximum length of adjourned undertakings in the Magistrates' Court? If so, why? If not, why not?

Under section 72(1) of the Sentencing Act, a court may make an adjourned undertaking for a period of up to five years. As outlined in Chapter 5 of the Consultation Paper, adjourned undertakings of

this length are rarely imposed. In VP's view, it does not seem necessary to further limit the length of adjourned undertakings. There are not sufficient benefits or risks present to warrant imposing on judicial discretion in the circumstances.

VP considers courts should retain the ability to sentence according to the facts and circumstances presented before them. However, as adjourned undertakings are the lowest outcome and least onerous option in the sentencing hierarchy, courts should have greater scope to account for the objective seriousness of the offending—without resorting to more severe penalties as an inevitable 'next step' when faced with legislative constraints. The data included in the paper seems to confirm whilst the upper limit to undertakings is significantly greater than the length of the average undertaking, courts apply appropriate moderation when setting timeframes in the vast majority of cases, ameliorating most, if not all, risks highlighted in the Consultation Paper.

Issues around spent convictions are addressed in response to question 23.

7. **Judicial supervision: is there scope to increase the use of judicial supervision as a condition of adjourned undertakings? In answering this question, you may wish to consider:**
    - **criteria for assessing offender suitability**
    - **the resource implications for courts**
    - **the need to balance the potential value of judicial supervision against the principles of proportionality and parsimony**
    - **the potential inconsistency between adjourned undertakings being primarily unsupervised orders but involving some supervision**
    - **the evidence base that would need to be developed to establish best practice processes; and**
    - **the training that judicial officers would require.**

Noting consideration of judicial supervision is outside of the scope of VP, the following comments are made.

Judicial supervision using techniques such as motivational interviewing supports an ongoing therapeutic alliance for parties involved. It has been well implemented by Community Correctional Services for offenders subject to CCOs. In VP's experience, judicial monitoring seems to be utilised more by certain officers of the judiciary, and more routinely employed for recidivist offenders. While this may increase the effectiveness of the order, it also adds a greater administrative burden on the courts.

VP has observed both benefits and disadvantages to judicial supervision. As above, the supervision element—which can work as a progress check—may address recidivism and increase safer community outcomes. It has worked effectively in drug court settings and these successes may translate. However, the use of judicial supervision may also undermine the intention of adjourned undertakings as unsupervised orders. Further, the court environment may not be conducive to an effective therapeutic environment.

VP believes the current provisions in section 72 of the Sentencing Act are sufficiently broad to allow the court to impose all appropriate special conditions, including judicial monitoring at an appropriate frequency. Ultimately, the conditions imposed in adjourned undertakings should be based on the most beneficial practices for the rehabilitation of the offender with consideration to the circumstances of the offending behaviour.

8. Good behaviour: Is there a need to clarify the definition of 'good behaviour' in sections 72 and 75 of the Sentencing Act 1991 (Vic)? If so, why and how? If not, why not?

As noted in the Consultation Paper, there is no definition of 'good behaviour' in the Sentencing Act or in case law. VP suggests a definition would be beneficial in assessing conduct which constitutes a breach of the order. In developing a definition, it would be useful to consider whether good behaviour must relate to further offending of a similar kind to the original offending, or if it relates to all offences.

In considering the statistics outlined in paragraph 4.7 of the Consultation Paper, VP stresses traffic or driving matters should not be removed from consideration as further offending, as these offences make up nearly one quarter of the adjourned undertakings in the Magistrates' Court.

9. Guidance about optional conditions: Is there a need for legislative or other guidance about the optional conditions that can be attached to adjourned undertakings? If so, why and what type of guidance? If not, why not?

VP submits there is benefit in retaining flexibility however, developing guidance for optional conditions may assist affected parties to understand the possible outcomes of adjourned undertakings. Should this be incorporated into legislation, VP supports utilising broad and inclusive condition categories similar to the New South Wales legislation.[3] In Victoria for instance, legislation could address:

- rehabilitation or treatment programs, including CBT-type programs
- educational programs
- supervision
- community service or volunteering
- restitution, compensation or financial donations
- apologies and/or
- any other condition the court deems fit.

VP also notes courts may benefit from being prompted to consider the utility of an adjourned undertaking with no optional conditions at all.

10. Payment conditions: Should Victorian courts continue to be able to require an offender to make a payment to an organisation that provides a charitable or community service, or to the court

[3] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2).

for payment to such an organisation, as a condition of an adjourned undertaking? If so, why? If not, why not?

As per ss5(4)-(7) of the Sentencing Act, adjourned undertakings are a lesser sentencing outcome in the hierarchy compared to a fine. Requiring a monetary penalty as a condition of an adjourned undertaking essentially acts as a fine and an undertaking, and therefore imposes a more severe penalty. Where a fine is imposed as a sentencing outcome, there are additional options to make payments that are not accessible under adjourned undertakings. This risks compounding disadvantage as failure to pay will equate to a criminal charge by breach of undertaking.

The imposition of monetary penalties or mandated donations can be particularly costly for marginalised communities and people already experiencing disadvantage. In these scenarios, financial penalties may risk contributing to further offences associated with disadvantage (petty theft etc.). VP therefore considers monetary penalties or donations should not be a default condition.

VP considers monetary penalties can be appropriate in some circumstances where other conditions—such as community service—are not a viable option. To ensure a fair and appropriate application of monetary penalties, consideration could be given to providing a choice between a monetary penalty or actively performing community service. This would allow tailoring for individual circumstances, for example where a person with full-time work commitments or carer responsibilities may not have the option to perform community services and may elect to pay a donation.

VP does note donations to charitable organisations are not possible under an ordinary fine and the court still retains the discretion and ability to determine if such payment conditions in an adjourned undertaking are appropriate in all circumstances.

11. Charitable donations: Should courts continue to be able to order donations to specific charities? If so, is there a need for guidance or limitations about which charities?

VP makes no comment on the appropriateness of donations ordered to specific charities.

Should donations to specific charities be retained, VP suggests courts could have the power to direct the donation be to a charity linked to the offending. For example, if the victim had a disability, the donation could be provided to a charitable organisation that supports people with disabilities. Similarly, if the offender committed criminal damage by fire, a donation could be provided to a charitable fire response service. It may also be appropriate to nominate a charity which is local to the offender or their offending.

Offending without a nexus to particular charitable initiatives could still be linked to other charities broadly relevant to the time of hearing—for example, bushfire, drought or flood related charities during times of natural disaster.

Should courts be able to continue to order donations to specific charities, it may be appropriate to establish a community member committee or panel to oversee donations. The committee's remit could include determining which charitable organisations should receive donations and having

oversight of the donations to ensure good governance in the equitable distribution of the funds. This may be like the Court Fund Committee which considers donations to the Court Fund.

12. Court fund: Should there be more transparency in how the Court Fund operates, including how much money it receives and distributes, who receives the funds and how decisions about distribution are made?

Funding financial assistance for those who are engaged with the criminal justice system is imperative to support access to justice. It is particularly important for people from marginalised communities or who experience other disadvantages to increase accessibility of legal processes. Funding support can include providing phone credit and Myki passes to enable individuals to engage with services and professionals and meet with services, attend appointments and travel to and from court.

Generally, VP notes transparency would provide offenders insight into how their donation is helping disadvantaged community members. Greater transparency in Court Fund operations may also be appropriate due to the significant volume of money moving through it.

While a matter for DJCS and Court Services Victoria, VP considers transparency could be achieved through an annual report or similar.

13. Justice plans: Are there any issues with the availability and operation of justice plans as conditions of adjourned undertakings? What changes would you propose and why?

VP supports broadening the eligibility criteria for justice plans. Limiting justice plans only to persons with intellectual disabilities may not support community safety as robustly as possible, given low level offending can often be related to an acquired brain injury and other cognitive or psychological impairments. Consideration should be given to including these factors in the eligibility criteria.

Risk or intake and program suitability assessments could also be resourced prior to hearing dates. This early intervention may provide additional support to accused people and assist them navigating the stress of final hearings.

14. Optional conditions: Are there any other issues with the optional conditions that currently can be, and are, attached to adjourned undertakings in Victoria?

VP has not identified any further issues with optional conditions beyond those set out in the Consultation Paper.

VP agrees optional conditions should be clear, achievable, and related to either the offending behaviour, rehabilitation and restoration or community safety.

As per the example in the paper, an optional condition which requires regular contact with a Centrelink worker lacks specificity. There is no definition of ‘regular’ in context, nor an understanding of what the purpose of the contact is. This ambiguity is particularly difficult for culturally and linguistically diverse people to navigate as assumed meanings of certain terms or phrases do not or may not translate accordingly.

15. **Funding for programs: Should offenders sentenced to participate in programs as a condition of an adjourned undertaking be required to pay for those programs themselves, or should they be paid for by the state?**

VP suggests funding for programs should be based on income, permitting those in financial hardship to have their program wholly or partially funded. Given there are criminal outcomes for breaching the adjourned undertaking, failure to access a service due to finance increases marginalisation of vulnerable and disadvantaged people. This could further entrench anti-social behaviour patterns and increase risks of reoffending.

VP notes it may be difficult for a court to make a reliable assessment of an individual's financial circumstances at the time of sentencing. Therefore, it may be more beneficial for a system to be created wherein an offender can apply in a simple and straightforward manner (through the court or another state agency) for required funding. At this time, a more holistic and thorough assessment could be made.

16. **The adjourned undertaking form: Should the Magistrates' Court review the current adjourned undertaking form (CP230-9)? If so, what revisions would you recommend and why?**

In its current form, CP230-9 lacks clarity and can cause confusion. VP agrees with the recommendations made in Chapter 7 of the Consultation Paper regarding CP230-9. The form needs to have a simple layout and plain language to ensure it is accessible, particularly by culturally and linguistically diverse people or those with a low level of literacy.

17. **The sentencing hierarchy: Should the placement of adjourned undertakings in Victoria's sentencing hierarchy be amended? If not, why not? If so, how, why and what consequential reforms would be needed (e.g. to section 70)?**

The current placement for adjourned undertakings as the lowest rung in the sentencing hierarchy seems appropriate, however some flexibility is required to ensure the sentence considers an individual's circumstances. VP notes that depending on an offender's financial situation, a fine may be more or less onerous than an adjourned undertaking. VP would support implementing consideration of the accused's capacity to pay a fine.

VP supports considering an amendment to section 60 of the Act to ensure courts are not restricted from imposing a modest fine in place of a more onerous undertaking where appropriate. Consideration could also be given to making fines and adjourned undertakings of an equal standing in the hierarchy of sentencing. Judicial discretion could then be exercised to determined which sentence would be more appropriate in the individual's circumstances.

18. **Merging sections 72 and 75: Should sections 72 and 75 of the Sentencing Act 1991 (Vic) be merged to create a single sentencing order of an 'adjourned undertaking' regardless of whether a conviction is also imposed? If so, why? If not, why not?**

The current separation between sections 72 and 75 supports a greater distinction between adjourned undertakings with a conviction and without. As such, retaining the separation may encourage the use of sentencing without conviction.

Notwithstanding, VP considers a merger would be a suitable approach to consolidate the sections. It is proposed the language is changed to ensure consistency, noting that section 72 references a five-year maximum whereas section 75 refers to a 60 month maximum.

19. Merging sections 73 and 76: Should sections 73 and 76 of the Sentencing Act 1991 (Vic) be merged to create a single sentencing order of dismissal or discharge (or some other term) regardless of whether a conviction is also imposed? If so, why? If not, why not?

As above, VP considers a merger is a suitable option to consolidate the sections and ensure plain accessible language is used. Outcomes should be dealt with at a single point in the legislation, regardless of whether a conviction is imposed.

20. Repealing sections 74 and 77 of the *Sentencing Act 1991* (Vic) be retained or repealed? In either case, why?

VP agrees there is limited utility to including sections 74 and 77 in the Sentencing Act however, considers the restitution provisions do allow for a victim-centric approach to sentencing.

In line with the responses to Questions 18 and 19, consideration could be given to merging the two provisions in the legislation and removing the requirement for a recording of conviction.

21. Spent convictions: should the Spent Convictions Act 2021 (Vic) be amended so that findings of guilt become spent at the date of sentencing for people receiving adjourned undertakings without conviction, rather than at the end of their adjourned undertaking?

VP notes there are benefits to legislating the date from which an adjourned undertaking becomes spent at the date of sentencing, rather than at the completion of the undertaking. However, there are also merits to continuing with current practice.

By amending the *Spent Convictions Act 2021* (Spent Convictions Act) to allow adjourned undertakings to become spent from the date of sentencing, this would ensure people with existing disadvantage, such as those who could not afford to pay a fine, are not further disadvantaged by requiring the completion of an adjourned undertaking before spent convictions begin.

Despite being the lowest option in the sentencing hierarchy, the spent period for adjourned undertakings is still greater than that of a fine, which is a higher sentence. In addition, the current requirement to satisfy conditions to allow a conviction to be spent immediately on completion creates an additional obligation not faced by those receiving fines. This may contribute to greater hardship for a person subject to an adjourned undertaking—which may be contrary to the intention of imposing the least severe sentencing outcome. Further, as noted in the Consultation Paper, it could be seen that there is an incentive to seek a more serious sentencing outcome (a fine) to have the conviction spent earlier.

Despite this, the current practice accounts for any breaches of the undertaking. Should the Spent Convictions Act be amended as proposed, consideration could be given to resentencing any breaches of adjourned undertakings to ensure the secondary offences are recognised and captured in the spent convictions scheme.

22. Decriminalising breaches: Should breaching an adjourned undertaking be decriminalised? If so, why? If not, why not?

VP considers the court must retain the ability to deal with breaches of adjourned undertakings, consistent with measures made by other court orders (bail, intervention orders etc.). This would support future decisions and ensure the purpose of an adjourned undertaking is not diminished. Removing the consequences of a breach would undermine the utility of an undertaking and may demonstrate to victims that there is little consequence to offending actions.

VP agrees there is a disproportionately excessive burden placed on courts and VP when resentencing for breaches of adjourned undertaking. It may therefore be that resourcing constraints are contributing to the discrepancies outlined in the Consultation Paper between people who are known to have breached an undertaking and those who have been found guilty of breaching an undertaking.

23. Successful completion: What should happen at the end of an adjourned undertaking that has been successfully completed? You may wish to consider:

- **whether courts should send a communication to offenders who successfully complete their adjourned undertaking; and**
- **whether there need to be a court hearing at the end of the undertaking, and if so, who should be required to attend.**

VP supports introducing a notification and record of completion for an adjourned undertaking via letter, email and accompanying phone call. Formal acknowledgement will ensure that offenders, particularly those from marginalised communities, are aware their undertaking is complete. Acknowledgement can also be used as a pro-social mechanism promoting achievement which further supports rehabilitation.

VP supports continuing the practice for matters to be listed and considered prior to completion. In this process, prosecutors are typically asked if there are any matters not known to the court which may impact the court's decision to finalise an adjourned undertaking. Matters such as breaches of conditions or charges pending may be communicated through this mechanism which the court can consider prior to finalising an adjourned undertaking.

While the Consultation Paper notes VP is typically asked to be present as adjourned undertaking matters are finalised on the papers, in practice prosecutors are generally present to support a larger list and are not present specifically for the adjourned undertaking matter. Even where a sitting prosecutor has not had exposure to a case, they may still make valuable comment regarding any breaches, pending charges or further offending.