Submission to the Sentencing Advisory Council: Reforming Adjourned Undertakings in Victoria

October 2022

Victoria Legal Aid

Acknowledgement of country

This submission was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of all First Nations people who today are still arrested and imprisoned at rates far higher than other Australians.

Contents

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Overview

Victoria Legal Aid (**VLA**) welcomes the opportunity to respond to the Sentencing Advisory Council's (**SAC**) consultation paper on adjourned undertakings.

Our feedback is informed by our extensive practice experience in the Magistrates' Court of Victoria, including in our 15 offices across the state.

In our practice experience, adjourned undertakings provide a flexible, problem-solving approach to sentencing. They are an essential tool to help address the underlying causes and risk factors for offending in a proportionate way, as the conditions of an order can be tailored to the needs of each person. Significantly, they allow the court to impose a sentence which links First Nations people with culturally safe and appropriate services which connect them with culture and community.

Given the clear benefits of adjourned undertakings in supporting rehabilitation and reducing entrenchment in the criminal justice system, VLA strongly supports SAC's consideration of ways to improve and increase the use of adjourned undertakings in Victoria.

Informed by our practice experience, we have identified barriers that prevent adjourned undertakings from being as effective as possible, and where there are opportunities for reform to create a more just, user-centred and equal system. This includes:

- reducing the risks of harm caused by interactions with the criminal justice system by decriminalising breaches of adjourned undertakings, reforming bail laws and providing more consistent access to the spent convictions scheme
- providing education, guidance and supporting materials so that judicial officers impose appropriately tailored conditions that can be met by individuals on adjourned undertakings
- increasing availability of services and programs in rural and regional Victoria to promote greater equality of access to the support they need
- creating a new sentencing order to fill the gap in the sentencing hierarchy between a fine and a Community Corrections Order
- redesigning court forms and information about adjourned undertakings in consultation with people with lived experience of the criminal justice system so that they can be clearly understood.

Should you require further clarification on any of the issues covered in this submission, please do not hesitate to contact Mahnoor Sikandar, Senior Policy and Projects Officer, Criminal Law on 03 9767 7153.

About Victoria Legal Aid

VLA is a statutory authority established under the *Legal Aid Act 1978* (Vic). Our vision is for a fair and just society where rights and responsibilities are upheld.

In 2020–21, VLA provided legal assistance to over 74,670 unique clients from our 15 offices across Victoria. This was a 16 per cent reduction in the number of people we usually help each year due to the COVID-19 restrictions and courts adjourning matters.

Legal assistance ensures fairness and helps ordinary people understand and participate in the legal system. It also helps to address the reasons people are in the justice system and works to address underlying causes to prevent recidivism.

As the image at the end of the submission shows, our clients are diverse and experience high levels of social and economic disadvantage. More than half of our clients are currently receiving social security and more than a third receive no income at all. More than a quarter of clients disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds. These circumstances increase the likelihood and severity of legal problems and make it more difficult for people to navigate the system without help.

As the largest criminal defence practice in Victoria, VLA's legal services are provided through specialised programs including Youth Crime, Summary Crime, Indictable Crime and Chambers.

VLA's Summary Crime Program is our largest service delivery program and is the first point of entry to the criminal justice system for most of our clients. We provide duty lawyer assistance at all Magistrates' Courts throughout Victoria and assist people in a range of proceedings including summary plea hearings where adjourned undertakings are common.

The extent and breadth of our work in the summary jurisdiction gives VLA significant practice experience in the operation of adjourned undertakings as a sentencing option.

Improvements to adjourned undertakings to promote a fairer and more effective criminal justice system[1]

Recommendation 1

To ensure adjourned undertakings can most effectively support rehabilitation and reduce entrenchment in the criminal justice system:

- **breaches of an adjourned undertaking should be decriminalised**
- **bail laws should be reformed to reduce its impact on minor offending while on bail**
- **a person should be eligible to have their conviction spent at the time the adjourned undertaking is initially imposed.**

When people enter the criminal justice system, there is an opportunity to intervene and address the underlying causes of offending. Adjourned undertakings present an important opportunity for intervention and provision of these supports in a way that is proportionate to the seriousness of the offending. Given the focus of these orders is often for lower-level offending, they can also be used as an important tool to reduce further contact with the criminal justice system.

To ensure these opportunities can be harnessed, VLA considers the changes outlined below would reduce the harms and risks of entrenchment in the criminal justice system and facilitate rehabilitation.

Breaches of adjourned undertakings

In our practice experience, sentencing courts rarely impose penalties for the offence of contravening an adjourned undertaking, consistent with the data and findings set out by SAC in the consultation paper. We consider breaches of adjourned undertakings should be decriminalised, as has been recommended by previous reviews and inquiries.[2]

In VLA's experience, the offence of breaching an adjourned undertaking is an unnecessarily punitive option for matters which are less serious. It is also inconsistent with the approach to non-payment of a fine (an outcome higher in the sentencing hierarchy), which does not have a specific breach offence.

In addition, where a court is concerned about non-compliance with any conditions, it can exercise its power to resentence to a more serious penalty. This approach provides flexibility to address the non-compliance as necessary, without the need for an additional offence and punishment for a specific breach offence.

Intersections with bail

As the consultation paper outlines, because of recent reforms to the *Bail Act 1977,* a person placed on an adjourned undertaking for an indictable offence who is alleged to have

[1] This section responds to consultation questions 3, 5, 21, and 22.
[2] Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 116–119; Tasmania Law Reform Institute, *Sentencing*, Final Report no. 11 (2008) 153; Sentencing Advisory Council, *Secondary Offences in Victoria* (2017) 25–26.

committed another indictable offence during the undertaking would fall in a reverse onus category for bail.

As there are many minor offences that are indictable (such as shop theft) and adjourned undertakings are the second most common sentencing outcome, these reforms have significantly widened the net of people who are subject to reverse onus bail categories.

Our practice experience is that these reforms have had a disproportionate impact on more disadvantaged groups and people charged with lower level offending for which they are unlikely to receive a sentence of imprisonment. The starkest impact can be seen in the number of First Nations women on remand, which has increased five-fold over the past 10 years.

We reiterate recommendations made to other inquiries that the *Bail Act 1977* should be amended to reduce the impact of minor offending while on bail. Importantly, this would mean people who receive an adjourned undertaking are not elevated into a higher bail threshold because they are arrested during the period of an undertaking and held on remand for low level offences where they would have not otherwise received a term of imprisonment.

Spent convictions

VLA is concerned about the disadvantage faced by people being sentenced to an adjourned undertaking who are eligible to have their conviction spent. If a person is sentenced to a fine without conviction, which is higher in the sentencing hierarchy, they can access the spent convictions scheme immediately after being sentenced. By contrast, a person sentenced to an adjourned undertaking without conviction must wait until the end of the period of good behaviour before their conviction can be spent.

This disadvantage is compounded where a lengthy undertaking is imposed, as an order can be up to five years in length. It may also disproportionately impact individuals who are unable to pay a fine and as a result, are placed on an adjourned undertaking as an alternative sentencing option.

In our view, to ensure the spent convictions scheme operates fairly and effectively, a person should be eligible to have their conviction spent at the time the adjourned undertaking without conviction is initially imposed. VLA considers that some small amendments could be made to section 7(2) of the *Spent Convictions Act 2021* to facilitate this. We consider that if an adjourned undertaking is breached during the operation of the order, a person could be brought back to court to be re-sentenced. At this time, the court would have the full suite of sentencing options available, including recording a conviction for the offence, which would then be disclosable.

Combination orders

We support reforms that would enable a sentencing court to make an order for an adjourned undertaking in combination with a term of imprisonment.

In our practice experience, this combination of orders can be effective where a judicial officer wants to emphasise the importance of the person remaining engaged in treatment upon release from custody but ongoing corrections and contact with Corrections is not necessary or beneficial.

Currently, this combination of orders is made by judicial officers imposing a prison sentence on the more serious offences within a consolidation of charges and the adjourned undertaking on the less serious charges. The amendment would ensure that this type of combination sentence could be made where there is a single charge before the court.

Supporting effective and appropriate conditions for adjourned undertakings[3]

Recommendation 2

Judicial officers should have access to guidance and training to support identification of appropriate conditions to impose in conjunction with an adjourned undertaking.

Guidance about optional conditions

The consultation paper highlights the little statutory guidance available about what options conditions might be attached to adjourned undertakings. From our practice experience, we consider it would be beneficial to provide some guidance to outline factors that should be taken into account when determining what conditions to include within an order. In our view, the most important principles are that conditions attached to an order should:

- be proportionate to the offending
- be no more restrictive than is required to meet the sentencing purposes set out in the *Sentencing Act 1991*
- only be imposed if they are capable of being fulfilled within the duration of the order
- reasonably relate to the purposes of imposing the order.

We do not consider it is necessary to include a specific list outlining optional conditions.

Based on VLA's practice experience, this legislative guidance should be complemented with practical education and materials to guide judicial officers' consideration and decisions about the types of optional conditions that may be appropriate to attach to adjourned undertakings.

Information should include the availability and accessibility of services within the local area and community. This would enable referrals to be made to the most appropriate services and reduce risks that conditions are unable to be complied with for reasons that are outside of the person who is subject to the order's control. We also consider priority should be given to materials and guidance regarding culturally safe and appropriate services for First Nations peoples.

It would also be beneficial for education and materials to support judicial officers' understanding about the need to clearly understand the impact of financial penalties on a range of people who come before the court, including those who may be experiencing financial difficulties.

[3] This section responds to consultation questions 6, 7, 9, 10, 11, 12.

Charitable donations and payments to the court fund

We are of the view that Victorian courts should retain the option of making it a condition of an undertaking that a person make a financial contribution to a charity or to the court fund. In cases where there is a connection between the offending and the chosen charity, this approach can be a particularly effective way of emphasising the consequences of offending behaviour (for example donations to charities focused on the impact of road trauma for driving offences). We consider that if a person is being ordered to contribute to the court fund, the court should be required to explain the objective of the fund so the person being sentenced is aware that the money will be used for charitable purposes.

In considering whether to impose financial obligations as a condition of an adjourned undertaking the court should ensure it has made enquiries regarding a person's financial situation.

In our practice experience, insufficient consideration is given to the impact these financial penalties can have on the person being sentenced. For people experiencing financial distress, a requirement to make a charitable donation can have a significant impact on their ability to pay for essential living expenses including food, rent and transport. The additional financial burden has a flow on effect on the person's children and other dependants.

Given the potential for these significant impacts, we consider it is important for judicial officers to be equipped with the tools to appropriately identify the potential impacts of requiring financial contributions to be made. This could include guidance about alternative conditions to impose in cases where people are experiencing financial stress. This might include participating in programs, continuing to seek treatment or support from medical or community organisations, or writing a letter of apology. This will ensure those experiencing financial stress are not being disproportionately impacted by the justice system or excluded from being sentenced to a less punitive order.

Judicial supervision conditions

Based on our practice experience, VLA agrees that judicial supervision can be an appropriate condition for adjourned undertakings in some cases based on the current orders available in the sentencing hierarchy. However, they should be used rarely, and with caution.

Adjourned undertakings are primarily imposed for more minor offending and for people who have had minimal prior contact with the criminal justice system. As a result, an intensive judicial supervision condition can result in a sentence which is disproportionate to the offending. Judicial supervision conditions can also prolong a person's contact with the criminal justice system, which as the consultation paper outlines, can be inconsistent with the purpose of adjourned undertaking orders, which is to encourage as little contact with the justice system as possible in appropriate cases.

We consider the limited circumstances in which judicial supervision is beneficial involves circumstances of more serious offending where the person's offending may be reaching a degree of seriousness where a Community Corrections Order (**CCO**) is being considered. Instead of a CCO, judicial monitoring can be an effective way of imposing a more onerous adjourned undertaking which is proportionate to the offending and meets all the sentencing purposes.

We recommend that guidance be developed for sentencing courts as to when a judicial monitoring condition is appropriate. This guidance should be supported by training for members of the judiciary in motivational interviewing techniques to ensure that judicial monitoring has the intended therapeutic benefits.

We also consider a specific entry for judicial monitoring hearings in court listing systems would promote greater efficiency and reduce confusion for those on adjourned undertakings. In our practice experience, court listing systems require an adjourned undertaking to be listed as a final sentence, and this means a judicial monitoring hearing cannot be separately listed. This can cause confusion for people attending court and the registry as there can be no formal listing within the court's systems.

As discussed in further detail below, VLA recommends that a new order should be created to address the gap in the sentencing orders currently available. If such an order was created, this would reduce the need for judicial supervision conditions for adjourned undertakings.

Maximum length of adjourned undertaking orders

Based on VLA's practice experience, we consider a five year maximum term is sufficient for this type of order and provides flexibility to tailor the appropriate length of an order to a person's individual needs.

However, orders over 24 months should be reserved for more serious offences and where it is clear that a person would benefit from a longer order to facilitate their rehabilitation. As the consultation paper highlights, only 0.3% of undertakings are longer than two years, which appears to be consistent with the way adjourned undertakings are currently being used.[4]

Promoting greater equality and access to the benefits of adjourned undertakings[5]

Recommendation 3

There should be increased availability of services and supports in rural and regional Victoria to promote greater equality of access to the benefits of adjourned undertakings.

Access to services and programs in rural and regional Victoria

Our practice experience has shown that people from regional and remote communities do not have the same access to services as those in metropolitan areas. This experience is reinforced by other increasing reports of shortages in allied health workers and a strong unmet need for allied health services in rural and regional areas.[6] For example, a common therapeutic condition is for a person to attend a general practitioner to access a mental

[4] Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria Consultation Paper* (2022) 30.
[5] This section responds to consultation questions 13 and 15.
[6] National Rural Health Commissioner, *Report for the Minister for Regional Health, Regional Communications and Local Government on the Improvement of Access, Quality and Distribution of Allied Health Services in Regional, Rural and Remote Australia* (2020) 4; *Royal Commission into Victoria's Mental Health System*: *Final report – Volume 3* (Report, 2021) 453; Media Release, The Royal Australian College of General Practitioners 'RACGP welcomes local GP agreement but warns more support needed for general practice care' (Media Release, 7 September 2022) <RACGP - Media releases>.

health care plan. However, our clients' experience in rural and remote areas are that medical practices are not taking new patients and there are long waiting lists for bulk billing psychologists.

The impact of a lack of access to services is that court may be less likely to impose an adjourned undertaking with treatment conditions at first instance. In these cases, the court may be more inclined to impose an undertaking with a financial condition, a fine or a CCO so that services can be organised and funded by Corrections. This moves people up the sentencing hierarchy, keeps them engaged with the criminal justice system in more intensive ways and means the person will face a further penalty and be brought back to court to be resentenced if the order is breached.

In other cases, in our experience, in rural Victoria there are instances where adjourned undertakings contain conditions that people cannot comply with during the period of the order because of delays in accessing services. This is particularly common when conditions relate to in demand services such as Men's Behaviour Change Programs. In such cases people are being brought back to court for breaching the order through no fault of their own.

In addition, a lack of access to public transport can be a significant barrier to accessing support and services. Many people living in remote areas are only able to attend regional centres to access services if they have a licence and access to a car. In our experience, many people coming before the court do not have this access and this can frequently lead to non-compliance with orders.

These experiences demonstrate the need for greater access to supports, services and programs in rural and regional Victoria. In our experience, the most acute and urgent needs relate to services for psychological and psychiatric issues, drug and alcohol addiction, anger management programs and greater access to public or low cost transportation for those unable to access a vehicle.

Justice plan conditions

In VLA's practice experience, the availability of justice plans is unnecessarily restrictive and there are significant delays in their preparation.

Adjourned undertakings with justice plan conditions attached are an important and effective sentencing option for people with intellectual disabilities. In our experience, because ordering an assessment for a justice plan triggers engagement with disability services it can ensure people receive targeted specialist treatment that they may not have otherwise been able to access. It also supports people to navigate the National Disability Insurance Scheme, which many of our clients find extremely difficult. In addition, the use of justice plans as a condition of an adjourned undertaking can reduce a person's engagement with multiple agencies and unnecessary contact with the criminal justice system.

Unfortunately, the standard waiting time for justice plans to be prepared in our experience is 12 weeks. This delay can lead to people experiencing anxiety due to court proceedings being prolonged and result in delays in receiving services. Additional resourcing to reduce the period for preparation would promote quicker connection to supports that address a person's needs and reduce the risk a delay leading to disengagement from services.

We are also of the view that the court should be able to order a justice plan for all people with a disability as defined within the *Disability Act 2006.* For example, growing evidence of the over-representation of people with an acquired brain injury in the criminal justice system suggests that there is no longer a good reason for adults with ABI to be excluded from the kind of therapeutic specialist intervention and assistance provided to those who have an intellectual disability.[7]

Funding for programs

A common feature of adjourned undertakings is a condition to participate in a therapeutic or other support program that is intended to address the underlying drivers of a person's offending.

However, as noted in the consultation paper there is currently no funding or support for people to comply with a condition of this nature (such as participation in a drug rehabilitation program). In our practice experience, this disproportionately impacts those who are unable to pay to access such services and programs. This limits an important opportunity to promote rehabilitation and reduce the risks of a person committing further offences and intervene at an early opportunity to prevent entrenchment in the criminal justice system.

We suggest consideration could be given to how additional support be provided so that the Court and person before the court can identify and access programs that are low or no cost, so that financial costs do not present a barrier to seeking and receiving support. For example, we note that the pilot Navigation and Triage program at Melbourne Magistrates' Court could fulfil a role in mapping and providing information about services and programs that may be appropriate for people's individual circumstances.

Ensuring the sentencing framework appropriately reflects the severity and purpose of orders[8]

Recommendation 4

A new sentencing order should be created to fill the gap in the sentencing hierarchy between a fine and a Community Corrections Orders.

The sentencing hierarchy and availability of orders

The question of where adjourned undertakings should sit in the sentencing hierarchy is complex. In most cases where adjourned undertakings are imposed the offending is at the lowest level and the person being sentenced has no prior criminal history. However, in our practice experience, some adjourned undertakings are used in more serious matters to fill a gap in the sentencing hierarchy between fines and the more onerous and resource intensive CCO. They may also be imposed in cases where fines are not considered appropriate

[7] In Victoria, research has found that 33% of women and 42% of men in prison have an acquired brain injury, compared with just 2% in the general Australian community. Stan Winford, Anna Howard & Jessica Richter, *Recognition, Respect and Support: Enabling justice for people with an Acquired Brain Injury* (Report, 2017).

[8] This section responds to consultation questions 17 and 18.

because a person is experiencing financial stress. In more serious cases where adjourned undertakings are imposed, they often include onerous conditions, resulting in a sentence that is more punitive than a fine.

Given our experience that adjourned undertakings are used to fill a gap in the current sentencing orders available, VLA is of the view that adjourned undertakings should be reserved for the lowest level of offending at the bottom of the hierarchy, and a new sentencing order should be created to fill the gap between fines and CCOs.

A new 'therapeutic order' would give sentencing courts the authority to impose tailored sentences in a similar way adjourned undertakings are currently being used in more serious cases but with additional resourcing. We envisage such orders could have a treatment component supported by dedicated resourcing and a legislated option of judicial monitoring.

Supplementary sentencing purposes

In our view, the supplementary purposes for imposing an adjourned undertaking could be removed.[9] In our practice experience, it is rare for reference to be made to the purposes in the legislation as a result of the extensive list of purposes for sentencing listed in section 3 of the *Sentencing Act 1991*. We consider the purposes are already largely addressed in this section and it would be beneficial to remove them to avoid the potential for unnecessary complexity in a sentencing exercise.

Achieving a more user-centred and accessible approach to adjourned undertaking orders[10]

Recommendation 5

Court forms and information regarding adjourned undertakings should be redesigned in consultation with people with lived experience of the criminal justice system.

Accessibility and clarity of forms and orders

In our practice experience, the court order for adjourned undertakings causes confusion for court users. Our lawyers frequently receive questions from our clients querying whether they need to attend court at the end of an adjourned undertaking because they are uncertain about the information contained in the current form.

In addition, in VLA's experience, clients, lawyers and some members of the judiciary, refer to adjourned undertakings as 'good behaviour bonds'. This term is often preferred as a clearer and plain language approach to describing what is required of a person on this order – that they be of good behaviour. The term adjourned undertaking can be confusing and unfamiliar.

It is well documented that there are better outcomes and experiences when services are developed and operated by the people who use them. Lived experience leadership and coproduction, using human-centred design techniques, is needed to ensure our justice

[9] *Sentencing Act 1991* (Vic) ss 72, 75.
[10] This section responds to consultation questions 16 and 23.

system is designed by those with lived experience to ensure it is tailored, effective and responsive.

Accordingly, we recommend that adjourned undertaking forms should be redesigned in consultation with people with lived experience of the justice system to ensure it is accessible and clear. This should also include consideration of the form being translated into languages other than English. At the same time, the views of those with lived experience could be sought regarding the terms or language used to describe the order that would best promote accessibility and clarity.

Redesign of the forms should be supported by a strong foundation for effective engagement with people with lived experience of the justice system, which should include ensuring appropriate structures, frameworks and resourcing are in place to ensure meaningful participation.

Notification of the completion of adjourned undertakings

In VLA's experience, the current process for notification involves a text message advising people to attend court for the return of their undertaking even though in most cases this is not required. This causes significant confusion and can lead to people attending court unnecessarily.

To address this, we consider when an adjourned undertaking is finalised, a person should be notified by email, letter, or their nominated form of communication. This would also provide an opportunity to include information about the spent convictions scheme.

Our clients

Service snapshot

The number of clients we worked with and services we delivered reduced overall in 2020–21 due to COVID-19 restrictions, courts adjourning matters and the challenges of providing services remotely.

74,670
total number of unique clients

16% down on 2019–20

40,486
number of grants of legal assistance

11% down on 2019–20

In-house
5,787 – 14% of total services delivered

Private Practitioners
34,086 – 84% of total services delivered

Community Legal Centres
643 – 2% of total services delivered

57,049
number duty lawyer services

45% down on 2019–20

Inhouse
36,499 – 64% of total services delivered

Private Practitioners
8,697 – 15% of total services delivered

Community Legal Centres
11,853 – 21% of total services delivered

Family Dispute Resolution Service

1,245 conferences in 2020–21
26% increase on 2019–20

Supporting remote service delivery

To provide continuity of services while working remotely and reduce the need for staff and clients to attend the office, we continued our transition to digital file management and digital service records.

Digital mail room

15,785 documents digitised in 2020–21
157,906 pages digitised

Legal Help

112,939 total requests for help responded to

41,267 number of webchat services
54% increase on 2019–20

46,211 number of webchat requests answered, or
89% of incoming requests

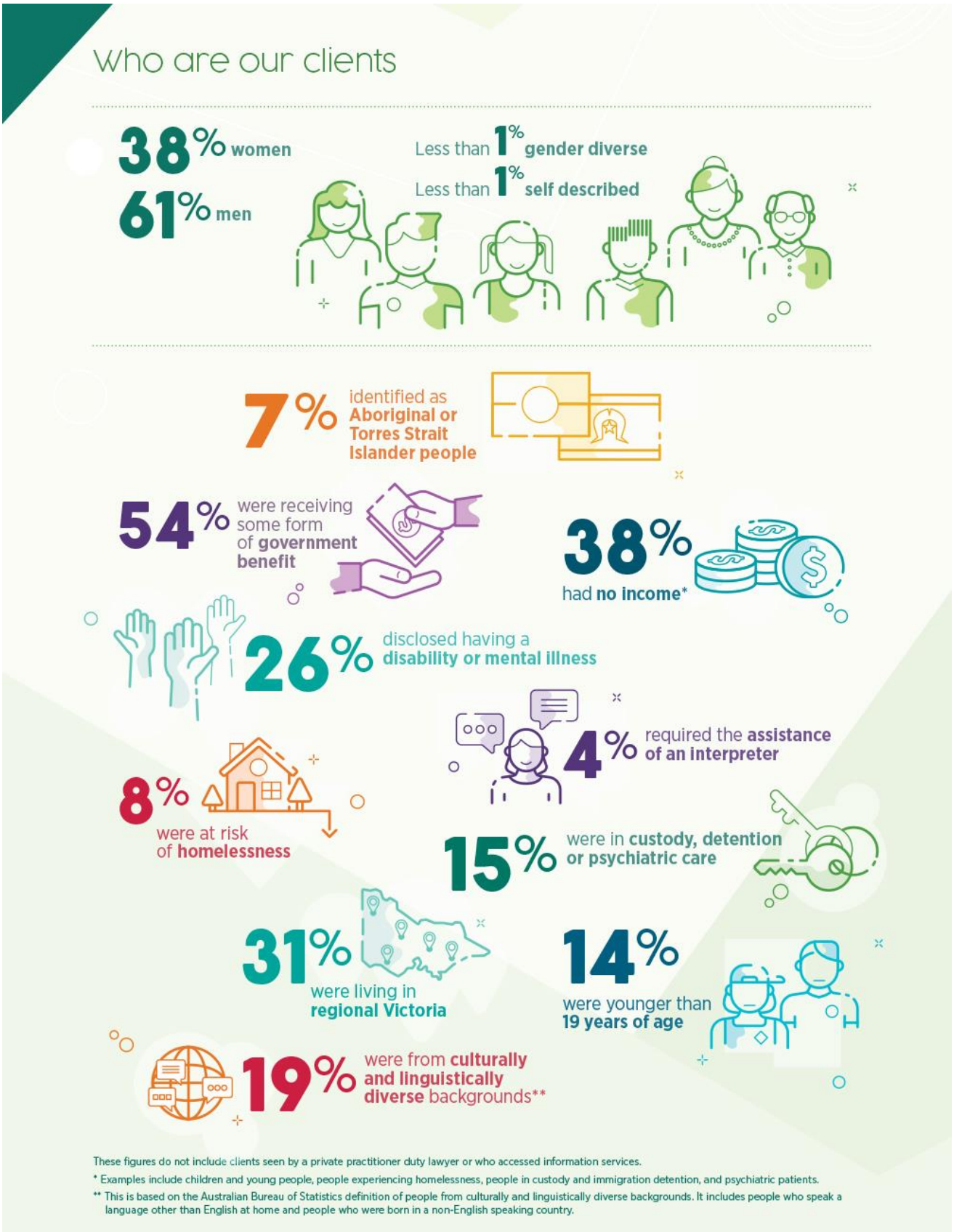
147,631 number of incoming calls
6% decrease on 2019–20

71,672 number of calls answered, or
49% of incoming calls

Family violence priority channels

3,395 number of webchats answered, or
90% of the **3,791** total incoming

6,804 number of calls answered, or
59% of the **11,470** total incoming


Who are our clients
38% women
61% men
Less than 1% gender diverse
Less than 1% self described
7% identified as Aboriginal or Torres Strait Islander people
54% were receiving some form of government benefit
38% had no income*
26% disclosed having a disability or mental illness
4% required the assistance of an interpreter
8% were at risk of homelessness
15% were in custody, detention or psychiatric care
31% were living in regional Victoria
14% were younger than 19 years of age
19% were from culturally and linguistically diverse backgrounds**
These figures do not include clients seen by a private practitioner duty lawyer or who accessed information services.
* Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.
** This is based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. It includes people who speak a language other than English at home and people who were born in a non-English speaking country.