Submission to the Sentencing Advisory Council:

Reforming Adjourned Undertakings in Victoria

To: Arie Freiberg AM
Chair, Sentencing Advisory Council
http://www.sentencingcouncil.vic.gov.au/

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INTRODUCTION

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and those who work with them in the legal sector.

The LIV welcomes this inquiry and is grateful for the opportunity to provide the Sentencing Advisory Council with a submission responding to its Consultation Paper on *Reforming Adjourned Undertakings in Victoria* (the **Consultation Paper**).

This submission has been prepared by the LIV's Criminal Law Section (**CLS**). The CLS has a long history of contributing to, shaping, and developing, effective criminal legislation, and has undertaken extensive advocacy on law reform issues.

The submission that follows first provides General Comments regarding the subject matter of the Consultation Paper, and then responds to each of the Consultation Paper's questions.

General comments

The LIV considers Adjourned Undertakings to be an important but often overlooked component of Victoria's sentencing system. As is acknowledged in the Consultation Paper, they are a cost effective, flexible sentencing disposition that facilitates offender rehabilitation by minimising contact with the criminal justice system. However, they are not perfect: several limitations to their efficacy, range of uses, and reach exist. The LIV considers that targeted reform will improve the operational efficacy of Adjourned Undertakings and extend their reach.

RESPONSES TO QUESTIONS

1. **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?**

The LIV submits that the adequacy of the list of purposes for which an Adjourned Undertaking may be imposed in section 70 of the *Sentencing Act 1991 (Vic)* (**Sentencing Act**) could be improved by amending the section to include an additional sub-section (70(1)(f)), and to amend existing sub-section (b).

Introduction of new sub-section 70(1)(f)

The LIV submits that section 70(1) should be amended to include an additional residual purpose for which adjourned undertakings may be imposed. More specifically, the LIV submits that the section should be amended to include a new subsection (1)(f) with words to the following effect:

> *(1) An order may be made under this Division –*
>
> *(f) where the court is of the view that it would otherwise be in the interests of justice to do so.*

The LIV considers that the inclusion of this additional sub-section would enable the courts to impose Adjourned Undertakings in a broader range of matters than the law currently permits. The LIV supports extending the use of Adjourned Undertakings in matters the court deems appropriate because of the significant benefits they offer to the functioning of the criminal justice system as discussed above; they are comparatively cheap and have better prospects of offender rehabilitation than many other sentencing dispositions.

Amendment to existing sub-section 70(1)(b)

The LIV submits that sub-section 70(1)(b) should be amended to remove the word ‘trivial’. Members of the LIV report that in practice, many matters that result in an Adjourned Undertaking are not trivial according to the technical definition of the term. The LIV submits

that removal of the word 'trivial' would enhance clarity and certainty in the operation of the law, and promote the use of Adjourned Undertaking's in a broader range of cases (subject to judicial oversight).

2. **Should these orders continue to be described as 'Adjourned Undertakings'? If not, what would be a more appropriate description?**

The LIV is of the view that Adjourned Undertakings should not be described as Adjourned Undertakings, but rather that the term 'good behaviour bond' ought instead be adopted.

The LIV considers it critical for the proper administration of justice that the criminal justice system be transparent and accessible to the public. All who come into contact with the system should be able to understand what the potential outcomes of a matter are and what their rights and obligations are after a matter has concluded. This requires that plain, readily understandable language is used wherever possible, as the administration of justice is not enhanced by the creation of confusion, uncertainty, and intimidation among participants in the criminal justice system regarding important aspects of the criminal justice system.

The LIV submits that the term 'Adjourned Undertaking' is not a widely used term, nor is its meaning capable of being easily deduced. As a result, many people encountering the sentencing disposition do not understand what it is or what it involves. This contributes to the creation of confusion and uncertainty for participants in criminal justice system regarding the potential outcome of a matter and, for defendants, their post-sentencing obligations. This naturally causes some participants to feel intimidated and alienated, and creates a risk that some may be left mistaken about what the order essentially involves – the maintenance of good behaviour.

The LIV submits that the term 'good behaviour bond' is a superior alternative that should be adopted. The term is already widely used and understood by the public, LIV members report that many clients use this term to describe the sentencing disposition of Adjourned Undertakings.

3. **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?**

   The LIV does not currently hold a view on this matter.

4. **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.**

   The LIV notes the limited availability of certain services that might ordinarily form a condition of an Adjourned Undertaking in rural areas, such as drug and alcohol counselling, and the impact that limited transportation options may have on access to such services in rural areas.

5. **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?**

   The LIV is of the view that reforms are needed to Adjourned Undertakings to mitigate the disproportionate effect they have on marginalised groups, especially First Nations people. The LIV suggests that reform could involve imposing a provision in the Sentencing Act that would require a court to consider an offender's ability to comply with the Adjourned Undertaking and any conditions imposed, especially where a condition involves a requirement that the offender pay money to satisfy the condition, and the offender's personal circumstances.

   With respect to the latter, the LIV submits that it is imperative that consideration be had to whether the offender is a First Nations person given the disproportionate effect that the criminal justice system has on First Nations people. The LIV notes that organisations such as the Victorian Aboriginal Legal Service would be best placed to provide a comprehensive answer with regard to this aspect of necessary reforms to Adjourned Undertakings.

6. **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?**

   The LIV does not currently hold a view on this matter.

7. **Is there scope to increase the use of judicial supervision as a condition of Adjourned Undertakings?**

   The LIV expresses no firm view in response to this question but notes that some of its members report that increased judicial supervision could be a useful tool in instances where compliance is a real concern. At the same time, members report that judicial supervision is not required in most cases. LIV Members also raised concerns that increasing the use of judicial supervision would increase the costs associated with Adjourned Undertakings.

8. **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?**

   The LIV submits that the definition of 'good behaviour' in section 72 and 75 of the Sentencing Act could be clarified so that offenders better understand what is required of them. However, any definition should not attempt to comprehensively define what the term means. Rather, it should set the minimum standard of behaviour that needs to be met.

   The LIV is of the view that it should specify that 'good behaviour' means that the person 'does not commit any further, non-trivial offences during their Adjourned Undertaking'. In this context, non-trivial should be defined to include traffic infringements and offences of similar magnitude.

9. 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?

   The LIV submits that there is no need for legislative or other guidance about the optional conditions that can be attached to Adjourned Undertakings.

10. **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 for payment to such an organisation, as a condition of an Adjourned Undertaking? If so, why? If not, why not?**

The LIV considers the flexibility of Adjourned Undertakings to be an important aspect of their utility and it supports continuing to allow Victorian courts to order payments be made to charitable organisations in appropriate cases. This is subject to the caveat that the payment be appropriate; in other words, there should be a nexus between the offending and the charity to which the charitable donation is ordered to be paid to. In such circumstances, the payment may be considered akin to an expression of remorse by way of the offender's acceptance of the nature of the specific harm done by the offence, or as an effort to redress harm done to society by the kind of offending perpetrated.

The LIV does not support continuing to allow courts to order donations to be paid to a charity of the court's preference in the absence of the nexus described above. In such circumstances it is difficult to meaningfully distinguish between the donation and a fine, rendering it inappropriate in the context of the sentencing disposition of an Adjourned Undertaking rather than a fine.

Further, the LIV submits that it is imperative that the court fully consider the financial position of the offender when making any orders involving the payment of money. Offenders should not be placed in a position where they cannot comply with, or would be unduly burdened by compliance with, the conditions of the Adjourned Undertaking.

11. **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?**

The LIV does not oppose continuing to allow courts to order donations to specific charities. However, it submits that limitations are required regarding the charities that may be selected.

The LIV submits that donations should only be paid to charitable organisations that are

registered with the Australian Charities and Not for profit Commission and that comply with all of their relevant legal obligations. Further, as discussed above, the LIV submits that courts should only be able to order donations to be paid to charities where there is a nexus between the charity and the offence, or the harm caused by the offence.

12. **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?**

    The LIV supports enhancing the transparency of the operation of the Court Fund. It is imperative that, like any other fund in receipt of donations, the Court Fund properly account for payments from the Court Fund to demonstrate their legal regularity. Further, the publication of such information would enable donations to the Court Fund to better perform a reparative effect by allowing the offender to understand where the donation is going and how it will be assisting the community.

13. **Are there any issues with the availability and operation of justice plans as conditions of Adjourned Undertakings? What changes would you propose and why?**

    The LIV does not currently hold a view on this matter.

14. **Are there any other issues with the optional conditions that currently can be, and are, attached to Adjourned Undertakings in Victoria?**

    The LIV does not currently hold a view on this matter.

15. **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?**

    The LIV submits that it is unfair to make offenders pay to participate in programs that they are ordered to participate in as part of an Adjourned Undertaking. This is particularly so in relation to offenders that are of a lower socioeconomic status. In such circumstances,

requiring offenders pay to participate in court-ordered programs risks placing offenders in the position where they simply cannot comply with an Adjourned Undertaking, or where they sacrifice satisfying their basic needs or other equally important financial obligations in order to comply with the conditions. This reduces the efficacy of Adjourned Undertakings and may lead to the imposition of harsher sentences such as CCOs and imprisonment for those who fail to comply with the conditions of an Adjourned Undertaking for financial reasons.

This LIV is of the view that this position is untenable and unjust. No one should be placed in a position where they cannot, despite their best efforts, adhere to the conditions of a court order because of their socioeconomic status.

The LIV submits that at a minimum, financial assistance should be provided to those experiencing financial need to enable them to participate in court-ordered programs. Alternatively, and preferably, all offenders should be given free access to programs and services that they are ordered to participate in as part of their Adjourned Undertaking.

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

    The LIV does not currently hold a view on this matter.

17. **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 LIV does not currently hold a view on this matter.

18. **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 LIV does not currently hold a view on this matter.

19. 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?

The LIV does not currently hold a view on this matter.

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

The LIV does not currently hold a view on this matter.

21. 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?

The LIV supports amending the *Spent Convictions Act 2021* (Vic) so that findings of guilt are spent at the date of sentencing. The LIV submits that this is appropriate given that Adjourned Undertaking are considered to be less serious than other sentencing dispositions, including fines, which are spent upon sentencing. Doing so is important as it helps to ensure that people subject to an Adjourned Undertaking can obtain employment, enhancing the prospects of their successful rehabilitation.

22. Should breaching an Adjourned Undertaking be decriminalised? If so, why? If not, why not?

The LIV supports entirely decriminalising the breaching of an Adjourned Undertaking. The LIV submits that there are complex and varied reasons why offenders may breach an Adjourned Undertaking, particularly in the case of technical breaches (being non-compliance with the conditions of an Adjourned Undertaking). The LIV considers the existing approach to be unduly punitive in the first instance as it fails to consider the circumstances of the offender or to identify why non-compliance or re-offending has occurred. This is particularly so as the existing criminal penalty for breaching an Adjourned Undertaking is a fine. Given that some

offenders could conceivably have failed to comply with the conditions of an Adjourned Undertaking for financial reasons, it is counterproductive to impose further financial burdens on such offenders.

The LIV supports adopting an approach toward non-compliance that would identify the reasons why non-compliance has occurred, and that would assist offenders in complying with the conditions of the Adjourned Undertaking moving forward where appropriate. If an offender's breach of an Adjourned Undertaking is sufficiently serious, other sentencing options are available that would better respond to the conduct. In such circumstances, it is unnecessary to impose an additional offence of breaching an Adjourned Undertaking.

23. What should happen at the end of an Adjourned Undertaking that has been successfully completed?

The LIV submits that it is important for those who successfully complete an Adjourned Undertaking to receive confirmation of their successful completion of it. Doing so demonstrates to the person that their efforts have been recognized, which may help to reduce recidivism. Further, it signals to the person that the period of the Adjourned Undertaking is complete and that they are free to move forward with their lives. The LIV suggests that such recognition could take the form of a certificate.