Victorian Aboriginal Legal Service Submission to Sentencing Advisory Council's Consultation on Adjourned Undertakings Reform

October 2022

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Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (**VALS**) is an Aboriginal Community Controlled Organisation (**ACCO**). VALS was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria. VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law; our human rights are respected; and we have the choice to live a life of the quality we wish.

Legal Services

Our legal practice serves Aboriginal people of all ages and genders in the areas of criminal, family and civil law. We have also relaunched a dedicated youth justice service, Balit Ngulu. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (**CSO**s). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and representation for Aboriginal people involved in court proceedings. This includes bail applications; representation for legal defence; and assisting clients with pleading to charges and sentencing. We represent clients in matters in the generalist and Koori courts. Most clients have been exposed to family violence, poor mental health, homelessness and poverty. We aim to understand the underlying reasons that have led to the offending behaviour and equip prosecutors, magistrates and legal officers with knowledge of this. We support our clients to access support that can help to address the underlying reasons for offending, and so reduce recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (**PSIO**) matters; coronial inquests; consumer law issues; and Working with Children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and representation to clients in family law and child protection matters. We aim to ensure that families can remain together, and children are kept safe. We are consistent advocates for compliance with the Aboriginal Child Placement Principle in situations where children are removed from their parents' care.

Our Specialist Legal and Litigation Practice (Wirraway) provides legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).

Community Justice Programs

VALS operates a Custody Notification System (**CNS**). The *Crimes Act 1958* requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria. Once a notification is received, VALS contacts the relevant police station to conduct a welfare check and facilitate access to legal advice if required.

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[1]
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)[2]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program[3]
- Aboriginal Community Justice Reports[4]

Policy, Research and Advocacy

VALS informs and drives system change initiatives to improve justice outcomes for Aboriginal people in Victoria. VALS works closely with fellow members of the Aboriginal Justice Caucus and ACCOs in Victoria, as well as other key stakeholders within the justice and human rights sectors.

Acknowledgements

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and future. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Morgan O'Sullivan – Policy, Research and Data Officer
- Fergus Peace – Policy, Research and Advocacy Officer

[1] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.
[2] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.
[3] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.
[4] See https://www.vals.org.au/aboriginal-community-justice-reports/

EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Sentencing Advisory Council's Consultation on Reforming Adjourned Undertakings in Victoria.

VALS is supportive of the use of adjourned undertakings in criminal matters. However, we regularly find that the implementation of adjourned undertakings is flawed, inconsistent and sometimes more onerous and stigmatising than other sentences that sit higher in the sentencing hierarchy. Amendments must be made to the *Sentencing Act* and the *Spent Convictions Act* to ensure adjourned undertakings do not disproportionately impact the sentenced person.

Overall, our service finds that despite the position of adjourned undertakings in the sentencing hierarchy, the implementation of adjourned undertakings in practice means they are inaccessible for many people. Our lawyers are regularly instructed by clients to accept a higher sentence that has a less detrimental impact on the client, because of perverse incentives created by the way adjourned undertakings currently operate.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. The adjourned undertaking form should be revised and reformatted for ease of use and must use plain language where possible.

Recommendation 2. Alternate adjourned undertaking forms should be available in different text sizes.

Recommendation 3. The statement of a requirement to return to court upon the conclusion of the adjourned undertaking should be removed from the form and replaced with clear information about when a person will be required to return to court, if at all.

Recommendation 4. Conditions specified in the form must be clear and concise.

Recommendation 5. The warning section of the adjourned undertaking form should be above the space for the sentenced person's signature.

Recommendation 6. The formal name of an adjourned undertaking should be amended to a Good Behaviour Bond (or similar) to reflect the language used during sentencing as well as the nature of the sentence.

Recommendation 7. Alternate conditions should be listed in the instance that original conditions may no longer be viable.[5]

Recommendation 8. Conditions attached to an adjourned undertaking must be relevant and proportionate to the offending.

Recommendation 9. The *Sentencing Act* should be amended to include guidance regarding optional conditions a decision maker may impose when imposing an adjourned undertaking.

Recommendation 10. The *Sentencing Act* should provide relevant guidance to judicial decision-makers as to what conditions are appropriate and relevant to the offending.

Recommendation 11. When imposing optional conditions, the decision maker must consider whether the person will be able to engage with culturally appropriate services or programs in lieu of generalist programs and services.

Recommendation 12. Optional conditions that require engagement with services must be flexible enough to allow a sentenced person to engage with their preferred service provider.[6]

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[5] For example, a condition that requires the person to continue engaging with their support worker at the local Aboriginal Cooperative may have an alternate condition that if the aforementioned person leaves the organisation then the person should continue to engage with the local Aboriginal Cooperative and any new employees assigned.

[6] That is, conditions must allow an Aboriginal person to chose between an Aboriginal specific service provider and a generalist service provider.

Recommendation 13. Charitable donation conditions should not be imposed on adjourned undertakings where the accused person is reliant on subsidised legal representation. This includes representation through VALS, a Community Legal Service, VLA or where the person is represented by a private practitioner either pro-bono or with a grant of legal aid.

Recommendation 14. The *Sentencing Act* should be amended to require a judicial decision-maker to consider the financial circumstances of the sentenced person when considering the inclusion of financial conditions on an adjourned undertaking.[7]

Recommendation 15. The *Sentencing Act* should be amended to allow financial conditions of adjourned undertakings to be converted to unpaid community work hours upon application to the Court.[8]

Recommendation 16. The Magistrates Court should publish annual reports on the management and disbursement of donations made to the Court Fund.

Recommendation 17. When imposing conditions on an adjourned undertaking, the judicial decision-maker must consider whether the sentenced person will be able to access the relevant services within the period of the undertaking.

Recommendation 18. The maximum length of an adjourned undertaking should be 18 months.

Recommendation 19. Sentenced people should not be required to attend court upon the conclusion of the adjourned undertaking period, provided they have complied with the conditions of the undertaking.

Recommendation 20. The court should provide information regarding returning to court to all people on adjourned undertakings a month prior to the conclusion of the adjournment period.

Recommendation 21. Court communication and materials must have clear information regarding a sentenced person's requirement to return on the adjournment date.

Recommendation 22. The term 'good behaviour' should be defined within the *Sentencing Act.*

Recommendation 23. An adjourned undertaking should not be breached by behaviours that are related to a medical disorder – such as drug use and possession offences. A person on an adjourned undertaking who is charged with such an offence should be dealt with in a manner that recognises and responds to medical issues, not through further criminalisation.

Recommendation 24. Programs and services attached to conditions of adjourned undertakings should be free of charge to low- and middle-income earners.

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[7] A condition similar to that of s64 of the *Sentencing Act* would be appropriate.
[8] Inspiration may be drawn from s83ADB of the *Sentencing Act.*

Recommendation 25. Where it is not possible to fund all programs and services attached to conditions of adjourned undertakings, there should be subsidisation options available to low-income earners.

Recommendation 26. The *Spent Convictions Act* should be amended so that a finding of guilt for an adjourned undertaking without conviction becomes spent immediately on sentencing.

Recommendation 27. The *Spent Convictions Act* should be amended to significantly reduce the 'conviction period' before a finding of guilt for an adjourned undertaking with conviction becomes spent.

Recommendation 28. Non-compliance with the conditions of an adjourned undertaking should be decriminalised.

Recommendation 29. In lieu of criminalisation of non-compliance with conditions of an adjourned undertaking, the judiciary should endeavour to determine the reason a person has been unable to comply with the conditions and engage in a resolution process by which alternate conditions may be imposed.

DETAILED SUBMISSIONS

Accessibility and clarity of the adjourned undertaking form

The current adjourned undertaking form is convoluted and difficult to understand. There would be benefit in amending the adjourned undertaking form to ensure it is user-friendly and accessible for sentenced persons, their support networks and legal practitioners.

Language and format

Presenting before court can be a source of stress and shame for many people. These anxieties combined with unclear instructions or legal documents can lead to further stigmatisation and stress for people encountering the criminal legal system. The current adjourned undertaking form causes unnecessary confusion and stress for many people and should be streamlined to reduce difficulties. The form should utilise plain language where possible and should avoid inaccessible legal language. There are many parts of the form that could be removed or amended to improve clarity.

VALS receives many enquiries from people who do not understand their obligations set out in the form. We regularly provide our clients with correspondence that outlines their obligations and requirements under the order in language that is easy to understand. The form should be amended to ensure that it can be understood by the sentenced person, or by a support person other than a legal representative (such as a family member or support worker) if the sentenced person has reading or writing difficulties.

A 2011 study found that nearly 50% of incarcerated young offenders experience language difficulties, which includes difficulties reading, writing, and comprehending.[9] Because an adjourned undertaking is an agreement between the offender and the court, the form's design should favour clarity and accessibility to ensure the sentenced person wholly understands their obligations under the order.

The form should be available in different formats to ensure its accessibility. More than 18% of Australian adults experience a print disability which creates barriers in accessing standard print materials.[10] This may include having the standardised form at size 12 font, and an alternate form that is available upon request with size 14 (or larger if needed) font. The court and its agents have a responsibility to ensure written materials that are signed by court users are accessible and useable.

Information on undertaking conditions

The adjourned undertaking form does not always provide clear, accurate or consistent information about conditions, which can cause distress and anxiety to the person receiving a sentence.

The first substantive section of the form states that the person is released, either with or without conviction, and that the matter is adjourned for the period of the undertaking. The form specifically

[9] Pamela Snow and Martine Powell, 'Oral language competence in incarcerated young offenders: Links with offending severity' (2011) 13(6) International Journal of Speech-Language Pathology 480, 484.
[10] Vision Australia, *Print Accessibility* (Webpage, 2022).

states that the matter has been adjourned for a further hearing upon the conclusion of the adjournment period. However, it is not the case that a person must return to court upon conclusion of the undertaking in instances where they have fully complied with the conditions of the undertaking. The form should be amended to make clear that the sentenced person will only be required to attend court on the conclusion of their undertaking if they have not complied with all conditions of the undertaking.

The form goes on to list three check-box conditions:

- the person must appear at court on the date the matter has been adjourned to;
- they must appear before the adjournment date if the sentenced person receives a notice to do so; and
- further conditions that may apply.

The check-box style is intended to ensure undertaking forms are consistent and easily understandable. However, there are instances where the form is not properly completed, leading to confusion and stress for the sentenced person. An example of this is when none of the boxes are checked, yet there are conditions imposed and the preceding paragraph states the person is required to attend on the adjourned date. Conflicting and unclear information on the form can be a source of significant anxiety to the person receiving the sentence.

Information on consequences of non-compliance

The form should also clearly set out the consequences for breaching the undertaking. Currently, the consequences cited in the form are convoluted and difficult to understand for many people.

The warning for breaching the undertaking is below the section where the person signs, which may mean that people do not take notice of or read this section. The consequences for breaching an undertaking should be listed further up on the form, above the signature, and should be written in plain language. A possible amendment, reflecting the current breach rules, could be:

> ***Warning – consequences of not complying with this undertaking***
>
> *This undertaking is an agreement between you and the Court that you will remain of good behaviour during the above period.*
>
> *If you do not comply with all conditions listed in this undertaking, you may have to return before the court with the possibility of being re-sentenced on the original offending.*
>
> *Alternatively, you may receive a fine of $X if you do not comply with the conditions listed above.*
>
> *If you are unsure about the above conditions or this warning, please contact your legal practitioner or the solicitor who assisted you with this case.*

Title of the sentence

The purpose of an adjourned undertaking is to ensure the sentenced person engages with the conditions of the undertaking and is **of good behaviour**. Magistrates, lawyers and police regularly use the term 'Good Behaviour Bond' when referring to adjourned undertakings.

The use of the term adjourned undertaking is needlessly confusing for court users. A major issue court users face when engaging with the legal system is the use of legal terminology that causes unnecessary confusion. The criminal legal system is already daunting and inaccessible for many people, and the use of terms that are not clearly connected to the purpose of the order creates another barrier to understanding the legal system for court users.

Many sentenced people experience a range of disabilities, including hearing difficulties and reading or writing limitations. Where a sentenced person is before the court and told by their lawyer and the Magistrate that they will be placed 'on a bond' and the person is then provided with an order that states they are on an adjourned undertaking, it is understandable that a person may be confused. While it is important that the language used in a courtroom is formal and compliant with court procedures, it is also imperative that a person who is being sentenced wholly understands the outcome of their matter and their responsibilities under the sentence.

RECOMMENDATIONS

Recommendation 1. The adjourned undertaking form should be revised and reformatted for ease of use and must use plain language where possible.

Recommendation 2. Alternate adjourned undertaking forms should be available in different text sizes.

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Conditions attached to adjourned undertakings

Alternate conditions

Adjourned undertakings should include alternate conditions for circumstances where the original condition may no longer be possible.

Conditions that have a specific requirement, such as "*engage with Dr X at VAHS Preston on a weekly basis*", should note an alternate condition in the circumstance that the first condition is no longer viable. A specific condition may become impossible when the employee listed in the undertaking no longer works for the organisation, or perhaps the sentenced person no longer feels comfortable engaging with the doctor for personal reasons. A person's right to engage with medical professionals that make them feel safe and comfortable must not be disregarded for the purposes of an adjourned undertaking. In the instance that a person cannot continue to comply with the non-viable original condition there should be clear expectation set by the court that the person will endeavour to continue to comply with an alternate and comparable condition.

This may include an alternate condition listed in smaller text following the original condition that sets out an alternate condition in a clear manner. For example:

> *In the circumstance that you can no longer see the above named professional, you must continue to engage with a professional of an equal or similar position.*

Culturally informed conditions

In 1991, the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommended that non-custodial sentences be available, accessible and culturally appropriate, and that authorities work with Aboriginal and Torres Strait Islander groups in implementing programs.[11] The court must have consideration as to the accessibility and availability of culturally safe rehabilitative programs when attaching conditions to an adjourned undertaking. Aboriginal specific rehabilitative programs, including drug and alcohol or behaviour change programs, regularly have limited capacity and long wait times for admission.

Our solicitors regularly witness clients struggling to comply with and engage with generalist stream rehabilitative programs, where those same clients will excel in engaging with Aboriginal specific programs. This is because Aboriginal specific programs provide services in a culturally safe and supportive manner, allowing people who engage with their services to be their true, authentic selves and wholly engage with all rehabilitative aspects of the program. VALS regularly sees our clients thriving when engaging with Aboriginal rehabilitative programs, in contrast to generalist programs.

At the point of intake, we regularly hear from clients that they want to engage with Aboriginal rehab programs or behavioural change programs, but that they don't have the means to self-refer or do not

[11] Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) Vol 5, Recommendations 111 - 116.

know where to start the process of engaging with these services. Our criminal practice spends a considerable amount of time arranging referrals to Aboriginal rehabilitative programs at the request of clients. A considerable proportion of referrals to such services are self-initiated by clients, and there is a strong appetite in Aboriginal communities for these services, but access to these services is generally limited given the high demand and lack of funding. Despite VALS having knowledge of the available services and the means to make these referrals, we still encounter roadblocks in referring clients due to under-resourcing and long waiting lists.

Judicial decision-makers must take into account an Aboriginal person's ability to access culturally safe services when including optional conditions on an adjourned undertaking. Ongoing systemic and institutional racism means that Aboriginal people may not always feel comfortable engaging with generalist services. Aboriginal people have a right to engage with a service that they feel adequately appreciates their connection to culture and Aboriginality.

Programs such as the Wulgunggo Ngalu Learning Place demonstrate the strength of initiatives that are designed jointly with Aboriginal communities, run by Aboriginal people and grounded in Aboriginal culture.[12] Currently, Wulgunggo Ngalu Learning Place has the capacity to support 17 Aboriginal men at once, with support ranging from 3-6 months. As recommended by the ALRC Inquiry into Incarceration of Aboriginal Peoples,[13] the Government should increase investment in Aboriginal-led support programs for Aboriginal people on community-based sentences, including the establishment of an equivalent program for women.

VALS believes it would be beneficial to insert guidance in the *Sentencing Act* as to what types of conditions may be imposed as part of an adjourned undertaking. This guidance should emphasise the importance of culturally safe conditions. When culturally safe programs and services are not available, the guidance should require judicial decision-makers to consider whether a condition requiring an Aboriginal person to engage with a generalist service may be more burdensome than it would be for a non-Aboriginal person. The guidance should also make clear that an adjourned undertaking without attached conditions is an available sentence, which is not clear in the existing legislation.

Requiring an Aboriginal person to engage with services that are not culturally safe makes meeting the conditions of an undertaking significantly more burdensome, compared to equivalent conditions imposed on a non-Aboriginal person. The judicial decision maker has a responsibility to ensure the person receiving the punishment will be able to comply with the undertaking in a manner that does not put their cultural identity at risk. Conversely, Aboriginal people must be allowed to elect which service they want to engage with, be it a specific Aboriginal service or a mainstream generalist service. Adjourned undertakings should always allow the sentenced person to elect their preferred service.

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[12] Clear Horizon Consulting, Department of Justice, Wulgunggo Ngalu Learning Place: Final Evaluation Report (2013), 3-4.
[13] 5 Australian Law Reform Commission, Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, (2017), Recommendation 7–3: "State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders."

Payment conditions and charitable donations

When including optional conditions on an adjourned undertaking, it must be considered whether the cumulation of the conditions imposed create an excessive punishment. Although charitable donation conditions may provide an opportunity for the person to address the impact of their offending, it must also be considered whether a financial penalty may be more punitive and detrimental than other work-based conditions.

If charitable donations are to be attached to an adjourned undertaking the judicial officer, or an officer of the court, must explain to the person the purpose of including such a condition, as well as the reasoning for electing the chosen charity. The chosen charity's purpose must align with the purposes of addressing the offending and should not, under any circumstances, be randomly chosen or completely disconnected from the offending.

Although not considered by a Victorian Court to date, courts in other Australian jurisdictions have established principles for adjourned undertakings, which require conditions to relate to the character of the offending or the purposes of punishment for such offending.[14] The consultation paper identifies many issues with charitable donations, including the imposition of charitable donation conditions that may be entirely irrelevant to the offending. Though the *Sentencing Act* does not specifically require charitable donation conditions to be relevant in some way to the offending,[15] it is well accepted in practice the conditions attached to the offending should be both rehabilitative in nature and address themes of the offending. An appropriate example is the inclusion of a condition that requires a person to undergo a men's behavioural change program where the offending is family violence related. It would be irrelevant to require a person to complete a men's behavioural change program for low level driving offences as the program would fail to address behaviours that led to the offending, nor would it provide the person with an opportunity to engage with the consequences of the offending. Similarly, for a charitable donation condition to be of any utility, it must be in some way aligned with the charges.

As VALS legal services are means-tested, all VALS clients are on low to middle incomes and some clients are reliant on Centrelink benefits as their sole income. As such, many VALS clients do not have disposable incomes that can absorb an unexpected expense. During consultation with solicitors, several issues were raised regarding financial penalties in the form of charitable donations. In many cases our clients cannot afford the financial burden of paying a financial penalty. As such, there have been circumstances where despite an adjourned undertaking being the most appropriate sentence for a client, the client may instruct their lawyer to accept a more severe penalty, like a Community Corrections Order (**CCO**), because they do not have the financial ability to accept a financial condition, whereas they may have the ability or time to engage with the conditions of a CCO. Clients may also instruct their lawyer to accept a fine rather than an undertaking with a charitable donation condition, because a person who receives a fine can apply to the court to have the fine converted into unpaid community work hours.[16] This option is not available for an adjourned undertaking. This again results

[14] *R v Bugmy* [2004] NSWCAA 258.
[15] *Sentencing Act 1991* (Vic) s72(2)(c) and s85(2)(c).
[16] *Sentencing Act 1991* (Vic) s83ADB.

in a client accepting a more serious sentence because they cannot afford to take on a financial penalty. Clients are, in effect, accepting more serious sentences because of a failure to consider the financial impacts of payment conditions. A person should not receive a more serious sentence because they have a lower income.

Judicial decision-makers should be required to consider the financial impact a charitable donation condition would have before attaching one to an adjourned undertaking. VALS's experience is that financial conditions on adjourned undertakings are rarely, if ever, considered in light of the persons financial situation or capacity to pay the penalty. When imposing a fine,[17] the judicial officer must take into consideration the financial circumstances of the offender in determining the amount and method of payment of the penalty.[18] The court must consider the impact that such a fine would have on the person and make orders accordingly.[19] A similar provision does not exist for adjourned undertakings. The *Sentencing Act* should be amended to ensure that when considering the imposition of a financial penalty as a condition of an adjourned undertaking, the decision maker must consider the burden the penalty would place on the sentenced person when determining the appropriateness and amount of the penalty.

Further, when a person is sentenced to an adjourned undertaking with conditions that require them to complete a program (at their expense) and make a charitable donation, the judicial decision-maker must contemplate whether the inclusion of such conditions would be unnecessarily severe for the sentenced person.

As noted in the consultation paper, over $1,200,000 in donations were ordered through adjourned undertakings in 2019 – 2020.[20] The consultation paper states that during the same period, 54 donations were made to the Finian Foundation, totalling an amount of $49,500 in donations from adjourned undertakings.[21] The Finian Foundation's Annual Information Statements[22] indicate that a majority of the foundation's income is from conditions attached to adjourned undertakings.

The consultation paper identifies an important issue in relations to tax benefits of charitable donation conditions. Any middle to high-income earner who is subject to an adjourned undertaking with charitable donation conditions is able to submit the receipt of their donation and receive a tax benefit. A person who earns over $180,000 per annum would receive a $225 tax benefit on a $500 donation condition, whereas a person who earns below $45,000 a year would only receive a $95 tax benefit (and may also be less likely to be aware of the possibility of claiming a deduction for the donation).[23] The same high-income earner is also paying approximately quarter of their **weekly wage** with a $500

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[17] *Sentencing Act 1991* (Vic) s49.
[18] *Sentencing Act 1991* (Vic) s52(1).
[19] *Sentencing Act 1991* (Vic) s52(1).
[20] Sentencing Advisory Council, *Reforming Adjourned Undertakings Consultation Paper* (Consultation paper, August 2022).
[21] Sentencing Advisory Council, *Reforming Adjourned Undertakings Consultation Paper* (Consultation paper, August 2022), p 51.
[22] Available through the Australian Charities and Not-for-profits Commission website, https://www.acnc.gov.au/charity/charities/9f1e8dd4-2daf-e811-a961-000d3ad24182/documents/.
[23] Sentencing Advisory Council, *Reforming Adjourned Undertakings Consultation Paper* (Consultation paper, August 2022), p 52.

condition, but for the low-income earner the same condition would be approximately a quarter of their **monthly wage**.[24] It is unconscionable that people who have the financial means to endure the burden of satisfying a charitable donation condition are able to ultimately benefit from the donation, while people who are unable to afford the donation in the first place receive minimal tax benefits. Our lawyers have reported that charitable conditions are rarely proportionate to the person's income.

As with charitable conditions, the judicial decision-maker must consider the sentenced person's ability to pay a Court Fund condition. Most VALS clients are not able to bear the impact of a Court Fund condition. Many clients assisted by VALS end up in breach of their adjourned undertaking because, although they have complied with all behavioural conditions, they are unable to afford the financial conditions of the undertaking.

Further information on the use of donations made to the Court Fund is required.

RECOMMENDATIONS

Recommendation 7. Alternate conditions should be listed in the instance that original conditions may no longer be viable.[25]

Recommendation 8. Conditions attached to an adjourned undertaking must be relevant and proportionate to the offending.

Recommendation 9. The *Sentencing Act* should be amended to include guidance regarding optional conditions a decision maker may impose when imposing an adjourned undertaking.

Recommendation 10. The *Sentencing Act* should provide relevant guidance to judicial decision makers as to what conditions are appropriate and relevant to the offending.

Recommendation 11. When imposing optional conditions, the decision maker must consider whether the person will be able to engage with culturally appropriate services or programs in lieu of generalist programs and services.

Recommendation 12. Optional conditions that require engagement with services must be flexible enough to allow a sentenced person to engage with their preferred service provider.[26]

Recommendation 13. Charitable donation conditions should not be imposed on adjourned undertakings where the accused person is reliant on subsidised legal representation. This includes

[24] Provided both people in this scenario do not have a HECS/HELP loan outstanding, the high-income earner earns approximately $2200 per week, while the low-income earner earns approx. $2900 per month.
[25] For example, a condition that requires the person to continue engaging with their support worker at the local Aboriginal Cooperative may have an alternate condition that if the aforementioned person leaves the organisation then the person should continue to engage with the local Aboriginal Cooperative and any new employees assigned.
[26] That is, conditions must allow an Aboriginal person to chose between an Aboriginal specific service provider and a generalist service provider.

representation through VALS, a Community Legal Service, VLA or where the person is represented by a private practitioner either pro-bono or with a grant of legal aid.

Recommendation 14. The *Sentencing Act* should be amended to require a judicial decision maker to consider the financial circumstances of the sentenced person when considering the inclusion of financial conditions on an adjourned undertaking.[27]

Recommendation 15. The *Sentencing Act* should be amended to allow financial conditions of adjourned undertakings to be converted to unpaid community work hours upon application to the Court.[28]

Recommendation 16. The Magistrates Court should publish annual reports on the management and disbursement of donations made to the Court Fund.

Recommendation 17. When imposing conditions on an adjourned undertaking the judicial decision maker must consider whether the sentenced person will be able to access the relevant services within the period of the undertaking.

Maximum length of adjourned undertakings

Currently, adjourned undertakings may be imposed for periods of up to 5 years.[29] Adjourned undertakings are at the lower end of the sentencing hierarchy and should be one of the least punitive sentences available to a judicial decision maker. The purpose of an adjourned undertaking is to limit a person's contact with the criminal legal system and to encourage rehabilitative behaviours, such as engaging with a drug and alcohol service. Where an adjourned undertaking is imposed for periods longer than 18 months there is an increased possibility a sentenced person may breach the undertaking.

An adjourned undertaking should not be a tool used to control and limit a sentenced person's behaviours and freedoms for *excessive periods*. New South Wales and Western Australia have a legislated maximum length of 2 years for comparable orders.[30] Given the types of offences for which an adjourned undertaking is a possible sentence, an undertaking lasting longer than 18 months is both excessive and inappropriate. VALS' view is that the maximum adjournment period should be 12 months but given the lengthy waiting times for many programs and services required by undertakings, a maximum period of 18 months allows for more opportunity to access the required services.

RECOMMENDATIONS

Recommendation 18. The maximum length of an adjourned undertaking should be 18 months.

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[27] A condition similar to that of s64 of the *Sentencing Act* would be appropriate.
[28] Inspiration may be drawn from s83ADB of the *Sentencing Act.*
[29] *Sentencing Act 1991* (Vic), s72(1) and s75(1).
[30] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95; and *Sentencing Act 1995* (WA), s 48(3).

Successful completion

The conclusion of an adjourned undertaking period should be dealt with on the papers.

Currently, the adjourned undertaking form is confusing for many people. VALS regularly receives inquiries from former clients, and those who we have not acted for, who are unsure if they are required to attend court for their bond return. As recommended above, the form should be amended to ensure it is clear that a person will only be required to attend on the bond return date in circumstances where they have not complied with the bond. Circumstances where a person is required to attend court on the bond return date are rare because if the person has not complied with the order, or has been charged with further offending, the undertaking is breached and their bond return will be abridged to be dealt with alongside their new matter.

If it is not possible to have all adjourned undertaking returns dealt with on the papers, the adjourned undertaking form must make this clear. Additional steps should be taken to ensure sentenced persons are informed of any requirement to attend court at the conclusion of the undertaking period. This may include sending a letter a month prior to the return date that informs the person they are required to attend court, or using the court texting system to inform the person. During COVID-19 lockdowns across Victoria the Magistrates Court utilised a text system to inform court users of their upcoming dates and provided information regarding Practice Directions. VALS clients would regularly receive text messages from the Magistrates Court regarding their matters. This demonstrates the Court's ability to implement a notification system for the return of adjourned undertaking matters.

VALS's main concern with the conclusion of adjourned undertakings is the lack of clarity available to our clients and all other court users regarding completion of the undertaking. Whether a person can have their matter dealt with on the papers or will be required to attend court is less important than ensuring that the court makes clear to the court user what is required of them.

RECOMMENDATIONS

Recommendation 19. Sentenced people should not be required to attend court upon conclusion of the adjourned undertaking period provided they have complied with the conditions of the undertaking.

Recommendation 20. The court should provide information regarding returning to court to all people on adjourned undertakings a month prior to the conclusion of the adjournment period.

Recommendation 21. Court communication and materials must have clear information regarding a sentenced persons requirement to return on the adjournment date.

Good behaviour

The term 'good behaviour' is currently not defined within the *Sentencing Act.* The term should be defined to ensure consistent application across all adjourned undertakings.

Good behaviour is a subjective term to many people. The application of the term in this instance is that the sentenced person shall not come before the court on any criminal charges during the adjournment period. However, the term may be interpreted differently by legal professionals and the general public. A more appropriate definition would be one that considers the rehabilitative intent of the order and involves consideration of the person's behaviour during the adjournment period in context. There must be recognition of a person's attempts to engage with the conditions of the undertaking and their efforts towards altering their behaviour.

This is particularly important in relation to drug offences. Drug addiction is a recognised medical disorder.[31] Medical professionals advocate for interventions for drug addiction to be founded in medical treatments and behavioural therapy.[32] VALS supports the decriminalisation of personal use and possession of drugs, recognising the failures of the criminal legal response to drug issues. In Victoria, moving towards more constructive public health responses is especially important for Aboriginal people. The colonial context of Australian criminal legal institutions means that trying to tackle health issues through police and prisons, while harmful for everyone, has disproportionate effects on Aboriginal people. Regardless of whether personal drug offences are decriminalised, people who are subject to an adjourned undertaking should not have their undertaking breached by drug possession or drug use charges. Instead, a personal drug offence should trigger a health and wellbeing response, rather than a breach of the undertaking and further criminalisation of the person. A person should be offered intervention supports to assist in addressing their addiction. The purpose of an adjourned undertaking is to encourage a person to address the underlying factors that led to the offending and allow the person to actively engage in their own rehabilitation and behavioural change process. In circumstances where a person subject to an adjourned undertaking is charged with a personal drug offence, the Magistrate dealing with the fresh matters must take into account a person's relevant medical disorder, being drug addiction. If the person is deemed to have an addiction the Magistrate should not cancel the adjourned undertaking and resentence the person for the original offending, but rather afford the person an opportunity to seek addiction and drug supports.

It is particularly important to consider what good behaviour looks like for communities that are over-policed. Aboriginal and Torres Strait Islander people are overrepresented in the criminal legal system overall, as well as in relation to drug offences.[33] In Victoria, 13,083 people were charged with drug use or possession over the 21/22 financial year.[34] Just over 6% of this cohort were Aboriginal and/or Torres

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[31] National Institute on Drug Abuse, *Drug Misuse and Addiction* (Website, July 2020) < https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction#ref>.
[32] National Institute on Drug Abuse, *Treatment and Recovery* (Website, July 2020) < https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery>.
[33] Aboriginal and Torres Strait Islander people represent over 6% of all drug offences (principal offence) despite Aboriginal and Torres Strait Islander people representing 1.2% of the Victorian population. Via Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander status* (Website, September 2022) < https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres>; and Australian Bauru of Statistics, Estimates of Aboriginal and Torres Strait Islander Australians (Website, 21 September 2022) < https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/jun-2021>.
[34] Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander status* (Website, September 2022) < https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres>.

Strait Islander, despite Aboriginal people only representing 1.2% of the Victorian population.[35] The targeted policing practices that disproportionately bring Aboriginal people before the courts in Victoria have a significant impact on Aboriginal people's ability to successfully complete an adjourned undertaking without police intervention.

RECOMMENDATIONS

Recommendation 22. The term 'good behaviour' should be defined within the *Sentencing Act.*

Recommendation 23. An adjourned undertaking should not be breached by behaviours that are related to a medical disorder – such as drug use and possession offences. A person on an adjourned undertaking who is charged with such an offence should be dealt with in a manner that recognises and responds to medical issues, not through further criminalisation.

Funding

The burden placed on the accused person to pay for the programs they are required to undertake as part of the undertaking is inappropriate. When a person receives a more severe sentence of a CCO, the programs they are required to engage with are funded by the State Government. It is paradoxical that a person who has been found guilty of a low-level offence and is receiving a less serious sentence should be burdened with the costs of engaging with court-ordered programs.

Many of our clients who receive an adjourned undertaking are required to engage with therapeutic programs or other programs that are related to the offending. For example, a person who is before the courts for driving matters may be required to complete a driver safety course at their own expense. As discussed above, many clients of VALS and other CLCs across Victoria are unable to afford unexpected expenses. The requirement for a sentenced person to pay for the program means that a nominally equivalent sentence imposes a far greater burden on low-income earners than those on higher incomes. It can also mean that the sentence imposes a burden on dependents and other family members, if the sentenced person is the sole or primary earner of household income and is forced to restrict spending on essential household items to cover the cost of participating in a mandatory program.

Programs that are mandated by an adjourned undertaking should be provided free of charge, or at a subsidised rate for people who are low- and middle-income earners. Judicial decision makers should consider a sentenced person's financial circumstances – including not only their income, but also the size of their household and whether they have other caring responsibilities to meet out of that income – when considering whether and how to impose a requirement to complete a program.

A person's financial incapacity to afford behavioural change programs should not result in automatic uplift of sentence. Issues of access to justice are compounded when the Magistrate imposes a higher sentence simply because a person cannot afford to comply with the conditions of an adjourned

[35] Ibid.

undertaking. Instead, low- and middle- income earners should be able to access free or subsidised programs which would afford them the same access to lower-level sentencing options as higher income earners. Further, failure to include a program condition simply because a person cannot afford it does not address the behaviours and attitudes that formed the basis of the offending.

RECOMMENDATIONS

Recommendation 24. Programs and services attached to conditions of adjourned undertakings should be free of charge to low- and middle-income earners.

Recommendation 25. Where it is not possible to fund all programs and services attached to conditions of adjourned undertakings there should be subsidisation options available to low-income earners.

Adjourned undertakings and convictions

Undertakings with and without conviction

VALS believes there is utility in retaining the current structure of separate provisions for with and without conviction undertakings.

Although in theory there is little to no difference in the two sections of the *Sentencing Act*, in practice a judicial decision maker will often 'climb' the hierarchy when sentencing. That is to say, an offence with low-level criminality may attract a sentence of an adjourned undertaking without conviction, but a slightly more serious offence can be dealt with by imposing an adjourned undertaking with conviction. When a decision maker is deciding between an adjourned undertaking and a fine, they may consider an undertaking with conviction as a 'middle ground' that allows a person to engage with the therapeutic conditions of the undertaking whilst also imposing the considerable penalty of conviction.

Retaining the current structure would allow people engaged with the criminal legal system for minor offending to be afforded the opportunity to complete an undertaking without conviction, before a more serious sentence is considered (including an undertaking with conviction).

Spent convictions

VALS supports an amendment to the *Spent Convictions Act* to provide that findings of guilt become spent at the date of sentencing for people receiving adjourned undertakings without convictions. This is currently not possible because the Act provides that a conviction cannot be spent until all conditions are completed. While some people may not complete all the conditions of their undertaking, this does not increase the seriousness of their offending or mean that the original sentence was inappropriate. Serious breaches of the undertaking may be dealt with in their own right, or through resentencing, and the Spent Convictions Scheme will operate afresh in such cases. There is thus no rationale for

waiting until the end of the adjournment period for the original finding of guilt to become spent. As noted in the consultation paper, the current legislation creates another perverse incentive (in addition to the financial incentives discussed above) to accept a more serious sentence such as a fine.

In our view, the same logic should apply to people who are sentenced to an adjourned undertaking with conviction. This would require more significant changes to the *Spent Convictions Act*. VALS' consistent position has been that a 10-year waiting period is far too long to be appropriate as the standard waiting period for any conviction that is not immediately spent.[36] This is particularly clear with respect to convictions where the only sentence is an adjourned undertaking. This sentence is imposed for relatively minor offending. Any breach of the order, as noted above, can be dealt with through further charges or resentencing for the original offence. It is clearly disproportionate to force a sentenced person to disclose for a decade their conviction for minor offending, for which they received a sentence low in the sentencing hierarchy. VALS supports significant reform to the *Spent Convictions Act*, which should include a change to the waiting periods for a sentence of an adjourned undertaking with conviction. In VALS' view it is not clear that any waiting period is appropriate for adjourned undertakings, and such findings of guilt could become spent immediately on sentencing even when a conviction is recorded. At a minimum, the waiting period for such convictions should be far less than 10 years and could reasonably be linked to the length of the adjournment period.

RECOMMENDATIONS

Recommendation 26. The *Spent Convictions Act* should be amended so that a finding of guilt for an adjourned undertaking without conviction becomes spent immediately on sentencing.

Recommendation 27. The *Spent Convictions Act* should be amended to significantly reduce the 'conviction period' before a finding of guilt for an adjourned undertaking with conviction becomes spent.

Decriminalising breaches

Breaches of adjourned undertakings should not be criminalised. The purpose of the adjourned undertaking is to have a less punitive and supervisory approach to sentencing. An adjourned undertaking is deliberately low in the sentencing hierarchy, and it cannot be that failure to comply with its conditions should result in further criminalisation.

A more appropriate approach to dealing with a sentenced person who is not complying with the conditions of their undertaking would be to engage the person in a discussion as to the reasons they are not complying. The reasons our clients are unable to comply with the conditions of an undertaking are typically:

[36] VALS (2019), *Submission to the Legal and Social Issues Committee Inquiry into a Legislated Spent Convictions Scheme*, pp14-16.

- they are unable to afford a financial condition
- they do not understand what they need to do to complete the condition
- they do not know where to start or how to commence engaging with certain programs and services
- an original condition of the bond is not viable for reasons out of their control (including inability to access services due to waiting periods)

Instead of criminalising a person's inability to comply with the conditions of an undertaking, the courts should attempt to determine the reasons the sentenced person has been unable to comply. By doing so, the Court and the sentenced person may be able to determine an appropriate alternate condition that is in line with the spirit of the initial condition and would subsequently allow the person to comply with the adjourned undertaking.

As discussed above, many services that will be included on an adjourned undertaking have extended waiting periods. A person who is unable to comply with their undertaking because the service is unable to accommodate them should not be criminalised. Rather, where a person is not complying with the conditions of the order they should be provided with further supports to encourage and provide an opportunity to wholly engage with the undertaking.

RECOMMENDATIONS

Recommendation 28. Non-compliance with the conditions of an adjourned undertaking should be decriminalised.

Recommendation 29. In lieu of criminalisation of non-compliance with conditions of an adjourned undertaking, the judiciary should endeavour to determine the reason a person has been unable to comply with the conditions and engage in a resolution process by which alternate conditions may be imposed.