

# Reforming Adjourned Undertakings in Victoria

## Consultation Paper

**The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues.**

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the *Sentencing Act 1991*. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices
- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

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- two people with broad experience in community issues affecting the courts
- one senior academic
- one highly experienced defence lawyer
- one highly experienced prosecution lawyer
- one member of a victim of crime support or advocacy group
- one person involved in the management of a victim of crime support or advocacy group who is a victim of crime or a representative of victims of crime
- one member of the police force of the rank of senior sergeant or below who is actively engaged in criminal law enforcement duties
- the remainder must have experience in the operation of the criminal justice system.

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# Reforming Adjourned Undertakings in Victoria Consultation Paper

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# Chair's foreword

Much of the Council's work since it was established in 2004 has focused on the upper end of Victoria's sentencing hierarchy: imprisonment, suspended sentences, community correction orders, even fines. Until now we have not directly turned our attention to what are sometimes described as 'low-end orders': adjourned undertakings (known in other jurisdictions as conditional release orders or good behaviour bonds) and dismissals with or without conviction.

Low-end orders are, however, a critical feature of the sentencing hierarchy. Among other things, they are designed to respond to low-level offending, first-time offenders and vulnerable offenders; to reduce the resources required in responding to certain offending; to acknowledge circumstances where a monetary penalty (a fine) would not be appropriate; to prioritise the supervisory and rehabilitative purposes of sentencing over its punitive aims; and to encourage as little interaction with the justice system as possible in appropriate cases. Contact with the justice system is a significant risk factor for *further* contact, and in that sense low-end orders are often the most appropriate means of facilitating offenders' rehabilitation, deterring them from further offending, and thus protecting the community from further offending behaviour.

With that in mind, in 2021 the Council committed to reviewing adjourned undertakings in Victoria, to see whether there was scope to improve their use, through legislative reform, changes to how they are operationalised in court, or changes to the programs and services that support those orders.

We started this project by meeting with representatives from 14 key organisations to ascertain their views about how adjourned undertakings and deferrals were working, and what the key issues might be. Their observations have been fundamental in guiding the Council's work on this project, and we're grateful to them for taking the time to speak with us. While there were a variety of views about the potential spaces for reform, there was one thing they all shared: an appetite for more focus on, and investment into, low-end orders. Prosecutors, defence lawyers and courts alike were all united in their view that encouraging increased use of adjourned undertakings, in appropriate cases, should be a priority for government. It is a fiscally sound focus, because money spent diverting people from increased justice system engagement is invariably returned many times over. And it will improve community safety by reducing reoffending. But it can only do that if the government commits the financial resources necessary to ensure that any reforms are given the opportunity to work.

We acknowledge that Victoria is in the midst of recovery from the COVID-19 pandemic, and its justice system is no exception. The courts are still grappling with a backlog of cases, and many organisations in this space told us they are still treading water. The reforms raised in this paper must be viewed in that context. We are dealing with the aspirational while most organisations are still struggling with business as usual. To their credit, the situation many organisations find themselves in did not seem to deter their fervour for reforming low-end orders, particularly if doing so meant implementing evidence-based, non-populist policies.

We welcome any and all submissions, both from key stakeholders in the justice system and from the general community, about the potential reforms raised in this consultation paper. This is an opportunity for a fairer and more effective justice system.



Emeritus Professor Arie Freiberg AM  
Chair, Sentencing Advisory Council

# Call for submissions

The Sentencing Advisory Council is seeking submissions on the questions posed in this consultation paper.

The deadline for submissions is **Friday 27 September 2022**.

The Council intends to use submissions, and the results of consultations, to make recommendations about the use of adjourned undertakings in Victoria. The Council welcomes submissions from stakeholders in the legal profession as well as the broader community. We are especially interested to hear from those who are members of, or representatives of, marginalised groups that are too often disproportionately in contact with, and affected by, the criminal justice system.

When making a submission, please identify how you would like your submission to be treated, based on the following three categories:

**Public submission:** the Council may publish, refer to, and/or quote directly from the submission and name the source of the submission in relevant publications.

**Anonymous submission:** the Council may publish, refer to, and/or quote directly from the submission but will not identify the source of the submission in relevant publications.

**Confidential submission:** the Council will not refer to or quote from the submission. The submission will not be published or provided to any third parties. Confidential submissions will only be used to inform the Council generally in its deliberations.

The Council reserves the right not to use or publish any submission that it considers may be defamatory or offensive.

To make a submission, please email [contact@sentencingcouncil.vic.gov.au](mailto:contact@sentencingcouncil.vic.gov.au).

# Consultation questions

The primary aim of this paper is to explore whether there might be opportunities to improve and increase the use of adjourned undertakings in Victoria. To that end, there are 23 questions raised throughout this paper that we would be interested in hearing your views on.

## Chapter 2: Eligibility and purposes

### Question 1: Supplementary purposes

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

### Question 2: The term ‘adjourned undertakings’

Should these orders continue to be described as ‘adjourned undertakings’? If not, what would be a more appropriate description?

## Chapter 3: Use of adjourned undertakings

### Question 3: A new combined order

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

### Question 4: Rural and regional Victoria

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

## Chapter 4: Who receives adjourned undertakings

### Question 5: Marginalised groups

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

**Chapter 5:  
Lengths of  
adjourned  
undertakings**

**Question 6: Maximum length**

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

**Chapter 6:  
Mandatory  
conditions**

**Question 7: Judicial supervision**

Is there scope to increase the use of judicial supervision as a condition of adjourned undertakings? In answering this question, you may wish to consider:

- criteria for assessing offender suitability;
- the resource implications for courts;
- the need to balance the potential value of judicial supervision against the principles of proportionality and parsimony;
- the potential inconsistency between adjourned undertakings being primarily unsupervised orders but involving some supervision;
- the evidence base that would need to be developed to establish best practice processes; and
- the training that judicial officers would require.

**Question 8: Good behaviour**

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

**Chapter 7:  
Optional  
conditions**

**Question 9: Guidance about optional conditions**

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

**Question 10: Payment conditions**

Should Victorian courts continue to be able to require an offender to make a payment to an organisation that provides a charitable or community service, or to the court for payment to such an organisation, as a condition of an adjourned undertaking? If so, why? If not, why not?

**Chapter 7:  
Optional  
conditions  
*continued***

### **Question 11: Charitable donations**

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

### **Question 12: Court Fund**

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

### **Question 13: Justice plans**

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

### **Question 14: Optional conditions**

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

### **Question 15: Funding for programs**

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

### **Question 16: The adjourned undertaking form**

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

**Chapter 8:  
The sentencing  
hierarchy**

**Question 17: The sentencing hierarchy**

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

**Question 18: Merging sections 72 and 75**

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

**Question 19: Merging sections 73 and 76**

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

**Question 20: Repealing sections 74 and 77**

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

**Question 21: Spent convictions**

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

**Chapter 9:  
Breaches of  
adjourned  
undertakings**

**Question 22: Decriminalising breaches**

Should breaching an adjourned undertaking be decriminalised? If so, why? If not, why not?

**Question 23: Successful completion**

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

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

# 1. Introduction

- I.1 The Sentencing Advisory Council ('the Council') was established in 2004 as an independent statutory authority.<sup>1</sup> The functions of the Council are set out in legislation. They include providing statistical information on sentencing, conducting research on sentencing and, most relevantly for this project, consulting with key stakeholders and the general community on sentencing matters, and advising the Attorney-General on sentencing issues.<sup>2</sup>
- I.2 The aim of this project is to examine and review the use of adjourned undertakings in Victoria, to identify potential opportunities for reform and to make recommendations to the Attorney-General. The process of review involves consultation with key stakeholders and the general community about their views on these orders.
- I.3 Since 1985,<sup>3</sup> Victorian courts have had the power to impose a sentence known as an 'adjourned undertaking'.<sup>4</sup> These orders are the functional equivalent of what are often referred to as good behaviour bonds. Once a court finds a person guilty of one or more offences, the court may release the offender for a period of time if they give an undertaking to comply with certain conditions, especially to be of good behaviour. Adjourned undertakings are predominantly issued in the Magistrates' Court and are the second most common sentencing outcome in Victoria, with only fines being more common.<sup>5</sup>

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1. *Sentencing Act 1991* (Vic) pt 9A, as inserted by *Sentencing (Amendment) Act 2003* (Vic) s 6.

2. *Sentencing Act 1991* (Vic) s 108C.

3. *Penalties and Sentences Act 1985* (Vic) ss 83–89 (repealed).

4. *Sentencing Act 1991* (Vic) ss 72 (with conviction), 75 (without conviction).

5. Sentencing Advisory Council, 'Sentencing Outcomes in the Magistrates' Court' (sentencingcouncil.vic.gov.au, 2022).

- 1.4 Freiberg has argued that adjourned undertakings have a number of advantages as a sentencing disposition. They:
- can provide for the rehabilitation of an offender through conditions;
  - are more cost-effective than community correction orders (CCOs) as they do not require supervision and the offender pays for their own treatment (if necessary); and
  - are 'less likely to be criminogenic if they keep first-time, or less serious, offenders away from more serious or recidivist offenders, or minimise the stigmatic effects of conviction'.<sup>6</sup>
- 1.5 Despite adjourned undertakings having been in operation for almost 40 years, there has not yet been a dedicated review of how they function in Victoria. As Bradfield observed in 2015, this is not unique to Victoria: '[s]anctions at the lower end of the sentencing scale tend to be overlooked in commentary on the criminal justice system'.<sup>7</sup> The current research by the Council aims to fill that gap and identify whether there are any opportunities to reform adjourned undertakings to increase and improve their use.

## Scope of this project

- 1.6 This consultation paper is concerned with adjourned undertakings pursuant to sections 72 and 75 of the *Sentencing Act 1991 (Vic)*.
- 1.7 The Council is also concurrently investigating potential reforms to the use of sentence deferrals; however, the unique issues associated with sentence deferrals will be discussed in a separate consultation paper released shortly after this one.

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6. Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 668. See also NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders* (2011) 24–25. The New Zealand Ministry of Justice, however, considers the evidence about the effectiveness of good behaviour bonds as a means of reducing crime to be 'inconclusive': Ministry of Justice (NZ), *Good Behaviour Bonds: Evidence Brief* (2016) 6.

7. Rebecca Bradfield, 'Sentences Without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment' (2015) 41(1) *Monash University Law Review* 40, 40. Contra NSW Sentencing Council (2011), above n 6.

## Human rights considerations

1.8 As a public statutory authority, the Council is required, 'in making a decision ... to give proper consideration to a relevant human right'. In developing its recommendations, the Council will have regard to the various rights enunciated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including but not limited to the rights to:

- equality, particularly given the disproportionate effect that the criminal justice system frequently has on a number of groups, such as young offenders, individuals experiencing mental illness and Aboriginal and Torres Strait Islander peoples (section 8);
- not be punished in a cruel, inhuman or degrading way (section 10);
- humane treatment when deprived of liberty, particularly people who have not yet been convicted of any offending (section 22); and
- legal assistance (section 25).

## Five phases of the project

1.9 There are five phases to this project:

1. **preliminary consultation:** meet with stakeholders to identify the key issues relating to adjourned undertakings (December 2021 – February 2022);
2. **survey:** survey judicial officers and criminal law practitioners about their perceptions of adjourned undertakings (February – March 2022);
3. **consult on options for reform:** publish this consultation paper and invite written submissions on the questions raised herein (August – September 2022);
4. **test draft recommendations:** meet with stakeholders and the general community to seek their views on draft recommendations (December 2022); and
5. **final report:** deliver a final report with recommendations to the Attorney-General, and then publish the report on the Council's website (early 2023).

## Method and data

- 1.10 This consultation paper includes an analysis of court data on the use of adjourned undertakings in Victoria between 2011 and 2020 (the reference period) and the reoffending patterns of people who received adjourned undertakings, as well as an analysis of the survey responses from legal practitioners and judicial officers. The methodology and counting rules used for those analyses are outlined in Appendix 2.

## 2. Adjourned undertakings: eligibility and purposes

- 2.1 This chapter discusses who is eligible for an adjourned undertaking in Victoria and the purposes for which they may be imposed. It includes questions about the purposes for which adjourned undertakings can be imposed, and whether the term ‘adjourned undertakings’ should continue to be used to describe these orders.

### Eligibility for adjourned undertakings

- 2.2 Sections 72 and 75 of the *Sentencing Act 1991* (Vic) empower adult courts to impose an adjourned undertaking for up to five years, either with (section 72) or without (section 75) a conviction. These orders have been used in a wide variety of circumstances, ranging from using public transport without a valid fare<sup>8</sup> and workplace health and safety offences<sup>9</sup> to manslaughter,<sup>10</sup> infanticide<sup>11</sup> and incest.<sup>12</sup>
- 2.3 There are no specific eligibility criteria for adjourned undertakings, though they cannot be imposed for a Category 1 offence under any circumstances,<sup>13</sup> or for a Category 2 offence unless there are ‘substantial and compelling circumstances that are exceptional and rare’.<sup>14</sup> As the Council recently observed in the context of sex offences, adjourned undertakings were already rarely imposed for Category 1 and 2 offences prior to the introduction of those classifications in 2017.<sup>15</sup> Therefore, adjourned undertakings are still available for the vast majority of offences in Victoria.
- 2.4 In the 10 years from 2011 to 2020, adjourned undertakings made up 13.6% of sentencing outcomes in the Magistrates’ Court and 1.3% in the higher courts.<sup>16</sup>

8. Victorian Ombudsman, *Investigation into Public Transport Fare Evasion Enforcement* (2016) 54.

9. WorkSafe Victoria, *Work Safe Annual Report 2020–2021* (2021) 63–64, 135.

10. Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 278; *R v Gazdovic* [2002] VSC 588, [10]; *DPP v Smith* [2012] VSC 314, [9].

11. *DPP v MA* [2022] VSC 170.

12. Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (2021) 36. Adjourned undertakings have also been imposed for possession of child pornography in unusual circumstances: *DPP v Ortell* [2016] VCC 1459; *DPP v Schulz* [2018] VCC 615.

13. *Sentencing Act 1991* (Vic) s 5(2G).

14. *Sentencing Act 1991* (Vic) s 5(2H). As the Court of Appeal recently observed, ‘[t]hat requirement is – no doubt quite deliberately – almost impossible to satisfy’: *DPP v Bowen* [2021] VSCA 355, [11].

15. Sentencing Advisory Council (2021), above n 12, 80–81.

16. This represents cases where the adjourned undertaking was the *principal sentence* in the case. There would also have been some cases where an adjourned undertaking was imposed alongside a more serious disposition, such as imprisonment or a fine (see [3.4]).

That makes them the second most common sentence in the Magistrates' Court, fines being the most common (54.6%), and it means that they are more prevalent than both community correction orders (CCOs) and imprisonment. Adjourned undertakings are, though, rare in the higher courts, where imprisonment is imposed in three-quarters of cases.<sup>17</sup>

## Case law about the use of adjourned undertakings

- 2.5 There is very little case law in Victoria about the appropriate use of adjourned undertakings. This is to be expected. Given the costs involved in an appeal and the potential to receive a more severe sentence, rarely would an offender appeal a low-end order such as an adjourned undertaking to the Court of Appeal.<sup>18</sup> Further, while the *Criminal Procedure Act 2009* (Vic) displaced the notion that Crown appeals 'should only be rare and exceptional',<sup>19</sup> they nevertheless remain fairly uncommon.<sup>20</sup>
- 2.6 One exception is *DPP v Abad*, in which the prosecution appealed an adjourned undertaking with conviction as manifestly inadequate for a man found guilty of sexual penetration of a child aged under 16.<sup>21</sup> In that case, a security guard working at a court formed a sexual relationship with a 14-year-old who he believed was 17, but after police told him that she was 14, he had intercourse with her on one more occasion. The Court of Appeal held that the adjourned undertaking was manifestly inadequate because it did not 'sufficiently reflect' the maximum penalty of the offence, the objective gravity of the offending, nor 'the express need for denunciation and general deterrence'.<sup>22</sup> However, given that the only effect of changing the sentence to a CCO would be to require unpaid community work, the court exercised its residual discretion not to interfere with the sentence because 'the respondent has incurred a conviction, lost his employment and is subject to registration as a serious sex offender for 15 years'.<sup>23</sup> In effect, this decision reaffirms that while an adjourned undertaking viewed in isolation might appear to be an insufficient response to objectively serious offending, ancillary orders such as a conviction and sex offender registration, along with extra-curial consequences such as lost employment, can reflect a far more serious constellation of punishment.

17. Sentencing Advisory Council, 'Sentencing Outcomes in the Higher Courts' (sentencingcouncil.vic.gov.au, 2022).

18. Appeals from the Magistrates' Court to the County Court, which are *de novo* appeals, are rarely published.

19. *DPP v O'Neill* [2015] VSCA 325, [103].

20. Sentencing Advisory Council, *Sentence Appeals in Victoria: Second Statistical Research Report* (2018) 13 (finding that of 230 appeals of criminal decisions in the higher courts in 2013–14, just 10% (23) were prosecution appeals).

21. *DPP v Abad* [2016] VSCA 279.

22. *DPP v Abad* [2016] VSCA 279, [36], [85].

23. *DPP v Abad* [2016] VSCA 279, [40], [85]–[88].

## Purposes of adjourned undertakings

2.7 The purposes that courts must bear in mind when sentencing in Victoria are specified in section 5(1) of the *Sentencing Act*:

The only purposes for which sentences may be imposed are—

- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
- (b) to deter the offender or other persons from committing offences of the same or a similar character; or
- (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- (e) to protect the community from the offender[.]

2.8 Those purposes are then supplemented by section 70(1) of the *Sentencing Act*, which outlines the purposes for which a court can impose an adjourned undertaking, discharge or dismissal:

An order may be made under this Division—

- (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;
- (b) to take account of the trivial, technical or minor nature of the offence committed;
- (ba) to allow for the offender to demonstrate his or her remorse in a manner agreed to by the court;
- (c) to allow for circumstances in which it is inappropriate to record a conviction;
- (d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment;
- (e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender.

- 2.9 Almost every Australian jurisdiction has legislation specifying the general purposes of sentencing.<sup>24</sup> The same is true in many common law countries.<sup>25</sup> However, only three Australian jurisdictions supplement those with additional purposes for issuing an adjourned undertaking (or a similar order).<sup>26</sup> Those supplementary purposes are almost identical across Victoria, the Northern Territory and Tasmania,<sup>27</sup> with the exception of Victoria uniquely specifying that adjourned undertakings can be imposed to allow offenders to demonstrate their remorse (a provision expressly inserted to allow courts to attach payment conditions to adjourned undertakings).<sup>28</sup> In South Australia, a court can impose a good behaviour bond ‘if it thinks that good reason exists for doing so’.<sup>29</sup> And in New South Wales, courts deciding whether to make a conditional release order are required to take into account ‘whether the offence is of a trivial nature’ and any ‘extenuating circumstances in which the offence was committed’.<sup>30</sup>
- 2.10 There is limited literature and case law about how these various supplementary purposes should be interpreted.
- 2.11 The case law that is available, however, suggests that they are alternative criteria, not cumulative, so only one purpose needs to be achieved to justify a low-end order.<sup>31</sup>
- 2.12 It also suggests that if a low-end order is not directed towards any of the purposes in section 70(1), then it is not permissible to impose that sentence, even if doing so would otherwise achieve one or more of the general purposes of sentencing in section 5. For instance, in *DPP v Bills*, the County Court held that an adjourned undertaking was not available because the offending was not ‘trivial, technical or of

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24. *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 3–4; *Sentencing Act 1991* (Vic) s 5(1). To a lesser extent, see *Sentencing Act 1997* (Tas) s 3(e) (which includes some purposes of sentencing as purposes of the Act). Sentencing legislation in Western Australia does not include a purposes section, and a 2013 review recommended against introducing one: Department of the Attorney General (WA), *Statutory Review of the Sentencing Act 1995* (WA) (2013) 10–12.

25. *Sentencing Act 2002* (NZ) s 7(1); *Sentencing Act 2020* (E&W) s 57(2); *Criminal Code*, RSC 1985, c C-46, s 718; Scottish Sentencing Council, *Principles and Purposes of Sentencing: Sentencing Guideline* (2018) 4. There is ‘no comprehensive statement of the principles and purposes of sentencing’ in Northern Ireland, but some have been proposed: Department of Justice (NI), *Sentencing Review Northern Ireland: A Public Consultation* (2019) 1, 4–5. And in Ireland, the purposes of sentencing are specified in common law, not legislation: *The State (Stanbridge) v Mahon* [1979] IR 214.

26. *Sentencing Act 1995* (NT) s 9; *Sentencing Act 1991* (Vic) s 70(1); *Sentencing Act 1997* (Tas) s 58.

27. This is also the case in Norfolk Island: *Sentencing Act 2007* (NI) s 9.

28. This was a specific amendment in response to a Supreme Court decision: see [2.11].

29. *Sentencing Act 2017* (SA) s 96(1).

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9(2)(b)–(c).

31. Freiberg (2014), above n 6, 674, citing *Commissioner of Taxation v Doudle* [2005] SASC 442, [13].

a minor nature', because there were no 'extenuating or exceptional circumstances that justify the court showing mercy', and because the offending required more than nominal punishment.<sup>32</sup>

- 2.13 Similarly, in 2013 the Supreme Court held that a charitable donation did not achieve any of the (at the time) specified purposes in section 70; therefore, it could not be imposed as a condition of an adjourned undertaking.<sup>33</sup> In response to that Supreme Court decision, the legislature amended the definition of *fine* (section 3), amended the permissible conditions of adjourned undertakings (sections 72 and 75), and added to section 70 that a low-end order can be imposed for the purpose of allowing an offender to demonstrate their remorse in an agreed-upon manner.<sup>34</sup>
- 2.14 The supplementary purpose that has received the most judicial consideration is section 70(1)(c), whether it would be 'inappropriate to record a conviction'. Most cases were Tasmanian decisions interpreting a similar provision.<sup>35</sup>
- 2.15 As to the meaning of 'trivial, technical or minor' in section 70(1)(b), Freiberg writes that this is to be 'ascertained by reference both to the gravity of the offence in the abstract and the particular conduct that constituted the offence for which the sentence is being considered'.<sup>36</sup> He also noted that an offence will generally not be trivial if it is a 'typical offence of the class prescribed' or was 'committed deliberately'.<sup>37</sup> In *DPP v Cooper*, the Tasmanian Court of Criminal Appeal held that an undertaking without conviction was manifestly inadequate in circumstances where a woman had drunkenly hit her neighbour on the head with a beer bottle because '[i]t was not a "trivial, technical or minor" crime and required much more than a nominal punishment'.<sup>38</sup>
- 2.16 Section 70(1)(e) allows courts to show 'mercy to an offender' based on extenuating or exceptional circumstances. For instance, in *Davis v Hayward*, the Northern Territory Supreme Court overturned a conviction due to 'extenuating circumstances'. The defendant in that case had been prosecuted for low-level firearm possession offences after trying to take his own life with a gun.<sup>39</sup>

32. *DPP v Bills* [2019] VCC 98, [40]. See also *Munro v Hatch* [2011] NFSC 1, [106]–[108].

33. *Brittain v Mansour* [2013] VSC 50, [50].

34. Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 1264 (Robert Clark, Attorney-General).

35. *Blake v Adams* [2013] TASSC 44; *Collins v Caccavo* [2015] TASSC 53; *Parker v Hall* [2015] TASSC 60; *Bonde v Ellery* [2016] TASSC 43; *Cannell v Probert* [2017] TASSC 69; *Moore v Rittman* [2018] TASSC 5; *Hamilton v Hampton* [2007] TASSC 27; *Badcock v White* [2004] TASSC 59; *Attorney-General v Smith* [2002] TASSC 10.

36. Freiberg (2014), above n 6, 675.

37. *Ibid* 675–676 (citations omitted). Contra *Curnow v Pryce* [1999] NTSC 116, [17] (finding that although the offence was typical, it was nevertheless trivial).

38. *DPP v Cooper* [2017] TASCCA 8, [23].

39. *Davis v Hayward* [1997] NTSC 8, [16].

Both the High Court and the Victorian Court of Appeal have described the power to show mercy as critical to an effective criminal justice system ('the very essence of justice').<sup>40</sup>

### Question 1: Supplementary purposes

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

## The term 'adjourned undertaking'

2.17 While the term 'adjourned undertaking' is probably well understood by experienced criminal law practitioners, it is also probably less well understood by the general public. There is inconsistent terminology to describe these and similar orders across the country. While Tasmania also describes them as adjourned undertakings, they are otherwise known as good behaviour orders (Australian Capital Territory), good behaviour bonds (South Australia), recognisance orders (Queensland), bonds (Northern Territory and Commonwealth) and conditional release orders (New South Wales and Western Australia). The Council is interested in hearing views as to whether this order should be renamed in Victoria to make its nature clearer to the public. The media frequently describes them as good behaviour orders or good behaviour bonds, which may suggest that these are the most accessible terms. There are, though, already good behaviour bonds that can be imposed on children in Victoria;<sup>41</sup> therefore, to avoid confusion good behaviour orders may be the most appropriate term.

### Question 2: The term 'adjourned undertaking'

Should these orders continue to be described as 'adjourned undertakings'? If not, what would be a more appropriate description?

40. *Cobiac v Liddy* [1969] HCA 26; *Markovic & Anor v The Queen* [2010] VSCA 105; *DPP v Snow (A Pseudonym)* [2020] VSCA 67; Freiberg (2014), above n 6, 678.

41. *Children, Youth and Families Act 2005* (Vic) s 367.

## 3. Use of adjourned undertakings

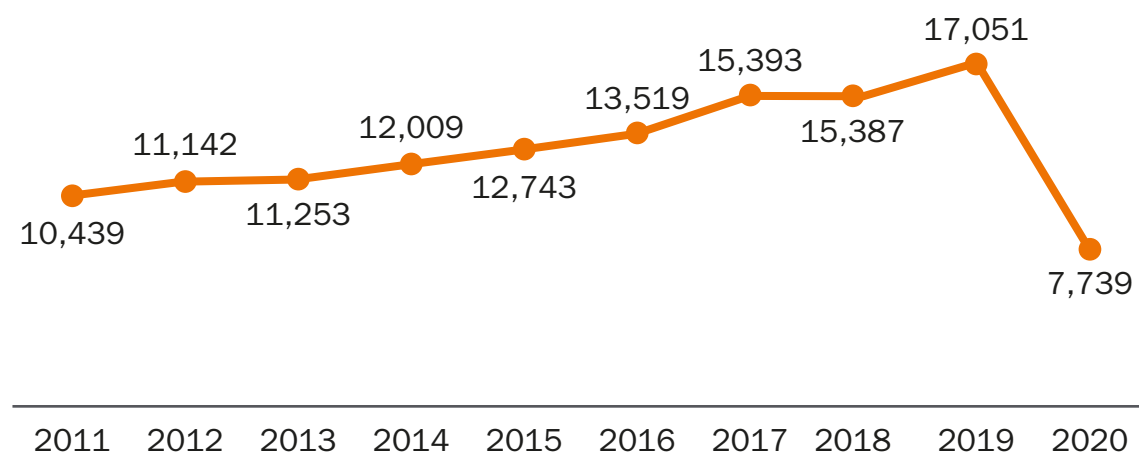
3.1 This chapter outlines data on the number of adjourned undertakings imposed in the Magistrates' Court and higher courts (County and Supreme Courts) between 2011 and 2020, including which region of Victoria they were imposed in. It also includes stakeholder views on the use of adjourned undertakings, arising from preliminary consultation and survey responses.

### Adjourned undertakings in the Magistrates' Court

#### The *number* of adjourned undertakings is increasing

3.2 Adjourned undertakings were imposed in over 126,000 cases in the Magistrates' Court in the 10 years from 2011 to 2020 (Figure 1). Over that period, they were increasingly used, with a 63% increase between 2011<sup>42</sup> and 2019,<sup>43</sup> followed by a significant decline in 2020 due to COVID-19 restricting the ability of courts to operate at full capacity.

**Figure 1: Yearly number of adjourned undertakings imposed in the Magistrates' Court, 2011 to 2020 (126,675 adjourned undertakings)**



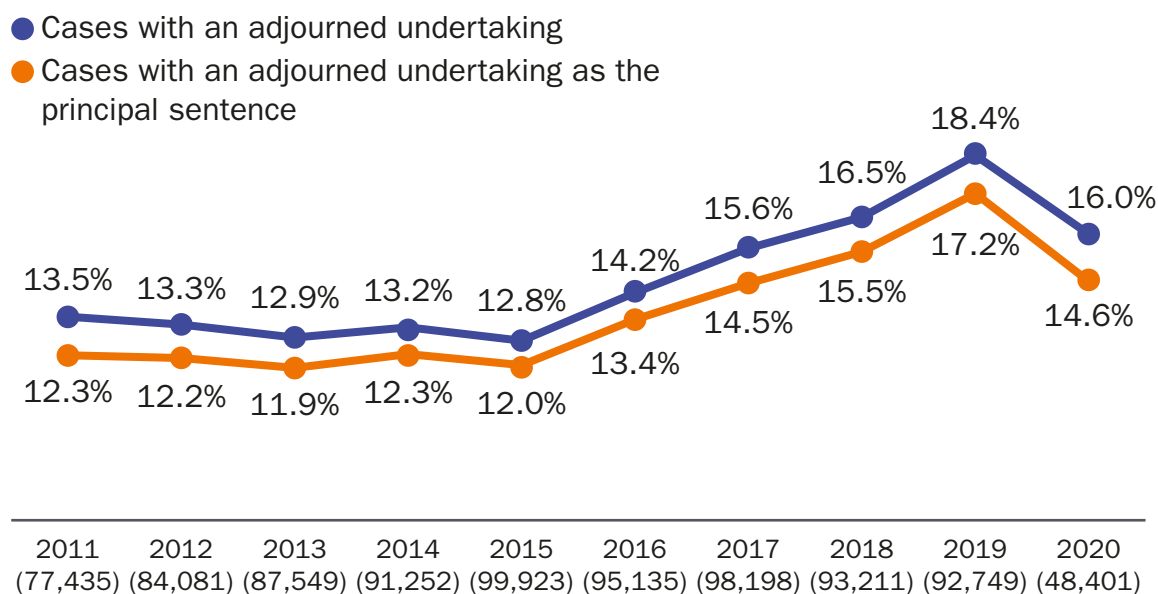
42. In 2011, 9,534 were imposed as the principal sentence, and 905 were imposed alongside a more severe sentence.

43. In 2019, 15,970 were imposed as the principal sentence, and 1,081 were imposed alongside a more severe sentence.

## The *proportion* of adjourned undertakings is increasing

3.3 Figure 2 shows the proportion of all sentenced cases in the Magistrates' Court each year that either involved an adjourned undertaking at all or involved an adjourned undertaking as the principal (most severe) sentence in the case. The trend for both was very similar. Most notably, since 2015 there has been a significant increase in the *proportion* of cases in the Magistrates' Court in which an adjourned undertaking was imposed.<sup>44</sup>

**Figure 2: Yearly proportion of cases with adjourned undertakings in the Magistrates' Court, 2011 to 2020 (868,654 total cases, 126,675 total cases with an adjourned undertaking, 118,056 cases with an adjourned undertaking as the principal sentence)**



## Cases where an adjourned undertaking was *not* the principal sentence

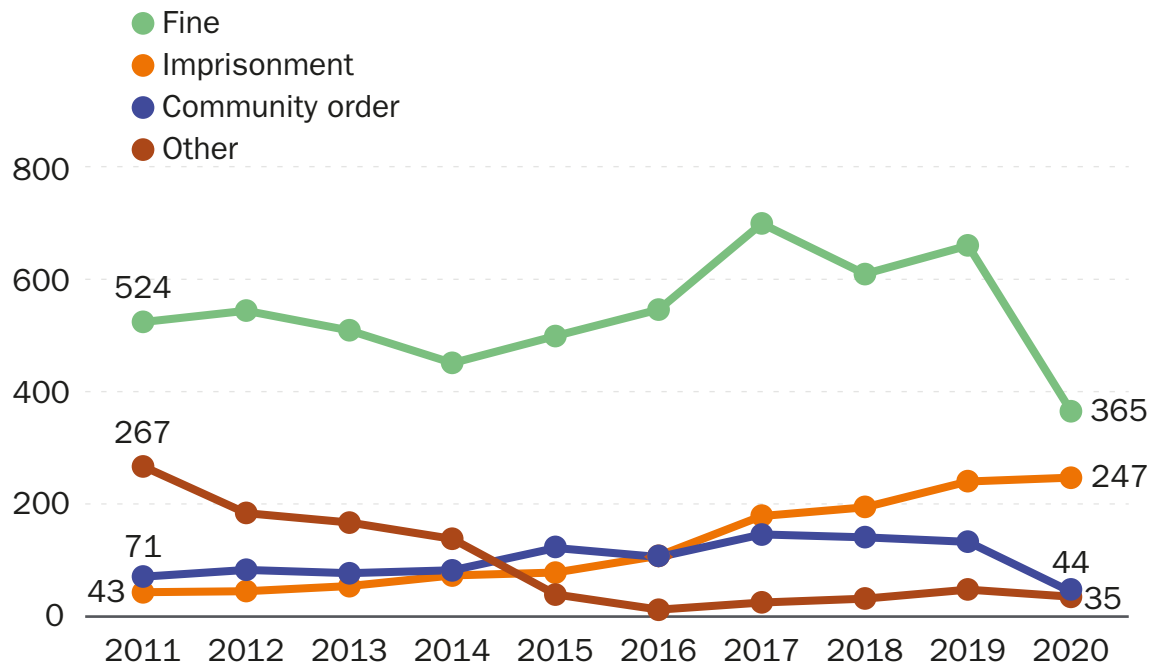
3.4 While the vast majority of adjourned undertakings were the principal sentence in the case (93%),<sup>45</sup> the other 7% were imposed alongside more severe sentencing outcomes such as fines, drug treatment orders and imprisonment (Figure 3, page 13). While the most common principal sentence in those cases was a fine, there has been a growing number of adjourned undertakings imposed alongside imprisonment since 2011 (from 43 to 247).<sup>46</sup>

44. In the same period that adjourned undertakings increased in prevalence (2015 to 2019), imprisonment also increased, from 6.3% to 10.5%, whereas fines decreased from 57.1% to 50.5%, and community orders decreased from 10.5% to 9.1%.

45. This represents 118,056 of 126,675 adjourned undertakings.

46. *Other* sentence types include drug treatment orders and suspended sentences. The abolition of suspended sentences in 2013 and 2014 explains their decline since then.

**Figure 3: Yearly number of adjourned undertakings that were not the principal sentence in a case, by principal sentence type, 2011 to 2020**



3.5 The increase in combined sentences of imprisonment and adjourned undertakings appears to be due to the increasing rate of time served prison sentences in Victoria.<sup>47</sup> Between 2017 and 2020,<sup>48</sup> there were 860 cases in which an offender received both imprisonment and an adjourned undertaking. Of those, more than two-thirds (68%)<sup>49</sup> were time served prison sentences. That is more than triple the rate of time served prison sentences in Victoria generally (20%).<sup>50</sup> The circumstances in which courts might impose this combination of sentences – imprisonment and an adjourned undertaking – are most likely those where (a) an offender has spent some time on remand, which the court recognises the punitive effect of by imposing a time served prison sentence (or something

47. See Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (2020) 7, 9.

48. This is when courts most reliably started recording pre-sentence detention in cases receiving imprisonment. Section 18 of the *Sentencing Act 1991* (Vic) stipulates that where an offender receives a sentence of imprisonment, 'any period during which he or she was held in custody' in relation to the offending must be 'reckoned as a period of imprisonment ... already served'.

49. Of the remaining 32% of cases in which an offender received imprisonment and an adjourned undertaking (271 cases), 6% of offenders had not spent any time on remand before receiving imprisonment and an adjourned undertaking (53 cases), 6% received total effective sentences less than the amount of time served (51 cases), and 19% received a prison sentence longer than the amount of time they had spent on remand (167 cases).

50. Sentencing Advisory Council (2020), above n 47, 17 (finding that in 2017–18, 20% of prison sentences in Victoria were time served prison sentences).

very close to it)<sup>51</sup> but (b) the court also considers it necessary to ensure there is either some ongoing form of accountability that is not as onerous as a community correction order (CCO) or some form of transition assistance available. For instance, some of the conditions attached to adjourned undertakings in those 860 cases included:

- engaging with VACRO's Second Chance Jobs program, which is aimed at linking people with 'a job at the prison gate', immediately upon release;<sup>52</sup>
- engaging with VACRO's ReConnect program, specifically designed to assist participants transition from prison back into the community;<sup>53</sup>
- complying with the conditions of a justice plan upon release from custody;
- attending the Victorian Aboriginal Health Service as soon as possible after release and complying with any treatment plans; and
- engaging with the NorthWestern Mental Health service and complying with any treatment plans.

3.6 Given how frequently courts impose combined orders of imprisonment and a CCO<sup>54</sup> – 9,137 in the six years to 30 June 2018 and increasing year on year<sup>55</sup> – there is perhaps scope for courts to more frequently impose combined sentences of imprisonment and an adjourned undertaking instead. This would reduce the severity of the community-based component of the sentence imposed, decrease offenders' contact with the criminal justice system, free up correctional resources and, if the above conditions are indicative, improve the transition assistance provided to people released from a time served prison sentence.

3.7 To that end, consideration might be given to specifically legislating the courts' ability to impose those two sentence types together (either on a single charge or on multiple charges). This would most likely replicate what section 44 currently does for combined orders of imprisonment and CCOs,<sup>56</sup> and be similar to the combined order specified in federal legislation.<sup>57</sup> While there are already cases where imprisonment and adjourned undertakings are being imposed together without

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51. To account for some discrepancies in data recording, the Council considers a prison sentence to be a time served prison sentence if the amount of pre-sentence detention recorded by the court is three days more or less than the total effective sentence.

52. VACRO, 'Second Chance Jobs' (vacro.org.au, 2022).

53. VACRO, 'ReConnect' (vacro.org.au, 2022).

54. *Sentencing Act 1991* (Vic) s 44.

55. See Sentencing Advisory Council (2020), above n 47, 8.

56. As a point of comparison, sentencing legislation in New Zealand goes one step further and specifically lists the types of sentences that can be combined: *Sentencing Act 2002* (NZ) s 19.

57. *Crimes Act 1914* (Cth) s 20(1)(b).

a specific provision in place, a new provision might draw courts' attention to the value that the legislature places on this particular combination and encourage its increased use in appropriate cases.

### Question 3: A new combined order

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

## Adjourned undertakings in the Magistrates' Court across Victoria

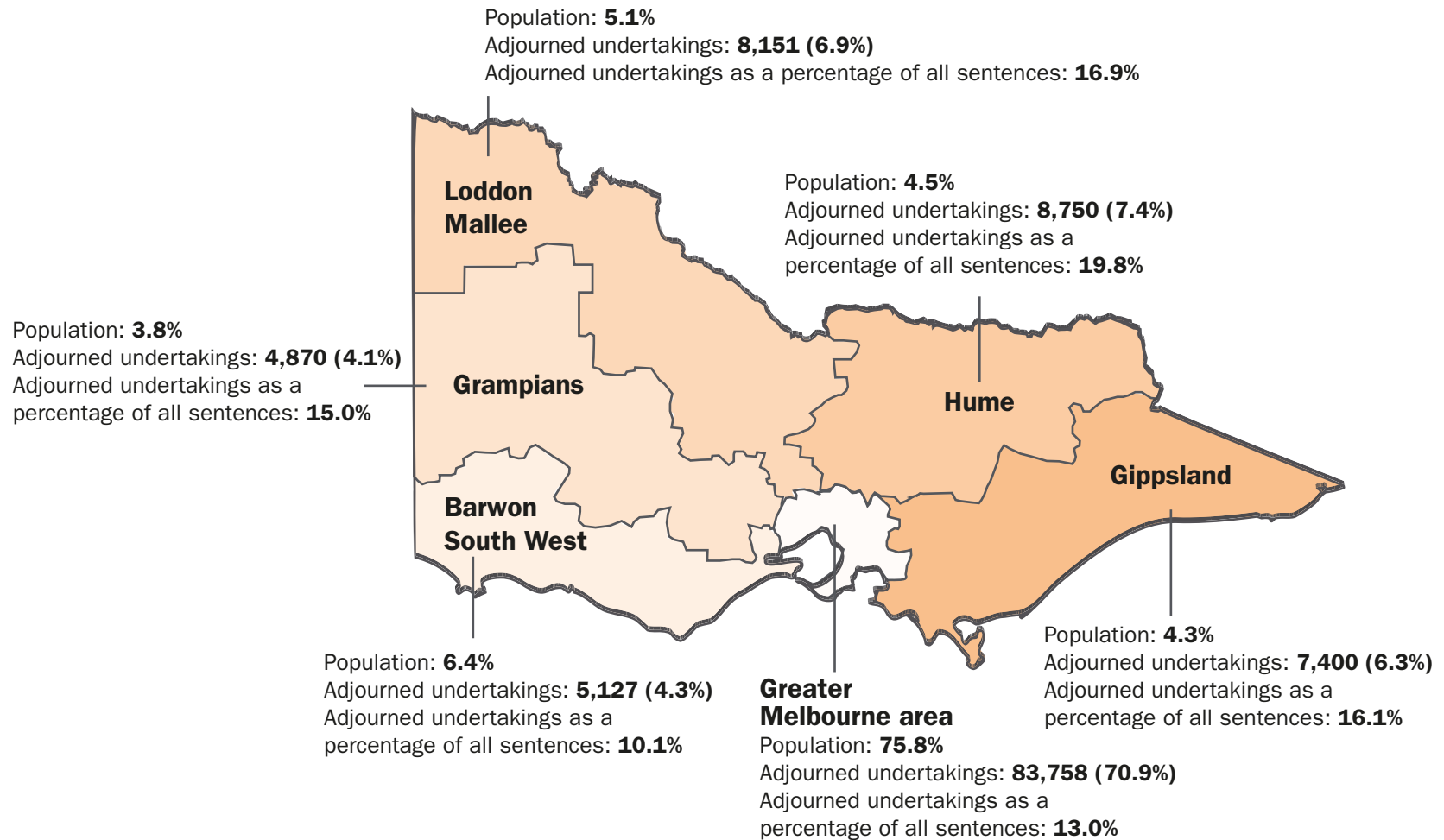
- 3.8 The majority of adjourned undertakings in the Magistrates' Court were imposed in the Greater Melbourne area (70.9%). This is slightly lower than the adult population rate in that area (75.8% of Victorian adults reside in Greater Melbourne), which is consistent with other findings that a disproportionate number of criminal cases are dealt with in rural and regional Victoria.<sup>58</sup> One possible explanation for this might be the limited availability of services in regional Victoria leading courts to impose adjourned undertakings in cases where they might otherwise have imposed a CCO.
- 3.9 There was also variation in the proportion of sentences that were adjourned undertakings across rural and regional Victoria (Figure 4, page 16). They made up between 10.1% of sentences (in Barwon South West) and 19.8% (in Hume). This variation should not, however, necessarily be construed as inconsistency in court practices. It may simply be attributable to the different types of offences dealt with in each region.

### Question 4: Rural and regional Victoria

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

58. See, for example, the Council's three recent reports on stalking and breaches of intervention orders: Sentencing Advisory Council, *Sentencing Breaches of Personal Safety Intervention Orders in Victoria* (2022) 21, 31, 71; Sentencing Advisory Council, *Sentencing Stalking in Victoria* (2022) 45–46; Sentencing Advisory Council, *Sentencing Breaches of Family Violence Intervention Orders and Safety Notices: Third Monitoring Report* (2022) 22–23, 30–31.

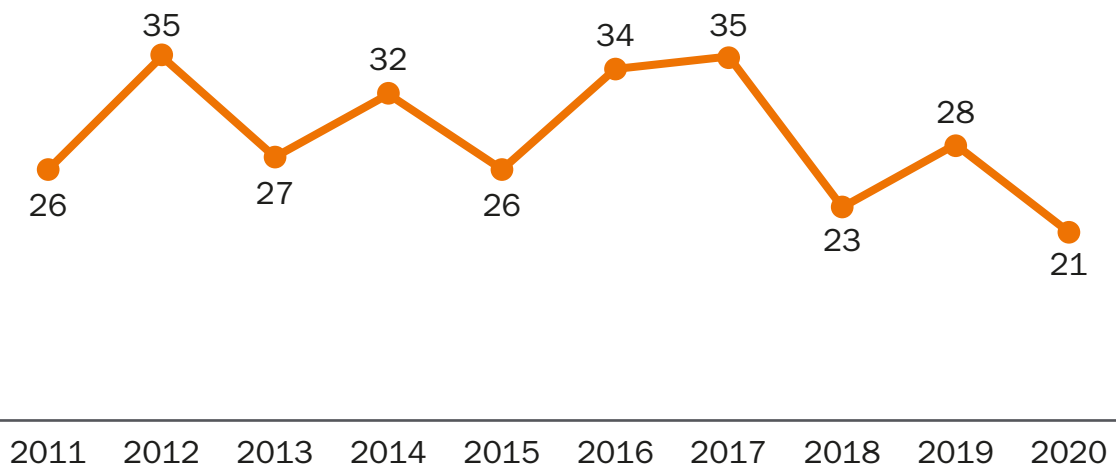
**Figure 4: Number and proportion of adjourned undertakings in the Magistrates' Court, by justice region, 2011 to 2020**



## Adjourned undertakings in the higher courts

3.10 From 2011 to 2020, there were 287 cases in which an offender received an adjourned undertaking in the higher courts, 276 in the County Court and 11 in the Supreme Court.<sup>59</sup> The yearly number remained relatively low and stable (Figure 5). An adjourned undertaking was the principal sentence in 236 of those cases and was combined with a more severe sentence in the remaining 51 cases, which involved 31 prison sentences, suspended sentences or youth justice centre orders, 13 CCOs and 7 fines.

**Figure 5: Yearly number of adjourned undertakings imposed in the higher courts, 2011 to 2020 (287 adjourned undertakings)**



## Stakeholder views on the use of adjourned undertakings

3.11 In late 2021 and early 2022, the Council conducted preliminary consultation with, and received survey responses from, legal and judicial stakeholders about their views of adjourned undertakings. The response was overwhelmingly positive, with most stakeholders saying that these orders ‘should be utilised more widely’ and that they ‘would encourage greater use of adjourned undertakings’.

3.12 Some of the common positive themes about adjourned undertakings were that they prioritise rehabilitation and allow offenders to get on with their lives by reducing their contact with the criminal justice system, and that they are

59. Six of the Supreme Court cases have publicly available sentencing remarks: *DPP v Smith* [2012] VSC 314 (negligent manslaughter); *R v Elias* [2013] VSC 123 (incitement to cause serious injury); *R v Nesci* [2014] VSC 67 (possession of an unregistered firearm); *R v Ton* [2015] VSC 188 (assisting offender); *DPP v Godfrey* [2020] VSC 197 (reckless conduct endangering serious injury); *DPP v Sugar* [2020] VSC 338 (attempted murder).

taken seriously by those who receive them. By far, though, the most commonly observed advantage of adjourned undertakings was the flexibility built into the order, allowing the conditions to be tailored to each person. Some of the survey responses included:

‘Very useful sentencing option – provides the opportunity to rehabilitate and extremely flexible sentencing options to address other sentencing purposes.’

‘There is a lot of room to be creative in the imposition of the conditions and the framework of the undertaking.’

‘Short adjourned undertakings with not too many conditions and conditions that are achievable work well and provide a meaningful rehabilitation opportunity for a wide range of defendants and offence types.’

- 3.13 However, a number of areas of improvement were also identified. Stakeholders identified a need for better access to support services, especially those that the offender does not have to pay for themselves, a need for broader and speedier access to justice plans for people with intellectual disabilities, and the need for criminal justice system actors to change their approach from expecting perfect compliance with conditions of the order to expecting *positive engagement* instead.
- 3.14 There was also considerable divergence on the appropriateness of monetary penalties as a condition of adjourned undertakings. Some believed they were inappropriate, because they disproportionately affect people of lower socioeconomic means, function like a more serious sentencing order (fines) yet are better enforced, and can lead to breach proceedings if people don't pay. In contrast, others said payment conditions could constitute the punitive condition of an adjourned undertaking and allow people to potentially avoid a more severe sentence and/or having a conviction recorded.
- 3.15 Each of these issues is discussed in detail throughout this paper.

## 4. Who receives adjourned undertakings?

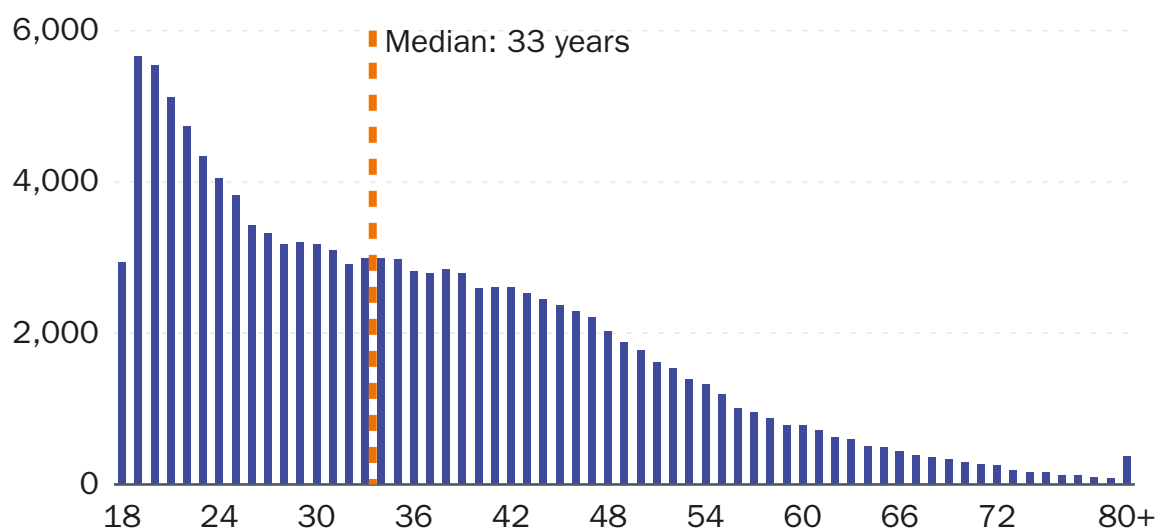
4.1 This chapter outlines data on who received adjourned undertakings in Victoria between 2011 and 2020, including the offender's age, gender and offence profile, and whether the case involved family violence.

### Age and gender of people receiving adjourned undertakings

#### Magistrates' Court

4.2 Data on age was available and reliable for 97%<sup>60</sup> of people who received adjourned undertakings in the Magistrates' Court between 2011 and 2020 (Figure 6). The largest number of adjourned undertakings was imposed on offenders aged 19 (5,683), and this number then declined steadily with age. There were 378 offenders aged 80 and over who received an adjourned undertaking, 20 of whom were aged 90 and over.<sup>61</sup>

**Figure 6: Age of people receiving adjourned undertakings in the Magistrates' Court, 2011 to 2020 (122,696 people)**



4.3 Data on gender was available and reliable for 99%<sup>62</sup> of people who received adjourned undertakings in the Magistrates' Court: 72% were male and 28% were female.

60. Data on age was available for 122,696 of 126,675 adjourned undertakings.

61. Most of those aged 90 and over received adjourned undertakings for driving offences; however, four were sentenced for unlawful assault and two were sentenced for indecent assault.

62. Data on gender was available for 125,994 of 126,675 adjourned undertakings.

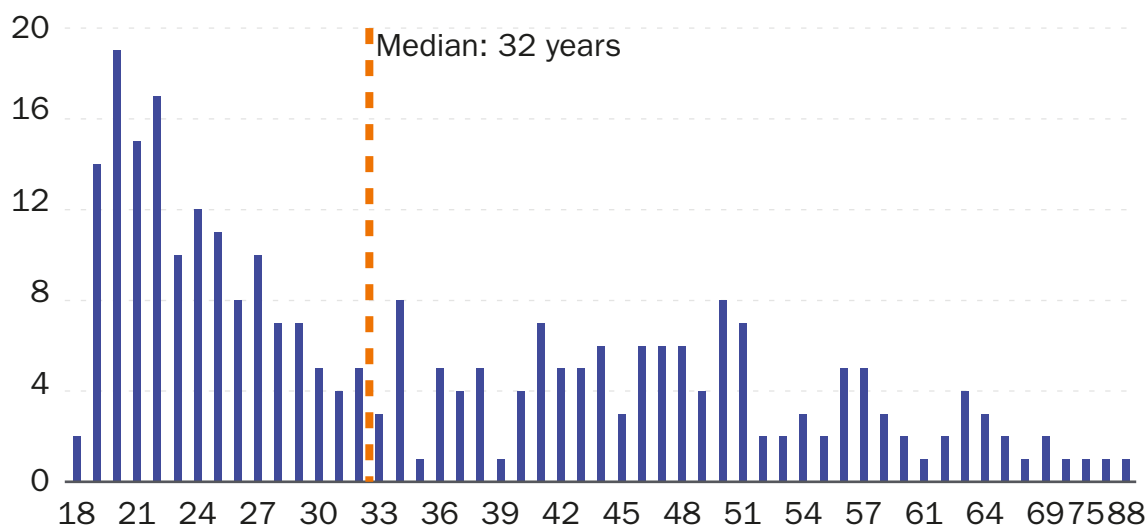
Given that women make up just 22% of *all* cases in the Magistrates' Court,<sup>63</sup> this means women were more likely than men to receive an adjourned undertaking.

**In the Magistrates' Court:  
18% of women received  
adjourned undertakings  
13% of men received  
adjourned undertakings**

## Higher courts

4.4 In the 283 adjourned undertaking cases for which data on age was available, there was a significant cluster of offenders aged 19 to 29 years (Figure 7). The oldest people receiving an adjourned undertaking in the higher courts were aged 88,<sup>64</sup> 76 and 75.<sup>65</sup>

**Figure 7: Age of people receiving adjourned undertakings in the higher courts, 2011 to 2020 (283 people)**



4.5 In the 283 cases for which data on gender was available, 74% of offenders receiving adjourned undertakings in the higher courts were male, and 26% were female. Similar to in the Magistrates' Court, given that just 10% of offenders in the higher courts are female, this means females were more than twice as likely as males to receive adjourned undertakings. This is consistent with female offenders often receiving less serious sentencing outcomes.<sup>66</sup>

**In the higher courts:  
3% of women received  
adjourned undertakings  
1% of men received  
adjourned undertakings**

63. Between 2011 and 2020, 190,785 of the 853,360 offenders sentenced in the Magistrates' Court were female.

64. *DPP v Sugar* [2020] VSC 338 (attempted murder).

65. *DPP v Ellett* [2016] VCC 1841 (dangerous driving causing death).

66. Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (2010) 11–35.

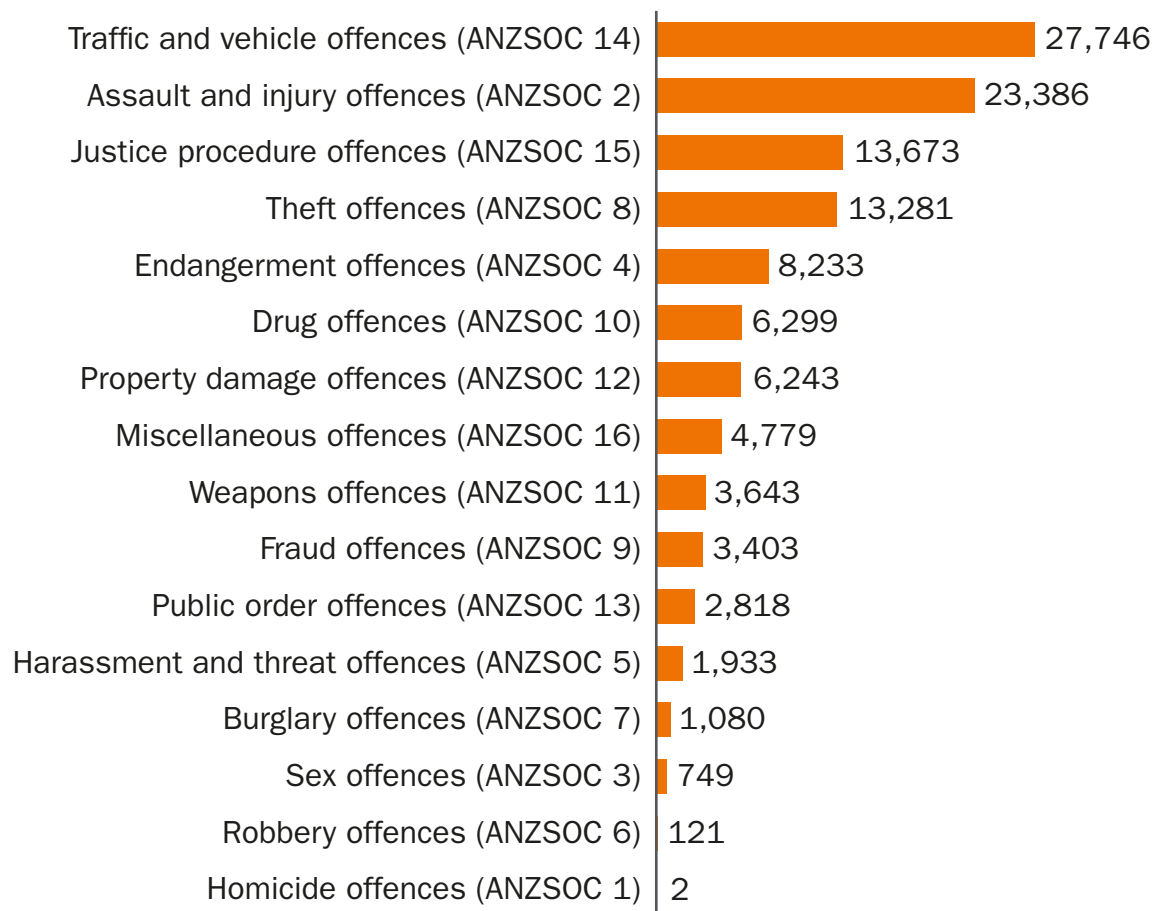
Women's offending is typically less serious and less violent than men's, their offending is frequently a product of trauma, which has a powerful mitigating effect on their sentence, and their criminal history is often much sparser, reducing the need for courts to prioritise specific deterrence and protection of the community when sentencing.<sup>67</sup>

## Offence types in adjourned undertaking cases

### Magistrates' Court

4.6 Figure 8 presents the most serious offence type<sup>68</sup> in cases where an adjourned undertaking was the principal sentence in the Magistrates' Court (117,389 adjourned undertakings).<sup>69</sup>

**Figure 8: Most serious offence type in cases in the Magistrates' Court resulting in adjourned undertakings as the principal sentence (117,389 cases)**



67. Ibid 17.

68. These offence types are based on the Australian Bureau of Statistics' offence classification system: Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification System (ANZSOC)*, cat no. 1234.0 (abs.gov.au, 2011). Some of the category descriptions have been simplified.

69. Data on offence type was not available or reliable for 667 of 118,056 adjourned undertakings that were principal sentences. Adjourned undertakings imposed with more serious sentence types are not included.

- 4.7 This shows that almost one-quarter of adjourned undertakings were for traffic and vehicle offences (23.6% of adjourned undertakings), the most common of which were driving while disqualified or suspended<sup>70</sup> (6.4% together), speeding<sup>71</sup> (4.7%), failing a breath test (1.4%), entering an intersection despite a red traffic arrow or light (1.9%) and using an unregistered motor vehicle on a highway or toll road (1.2%). This is consistent with findings from 2011 by the NSW Sentencing Council that good behaviour bonds were most commonly imposed for driving offences such as driving an unregistered vehicle, negligent driving, drink driving and driving while suspended or disqualified.<sup>72</sup>
- 4.8 The next most prevalent offence types were assault and injury offences (19.9% of adjourned undertakings), the most common of which were unlawful assault<sup>73</sup> (12.0%), recklessly causing injury (3.4%), assault with a weapon (0.8%) and stalking (0.5%).
- 4.9 As to some of the remaining offence types:
- breaching a family violence safety notice or intervention order<sup>74</sup> was the most common justice procedure offence (8,492 or 7.2% of adjourned undertakings);
  - theft from a shop was the most common theft-related offence<sup>75</sup> (6,606 or 5.6% of adjourned undertakings);
  - careless driving of a motor vehicle<sup>76</sup> was the most common endangerment offence (5,047 or 4.3% of adjourned undertakings);
  - possession of cannabis<sup>77</sup> was the most common drug-related offence (1,756 or 1.5% of adjourned undertakings);<sup>78</sup>
  - obtaining property by deception was the most common fraud-related offence (1,888 or 1.6% of adjourned undertakings); and
  - the two homicide-related offences were both inciting suicide.<sup>79</sup>

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70. *Road Safety Act 1986* (Vic) s 30.

71. *Road Safety Rules 2009* (Vic) r 20 (repealed), as replaced by *Road Safety Rules 2017* (Vic) r 20.

72. NSW Sentencing Council (2011), above n 6, 29–30. Note, however, that in 2012, assault and injury offences were the most serious offences in cases receiving section 9 good behaviour bonds in New South Wales (33% of cases), and traffic related offences were the second most common (18%): NSW Law Reform Commission, *Sentencing – Patterns and Statistics: Companion Report 139-A* (2013) 75.

73. *Summary Offences Act 1966* (Vic) s 23.

74. *Family Violence Protection Act 2008* (Vic) ss 37, 37A, 123, 123A, 125A.

75. *Crimes Act 1958* (Vic) s 74. This does not include other forms of theft under section 74, such as theft of or from a motor vehicle.

76. *Road Safety Act 1986* (Vic) s 65.

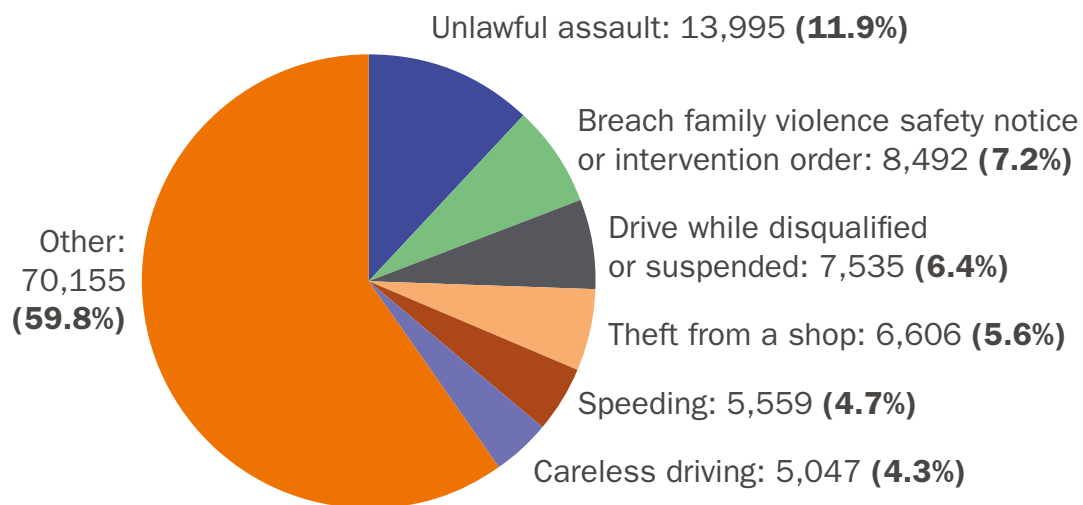
77. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73. This does not include other drug possession offences under section 73, such as possession of amphetamine or cocaine.

78. Some of these may have been adjourned bonds pursuant to section 76 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which allows or encourages a court to impose an adjourned undertaking without conviction pursuant to section 75 of the *Sentencing Act 1991* (Vic) for possession of small quantities of cannabis.

79. *Crimes Act 1958* (Vic) s 6B.

4.10 In effect, the specific offences of unlawful assault, driving while disqualified or suspended, speeding, careless driving, breaching a family violence safety notice or intervention order and theft from a shop together represent 40.2% of all adjourned undertakings.

**Figure 9: Most common principal proven offence types in cases in the Magistrates' Court resulting in adjourned undertakings, 2011 to 2020**



## Higher courts

4.11 In the 236 cases in the higher courts where an adjourned undertaking was the principal sentence, the most common principal proven offence types were:

- sexual assault offences (28% or 65 cases), the most common of which was sexual penetration of a child aged under 16 (i.e. aged 12 to 15) (29 cases);<sup>80</sup>
- justice procedure offences (18% or 42 cases), the most common of which were failing to comply with a sex offender supervision order (12 cases) and attempting to pervert the course of justice (11 cases); and
- assault and injury offences (15% or 36 cases), the most common of which were common law assault (14 cases) and recklessly causing injury (14 cases).

80. This is most likely in the context of less predatory offending involving offenders aged 17 to 21 and victims in the upper end of the age range: see Sentencing Advisory Council (2021), above n 12, 50.

## Adjourned undertakings in family violence cases in the Magistrates' Court (2016–)

4.12 In 18,106 cases since 2016,<sup>81</sup> an offender received an adjourned undertaking in a case with a family violence flag. A family violence flag is typically transferred from Victoria Police's LEAP database to the Magistrates' Court system and indicates that at least one of the offences in the case occurred in a family violence context.<sup>82</sup> This means that just over one-quarter of adjourned undertakings (26.2%) during that five-year period were imposed in a case involving family violence. Previous research by the Council has suggested that about 11% of all cases sentenced in the Magistrates' Court have a family violence flag.<sup>83</sup> Together, these statistics suggest that adjourned undertakings are more than twice as common in family violence cases as they are in other cases. This may be because, as the Council has previously observed, fines are often inappropriate in a family violence context.<sup>84</sup> In comparison, a sentencing order requiring an offender to be of good behaviour; to comply with the conditions of an intervention order and/or to participate in a behaviour change program<sup>85</sup> may better achieve the purposes of sentencing than a fine would.

**26% of adjourned undertakings were imposed in family violence cases**

4.13 Figure 10 (page 25) illustrates that the principal proven offence types in the 18,106 family violence cases were significantly different from those in non-family violence cases. Assault and injury offences, as well as justice procedure offences (most of which were breaches of intervention orders), were the principal offence in 80% of family violence cases (compared to 17% in non-family violence cases). Property damage offences were also three times more likely in family violence cases. In comparison, non-family violence cases were much more likely to involve endangerment offences, theft offences, and traffic and vehicle offences.

81. This is the first full calendar year for which family violence flags were reliable.

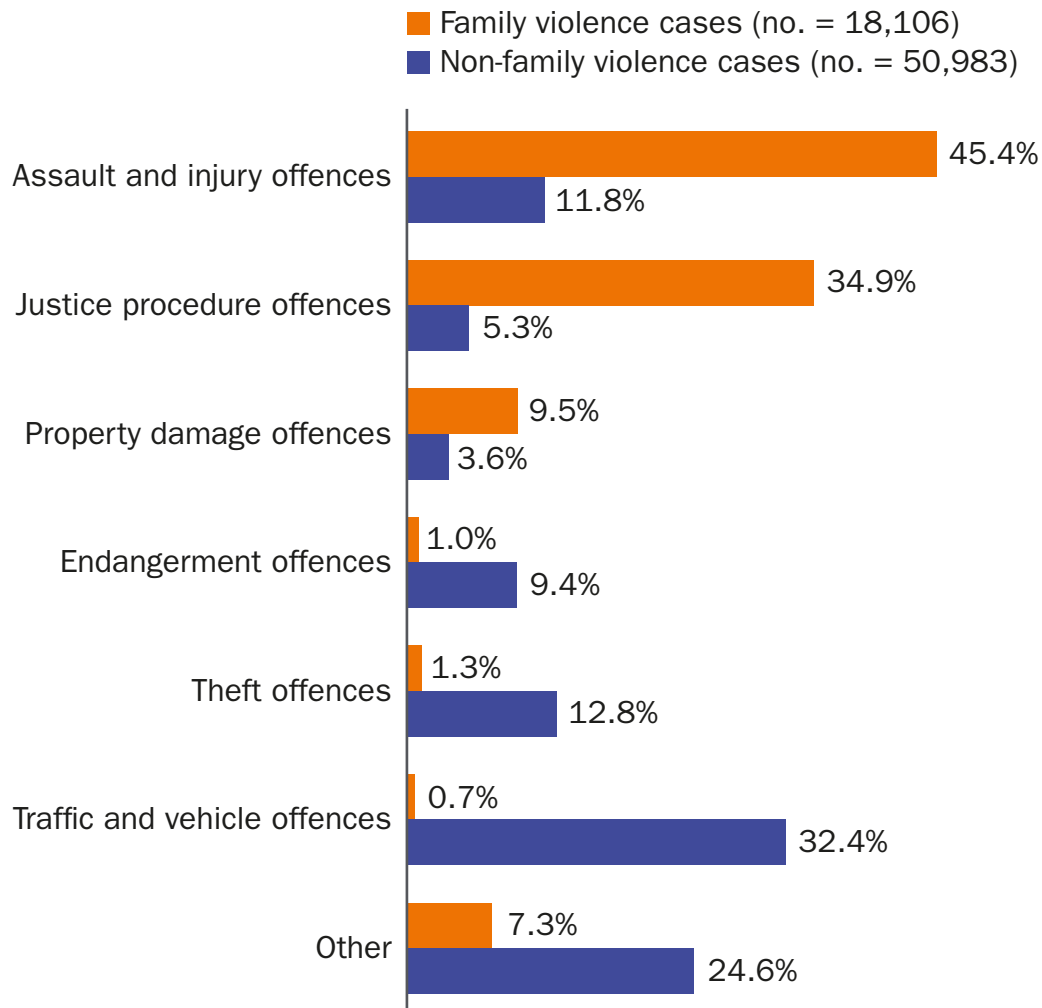
82. See Karen Gelb, *Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria* (2016) 1 fn 5.

83. Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (2017) 34.

84. See, for example, Sentencing Advisory Council, *Sentencing Breaches of Family Violence Intervention Orders and Safety Notices: Third Monitoring Report* (2022) 59–60.

85. See, however, Charlotte Bell and Dominiek Coates, *The Effectiveness of Interventions for Perpetrators of Domestic and Family Violence: An Overview of Findings from Reviews* (2022) 2 ('Of 29 reviews that assessed the effectiveness of behaviour change interventions for a reduction in DFV/IPV, only one concluded that the intervention works').

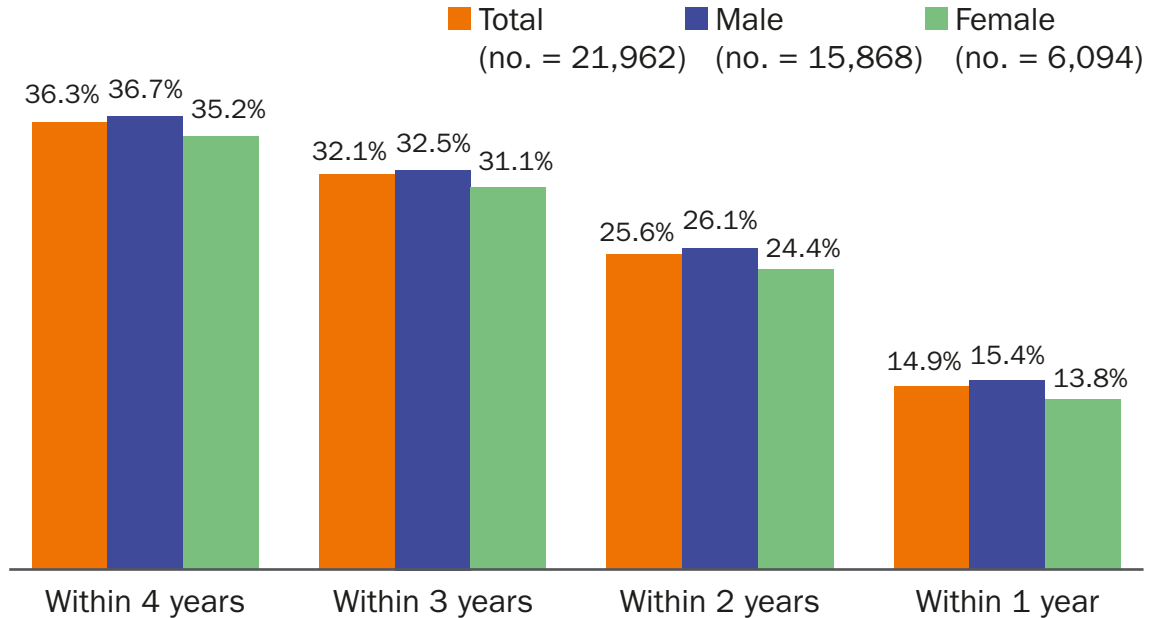
**Figure 10: Comparison of most serious offence types in family violence and non-family violence cases resulting in adjourned undertakings in the Magistrates' Court, 2016 to 2020**



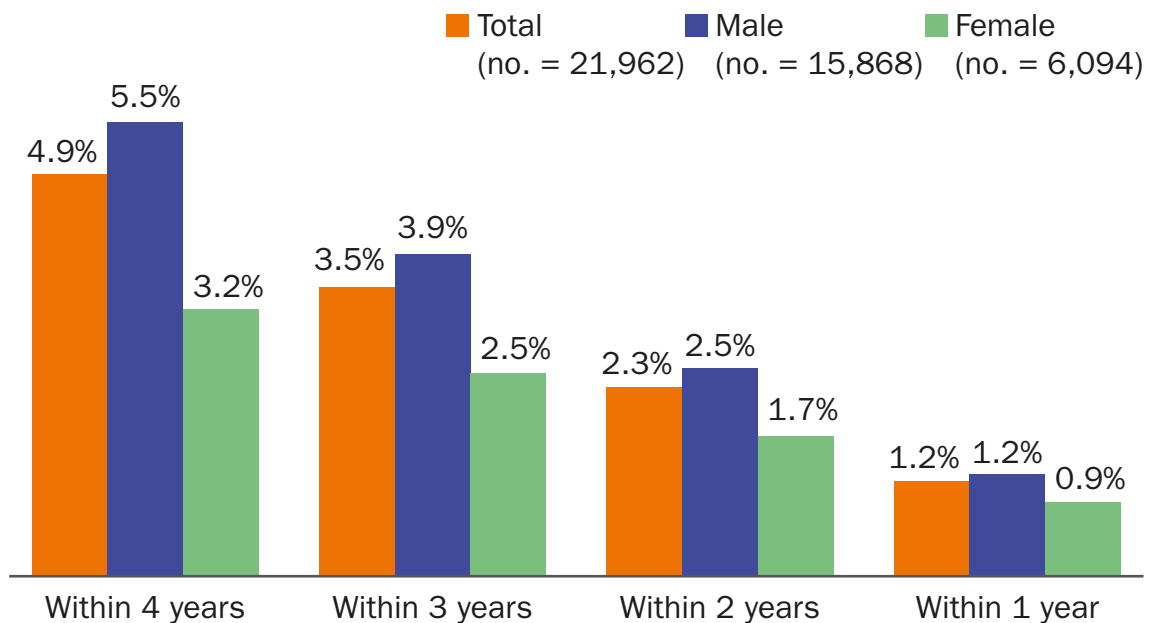
## Recent criminal history of people receiving adjourned undertakings

4.14 Looking at the recent criminal history of people receiving adjourned undertakings is useful because it provides some insight into the extent and severity of the recent contact that these people have had with the criminal justice system. It was expected that there would be a relatively low rate of prior offending for people receiving adjourned undertakings.

4.15 In 2019 and 2020, 21,962 people received an adjourned undertaking. Just over one-third of those people (36%) had been sentenced on another occasion in the previous four years (Figure 11, page 26). That rate was slightly higher for males than for females, but not significantly so.

**Figure 11:** Prior offending rates of people receiving adjourned undertakings in 2019 and 2020

4.16 There were also relatively few people who had received a prison sentence at any stage in the four years prior to receiving an adjourned undertaking (4.9%). The prior imprisonment rate was notably higher for males than for females.

**Figure 12:** Prior imprisonment rates of people receiving adjourned undertakings in 2019 and 2020

4.17 These findings support the notion that adjourned undertakings are largely utilised in cases involving first-time and less serious offenders, given that, in the most recent four years, 64% of offenders had not been sentenced for any other offending, and 95% had not received a recent prison sentence.

## Adjourned undertakings and marginalised groups

4.18 The evidence is overwhelming that the criminal justice system has a disproportionate effect on a number of marginalised groups. The Council is interested in stakeholder views on whether there are reforms that could be made to adjourned undertakings – whether related to legislation, practice or resourcing – that could improve criminal justice system responses for those groups. This could include, for example:

- Aboriginal and Torres Strait Islander peoples;
- women;
- young adults;
- people with a history of trauma;
- people with substance abuse issues;
- people with mental health issues;
- people with an intellectual disability or a cognitive impairment;
- people experiencing homelessness;
- people from culturally and linguistically diverse backgrounds; and
- people living in rural and regional Victoria.<sup>86</sup>

4.19 For instance, during preliminary consultation, the Council heard that:

- the availability of justice plans is limited by both the resourcing and the current definition of *intellectual disability*;
- the payment conditions attached to adjourned undertakings disproportionately affect Aboriginal and Torres Strait Islander peoples;
- the wait lists to participate in many drug and alcohol treatment programs are inordinately long; and
- for many people, their criminogenic risk factors stem from the limited availability of appropriate public housing.

4.20 As is often the case, the best way to reduce the disproportionate effect of the criminal justice system on marginalised groups is not to improve the criminal justice system itself, but instead to front end the resourcing of social goods such as education, housing, welfare and medical care. These issues are, however, beyond the scope of the Council's remit.

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86. With the exception of gender, discussed above at [4.3] and [4.5], data on the prevalence of these other groups among those who receive adjourned undertakings is either unavailable or unreliable and cannot be reported here.

- 4.21 Nevertheless, the criminal justice system can and should have some role to play in reducing the disproportionate effect it too often has on particular groups. If, for example, justice plans attached to adjourned undertakings are known to be effective in giving people access to programs and services that reduce their risk of reoffending but they are not widely used because of inadequate resourcing, then now may be an opportune time to increase those resources. This would not only reduce the overrepresentation of people with impaired mental functioning cycling through the criminal justice system but also make the community safer in the long term and, as a result, be an economically sound investment.
- 4.22 Similarly, the Council is interested in hearing whether there is a way to reduce the disproportionate effect of payment conditions of adjourned undertakings on Aboriginal and Torres Strait Islander peoples (payment conditions are discussed in more detail at [7.11]–[7.27]) and/or whether offenders required to participate in drug and alcohol treatment programs should have those services paid for by the state rather than having to self-fund them (this is discussed in more detail at [7.37]).

### Question 5: Marginalised groups

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

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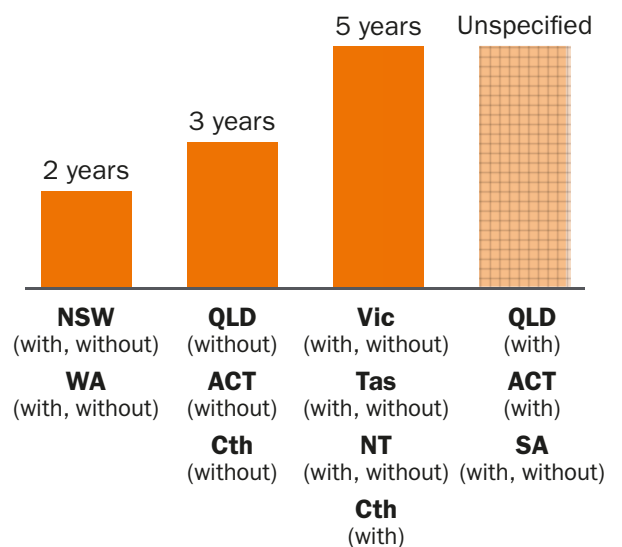
## 5. Lengths of adjourned undertakings

5.1 This chapter discusses the length of adjourned undertakings. This includes a comparison of the maximum permissible lengths of adjourned undertakings in Victoria with the maximum lengths of similar orders in other jurisdictions, and an analysis of their actual lengths over the last 10 years based on court data.

### Maximum length

5.2 The maximum possible length of an adjourned undertaking in Victoria is five years, regardless of whether a conviction is imposed.<sup>87</sup> The maximum length of comparable orders varies across Australia and in some jurisdictions depends on whether the court imposes a conviction or not (Figure 13).<sup>88</sup> Victoria has the longest specified maximum, on par with Tasmania and the Northern Territory (with or without conviction), as well as federal legislation (but only with conviction). There are, however, a number of jurisdictions where legislation is silent about the maximum length, especially when a conviction is imposed.

**Figure 13: Maximum lengths of adjourned undertakings (or similar orders) across Australia, by whether the order is imposed with or without conviction**



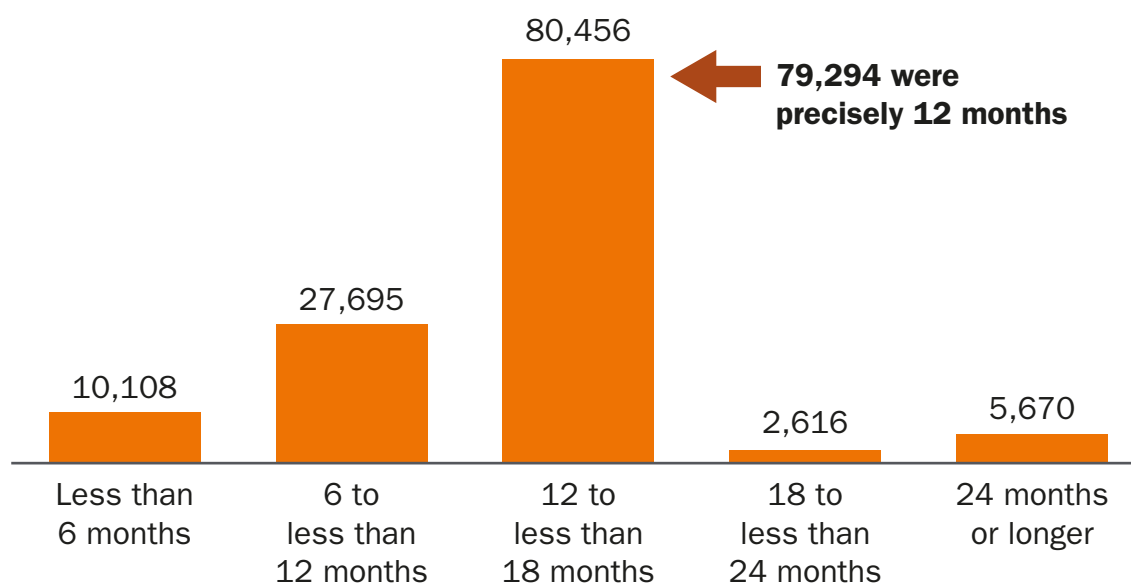
87. *Sentencing Act 1991* (Vic) ss 72(1), 75(1), 95.

88. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9, 10(1)(b), 95 (the maximum length was previously five years with conviction, but that was reduced to two years by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) ss 9, 31; *Penalties and Sentences Act 1992* (Qld) ss 19, 32; *Sentencing Act 2017* (SA) ss 97, 99 (the maximum length was previously three years until the enactment of the new 2017 sentencing legislation); *Sentencing Act 1995* (WA) s 48(3); *Sentencing Act 1997* (Tas) s 7(f); *Sentencing Act 1995* (NT) ss 11(1)(a), 13(1)(a); *Crimes (Sentencing) Act 2005* (ACT) ss 13, 17(7); *Crimes Act 1914* (Cth) ss 19B(1)(d)(i), 20(1)(a)(i).

## Lengths in the Magistrates' Court

5.3 While an adjourned undertaking in Victoria can be imposed for a period of up to five years, 99.7% of adjourned undertakings in the Magistrates' Court are two years or less in length.<sup>89</sup> Data on length was available for almost all adjourned undertakings (99.9%)<sup>90</sup> and is shown in Figure 14. Most undertakings were clustered at precisely six months (17.4%), 12 months (62.6%), 18 months (1.8%) or 24 months (4.2%). Together these four six-month increments accounted for 86% of all adjourned undertakings, which is consistent with similar findings in New South Wales.<sup>91</sup> This is most likely due to what Marder and Pina-Sánchez describe as 'sentence clustering', 'whereby [sentences] are clustered around a small number of specific [quantums]'.<sup>92</sup>

**Figure 14: Lengths of adjourned undertakings imposed in the Magistrates' Court, 2011 to 2020 (126,545 adjourned undertakings)**



89. Just 393 of 126,545 adjourned undertakings were longer than 24 months.

90. Data on length was available for 126,545 of 126,675 adjourned undertakings.

91. Suzanne Poynton et al., 'Good Behaviour Bonds and Re-offending: The Effect of Bond Length' (2014) 47(1) *Australian & New Zealand Journal of Criminology* 25, 29 ('The length of bonds ... tends to be grouped into discrete categories ... i.e. 6, 9, 12, 18, 24, 36 months').

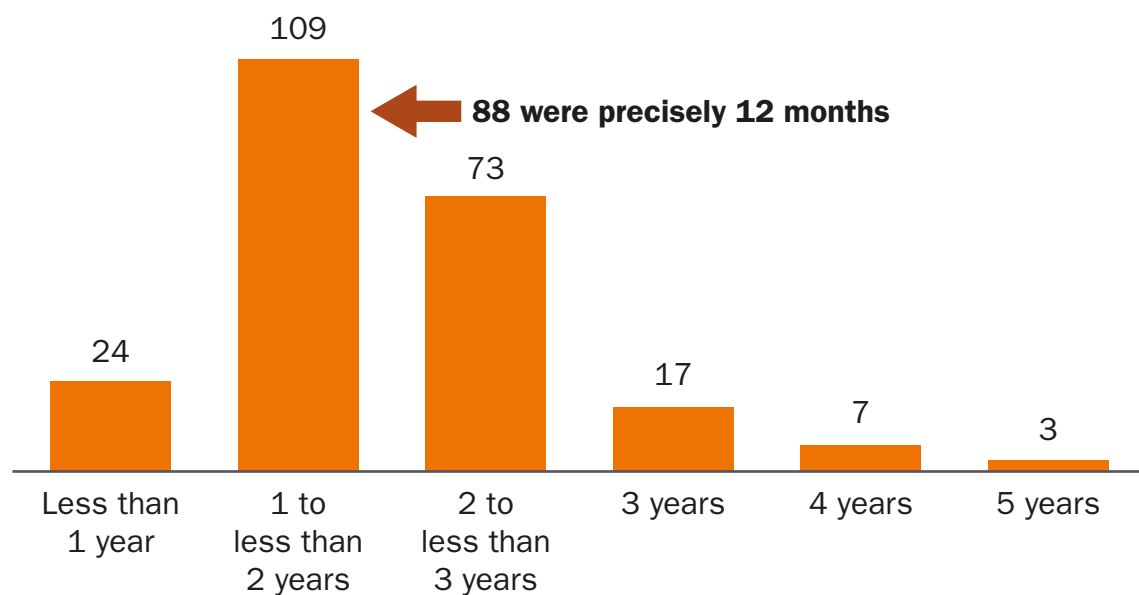
92. Ian Marder and Jose Pina-Sánchez, 'Nudge the Judge? Theorising the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clustering' (2020) 20(4) *Criminology & Criminal Justice* 399. While they focused their discussion on the clustering of *prison* sentence lengths, the same logic applies to any sentence that is too long for a specified length.

5.4 It might have been expected that the different maximum lengths of adjourned undertakings and equivalent orders across Australia would correlate with similar jurisdictional differences in the range of actual lengths imposed. In particular, jurisdictions with longer maximum lengths would also have longer actual lengths. This does not, however, appear to be the case. For instance, in New South Wales, when the maximum length was five years with conviction and three years without, 25% of good behaviour bonds were ordered to last for longer than two years.<sup>93</sup> In contrast, just 0.3% of adjourned undertakings in Victoria were ordered to last for longer than two years, despite Victoria having a slightly longer maximum than the similar order in New South Wales when the undertaking is without conviction.

## Lengths in the higher courts

5.5 In the higher courts, data on length was available in 233 cases when the adjourned undertaking was the principal sentence. As in the Magistrates' Court, in the higher courts many adjourned undertakings clustered around the specific lengths of 6 months (9%), 12 months (38%), 18 months (9%) and 24 months (31%), with a median of 18 months (Figure 15).

**Figure 15: Lengths of adjourned undertakings imposed in the higher courts, 2011 to 2020 (233 adjourned undertakings)**



93. Poynton et al. (2014), above n 91, 29.

5.6 Adjourned undertakings longer than two years were, however, more common in the higher courts (12% or 28). Three offenders received the maximum five years' length: one in the Supreme Court for manslaughter;<sup>94</sup> one in the County Court for attempted armed robbery and another in the County Court for three charges of the historical sex offence of indecent assault on a male person.<sup>95</sup> Another seven offenders received adjourned undertakings of four years' length, with their offending involving dangerous driving causing death,<sup>96</sup> recklessly causing injury, sexual penetration of a child aged under 16 (three cases), attempted armed robbery and incest with a sibling.

## A jurisdictional limit on the length of some adjourned undertakings?

- 5.7 There is currently a significant gap between the available maximum length (five years) and the actual lengths of most adjourned undertakings, with (in the Magistrates' Court) 99.7% being two years or less and 92.5% being one year or less. In contrast, a larger proportion of adjourned undertakings in the higher courts were longer than two years.
- 5.8 On the one hand, this could suggest that there is a need for the Magistrates' Court to consider longer adjourned undertakings in some cases and better utilise the full permissible duration of adjourned undertakings. There is some research from New South Wales suggesting that longer good behaviour bonds can be more effective than shorter ones in reducing reoffending;<sup>97</sup> however, the findings of this paper suggest the opposite (see [9.16]).
- 5.9 Alternatively, it may suggest that it could be appropriate to reduce the maximum permissible length of adjourned undertakings in the Magistrates' Court. This would constitute a restriction on judicial discretion, a step not to be taken lightly. There are, however, a number of arguments in support of this option.
- 5.10 First, this is already the case with community correction orders (CCOs), for which the maximum duration is two years (for one offence), four years (for two offences) or five years (for three or more offences).<sup>98</sup> It seems somewhat unusual that a less serious sentencing order (an adjourned undertaking) can last much longer than a CCO.

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94. *DPP v Smith* [2012] VSC 314.

95. Sentencing remarks are not publicly available for the two cases in the County Court.

96. *DPP v Ramirez* [2017] VCC 1898.

97. Poynton et al. (2014), above n 91, 36–37.

98. *Sentencing Act 1991* (Vic) s 38.

- 5.11 Second, the principles of proportionality<sup>99</sup> and parsimony (see [8.2]) require courts to impose a sentence commensurate with the seriousness of the offending and to impose the least severe sentence capable of achieving the purposes of sentencing. If an adjourned undertaking is the most appropriate sentence in any given case, it is difficult to conceive of many cases in the summary jurisdiction where a period longer than two years would be proportional and parsimonious.
- 5.12 Third, overly long adjourned undertakings can be found to be manifestly excessive. That was the case for a five-year good behaviour bond in New South Wales, with the Court of Criminal Appeal finding that imposing the maximum duration was ‘unnecessarily burdensome, and inappropriate to all the circumstances of [the] case’.<sup>100</sup>
- 5.13 Fourth, the new spent convictions scheme means that a finding of guilt for someone receiving an adjourned undertaking without conviction remains a disclosable event so long as the person is subject to conditions, and it is a mandatory condition of all adjourned undertakings that the person be of good behaviour for the period of the order. Therefore, longer adjourned undertakings significantly extend the period during which those people must disclose their finding of guilt (see [8.17]).
- 5.14 Fifth, the current provisions of the *Bail Act 1977* (Vic) mean that since 2018, if a person is serving an adjourned undertaking for an indictable offence and they are alleged to have committed another indictable offence during the period of the undertaking, the latter is considered a Schedule 2 offence, such that the person would need to establish compelling reasons why they should be released rather than remanded.<sup>101</sup> A compelling reason is one that is ‘difficult to resist’,<sup>102</sup> and it can be based on a combination of factors. If that person is released but is then alleged to have committed another offence while on summons or bail, they would then be in an even more difficult position and need to establish exceptional circumstances why they should be granted bail.<sup>103</sup> While exceptional circumstances are not an ‘impossible’<sup>104</sup> hurdle and can be based on a combination of factors,<sup>105</sup> the hurdle is nonetheless ‘a high one’.<sup>106</sup>

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99. *Hoare v R* [1989] HCA 33, [7].

100. *R v JJS* [2005] NSWCCA 225, [24].

101. *Bail Act 1977* (Vic) s 4AA(3), sch 2 cl 1(d). During the period of an adjourned undertaking, a person is ‘serving a sentence’.

102. *Re Ceylan* [2018] VSC 361, [47].

103. *Bail Act 1977* (Vic) s 4AA(2)(c), sch 2 cl 1.

104. *Re CT* [2018] VSC 559, [64].

105. *Re Gloury-Hyde* [2018] VSC 393, [30]–[36]; *Re CT* [2018] VSC 559, [65]; *Re Logan* [2019] VSC 134, [13].

106. *Re CT* [2018] VSC 559, [64], quoting *Re Whiteside* [1999] VSC 413, [10].

5.15 Given the complex lives of many people who come into contact with the criminal justice system, and given that desistance from offending is much more a journey than it is a moment in time,<sup>107</sup> these bail provisions place people who receive adjourned undertakings – low-level sentencing orders primarily designed to facilitate rehabilitation and *reduce* contact with the criminal justice system – in a very precarious position. If it is alleged that they have engaged in certain further offending during the period of their undertaking, they would need to establish either compelling reasons or exceptional circumstances as to why they should be granted bail. Therefore, longer adjourned undertakings may unintentionally increase the severity of a person's contact with the criminal justice system, and what may have seemed like an opportunity for longer-term support could instead further entrench them in the system.

### Question 6: Maximum length

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

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107. See, for example, John H. Laub and Robert J. Sampson, 'Understanding Desistance from Crime' (2001) 28 *Crime and Justice* 1.

## 6. Mandatory conditions of adjourned undertakings

6.1 This chapter discusses the two mandatory conditions that must be attached to all adjourned undertakings in Victoria. The first is that the offender must attend court if required, and the second is that the offender be of good behaviour during the period of the adjournment.<sup>108</sup>

### Mandatory condition 1: the requirement to attend court

6.2 The first mandatory condition attached to all adjourned undertakings is that the person must agree to attend court if required. Notice must be served on the offender at least four days before the required date of attendance.<sup>109</sup> During preliminary consultation, many stakeholders advised the Council that offenders on adjourned undertakings are rarely brought back before the court during the relevant period (unless they reoffend). They also advised that offenders are not brought back at the end of their adjourned undertaking either; instead, if there has not been any reoffending, the matter is typically finalised 'on the papers' by a magistrate in open court.

6.3 This broad condition, that a person must agree to attend court if required, may provide a possible vehicle for courts, in appropriate cases and without any legislative intervention, to undertake judicial monitoring of offenders serving adjourned undertakings. There is currently no formal judicial monitoring process for offenders on adjourned undertakings as there is for offenders on community correction orders (CCOs).<sup>110</sup> This is unsurprising given that one of the aims of low-end orders is to allow sentences to be served in the community 'unsupervised'.<sup>111</sup>

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108. *Sentencing Act 1991* (Vic) ss 72(2)(a)–(b), 75(2)(a)–(b).

109. *Sentencing Act 1991* (Vic) ss 72(4)–(5), 75(4)–(5).

110. *Sentencing Act 1991* (Vic) s 48K.

111. *Sentencing Act 1991* (Vic) s 70(1)(a).

It would, however, be possible in appropriate cases for courts to ask offenders to attend court for review of their compliance, as part of a ‘web of accountability’.<sup>112</sup> Courts could do this either via the general condition requiring an offender to attend court if called on to do so<sup>113</sup> or as an optional condition.<sup>114</sup>

## Judicial monitoring as a form of therapeutic jurisprudence

6.4 In recent years, there has been a surge of interest in therapeutic jurisprudence. At its core, therapeutic jurisprudence recognises that the law is capable of affecting people in a positive, negative or neutral way, and tries to ensure that as much as possible of that engagement is positive.<sup>115</sup> For instance, the increasing utilisation of restorative justice processes is designed to improve the criminal justice experience for victims of crime.<sup>116</sup> One of the most common contexts for therapeutic jurisprudence has been in trying to transform how sentencing courts engage with offenders during the process: before sentencing, at sentencing, even after sentencing. It has, for example, been advocated in the context of sentencing environmental offenders,<sup>117</sup> offenders with substance abuse issues,<sup>118</sup> sex offenders,<sup>119</sup> juvenile offenders<sup>120</sup> and offenders in mainstream courts generally.<sup>121</sup>

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112. Pauline Spencer, ‘Strengthening the Web of Accountability: Criminal Courts and Family Violence Offenders’ (2016) 41(4) *Alternative Law Journal* 225. See also Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Report* (2017) 44–62 (on increasing the use of judicial monitoring of family violence offenders on CCOs).
113. *Sentencing Act 1991* (Vic) ss 72(2)(a), 75(2)(a).
114. *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c).
115. David B. Wexler, ‘Therapeutic Jurisprudence: An Overview’ (2000) 17(1) *Cooley Law Review* 125.
116. See, for example, John Braithwaite, ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) 38(2) *Criminal Law Bulletin* 244. Indeed, one of the specific legislated purposes of a sentence deferral in Victoria is to allow a restorative justice process to occur: *Sentencing Act 1991* (Vic) s 83A(1A)(d).
117. Carrie C. Boyd, ‘Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?’ (2008) 32(2) *William and Mary Environmental Law and Policy Review* 483.
118. Michael King, ‘New Directions in the Courts’ Response to Drug and Alcohol Related Legal Problems: Interdisciplinary Collaboration and Collaboration with Defendants’ (2012) 6 *Phoenix Law Review* 917; Jamey Hueston and Kevin Burke, ‘Exporting Drug-Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court’ (2016) 52(1) *Court Review* 44.
119. William Edwards and Christopher Hensley, ‘Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process’ (2001) 45(6) *International Journal of Offender Therapy and Comparative Criminology* 646; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 184–212.
120. Michael L. Perlin and Alison J. Lynch, ‘“Some Mother’s Child Has Gone Astray”: Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing’ (2021) 59(3) *Family Court Review* 478.
121. Pauline Spencer, ‘From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream’ (2014) 39(4) *Alternative Law Journal* 222; Michael King, ‘What Can Mainstream Courts Learn from Problem-Solving Courts?’ (2007) 32(2) *Alternative Law Journal* 91; Michael D. Jones, ‘Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners’ (2012) 5(4) *Phoenix Law Review* 753.

6.5 One of the ‘key element[s]’<sup>122</sup> of therapeutic jurisprudence for sentencing courts is the use of judicial supervision, which ‘involves a judicial officer monitoring an offender’s ... treatment or compliance via specially listed “review” hearings’.<sup>123</sup> For instance, Victorian sentencing courts are specifically empowered to attach a judicial monitoring condition to a CCO, which involves the offender attending court on one or more occasions during their CCO to ‘answer questions or produce information (including reports or the results of medical examinations or medical tests)’.<sup>124</sup> Judicial monitoring is also a central feature of cases dealt with in the specialist Drug Court,<sup>125</sup> with ‘a large majority’ of participants describing that aspect as either useful or very useful.<sup>126</sup> Courts can also undertake judicial monitoring with offenders whose sentence has been deferred.<sup>127</sup> These review hearings are not, however, just about monitoring compliance with the sentencing order. They are also an opportunity for courts to engage in ‘motivational interviewing’, which Walters et al. describe as follows:

Motivational interviewing (MI) is conversational style for strengthening a person’s motivation and commitment to change ... There are two basic components of an MI interaction: relational and technical. Relational components involve the overall listening tone and spirit of the interaction. This is shown through open-ended questions, affirmations, reflections and summaries (referred to as OARS) as well as through an MI spirit that demonstrates evocation, collaboration and autonomy support.<sup>128</sup>

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122. Michael D. Trood, ‘Judicial Supervision of People Who Have Offended’, *The ISTJ Blog* (12 December 2021).

123. Michael D. Trood et al., ‘Magistrates’ Experiences of Judicial Supervision in Mainstream Courts’ (2022) 31(3) *Journal of Judicial Administration* 115.

124. *Sentencing Act 1991* (Vic) ss 48K–48L.

125. *Sentencing Act 1991* (Vic) s 18ZF(1)(b). Attending Drug Court as required has been a core condition for more than 20 years: see, for example, Arie Freiberg, ‘Drug Courts: Sentencing Responses to Drug Use and Drug-Related Crime’ (2002) 27(6) *Alternative Law Journal* 282; KPMG, *Evaluation of the Drug Court of Victoria: Final Report* (2014) 18, 19 (noting that ‘Court Review Hearings’ were weekly, fortnightly or monthly).

126. KPMG (2014), above n 125, 67.

127. *Sentencing Act 1991* (Vic) ss 83A(1B)–(1C).

128. Scott T. Walters et al., ‘Motivational Interviewing in Criminal Justice: A New Approach to Addressing Treatment Motivation and Related Behaviours’ *Counselor Magazine: The Magazine for Addiction & Behavioural Health Professionals* (October 2013) 49. See also Jill D. Stinson, ‘Motivational Interviewing with Court-Ordered Populations’, in Elizabeth L. Jeglic and Cynthia Calkins (eds), *New Frontiers in Offender Treatment* (2018). The Council also heard during consultation from a number of stakeholders that judicial supervision hearings can be a useful tool for holding correctional staff and service providers accountable if a person has not been placed on a particular program yet.

6.6 In order to understand how judicial monitoring and motivational interviewing might operate in practice, the Magistrates' Court in February allowed the Council to observe a half-day of part-heard hearings. The hearings were conducted virtually via WebEx due to the ongoing restrictions arising from the COVID-19 pandemic. The matters heard that day included judicial monitoring hearings for people serving CCOs and people whose sentence had been deferred. What we observed, above all else, was the intentional implementation of motivational interviewing strategies. Some examples of what the magistrate said to a number of different people during judicial monitoring hearings that day included:

'I've got your judicial monitoring report here from Corrections. How are you going?'

'And what are you thinking in terms of assessment for treatment? What are you hoping to get out of that?'

'What do you want to get out of the counselling? What sorts of things might you like to focus on?'

'Okay, so you've tried counselling in the past but you felt like it hasn't helped. But you're willing to give it another go?'

'What I'm hearing from you is to stop the circle going round and round, you might need some structure and discipline to focus on your goal, yeah?'

'Alright, well look it sounds like you're open to things, you're trying very hard. I want to say to you that I think you can have a little confidence in yourself to turn a corner.'

'I've got your Corrections report here. You've been seeing Corrections regularly? Double thumbs up, that's really good work. And you haven't had any police contact, which is excellent.'

'You're laying low, staying at home, well that's good. And you're struggling with the drug use but talking to your corrections officer about that, so that's good.'

'Given that you're going well on CISP, I'm willing to defer sentence more, and keep you on bail. So I'm not sentencing you finally today ... But I'm happy to keep you on bail to get on to the NDIS because you've been going so well.'<sup>129</sup>

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129. Magistrates' Court Observation (February 2022).

6.7 The value of these brief exchanges at judicial monitoring hearings should not be underestimated. Research (primarily in the context of drug courts) has gone as far as describing the judge–offender relationship at these hearings as ‘the key component’ of achieving behavioural change through a sentencing order:

After reviewing the mounting literature on the success of [drug treatment courts], researchers have confidently concluded that the power of the judge-participant relationship is so immense that it may have ‘effectively suppressed all other theoretical mechanisms’ that could potentially lead to desired outcomes ... The evidence is overwhelming.<sup>130</sup>

## Judicial monitoring as a condition of adjourned undertakings?

6.8 The Council is interested in stakeholder views on the appropriateness of judicial supervision as a condition of adjourned undertakings. On the one hand, judicial supervision can be highly effective in reducing reoffending, is already available as either a mandatory or an optional condition, and is already occasionally used by courts as a condition of adjourned undertakings (see [6.10]). On the other hand, this raises important fundamental questions about the nature of adjourned undertakings; even if judicial monitoring is effective, the order is intended to be an unsupervised one (though it is arguable whether the term ‘unsupervised’ is intended to refer to all forms of supervision, including judicial monitoring, or whether it primarily refers to supervision by correctional staff). Encouraging more engagement with the criminal justice system for offenders receiving adjourned undertakings may be seen as antithetical to the very purpose of such orders.

6.9 There is little information available about the current use of judicial monitoring in Victoria generally. The Council has, however, previously found that judicial monitoring was attached to between 10% of all CCOs imposed in the Magistrates’ Court (from 2012 to 2015)<sup>131</sup> and 20% of CCOs imposed on people found guilty of breaching a personal safety intervention order (from 2012 to 2020).<sup>132</sup>

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130. Brian MacKenzie, ‘The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts’ (2016) 52(1) *Court Review* 8, 9 (citations omitted).

131. Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) 17.

132. Sentencing Advisory Council, *Sentencing Breaches of Personal Safety Intervention Orders in Victoria* (2022) 58. See also Sentencing Advisory Council, *Sentencing Stalking in Victoria* (2022) 50 (18% of CCOs); Sentencing Advisory Council, *Sentencing Breaches of Family Violence Intervention Orders and Safety Notices: Third Monitoring Report* (2022) 70 (16% of CCOs); Sentencing Advisory Council, *Animal Cruelty Offences in Victoria* (2019) 37 (10% of CCOs).

- 6.10 It is not possible to discern how many courts achieve judicial monitoring as a condition of adjourned undertakings simply by using the general condition requiring people to attend court as directed. It was, however, imposed as a specific, optional condition of 20 adjourned undertakings in 2019 and 2020, such that at least 0.1% of adjourned undertakings had a judicial monitoring condition (see Figure 16, page 44).
- 6.11 Motivational interviewing and judicial supervision have traditionally been reserved for specialist courts such as drug courts, which often have more resources than mainstream courts do to undertake this sort of work. However, as Trood et al. recently observed after surveying Victorian magistrates about their use of judicial supervision, there are many offenders in mainstream courts who would most likely benefit from this sort of intervention, such as offenders with substance abuse issues and/or mental health issues. It is, though, difficult to implement with current 'resource and listing constraints ... relative to problem-solving courts'.<sup>133</sup> In that context, Trood et al. recommend further research to identify which people would most benefit from judicial supervision in mainstream courts, to ensure the resourcing implications would be concentrated.
- 6.12 If judicial supervision is to become part of mainstream courts' business as usual, this would most likely require training for judicial officers. During preliminary consultation, the Judicial College of Victoria advised that judicial supervision of sentenced offenders (how it works, when to use it and how to use it effectively) is not currently part of training routinely delivered to judicial officers by the Judicial College.<sup>134</sup> The Judicial College was, however, keen to explore adding it to their curriculum, particularly for new judicial officers, and suggested that it could be done with fairly minimal resource implications.<sup>135</sup>

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133. Trood et al. (2022), above n 123, 136. Trood et al. recommend further research into the optimal scheduling of review hearings.

134. The Judicial College of Victoria did, though, host a two-day workshop on motivational interviewing for judicial officers in late 2020: Judicial College of Victoria, 'Motivational Interviewing' ([judicialcollege.vic.edu.au](http://judicialcollege.vic.edu.au), 2020).

135. Meeting with Judicial College of Victoria (30 March 2022).

6.13 Any attempt to increase the use of judicial supervision in the context of adjourned undertakings has the potential to significantly affect court resources and workloads. To overcome this issue, there would need to be criteria to help courts decide when judicial supervision is appropriate and thereby limit the use of this condition (presumably, it would only be a small number of cases), and there would need to be specifically allocated resources for the Magistrates' Court to manage the extra work.

### Question 7: Judicial supervision

Is there scope to increase the use of judicial supervision as a condition of adjourned undertakings? In answering this question, you may wish to consider:

- criteria for assessing offender suitability;
  - the resource implications for courts;
  - the need to balance the potential value of judicial supervision against the principles of proportionality and parsimony;
  - the potential inconsistency between adjourned undertakings being primarily unsupervised orders but involving some supervision;
  - the evidence base that would need to be developed to establish best practice processes; and
  - the training that judicial officers would require.
-

## Mandatory condition 2: good behaviour

- 6.14 An adjourned undertaking must include as a condition ‘that the offender is of good behaviour during the period of the adjournment’.<sup>136</sup> The imposition of a ‘good behaviour’ requirement as punishment for criminal offending has a long history in Australia. There are a number of publicly available judgments from the late eighteenth and early nineteenth centuries in which an offender was sentenced to a condition to be of good behaviour for a certain period, often alongside other people agreeing to act as monetary sureties for the offender.<sup>137</sup>
- 6.15 There is, however, no definition of ‘good behaviour’ in the legislation, and the Council could find no definition in case law either.<sup>138</sup> Stakeholders suggested that the term is typically interpreted as meaning that the offender should not commit further offences during the period of their adjourned undertaking. This is consistent with the requirement in other jurisdictions that people on similar orders not reoffend. Even this interpretation, however, might benefit from some clarification. Is a parking infringement a breach of the requirement not to reoffend? Is it only when the law broken is punishable by a term of imprisonment, excluding more regulatory offences where the maximum penalty is a fine? Must there be some form of ‘physical assault or public violence’?<sup>139</sup> Or conversely, might good behaviour require something *more* than just abstaining from criminal offending?<sup>140</sup>

### Question 8: Good behaviour

Is there a need to clarify the definition of ‘good behaviour’ in sections 72 and 75 of the *Sentencing Act 1991* (Vic)? If so, why and how? If not, why not?

136. *Sentencing Act 1991* (Vic) ss 72(2)(b), 75(2)(b).

137. *R v Barsby* [1788] NSWSupC1; *R v Webb* [1794] NSWSupC1; *R v Bowman* [1800] NSWSupC4; *R v Davoren* [1813] NSWSupC14; *R v Bland* [1818] NSWSupC 5.

138. Freiberg (2014), above n 6, 686 (‘This concept is poorly defined’); NSW Sentencing Council (2011), above n 6, 56 (‘the concept of “good behaviour” is ill defined’).

139. Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982: Discussion Paper* (2005) 20.

140. While not comparable, there have been arguments that the constitutional requirement for judicial officers to be of good behaviour in both the United States and Australia means more than simply not committing an offence: Raoul Berger, *Impeachment: The Constitutional Problems* (1973); Saikrishna Prakash and Steven D. Smith, ‘Reply: (Mis)understanding Good-Behavior Tenure’ (2006) 116(1) *Yale Law Journal* 159; see the ‘Class B documents’ of the federal parliamentary inquiry into Justice Murphy of the Higher Court, as defined in section 6(6) of the *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth): Parliament of Australia, ‘Records of the Parliamentary Commission of Inquiry’ (aph.gov.au, 2016).

## 7. Optional conditions of adjourned undertakings

- 7.1 In addition to attaching the two mandatory conditions (described in the previous chapter) to all adjourned undertakings, Victorian courts have significant flexibility in attaching other optional conditions, including ‘any conditions’ they deem appropriate.<sup>141</sup> The same is true for similar orders across Australia.<sup>142</sup> This chapter includes an overview of some of the optional conditions that are often attached to adjourned undertakings.
- 7.2 To date, there does not appear to have been any research in Australia on the conditions attached to adjourned undertakings or their counterpart orders. In its 2011 report on the use of good behaviour bonds, the NSW Sentencing Council wrote that it ‘was unable to obtain statistics in relation to the specific conditions imposed on orders’.<sup>143</sup> In that context, the below analysis of conditions attached to adjourned undertakings appears to be the first of its kind in Australia.
- 7.3 The most common optional conditions imposed on adjourned undertakings between 1 January 2019 and 31 December 2020 (two years)<sup>144</sup> are shown in Figure 16 (page 44). About half of all adjourned undertakings (47.3%) had *no* optional condition attached beyond the requirements to attend court when necessary and be of good behaviour. The most common optional condition, in one-quarter of adjourned undertakings (24.2%), was a donation to the Court Fund (discussed below at [7.25]–[7.30]). And the second most common optional condition involved seeking, or more frequently *continuing* with, mental health or some other form of medical treatment. This was often described as, for example, ‘continue to see Dr Smith’ or ‘continue to take medication as prescribed’.

141. *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c).

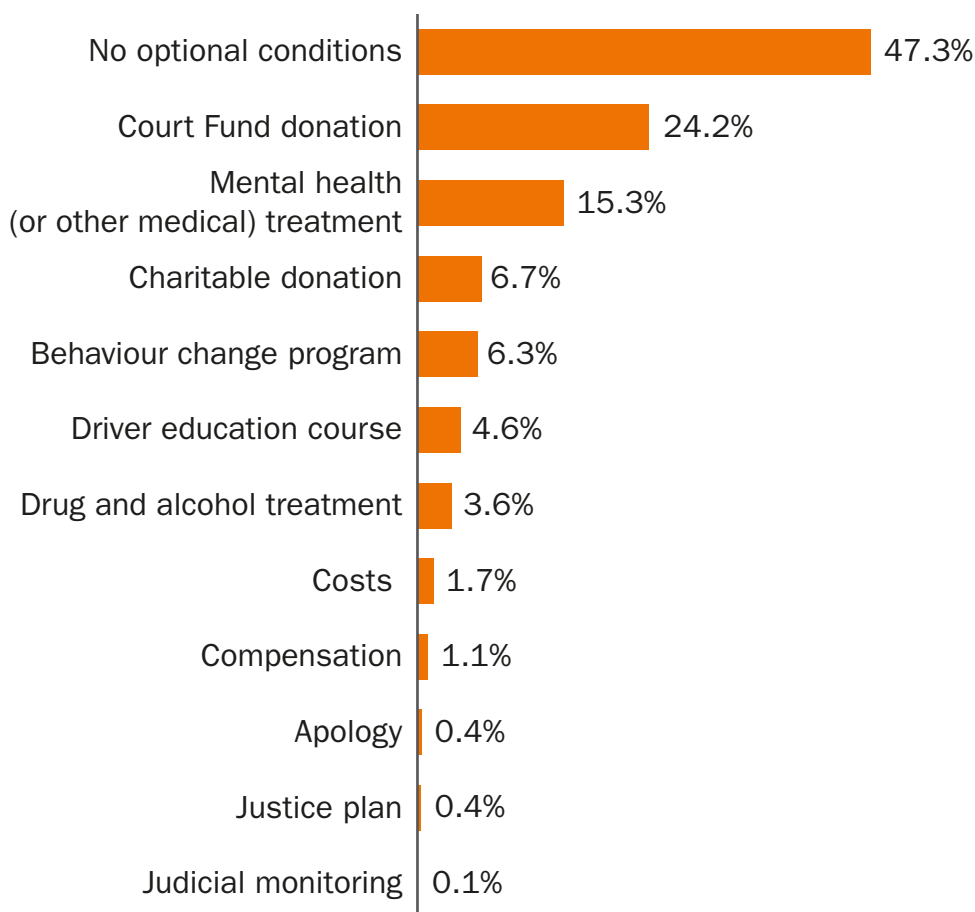
142. *Sentencing Act 1997* (Tas) s 59(c); *Crimes (Sentencing) Act 2005* (ACT) s 13(4)(g); *Sentencing Act 2017* (SA) s 98(1)(l); *Penalties and Sentences Act 1992* (Qld) s 19(2); *Sentencing Act 1995* (NT) s 13(1)(c); *Crimes Act 1914* (Cth) ss 19B(1)(d)(iii), 20(1)(a)(iv); *Sentencing Act 1995* (WA) s 49(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99A (albeit there are some restrictions in New South Wales, such as prohibiting a home detention condition, a curfew condition, a community work condition and an electronic monitoring condition).

143. NSW Sentencing Council (2011), above n 6, 42.

144. This is the period for which the Magistrates’ Court was able to provide the Council with an exhaustive account of conditions attached to all adjourned undertakings.

7.4 Other common optional conditions included donating to specific charities (6.7% of adjourned undertakings), participating in a behaviour change program (6.3%), either a family violence specific men's behaviour change program or a more general anger management course, participating in a driver education course (4.6%) such as Amber Community's Road Trauma Awareness Seminar,<sup>145</sup> seeking or continuing with a drug and alcohol treatment program (3.6%) and paying the prosecuting agency's costs (1.7%).<sup>146</sup> Less common conditions were apologising to the victim or someone else such as the police informant (0.4%), participating in a justice plan (0.4%) and engaging in judicial monitoring (0.1%).

**Figure 16: Optional conditions attached to adjourned undertakings in the Magistrates' Court, 1 January 2019 to 31 December 2020 (24,787 adjourned undertakings)<sup>147</sup>**



145. Amber Community, 'Road Trauma Awareness Seminar Calendar' (rtssv.org.au, 2022).

146. In appropriate cases, courts usually award costs pursuant to section 401 of the *Criminal Procedure Act 2009* (Vic). However, as the example adjourned undertaking form in Figure 17 seems to suggest, the award of costs can be a condition of an adjourned undertaking.

147. Note that many undertakings included two or more optional conditions, such as a donation to the Court Fund as well as participating in a behaviour change program, which is why the percentages add up to more than 100%.

## Guidance about optional conditions

7.5 There is little guidance in the *Sentencing Act 1991* (Vic) about what optional conditions might be attached to adjourned undertakings, except that they can include charitable donations, either directly or via the court,<sup>148</sup> and/or justice plans for people with an intellectual disability.<sup>149</sup>

7.6 There is some common law guidance about how to decide which conditions to impose, but it is abstract guidance rather than specific. In *R v Bugmy*, the New South Wales Court of Criminal Appeal outlined three principles that have since been cited with approval in a number of other jurisdictions (but not yet in Victoria):

- First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation.
- Secondly, the conditions must each be certain, defining with reasonable precision conduct which is proscribed.
- Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.<sup>150</sup>

7.7 Along similar lines, the Australian Law Reform Commission (ALRC) in 2006 proposed the following restrictive principles:

Conditions should be attached to conditional release orders only if they are capable of being complied with. Accordingly, the court should not order a federal offender to participate in a rehabilitation program unless it is satisfied that the offender is a suitable person to participate in the program, is eligible to participate, and the program is accessible to the offender. Similarly, the court should not order a federal offender to undergo medical or psychiatric treatment unless the treatment has been recommended by a qualified medical practitioner and is available to the offender.<sup>151</sup>

148. *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c).

149. *Sentencing Act 1991* (Vic) ss 72(3), 75(3), 80.

150. *R v Bugmy* [2004] NSWCCA 258, [61], cited with approval in the Northern Territory, the Australian Capital Territory and Tasmania: *Perkins v Heath* [2017] NTSC 74, [15]; *Garling v Firth* [2016] NTSC 41, [33]–[36]; *Byrne v Mingay* [2014] ACTSC 126, [109]–[110]; to a lesser extent (only the second principle), *Maynard v Lane* [2011] TASSC 33, [8].

151. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 245.

- 7.8 A question arises as to whether the *Sentencing Act 1991* (Vic) would benefit from the inclusion of optional conditions.
- 7.9 In 2006, the ALRC recommended that federal sentencing legislation include examples of the types of conditions that might be imposed, without mandating them.<sup>152</sup> In particular, '[u]seful examples of conditions are that offenders undertake a rehabilitation program, undergo specified medical or psychiatric treatment, or be subject to the supervision of a probation officer'.<sup>153</sup> The aim of these examples would be to guide judicial officers about the types of conditions they might want to consider.
- 7.10 The NSW Sentencing Council recommended the opposite in 2011, 'that there is [no] need to specify any additional conditions that should be imposed',<sup>154</sup> noting that they were 'not satisfied from the statistics, the submissions received, or from [their] review of the case law' that such guidance would be useful. One possible reason for not legislating optional conditions, suggested during the Council's preliminary consultations, could be that doing so might unintentionally result in judicial officers 'overloading' some orders with too many conditions 'because they're there'.

### Question 9: Guidance about optional conditions

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

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152. Ibid.

153. Ibid 241–245.

154. NSW Sentencing Council (2011), above n 6, 56.

## Optional condition 1: donations

7.11 There are two avenues by which the offender can be ordered to make a donation as a condition of an adjourned undertaking: directly to a charity or to the court for distribution to organisations providing a charitable or community service (usually via the Court Fund).<sup>155</sup> There are a number of issues that arise in this context: whether monetary penalties are appropriate conditions of adjourned undertakings, whether donations to specific charities are appropriate conditions of adjourned undertakings and the limited publicly available information about the Court Fund.

### The appropriateness of monetary penalties in general

7.12 Victorian courts ordering an adjourned undertaking are specifically empowered to impose a monetary penalty requiring the offender to pay an amount of money to an organisation that provides a charitable or community service, either directly or via the Court Fund. Victoria is the only jurisdiction in the country to specifically empower courts to impose this sort of condition on an undertaking or similar order. While similar orders across Australia usually permit courts to impose 'any condition' they see fit,<sup>156</sup> none of them specifically mention charitable or other donations.

7.13 While donation conditions of adjourned undertakings have been available in Victoria for decades, an issue arose in 2013 when the Supreme Court held that they were no longer permissible. In particular, the court held that conditions requiring an offender to pay a sum of money to a charitable organisation were effectively fines and therefore not an appropriate condition of an undertaking. The court said:

[o]n 30 August 2011 at the plea hearing, the magistrate ordered ... [the offender] to make a donation to St Vincent de Paul for their 'Food Van' service to the Needy/Homeless in an amount of \$2,500 – payment to be made by 28 October 2011.

...

155. *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c). There were some cases where the court imposed a condition that was earmarked for a particular charity (like a charitable donation) but the money was ordered to be paid to the court (like the Court Fund). This option, while not particularly common, could be one way of avoiding the disproportionate tax deduction for wealthier offenders when they themselves make the payment to the charity, while also ensuring the offender has a clear understanding about the final destination of the funds.

156. *Sentencing Act 1997* (Tas) s 59(c); *Sentencing Act 2017* (SA) s 98(1)(l); *Crimes (Sentencing) Act 2005* (ACT) s 13(4)(g); *Sentencing Act 1995* (NT) s 11(1)(c). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99; *Sentencing Act 1995* (WA) s 49; *Penalties and Sentences Act 1992* (Qld) ss 24, 30–31.

The statutory definition of a fine is not avoided because an obligation to make a payment is agreed to by the offender ... A payment required by a special condition is a payment made 'under an order of a court' that is made on the offender being found guilty of an offence ... The fact that the offender has submitted to the obligation does not alter that characterisation. ...

I am satisfied that the magistrate erred when he required [the offender] to make a payment to St Vincent de Paul as a condition of the undertaking because such a condition was ... not a sentence passed in accordance with ... the Sentencing Act.<sup>157</sup>

7.14 The legislature shortly thereafter amended the *Sentencing Act* to expressly specify that a donation condition is permissible<sup>158</sup> and 'should not be treated as a substitute or replacement for a fine'.<sup>159</sup> Therefore, the current position in Victoria is that donation conditions, either to specific charities or to the Court Fund, are not fines.

7.15 As a point of contrast, the ALRC has specifically recommended against courts being able to attach conditions to conditional release orders that are effectively the equivalent of imposing a more severe penalty. In particular, the ALRC recommended against community service or monetary penalties (fines) as conditions of good behaviour bonds:

There is no practical difference between a monetary penalty and a fine. It is undesirable to enable a court to impose a monetary penalty as a condition of a conditional release order when the offence in question is punishable by a fine.<sup>160</sup>

7.16 During preliminary consultation, stakeholders were divided about whether financial penalties, even in the form of charitable donations, should remain a permissible condition of an adjourned undertaking. On the one hand, a financial penalty can represent a punitive aspect of the sentence and arguably facilitates rehabilitation by encouraging the offender to better understand the consequences of their behaviour, thereby allowing the sentencing court to not record a conviction, or to impose a less severe penalty than, for example, a fine or a community correction order (CCO). On the other hand, while these donation conditions may not technically be fines, since parliament amended the *Sentencing Act* in 2013, it is hard not to characterise them as fines in appearance and function, such that they constitute informal slippage up the sentencing hierarchy.

157. *Brittain v Mansour* [2013] VSC 50, [6], [41], [44], [57].

158. *Justice Legislation Amendment Act 2013* (Vic) ss 9(2)–(3), amending *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c).

159. Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 1264 (Robert Clark, Attorney-General). The *Justice Legislation Amendment Act 2013* (Vic) also amended the definition of *fine* in the *Sentencing Act 1991* (Vic) to make it clear that court-ordered donations are not to be characterised as a monetary penalty.

160. Australian Law Reform Commission (2006), above n 151, 245–247.

Moreover, financial penalties in any form disproportionately affect people experiencing socioeconomic disadvantage,<sup>161</sup> and Aboriginal and Torres Strait Islander peoples are often overrepresented as fine recipients.<sup>162</sup>

- 7.17 Further, the Council was advised during preliminary consultation that at the end of the period of the undertaking when the case is again heard in open court, registry staff will have flagged for the magistrate whether the offender has sent all relevant evidence of compliance with the various conditions. A lack of evidence of payment will be flagged as non-compliance and therefore lead to consequences, such as prosecution for a breach offence and/or resentencing for the original offending. In comparison, 'just over half' of all court fines are fully paid.<sup>163</sup> It is possible that the fact of a subsequent court hearing for people receiving adjourned undertakings significantly increases the risk – compared to people receiving fines – of their non-payment being discovered and leading to consequences.

### Question 10: Payment conditions

Should Victorian courts continue to be able to require an offender to make a payment to an organisation that provides a charitable or community service, or to the court for payment to such an organisation, as a condition of an adjourned undertaking? If so, why? If not, why not?

## The appropriateness of charitable donations

- 7.18 This section considers the appropriateness of charitable donation conditions specifically, separate from Court Fund donation conditions. This involves offenders themselves paying money directly to a charity. These conditions arguably achieve some purposes of sentencing by encouraging an offender to engage with the consequences of their offending, particularly if the services provided by the charitable organisation somehow relate to the offending in question (e.g. a donation to a domestic violence shelter in a case involving family violence offending). In the past, these donations have 'supported the work of the Salvation Army, the St Vincent de Paul Society and the Melbourne Citymission, among many others'.<sup>164</sup>

161. Zhigang Wei et al., *Fines: Are Disadvantaged People at a Disadvantage?* Justice Issues Paper no. 27 (2018); Sophie Clarke et al., *Fine but Not Fair: Fines and Disadvantage*, Justice Issues Paper no. 3 (2008).

162. Mary S. Williams and Robyn Gilbert, *Reducing the Unintended Impacts of Fines*, Current Initiatives Paper no. 2 (2011); Meeting with Victorian Aboriginal Legal Service (22 December 2021).

163. Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report* (2014) 36.

164. Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 1264 (Robert Clark, Attorney-General).

- 7.19 However, donation conditions attached to adjourned undertakings also create the risk, at least in perception, that magistrates will order donations to their preferred charities, regardless of whether the charity in question is somehow related to the offending. For instance, the charity receiving the largest number of charitable donations was the Country Fire Authority (CFA) – specifically, dozens of individual CFAs across Victoria. Very few of those cases involved fire-related offending such as arson or lighting a fire during a prohibited period. So too was there a large number of donations to the Victorian Bushfire Appeal, all of them in 2020 following the 2019–20 Eastern Victorian bushfires. In that sense, these donation conditions seem to have been driven not by the offending before the court but rather by the perceived needs of the Victorian community at the time. Similarly, 55 of the 56 donations to the Father Bob Maguire Foundation – which seems to operate primarily in Albert Park and St Kilda – were imposed about 30 kilometres away in the Ringwood Magistrates’ Court, suggesting that the preferences of judicial officers are sometimes guiding the choice of charity. There were also region-specific charities that received charitable donations, such as Banksia Gardens (operating in the Hume region), Edgars Mission Farm Sanctuary (in Lancefield),<sup>165</sup> the Mittagundi Outdoor Education Centre (in Gippsland)<sup>166</sup> and the Finian Foundation, which currently ‘exclusively’ assists ‘students of St Bede’s College, Mentone’.<sup>167</sup>
- 7.20 In 2019 and 2020, there was a total of \$1,281,810 ordered to be paid to charities and community organisations as conditions of adjourned undertakings. The figure was much higher in 2019 (\$795,572) and is most likely more indicative of common practice than the figure in 2020 (\$486,238) given the effect of COVID-19 on court operations in the latter year. Those donations arose from 1,691 unique donation conditions in 1,660 cases (there were 23 cases with two donation conditions and four cases with three donation conditions). The largest donations required in any case were \$150,000 (made up of three separate \$50,000 donations),<sup>168</sup> \$75,000, \$50,000 and two \$10,000 donations.

**\$1,281,810**  
**charitable donation**  
**conditions in 2019**  
**and 2020**

165. While not shown in Table 1, there were 18 cases with conditions requiring a donation to Edgars Mission Farm Sanctuary, totalling \$7,560.

166. While not shown in Table 1, there were 10 cases with conditions requiring a donation to the Mittagundi Outdoor Education Centre, totalling \$4,600.

167. Old Collegians Association, ‘The Finian Foundation’ (stbedes.catholic.edu.au, 2022). Unusually, despite the locations of St Bede’s campuses (Mentone, Bentleigh East and Phillip Island), many of these donations were imposed in northern regional courts such as Shepparton, Cobram and Wodonga.

168. See Alexandra Treloar, ‘Olam Orchards Australia, Complete Commodity Management Plead Guilty over Carwarp Workplace Death’, *ABC News* (18 December 2020).

The 20 charities receiving the largest number of donations and the total amounts ordered are shown in Table 1.

**Table 1: Charities ordered to receive the largest number of donations as conditions of adjourned undertakings in the Magistrates' Court, 2019 and 2020 (1,691 donations in 1,660 cases)**

<b>Charity</b>	<b>Number of donations</b>	<b>Total value of donations</b>
Country Fire Authority (various)	129	\$76,250
Salvation Army	104	\$63,238
Royal Melbourne Hospital	96	\$97,500
Victoria Police Blue Ribbon Foundation	88	\$59,988
Banksia Gardens	80	\$28,400
White Ribbon Australia	69	\$40,775
Royal Children's Hospital	68	\$30,700
Victorian Bushfire Appeal	65	\$29,620
Buy a Bale	64	\$12,330
Father Bob Maguire Foundation	56	\$35,200
Finian Foundation	54	\$49,500
Road Trauma Support Services Victoria (now Amber Community)	38	\$20,800
Austin Hospital	37	\$18,038
RSPCA	33	\$25,850
Alfred Hospital	29	\$15,500
Pip.ilepsy Foundation	28	\$5,890
McGrath Foundation	27	\$14,400
Sacred Heart Mission	26	\$19,650
Beyond Blue	25	\$14,950
MS Australia	23	\$4,935
Other (172 organisations)	514	\$663,514

7.21 Another potential problem with donation conditions is that they can disproportionately affect people with lower incomes. Whereas a contribution to the Court Fund is not tax deductible (it is not a registered charity),<sup>169</sup> there is nothing stopping an offender from claiming their charitable donation as a tax deduction; they can submit the receipt to the court as proof of compliance, but the donation would remain a deductible expense. Offenders in higher income brackets would therefore be able to receive a far more significant tax deduction (e.g. a \$500 donation for someone earning over \$180,000 would receive an additional \$225 in savings) than would offenders in lower income brackets (e.g. that same \$500 donation for someone earning between \$18,200 and \$45,000 would only receive \$95 in savings). There is, perhaps, also a question about the appropriateness of these donations being subsidised.

### Question 11: Charitable donations

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

## The appropriateness of donations to the Court Fund

7.22 The other form of charitable donation that a court can order is for the offender to make a payment into the Court Fund for distribution by the court to charitable and community organisations.<sup>170</sup> The Court Fund, previously referred to as ‘the poor box’,<sup>171</sup> ‘is used to provide direct financial assistance to needy persons who present at the court, or to make payments to welfare bodies who then distribute the funds to individuals.’<sup>172</sup>

7.23 The Magistrates’ Court has described the Court Fund as being of ‘great value to the community’.<sup>173</sup> Funds have in the past supported the work of organisations such as Whitelion, Berry Street, Kids Under Cover, 20th Man Fund, Hand Brake Turn, lifesaving clubs, rescue squads, road safety initiatives, hospitals, and community health and family support centres.<sup>174</sup> In 2020–21, the Heidelberg Magistrates’ Court contributed more than \$270,000 to the Court Fund, with the funds going towards ‘food, crisis accommodation, Myki passes, petrol vouchers, clothing, school fees and Christmas hampers’.<sup>175</sup>

169. Australian Charities and Not-for-Profits Commission, ‘Search for a Program’ (acnc.gov.au, 2022).

170. In addition to the two standard donation conditions – donating directly to a particular charity or to the Court Fund – there were also a handful of cases where offenders were ordered to pay money to the court registrar for distribution to a specific charitable organisation.

171. Arie Freiberg and Monica Pfeffer, ‘The Poor Box: A Charitable Disposition?’ (1989) 14(5) *Legal Service Bulletin* 219.

172. Auditor General Victoria, *Results of Special Reviews and Other Investigations* (2005) 109.

173. Magistrates’ Court of Victoria, *Annual Report 2014–2015* (2015) 13.

174. Magistrates’ Court of Victoria, *Annual Report 2011–2012* (2012) 67.

175. Magistrates’ Court of Victoria, *Annual Report 2020–2021* (2021) 37.

7.24 There is a significant amount of money received and distributed by the Court Fund each year. It has, for instance, received \$121,000 (1973), \$542,000 (1979), \$827,000 (1982), \$2,047,000 (1987),<sup>176</sup> about \$2 million a year (early 2000s)<sup>177</sup> and \$1.3 million (2005–06).<sup>178</sup> There is, however, no recent publicly available information about the Court Fund, including how much money it receives, how much is distributed, who it is distributed to, and how those decisions about distribution are made. There was once a practice direction about how those monies were to be distributed,<sup>179</sup> following recommendations made by the Auditor-General,<sup>180</sup> but that practice direction may no longer be in effect as it is not available on the Magistrates' Court's website.<sup>181</sup>

7.25 The Magistrates' Court advised that there are internal guidelines for the distribution of Court Fund proceeds, whereby:

- each court region has a Court Fund Committee that meets quarterly to consider requests for funding;<sup>182</sup>
- organisations must be not-for-profit or charitable organisations, and preference is given to local organisations supporting the community;
- the funds should be used as emergency relief or to address disadvantage and cannot be used for administrative purposes; and
- each organisation receiving funds is required to submit quarterly reports about how the money has been spent and any unspent funds remaining.<sup>183</sup>

7.26 The Council's analysis of conditions attached to adjourned undertakings in 2019 and 2020 reveals that there was \$3,205,138 ordered to be paid to the Court Fund as a condition of an adjourned undertaking.

**\$3,205,138**  
**Court Fund**  
**donation conditions**  
**in 2019 and 2020**

176. Freiberg and Pfeffer (1989), above n 171, 219.

177. Fairfax Media Australia, 'Court Poor Box Gives Rich Solace to Needy', *The Age* (8 July 2002).

178. Victorian Auditor-General, *Administration of Non-Judicial Functions of the Magistrates' Court of Victoria* (2007) 46.

179. *Ibid* 47 fn 2, citing Magistrates' Court of Victoria, *Practice Direction 25/2006: Guidelines for the Distribution of Court Funds* (2006).

180. Auditor-General Victoria, *Administration of Non-Judicial Functions of the Magistrates' Court of Victoria* (2007) 47. The Auditor-General found that there was 'a lack of formal policy on how the Court fund should be administered, and a lack of reporting and accountability for funds provided to charities', that 'junior court administrative staff effectively had discretion over who received assistance and how much', and that there was 'inadequate documentary evidence for many Court fund payments'. The Auditor-General recommended that the Magistrates' Court and Department of Justice 'consider alternative methods to administer the Court fund', such as 'the outsourcing of the function': *ibid*, 3, 50.

181. Magistrates' Court of Victoria, 'Practice Directions' (mcv.vic.gov.au, 2022).

182. There is a specific 'Court Fund Application' form, a copy of which the Court sent to the Council, but that form does not seem to be publicly available, so it is not clear how organisations would become aware of this funding option.

183. Email from Magistrates' Court of Victoria (18 May 2022).

The figure in 2019 was much higher (\$2,176,079) than in 2020 (\$1,029,059) and is most likely more representative of standard practice given the effect of COVID-19 on court operations in 2020. The largest donations ordered to the Court Fund were \$40,000 (one case), \$25,000 (two cases), \$12,500 (one case) and \$12,000 (one case).

7.27 It would possibly be of some utility for information about the Court Fund such as this to be made more regularly and publicly available. Above and beyond transparency in public budgeting being a recognised principle of sound governance,<sup>184</sup> it may also assist in achieving the purposes of sentencing when ordering a person to make a donation to the Court Fund. In Victoria, a sentence (or condition) cannot be imposed unless it facilitates one of the specified purposes of sentencing: deterrence (general and specific), rehabilitation, community protection, denunciation, just punishment.<sup>185</sup> It has previously been argued that a payment into the Court Fund does not easily achieve any of these purposes, except insofar as it may have 'a minor punitive component'.<sup>186</sup> Stakeholders did, however, tell the Council during preliminary consultation that some offenders will argue that a more severe sentence (or the recording of a conviction) is unnecessary if the offender is required to make a charitable donation or a contribution to the Court Fund because of its punitive effect. There is also, perhaps, potential for these contributions to have some form of reparative function if the offender is made aware of how the funds are distributed and can better engage with the consequences of their offending.<sup>187</sup>

## Question 12: Court Fund

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

184. Paolo de Renzio and Harika Masud, 'Measuring and Promoting Budget Transparency: The Open Budget Index as a Research and Advocacy Tool' (2011) 24(3) *Governance* 607, 608–609.

185. *Sentencing Act 1991* (Vic) s 5. Another possibly appropriate purpose of sentencing that could be achieved by the imposition of a donation condition exists in jurisdictions other than Victoria, in particular, 'to recognise the harm done to the victim of the crime and the community': see, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Crimes (Sentencing) Act 2005* (ACT) s 7(g).

186. Freiberg and Pfeffer (1989), above n 171, 220.

187. Of course, as was observed in 1989 (and which seems to remain apt today): 'one wonders how many offenders are actually aware of the destination of the funds': *ibid.*

## Optional condition 2: justice plans

- 7.28 The *Sentencing Act 1991* (Vic) allows adjourned undertakings to include a condition that the offender participate in services specified in a justice plan for up to two years (that is the maximum length of a justice plan, even if the adjourned undertaking is longer).<sup>188</sup> Justice plans can also be attached as conditions to CCOs.<sup>189</sup> They are currently only available to offenders with an intellectual disability.
- 7.29 Justice plans must be reviewed yearly, or at briefer intervals if ordered by the court.<sup>190</sup> An offender can ask the Department of Families, Fairness and Housing (DFFH) to review a justice plan.<sup>191</sup> The offender or the Department can ask the court to review the justice plan, so long as notice has been given to the offender and either to the Director of Public Prosecutions or to Victoria Police.<sup>192</sup> If on review the court believes that the offender is no longer willing to comply, the justice plan no longer meets the offender's needs or is otherwise no longer appropriate, or the offender has without reasonable excuse failed to comply with a condition, the court can confirm, vary or cancel the order.<sup>193</sup> If the court cancels the justice plan condition, it may cancel the entire sentence and resentence the offender, but in doing so it must take into account the extent to which the offender had complied with the sentence prior to cancellation.<sup>194</sup>
- 7.30 The Council's analysis reveals that there were 92 adjourned undertakings with justice plan conditions attached to them in 2019 and 2020 (59 in 2019 and 33 in 2020). That amounts to 0.4% of all adjourned undertakings in those two years.

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188. *Sentencing Act 1991* (Vic) ss 72(3), 75(3), 80(4).

189. *Sentencing Act 1991* (Vic) ss 3(a) (definition of *justice plan condition*), 80(1)(a). See also section 44A(1)(b)(ii) requiring mandatory treatment and monitoring orders to include either a treatment and rehabilitation condition or a justice plan condition.

190. *Sentencing Act 1991* (Vic) s 81(1).

191. *Sentencing Act 1991* (Vic) s 81(2)(a).

192. *Sentencing Act 1991* (Vic) ss 82(2)(a), (d), (3). The *Sentencing Regulations 2011* (Vic) sch 1 specifies the prescribed form (Form 2) of an application for review of a justice plan condition.

193. *Sentencing Act 1991* (Vic) s 82(1).

194. *Sentencing Act 1991* (Vic) ss 82(5)–(6).

7.31 The current issues with justice plans are not new, nor are they specific to adjourned undertakings (they also apply to offenders sentenced to CCOs with a justice plan condition).<sup>195</sup> Those issues primarily relate to limited resourcing and restrictive eligibility criteria:

- an initial assessment of whether a person meets the diagnostic criteria (a Target Group Assessment) tends to take about six weeks,<sup>196</sup> and the preparation of available services tends to take about six weeks,<sup>197</sup> altogether meaning that many people who are considered potential candidates for a justice plan will often have to wait up to three months (or more) until it can potentially begin;<sup>198</sup>
- eligibility for justice plans is currently restricted to people with an ‘intellectual disability’ within the meaning of the *Disability Act 2006* (Vic),<sup>199</sup> which is an overly narrow definition. The expansion of this definition was recommended by the Victorian Law Reform Commission in 2003,<sup>200</sup> Victoria Legal Aid in 2011<sup>201</sup> and a parliamentary law reform committee in 2013;<sup>202</sup>

195. *Sentencing Act 1991* (Vic) ss 3 (definition of *justice plan condition*), 80(1)(a).

196. State of Victoria, *Victorian Budget 2020/21: Putting People First*, Budget Paper no. 3: Service Delivery (2021) 227; Department of Families, Fairness and Housing, *Disability Services: Additional Service Delivery Data 2020–21* (2021) 3.

197. Meeting with Department of Families, Fairness and Housing (17 January 2022). The DFFH further advised that this is largely because they only have one forensic psychologist on staff to conduct these assessments and prepare these service plans.

198. DFFH advised that sometimes these processes will take less than three months, and sometimes they will take longer. Section 80(3) of the *Sentencing Act 1991* (Vic) states that courts considering a justice plan condition may request a pre-sentence report (which is prepared by Corrections Victoria pursuant to sections 8A–8D of the *Sentencing Act 1991* (Vic)), a statement of intellectual disability and a program of available services. The period can be reduced to six weeks if the person has been assessed on a previous occasion as having an intellectual disability. In 2011, Victoria Legal Aid highlighted a case in which the assessment took so long while the offender was on remand that the magistrate imposed a time served prison sentence, resulting in the offender being ‘released without a justice plan, any accommodation or services in place to support him in the community’: Victoria Legal Aid, *Submission to the Parliament of Victoria Law Reform Committee: Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2011) 10. In 2013, a parliamentary committee recommended improving times for these assessments and the proper resourcing of DFFH and DJCS to that end: Parliament of Victoria, Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2013) 309–312 (Recommendation 42). Therefore, while there are some cases where the delay is due to the person being assessed – see, for example, *Re Chatters* [2017] VSC 2, [16] – it appears to more often be a question of available resources.

199. *Sentencing Act 1991* (Vic) s 80(3)(b). This includes ‘in relation to a person over the age of 5 years ... the concurrent existence of—(a) significant sub-average general intellectual functioning; and (b) significant deficits in adaptive behaviour—each of which became manifest before the age of 18 years’: *Disability Act 2006* (Vic) s 3 (definition of *intellectual disability*).

200. Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Report* (2003) 126–127 (‘There is no logical reason for limiting the availability of justice plans to people with an intellectual disability’).

201. Victoria Legal Aid (2011), above n 198, 19. Victoria Legal Aid also included a case study of an offender for whom engagement with Disability Services had successfully interrupted his cycle of offending: *ibid* 7.

202. Parliament of Victoria, Law Reform Committee (2013), above n 198, 309–312 (Recommendation 42).

it was supported in principle by the government in 2013<sup>203</sup> and recommended by a parliamentary committee reviewing Victoria's criminal justice system in 2022,<sup>204</sup> and it is also under consideration as part of the current review of the *Disability Act 2006* (Vic).<sup>205</sup> The Council notes that since many of these recommendations were made, a definition of 'impaired mental functioning' has been introduced into section 10A of the *Sentencing Act 1991* (Vic) in 1 July 2013,<sup>206</sup> which could potentially serve as an alternative eligibility criterion.

- 7.32 During preliminary consultation, stakeholders also advised the Council that there are issues with the availability of programs and services for people on justice plans, largely due to an awkward overlap between Commonwealth-funded services delivered by the National Disability Insurance Scheme (NDIS) and state-funded services.<sup>207</sup>

### Question 13: Justice plans

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

### Other optional conditions

- 7.33 Victorian courts can also attach 'any' condition to an adjourned undertaking that they believe would be appropriate. In practice, the conditions tend to be focused on rehabilitation and are not particularly onerous. Case law examples of optional conditions imposed in the higher courts have included a firearm prohibition, a non-contact condition, participating in an approved drug education program, completing an accredited driver education program, and being under the care and direction of psychiatric clinicians.<sup>208</sup>

203. State of Victoria, *Whole of Victorian Government Response to the Law Reform Committee Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2013) 4.

204. Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (2022) 559–560.

205. Department of Families, Fairness and Housing, *Review of the Disability Act 2006: Consultation Paper* (2021) 36–37, 62.

206. As inserted by *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 9.

207. The NDIS provides support to people serving a community order: National Disability Insurance Agency, 'Justice System', NDIS (ndis.gov.au, 2021). See also Department of Social Services, *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (2015) 23–25.

208. *R v Whincup* [2001] VSC 408, [40]; *R v Elias* [2013] VSC 123, [26]; *DPP v Smith* [2012] VSC 314, [9].

- 7.34 The most common optional conditions attached to adjourned undertakings are shown in Figure 16 (page 44). They tended to be very rehabilitative in focus – whether through treatment for mental health or substance abuse, or through driver education or anger management. There were also a number of payment conditions attached to adjourned undertakings, above and beyond charitable donations, such as paying compensation or restitution to someone harmed by the offending,<sup>209</sup> and paying costs associated with the proceedings, such as to the Department of Justice and Community Safety, RSPCA, CityLink and local councils.<sup>210</sup>
- 7.35 However, there were also some anomalous conditions that would have been specific to the circumstances of each case, such as removing rubbish from an address, not attending gambling venues such as Crown Casino, making an apology in person (rather than in writing), disclosing cannabis and amphetamine use to a GP, completing a firearms safety course, not consuming alcohol, abstaining from illicit drug use, complying with another court order that was already in place (such as bail, probation, a CCO or an intervention order), not attending a local community football oval, seeking help in improving English language skills, limiting the number of pets the offender can care for,<sup>211</sup> not driving a motor vehicle without a licence, participating in financial counselling, participating in family counselling, not incurring any further traffic infringements or accruing further demerit points, sitting a learner’s permit test, attempting to obtain a driver licence, *actually* obtaining a driver licence, seeking the assistance of the Australian Vietnamese Women’s Association, ‘read[ing] up on the cost to the community of graffiti’, not entering a Target or Cotton On store, maintaining a property in accordance with local council laws, considering volunteering with a Men’s Shed, volunteering with a food delivery service, accepting temporary accommodation arranged by the court, staying in regular contact with a Centrelink case worker and participating in specific First Nations programs.<sup>212</sup>

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209. In 2019 and 2020, a total of \$1,436,811 in compensation was ordered in cases involving adjourned undertakings, with \$1,205,852 of that amount being via ancillary compensation orders pursuant to section 85AB of the *Sentencing Act 1991* (Vic), and the remaining \$230,959 being ordered as optional conditions of the adjourned undertaking itself. On compensation orders generally, see Sentencing Advisory Council, *Restitution and Compensation Orders: Issues and Options Paper* (2018); Sentencing Advisory Council, *Restitution and Compensation Orders: Report* (2018).

210. In 2019 and 2020, a total of \$201,386 in costs was ordered: \$120,934 in 2019 and \$80,452 in 2020.

211. This is often a condition of an ancillary ‘control order’ in animal cruelty cases: see Sentencing Advisory Council (2019), above n 132, 39–44.

212. For example, Rumbalara provides support for First Nations peoples and communities affected by gambling, the Victorian Aboriginal Health Service addresses the specific medical needs of Victorian Indigenous communities, the Kurnai Youth Homelessness Program helps Aboriginal young people who are homeless or at risk of homelessness, Stronger Families is an integrated placement, prevention and family reunification service run by Mallee District Aboriginal Services, Ramahyuck is a leading provider of primary health care and related social and family support services to Aboriginal people in the Gippsland region, and Winda Marra is a community-controlled organisation in South West Victoria with a key focus on providing Aboriginal and Torres Strait Islander peoples with access to culturally appropriate services and community activities. Each of these services was specified in one or more conditions of adjourned undertakings over the reference period.

7.36 There are perhaps some questions to be asked about the appropriateness of some of these conditions, and whether they should be imposed. As Freiberg has observed, conditions of sentencing orders are often found invalid when they are uncertain, unnecessary or impossible.<sup>213</sup> For instance:

- it may be undesirable for courts to impose conditions such as unpaid community work, abstinence from drugs and alcohol, and area exclusions, if they functionally make the undertaking more akin to a CCO;
- it may be unfair for a condition to require an offender to successfully obtain their driver licence (as opposed to attempting to get their driver licence) when they may, despite their best efforts, not succeed;
- it may be unnecessary to include a condition requiring an offender to comply with another court order (such as a bail order or family violence intervention order), given that person is already obligated to comply with that other order; and
- while courts more often than not specify a particular medical practitioner's name when the condition requires the offender to seek or continue medical treatment, it may be more appropriate for the condition to also expressly allow for 'a reasonable alternative', both to ensure that the offender accesses the services that best suits their needs during the undertaking and to avoid a potential impossibility of compliance if the practitioner becomes unavailable.

### Question 14: Optional conditions

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

## Funding for programs

7.37 There is currently no funding or support for people to comply with conditions attached to an adjourned undertaking (such as participation in a drug rehabilitation program or road trauma awareness seminar). In contrast, support is available for similar orders in South Australia,<sup>214</sup> for people on bail,<sup>215</sup> for people on a CCO<sup>216</sup>

213. Freiberg (2014), above n 6, 689. For instance, in *MacPherson v Beath* (1975) 12 SASR 174, a court held that a condition requiring an offender to be 'courteous' was 'bad for several reasons', including that it was 'uncertain' and 'oppressive': at 180.

214. *Sentencing Act 2017* (SA) ss 29(1)(b), (d), 98(1)(e).

215. Magistrates' Court of Victoria, 'Bail Support (CISP)' (mcv.vic.gov.au, 2019).

216. See, for example, Corrections Victoria, *Corrections Alcohol and Drug Strategy 2015: Overview* (2015) 12 (on funding for alcohol or drug treatment programs).

and for people on parole.<sup>217</sup> Adjourned undertakings seem to uniquely leave the financial cost of compliance with offenders. Given the cost of many programs attached as conditions to adjourned undertakings – for instance, one drink-driving education program is \$384 for two 3.5-hour sessions<sup>218</sup> – this discrepancy seems to unfairly punish offenders financially when that is not the intent of these orders.

### Question 15: Funding for programs

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

## The adjourned undertaking form: CP230-9

- 7.38 One of the possible ways to improve a person's criminal justice experience is through what is called 'form reform', the redesign of forms to be more user-friendly.<sup>219</sup>
- 7.39 The Magistrates' Court has a template adjourned undertaking form that is signed and printed by both the magistrate and the offender. They each then retain a copy. The current version of the template form is CP230-9. An anonymised example form was provided to the Council by the Magistrates' Court and is extracted in Figure 17 (page 62). It is a 12-month adjourned undertaking imposed with conviction in February 2022 for drink driving, with a requirement to participate in a drink-driving education program.
- 7.40 In the context of that example form, some possible amendments might include:
- **changing the language of conditions:** an adjourned undertaking can only be imposed with the offender's consent. Given that the form is designed to represent an agreement between the offender and the court about what behaviours are expected of the offender, the language around conditions might more appropriately be written as commitments by the offender, rather than implying that they are requirements unilaterally imposed by the court. For instance, instead of 'You must complete a first stage behaviour change program', it could instead read 'I will complete a first stage behaviour change program';

217. See, for example, Victorian Auditor-General, *Administration of Parole* (2016) 24–25.

218. TaskForce, 'Behaviour Change Program' (taskforce.org.au, 2022).

219. See, for example, David B. Wexler, 'Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion' (2009) 22(1) *Federal Sentencing Reporter* 17.

- **excluding unnecessary conditions:** there are a number of conditions in the example form that are part of the template form but appear to have been irrelevant to the offender in that case, including attending court on the date that the undertaking expires, the 'optional condition' box, the FOCiS (First Offender's Court Intervention Service) drug education program, and the various payment conditions (costs, payment to the Court Fund and compensation). To ensure the offender has an easily understandable document specifying the conditions that they have agreed to, there would most likely be considerable benefit in only listing those conditions that apply to them; and
- **revising the breach warning:** the form currently states that failing to comply with an adjourned undertaking could be punished by up to \$1,408. The current maximum penalty for breaching an adjourned undertaking is a level 10 fine, which equates to 10 penalty units,<sup>220</sup> which in turn equates to \$1,849 in the 2022–23 financial year. There may also be some added value in warning offenders that breaching their adjourned undertaking may result in the order being cancelled and them being resentenced for the original offending.<sup>221</sup>

7.41 Even a matter as simple as increasing the font size can make a considerable difference in terms of accessibility. The font size of the current form is quite small. Given the high rates of impaired mental functioning and learning disabilities experienced by people appearing before courts for criminal offending,<sup>222</sup> it seems reasonable to assume that improving accessibility of this form would also improve compliance.

### Question 16: The adjourned undertaking form

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

220. *Sentencing Act 1991* (Vic) s 109(2).

221. *Sentencing Act 1991* (Vic) s 78.

222. See, for example, James R. P. Ogloff et al., *The Identification of Mental Disorders in the Criminal Justice System, Trends & Issues in Crime and Criminal Justice* no. 334 (2007); Glyn Jones and Jenny Talbot, 'No One Knows: The Bewildering Passage of Offenders with Learning Disability and Learning Difficulty Through the Criminal Justice System' (2010) 20(1) *Criminal Behaviour and Mental Health* 1.

Figure 17: Example adjourned undertaking form: CP230-9

<b>UNDERTAKING WITH CONDITIONS</b>		CP230-9
<p>The Magistrates' Court at MELBOURNE on 01/02/2022 found of guilty of</p>	<p>Case Number: Date of Birth: Licence No.: State: VIC</p>	
<p><b>CHARGE 2 - FAIL ORAL FLUID TEST W/IN 3HR OF DRIVING</b></p>		
<p>and released you on an undertaking with the conditions written below. The court with conviction adjourned the further hearing of your case to MELBOURNE MAGISTRATES' COURT ON 01/02/2023 at 9:30 am The undertaking starts on 01/02/2022 and goes to 01/02/2023 You must be of good behaviour during the time the undertaking is in force.</p>		
<p><input type="checkbox"/> You must appear at Court on the date that this case has been adjourned to.</p>		
<p><input checked="" type="checkbox"/> You must appear at Court before the date that this case has been adjourned to only if you get a notice from the Court telling you to appear.</p>		
<p><input type="checkbox"/> The other conditions that apply to you are:</p>		
<p><input checked="" type="checkbox"/> You must complete a first stage behaviour change program.</p>		
<p><input type="checkbox"/> You must complete "FOCIS" the approved drug education and information program.</p>		
<p><input type="checkbox"/> To pay \$ costs, \$ to the Court Fund, \$ compensation.</p>		
<p>I, of</p>	<div style="border: 1px solid black; height: 40px; width: 100%;"></div>	
<p>agree to comply by the conditions of this undertaking</p>		
<p>This undertaking was acknowledged Before Signature</p>	<p style="text-align: center;">Signature On 01/02/2022 Magistrate</p>	
<p><b>WARNING - If you break the conditions of this undertaking :</b> -You may be punished for any offence that has been adjourned on you agreeing to this undertaking. -You may also be punished for failing to comply with the conditions of the undertaking by a fine of up to \$1,408.</p>		

## 8. Adjourned undertakings in the sentencing hierarchy

8.1 This chapter discusses the positioning of adjourned undertakings in Victoria's sentencing hierarchy and whether there may be some possibilities for reforming the relevant provisions of the *Sentencing Act 1991* (Vic). It also examines the rate at which courts record convictions alongside adjourned undertakings.

### Revising the sentencing hierarchy?

8.2 The principle of parsimony requires courts to impose a sentence (in its type, length/amount and conditions) that is no more severe than necessary to achieve the purposes of sentencing, taking into account the circumstances of each case. Parsimony is originally a common law rule, aimed primarily at ensuring that imprisonment is a sentence of last resort,<sup>223</sup> but it is also enshrined in legislation, with sections 5(4)–(7) of the *Sentencing Act* specifying that certain orders (imprisonment or youth detention orders, drug and alcohol treatment orders, community correction orders (CCOs) and fines) cannot be imposed if a less severe sentencing order would suffice. As the Court of Appeal wrote in 2016, these provisions 'create a loose hierarchy of sentencing options'.<sup>224</sup> The legislation does not otherwise rank adjourned undertakings, dismissals and discharges in terms of severity (though it seems uncontroversial to assert that a dismissal without conviction is the least severe of the three).

#### Victoria's current sentencing hierarchy

- Imprisonment or youth detention order
- Drug and alcohol treatment order
- Community correction order
- Fine
- Adjourned undertaking, discharge or dismissal

*Sentencing Act 1991* (Vic)  
ss 5(4)–(7)

223. See, for example, *R v O'Connor* [1987] VR 496, 501.

224. *Bell v The Queen* [2016] VSCA 203, [47].

Some have interpreted the order of dispositions in section 7(1) as a form of hierarchy, with adjourned undertakings treated as more serious than dismissals and discharges.<sup>225</sup> However, it is not immediately apparent that section 7 is intended to supplement the hierarchy in section 5.

- 8.3 There are two particular issues related to the placement of adjourned undertakings in Victoria's sentencing hierarchy and the relevant legislative provisions. The first is whether fines should be above adjourned undertakings in the hierarchy. The second is whether there is scope to revise Division 1 of Part 3BA of the *Sentencing Act* to improve its coherence and accessibility.

## Fines and adjourned undertakings

- 8.4 Section 5(7) currently prohibits a court from imposing a fine (or a more serious sentence) if an adjourned undertaking would suffice.<sup>226</sup> However, the Council heard during preliminary consultation that the appropriateness of a fine or an adjourned undertaking will often be far more context dependent than this hierarchy suggests. In particular, an adjourned undertaking can sometimes be more severe than a fine, particularly if the court records a conviction, or if it includes a payment condition and/or a condition requiring participation in a program of some sort (especially if the offender has to pay for the program themselves). For example, someone receiving an adjourned undertaking for a drink-driving offence may be ordered to participate in a seven-hour behaviour change program, with registration costing the offender over \$400 of their own money.<sup>227</sup> This would make an adjourned undertaking substantively more onerous than a fine, particularly if the fine would have been in the region of \$400 or less. In that context, and noting the onerous nature of some conditions attached to adjourned undertakings (see Chapter 7),<sup>228</sup> there is a question as to whether the *Sentencing Act* should continue to so firmly place fines above adjourned undertakings in the sentencing hierarchy, or whether the Act should be amended to allow a more flexible approach to sentence selection, with no overt hierarchy between the two.

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225. See, for example, Paula O'Byrne, 'Therapeutic Jurisprudence and the Sentencing of Family Violence Offenders: Does the Sentencing "Bottle" in Victoria Need to Change?' (2016) 1(1) *International Journal of Therapeutic Jurisprudence* 147, 171–172.

226. 'A court must not impose a fine unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a dismissal, discharge or adjournment': *Sentencing Act 1991* (Vic) s 5(7).

227. See, for example, *TaskForce* (2022), above n 218.

228. Adjourned undertakings might be conceptualised as falling into two categories, one with more onerous conditions and one with less onerous conditions. In that sense, there may be some utility in considering the introduction of a mid-tier community order between community correction orders and adjourned undertakings; however, preliminary consultation did not reveal much appetite for this reform.

- 8.5 If adjourned undertakings and fines were to be co-located in the hierarchy, there would also be some collateral issues for consideration. For example, section 70 of the *Sentencing Act* currently specifies the supplementary purposes for which adjourned undertakings, dismissals and discharges can be imposed (discussed at [2.8]–[2.15]), such as allowing for circumstances where only a nominal punishment is appropriate or to acknowledge the trivial nature of the offending. There is a question as to whether fines would be subject to the same supplementary sentencing purposes if the hierarchy were amended.
- 8.6 There are a number of options. The supplementary purposes could be left as they are in section 70, though that may continue to give the impression that adjourned undertakings are more akin to dismissals and discharges than to fines. They could be imported into section 5 so that they are read alongside the primary purposes of sentencing when deciding whether to impose certain sentencing orders. This would have the advantage of co-locating the objectives of sentencing into a single provision. Or they could become independent provisions relating to each of the orders themselves (e.g. specific sections titled ‘Purposes of adjourned undertakings’ and ‘Purposes of discharges and dismissals’). This would have the advantage of specifically drawing courts’ attention to the supplementary objectives of each specific sentencing order. For instance, it is doubtful that dismissals and discharges are capable of ‘allow[ing] for the offender to demonstrate his or her remorse in a manner agreed to by the court’.

### Question 17: The sentencing hierarchy

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

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## Merge sections 72 and 75 of the *Sentencing Act*?

- 8.7 Another possible reform could be to merge sections 72 (adjourned undertakings with conviction) and 75 (adjourned undertakings without conviction) of the *Sentencing Act*. The power to impose most other sentence types, such as fines and CCOs, exist in individual provisions (sections 49 and 37), regardless of whether a conviction is also imposed. There is no apparent reason to distinguish between the two provisions relating to adjourned undertakings. The provisions are practically identical, and the decision to impose a conviction (for other orders) appears to be adequately addressed by sections 7 and 8 of the *Sentencing Act*. Arguably the *Sentencing Act* would be simplified, and therefore more coherent and accessible, if sections 72 and 75 were merged so that a single provision empowered courts to impose an adjourned undertaking, with or without conviction. The decision whether to record a conviction would then simply be governed by the criteria in section 8(1) of the *Sentencing Act*.<sup>229</sup>
- 8.8 One caveat with this reform would be ensuring that the punitive effect of sentencing continues to be viewed as a whole, such that the consequences of imposing a conviction inform whether the sentence type imposed would achieve the purposes of sentencing. In effect, the decision to impose a conviction and the decision to impose an adjourned undertaking should occur concurrently to acknowledge, as the Court of Appeal did in *DPP v Abad* (see above at [2.8]) that sentencing often involves a constellation of punishment.

### Question 18: Merging sections 72 and 75

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

## Merge sections 73 and 76 of the *Sentencing Act*?

- 8.9 Relatedly, the *Sentencing Act* currently distinguishes between whether a court discharges a person (with conviction) or dismisses their charges (without conviction). There are no other conditions associated with those two dispositions. As mentioned at [8.6], the discretionary nature of imposing a conviction is addressed by section 7

229. This would likely require a consequential amendment of merging sections 7(1)(g) and 7(1)(i) of the *Sentencing Act 1991* (Vic) so that the former would read 'with or without recording a conviction, order the release of the offender on the adjournment of the hearing on conditions', which would be consistent with other dispositions in section 7.

for other dispositions, such as fines and CCOs. It may be worth considering the possibility of also merging these two provisions to create a single sentencing order (whether it be called discharge, dismissal or some other term) that also leaves the decision to record a conviction or not to be dealt with via sections 7 and 8. While these orders are slightly outside the scope of this consultation paper, they are nevertheless related and covered in the same division of the *Sentencing Act*.

### Question 19: Merging sections 73 and 76

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

## Repeal sections 74 and 77 of the *Sentencing Act*?

- 8.10 Sections 74 and 77 of the *Sentencing Act* currently specify that a court 'may make an order for compensation or restitution in addition to' an adjourned undertaking, dismissal or discharge. There is a question as to whether these provisions add anything of substance to the legislation. Sections 84 and 84B empower courts to impose a restitution or compensation order if they find 'a person guilty of an offence ... or [convict] a person of an offence'. In that context, sections 74 and 77 do not appear to add any judicial power to impose a restitution or compensation order, and instead simply clarify that courts can impose such orders *pursuant to* sections 84 and 84B.
- 8.11 There are at least two possible justifications for the continued existence of sections 74 and 77. Those sections might allow for the courts to issue own-motion compensation orders, because section 84B only allows a compensation order to be made 'on the application of a person who has suffered any injury'. However, it seems doubtful that this would be an issue in many cases, particularly given that the court can invite an application if truly necessary. The other possibility is that a court 'being satisfied that a person is guilty of an offence' (section 76) is not synonymous with 'find[ing] a person guilty of an offence', such that a compensation order can only be imposed in cases involving section 76 dismissals if section 77 specifically empowers courts to do so. This also, though, seems unlikely, and does not explain the need for section 74.

### Question 20: Repealing sections 74 and 77

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

## Adjourned undertakings with or without conviction

- 8.12 An adjourned undertaking can be imposed with (section 72) or without (section 75) a conviction. Recording a conviction can have significant consequences for offenders. Among other things, it can affect their visa status, employment prospects, housing opportunities, ability to travel internationally, access to firearms, access to adoption and admission into certain professions. It can also ‘rule [Aboriginal and Torres Strait Islander peoples] out of being kinship carers ... That can mean that Aboriginal children are placed in non-Indigenous care’.<sup>230</sup> Because of these consequences, there are some cases where having a conviction recorded would most likely be more onerous than receiving other sentencing orders – adjourned undertakings, fines even CCOs (e.g. a young offender’s career might be stymied by a conviction).
- 8.13 In 1989, Fox and Freiberg argued that where sentencers are given a discretion whether to record a conviction (as they currently are in Victoria when imposing CCOs, fines, adjourned undertakings, discharges and dismissals),<sup>231</sup> they should also be given criteria to guide them in exercising that discretion.<sup>232</sup> Along those lines, section 8(1) of the *Sentencing Act* requires courts, when deciding whether to record a conviction, to have regard to ‘all the circumstances of the case’, including the nature of the offence, the character and past history of the offender, and the impact of recording a conviction on the offender’s economic or social wellbeing or on their employment prospects.

## Conviction rates in the Magistrates’ Court

- 8.14 Convictions were not commonly attached to adjourned undertakings during the reference period. Of the 118,056 adjourned undertakings that were the principal sentence in a case, just 16.9% were imposed *with* conviction. The vast majority (83.1%) were imposed *without* conviction. This stands in stark contrast to the much higher rate of convictions attached to fines (63.6%) and community-based orders (83.6%).<sup>233</sup> There has, however, been a trend since

**16.9% of adjourned undertakings were imposed with conviction**

230. Meeting with Victorian Aboriginal Legal Service (22 December 2021). The recent parliamentary inquiry into Victoria’s justice system recommended that the government ‘evaluate its response to the overrepresentation and serious consequences experienced by Aboriginal children and young people in out of home care’: Parliament of Victoria, Legal and Social Issues Committee (2022), above n 204, 123.

231. *Sentencing Act 1991* (Vic) ss 7(1)(e)–(j).

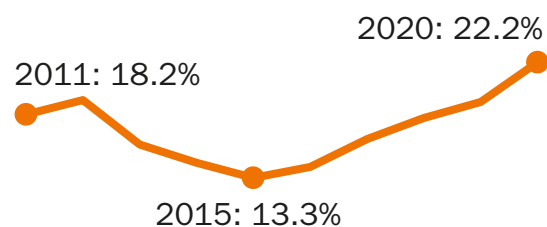
232. Richard Fox and Arie Freiberg, ‘Sentences Without Conviction: From Status to Contract in Sentencing’ (1989) 13(5) *Criminal Law Journal* 297, 322.

233. Sentencing Advisory Council (2014), above n 163, 32.

2015 of an increasing rate of adjourned undertakings imposed with conviction, steadily increasing from 13.3% in 2015 to 22.2% in 2020 (Figure 18). Rather than indicating a greater inclination for courts to impose adjourned undertakings with conviction, it is possible that this is due to the growing rate of adjourned undertakings in the Magistrates' Court (see [3.3]). In

particular, given that the rate of adjourned undertakings in the Magistrates' Court has recently increased from 13% of all sentencing outcomes to 18% at the same time that the rate of fines and CCOs have declined, it may be that offenders who were previously receiving more serious sentencing outcomes are now receiving adjourned undertakings instead, and that they are thus more likely to have a conviction recorded.

**Figure 18: Proportion of Magistrates' Court adjourned undertakings imposed with conviction, 2011 to 2020 (118,056 adjourned undertakings)**



### Conviction rates by offence type

8.15 The conviction rate for most offences ranged from around 10% to 20% (e.g. careless driving: 11.3%; unlawful assault: 15.6%; driving while disqualified or suspended: 18.2%; breaching a family violence safety notice or intervention order: 18.3%). However, there were some offences that were much *more* likely to have a conviction recorded (e.g. theft from a shop: 32.4%) and other offence types that were much *less* likely to have a conviction recorded (e.g. speeding: 2.9%). The high rate of convictions for theft from a shop seems unusual. It may be that the prior criminal history of those offenders was more likely to already include convictions, which would reduce the effect of a further conviction and also influence the court's assessment of their prospects of rehabilitation.

### Conviction rates in the higher courts

8.16 In the 236 cases in the higher courts where an adjourned undertaking was the principal sentence, the slight majority were imposed without conviction (53% or 126 cases) and the remainder were imposed with conviction (47% or 110 cases). This is a higher rate of convictions than the rate in the Magistrates' Court, but that is to be expected given the nature of the higher courts jurisdiction, typically attracting more serious cases.

**47% of adjourned undertakings in the higher courts were imposed with conviction**

## The Spent Convictions Act 2021 (Vic)

- 8.17 In December 2021, the *Spent Convictions Act 2021* (Vic) came into effect, providing new rules about when a person's criminal history is disclosable. During preliminary consultation, some stakeholders raised an issue with the effect of that recent legislation on people receiving adjourned undertakings without conviction.
- 8.18 In particular, stakeholders advised that despite adjourned undertakings currently being less severe than a fine in the sentencing hierarchy, the finding of guilt for people receiving an adjourned undertaking without conviction is not 'spent' until the end of the period of the undertaking (because they have 'conditions' such as good behaviour, and findings of guilt cannot become spent 'until the person completes all conditions attached to the penalty').<sup>234</sup> In contrast, the finding of guilt for people receiving a fine without conviction is spent immediately at the date of the sentencing hearing. There appears to be a perverse incentive to argue for a more serious sentencing outcome in order to ensure the conviction is spent earlier. This issue does not apply to fines and adjourned undertakings imposed *with* conviction, as the 'conviction period' for both those orders is 10 years from the date of sentencing.<sup>235</sup> It would, however, affect thousands of people each year; in 2019 alone, almost 14,000 people received an adjourned undertaking without conviction and would have been subjected to a waiting period before their finding of guilt would cease to be a disclosable event.

### Question 21: Spent convictions

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

234. *Spent Convictions Act 2021* (Vic) ss 7(1)(a), (2). The definition of 'conviction' in section 5 of the Act could be interpreted as suggesting that section 7(1)(a) only applies to cases where a court does not record a finding of guilt (e.g. *Criminal Procedure Act 2009* (Vic) s 59). However, that interpretation would be inconsistent with what the Department of Justice and Community Safety and the Attorney-General appear to have intended: Department of Justice and Community Safety, *Spent Convictions Act 2021: Factsheet – December 2021* (2021) 2; Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2020, 2981 (Jill Hennessy, Attorney-General). It would also render section 7(1)(a) redundant because a person receiving a diversion program does not have a finding of guilt recorded. Further, even if a term is otherwise defined in an Act, it can take an alternative interpretation if 'the contrary intention appears', as seems to be the case here: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (8th ed., 2014) 316–319. Finally, the inclusion of the term 'recorded' in section 7(1)(a) suggests that it specifically relates to sentencing courts' discretion whether or not to record a conviction pursuant to section 8 of the *Sentencing Act 1991* (Vic). On balance, it seems very likely that the term 'conviction' in section 7(1)(a) of the *Spent Convictions Act 2021* (Vic) is intended to relate to the narrower definition of courts actively recording a conviction, and not the broader section 5 definition of any finding of guilt.
235. *Spent Convictions Act 2021* (Vic) ss 8–10.

## 9. Breaches of adjourned undertakings

9.1 This chapter examines data on the rates of breaches of adjourned undertakings recorded by police and sentenced by courts, and reoffending rates within four years of receiving an adjourned undertaking. That examination suggests an increasing number of breach offences recorded by police and a relatively low reoffending rate, especially for serious reoffending. This suggests that adjourned undertakings are often successfully completed and effective in reducing and preventing recidivism.

### Breaching an adjourned undertaking

9.2 There are two ways to breach an adjourned undertaking; the first is by reoffending, and the second is through what is often called a 'technical breach',<sup>236</sup> behaviour that is not criminal in its own right but represents non-compliance with the order.

9.3 In Victoria, it is an offence to breach an adjourned undertaking without a reasonable excuse, punishable by a fine of up to 10 penalty units<sup>237</sup> (which in 2022–23 would have equated to \$1,849.20). Because the provision does not specify that a term of imprisonment can be imposed, it is impermissible for a breach offence to receive one.<sup>238</sup> However, if the fine goes unpaid, it can be converted into a term of imprisonment of up to 10 days.<sup>239</sup>

9.4 Any prosecution for that breach offence must commence in the Magistrates' Court.<sup>240</sup> However, if the original adjourned undertaking was imposed in the County Court or the Supreme Court, the Magistrates' Court must transfer the proceedings to that court.<sup>241</sup> There is a statute of limitations requiring a prosecution to be brought within either 6 months of the offender being found guilty of another offence or 12 months of the end of the undertaking.<sup>242</sup>

236. See, for example, Neil Donnelly and Lily Trimboli, *The Nature of Bail Breaches in NSW*, Crime and Justice Statistics Issue Brief no. 133 (2018).

237. *Sentencing Act 1991* (Vic) s 83AC. Prior to 16 January 2012, the breach offence was in section 79.

238. *Sentencing Act 1991* (Vic) s 113C.

239. *Sentencing Act 1991* (Vic) s 69N.

240. *Sentencing Act 1991* (Vic) s 83AG(1).

241. *Sentencing Act 1991* (Vic) s 83AJ(1).

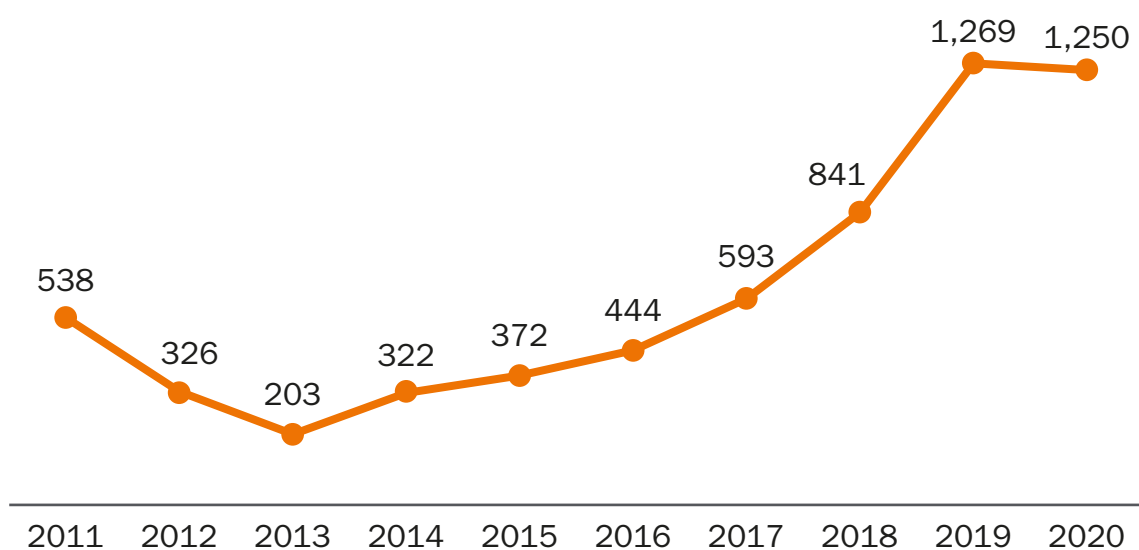
242. *Sentencing Act 1991* (Vic) s 83AH(1). The prosecution for the breach must, though, nevertheless 'not be commenced more than two years after the order ceases to be in force': s 83AH(2).

9.5 If a court then finds the person guilty of breaching the undertaking, the court must do one of the following: confirm the original order, vary the original order, cancel the order and resentence the offender for the original offending, or make no further order.<sup>243</sup> In doing so the court must take into account the extent to which the offender has complied with the order.<sup>244</sup> These powers to confirm, vary or cancel the order exist separately from the need to also sentence the breach offence itself. If the breach was a result of reoffending, this can lead to what has been described as a ‘triple jeopardy situation’, because the person can be (a) resented for the original offending, (b) sentenced for the breach offence and (c) sentenced for the new offending.<sup>245</sup>

## The number of breaches recorded by police is increasing

9.6 Figure 19 shows how many breaches of adjourned undertakings were recorded by police in the 10 years to 2021, using publicly available data published by the Crime Statistics Agency.<sup>246</sup> With the exception of a very slight decline in 2021, which would have been due to COVID-19, the yearly number of recorded breaches increased significantly to almost 1,300 in 2019. While there has been an increase in the number of adjourned undertakings imposed in the Magistrates’ Court in the same period, it was nowhere near this magnitude.

**Figure 19: Breaches of adjourned undertakings recorded by police, 2011 to 2020**



243. *Sentencing Act 1991* (Vic) s 83AT(1).

244. *Sentencing Act 1991* (Vic) s 83AT(2).

245. Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 116–117.

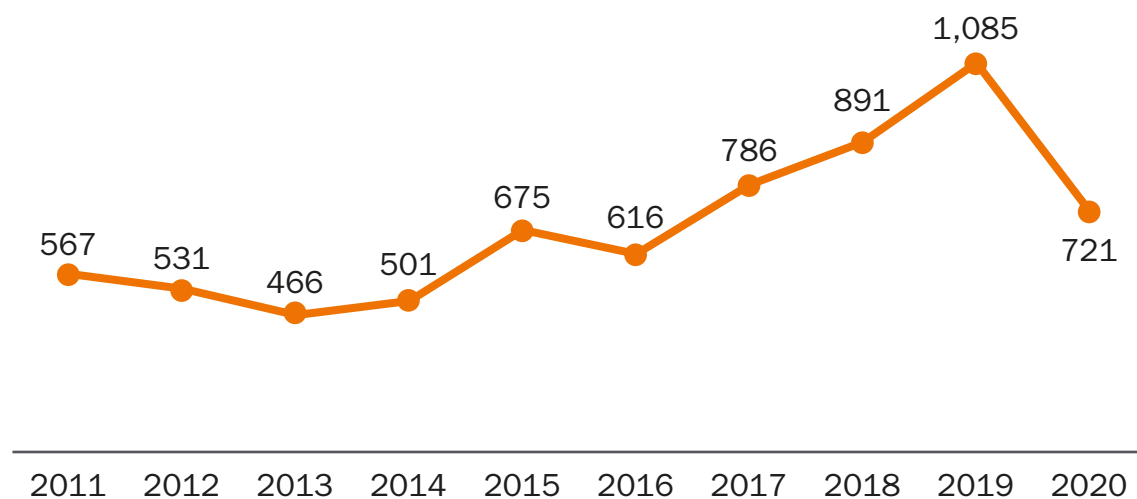
246. Crime Statistics Agency, ‘Year Ending 31 December 2020’ (crimestatistics.vic.gov.au, 2022).

The Council has recently found significant increases in how many breaches of court orders (sometimes called justice procedure offences) are recorded and prosecuted by police each year, including breaches of bail<sup>247</sup> and breaches of intervention orders.<sup>248</sup> The increase in breaches of adjourned undertakings is therefore likely to be another example of the cultural shift in enhanced responsiveness by police to breaches of court orders.

## The number of breaches sentenced by courts is increasing

9.7 The number of breaches of adjourned undertakings sentenced by courts each year follows a similar trend but is less pronounced (Figure 20). In particular, there was a significant increase in the number of breaches sentenced between 2013 and 2019, more than doubling (a 133% increase) and very much outpacing the 52% increase in the number of adjourned undertakings imposed each year. Again, this most likely reflects a change in police, prosecutor and perhaps even court responses to breaches rather than a change in compliance rates by people serving adjourned undertakings.

**Figure 20: Breaches of adjourned undertakings sentenced by courts, 2011 to 2020**



247. Sentencing Advisory Council, *Secondary Offences in Victoria* (2017) 3, 14.

248. Sentencing Advisory Council, *Sentencing Breaches of Personal Safety Intervention Orders in Victoria* (2022) 33, 45; Sentencing Advisory Council, *Sentencing Breaches of Family Violence Intervention Orders and Safety Notices: Third Monitoring Report* (2022) 35, 42.

9.8 As to the consequences of these breach offences, the Council has previously analysed sentencing outcomes for breaches of adjourned undertakings. By far the most common sentence was to find the charge proven and dismiss it, either with or without conviction (84%), followed by fines (14%) and other orders (2%).<sup>249</sup>

9.9 However, as the Council also observed, the data:

illustrate(s) the importance of considering the entire outcome ... If only the specific penalty for the breach offence is considered, it might wrongly be concluded that a large number of offenders had received a very minor (or even no) recorded penalty for their breaching behaviour.<sup>250</sup>

9.10 In that context, it is important to note that half of all people found guilty of breaching an adjourned undertaking were resentenced for their original offending (50%).<sup>251</sup> And another 11% had the order varied, which may have resulted in more stringent conditions, but it may also have been the result of the court changing the conditions so the offender would be better able to comply with them.

## Reoffending after receiving an adjourned undertaking

9.11 This section discusses the reoffending rates of people after they received an adjourned undertaking. As the Productivity Commission recently observed, there are a number of ways of measuring reoffending.<sup>252</sup> In this consultation paper, reoffending is only counted if the offence was eventually sentenced, but it is measured by the date of the offence. If, for example, an offence was *committed* 10 months after an adjourned undertaking was imposed but *sentenced* 14 months after the undertaking was imposed, this would be classified as reoffending occurring within one year.

9.12 The below analysis relates to the 23,482 people who received an adjourned undertaking in 2015 and 2016. This allows for an identical four-year follow-up period for each of them. If a person received multiple adjourned undertakings, they were only counted once at the date of their first adjourned undertaking in those two years.

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249. Sentencing Advisory Council (2017), above n 247, 30.

250. Ibid 28.

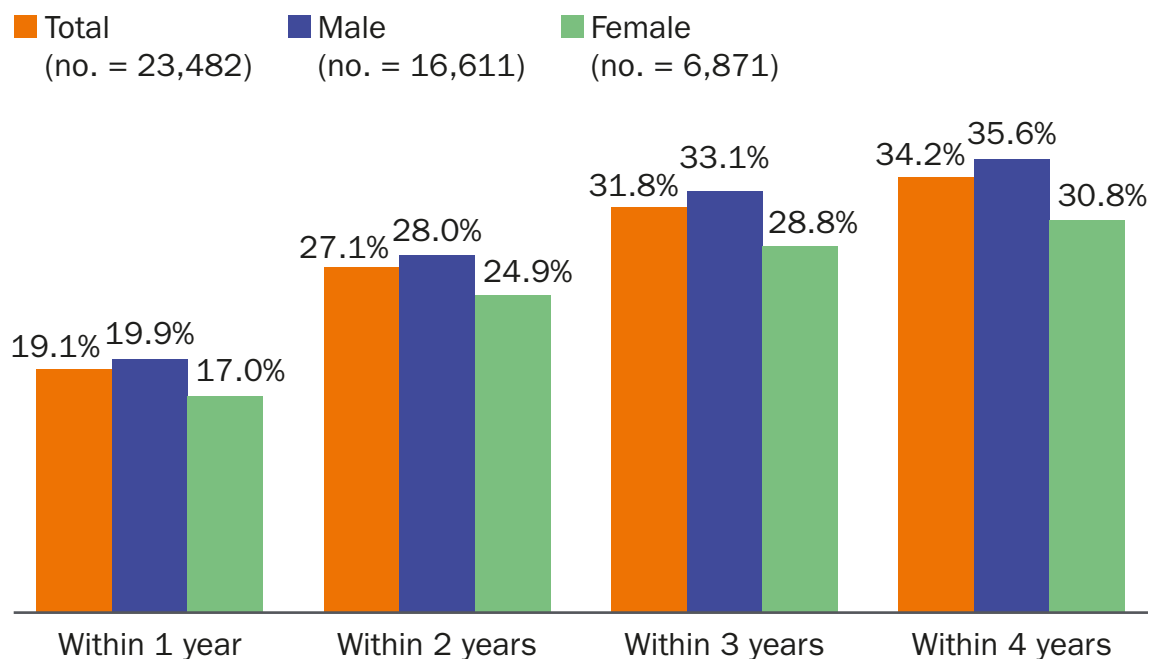
251. Ibid 30.

252. Australian Productivity Commission, *Australia's Prison Dilemma: Research Paper* (2021) 43.

## People who reoffended within four years

9.13 Of those 23,482 people, two-thirds did not reoffend at all in the four years after receiving an adjourned undertaking (65.8%), while 34.2% did (Figure 21). The reoffending rate was higher for males than for females.

**Figure 21: Cumulative reoffending rates by people who received an adjourned undertaking**



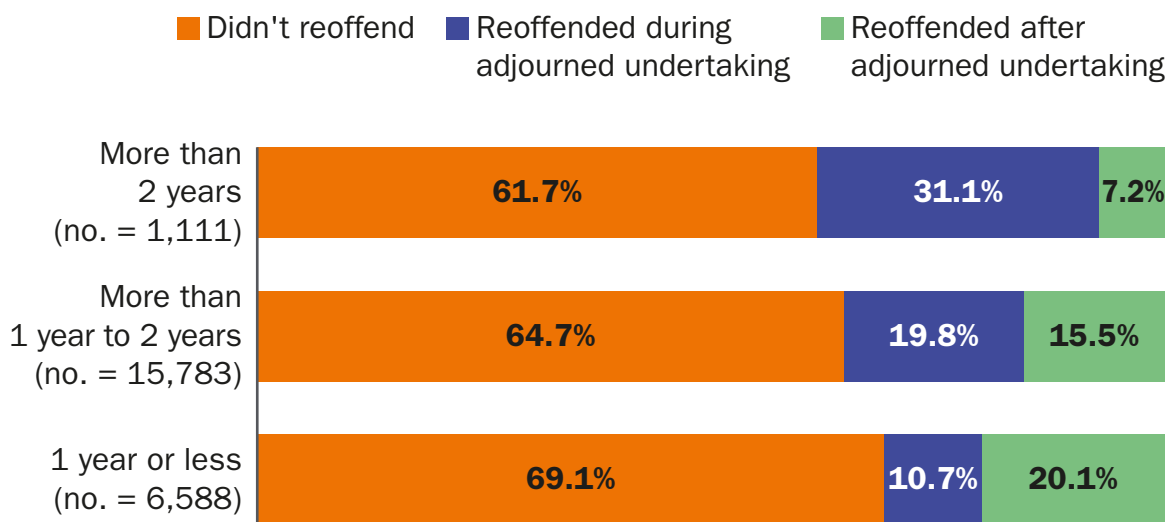
9.14 In the context of the Council's previous reoffending analyses, this is a comparatively low rate of recidivism. The Council has previously found four-year reoffending rates of 58% (threat offenders), 57% (people who breach personal safety intervention orders), 56% (stalkers), 54% (children and young people) and 48% (people who breach family violence safety notices or intervention orders).<sup>253</sup> The only comparable rates in the Council's previous work have been 32% (animal cruelty offenders) and 34% (all offenders sentenced in 2004–05).<sup>254</sup> The relatively low rate at which people receiving adjourned undertakings reoffended was expected given that the order is typically imposed for less serious offending. However, it may also indicate that adjourned undertakings are an effective tool in reducing recidivism.

253. Sentencing Advisory Council, *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending* (2016) 26, 33; Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016) 20; Sentencing Advisory Council, *Sentencing Stalking in Victoria* (2022) 63; Sentencing Advisory Council, *Sentencing Breaches of Personal Safety Intervention Orders in Victoria* (2022) 65. Many of these were based on a 'sentence date' counting rule to measure recidivism, whereas an 'offence date' counting rule was used here.

254. Sentencing Advisory Council (2019), above n 132, 58; Sentencing Advisory Council, *Reoffending Following Sentence in Victoria: A Statistical Overview* (2015) 8.

9.15 The reoffending rate varied slightly by the original length of the adjourned undertaking, but not significantly (Figure 22). The group of people least likely to reoffend were those receiving adjourned undertakings of less than one year (30.9%). That group of people tended to reoffend *after* the period of the undertaking, whereas those receiving longer undertakings were more likely to reoffend *during* the undertaking.

**Figure 22: Timing of reoffending, by duration of adjourned undertaking**



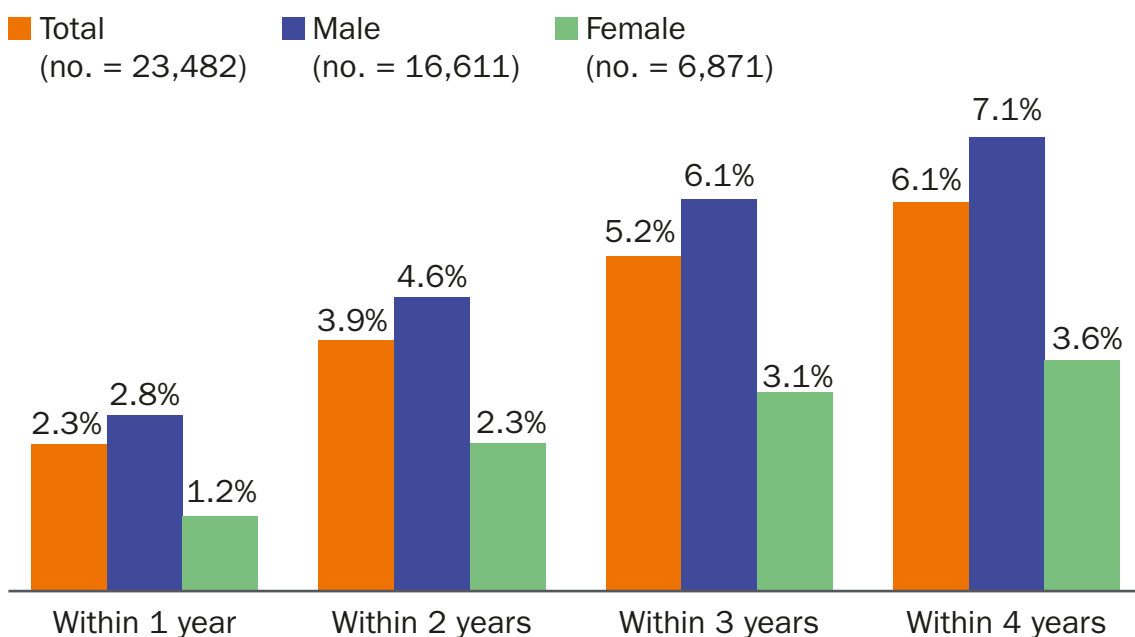
9.16 The group of people most likely to reoffend were those receiving adjourned undertakings of more than two years (38.3%). This is inconsistent with previous findings in New South Wales that recidivism rates are lower for people receiving longer good behaviour bonds.<sup>255</sup> It does, however, accord with the principle of parsimony, meaning that people receiving longer adjourned undertakings are also more likely to have committed more serious offences and are therefore more likely to reoffend.

255. Poynton et al. (2014), above n 91, 25. This could be because of the distinctiveness of section 9 good behaviour bonds, as they then were (sentencing provisions in New South Wales have since been amended by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW)).

## People sentenced to prison within four years

9.17 Relatively few people (6.1%) receiving an adjourned undertaking received a prison sentence in the following four years (Figure 23), and it was twice as common for men than for women. As a point of comparison, 43.6% of people released from prison in Victoria in 2018–19 returned to prison within two years,<sup>256</sup> compared to 3.9% of people receiving adjourned undertakings. While these two groups would be very different in nature, this nevertheless suggests that, within two years, prison leavers are about 11 times more likely to receive a prison sentence than people receiving an adjourned undertaking.

**Figure 23: Proportion of people receiving an adjourned undertaking who went on to receive a prison sentence within four years**

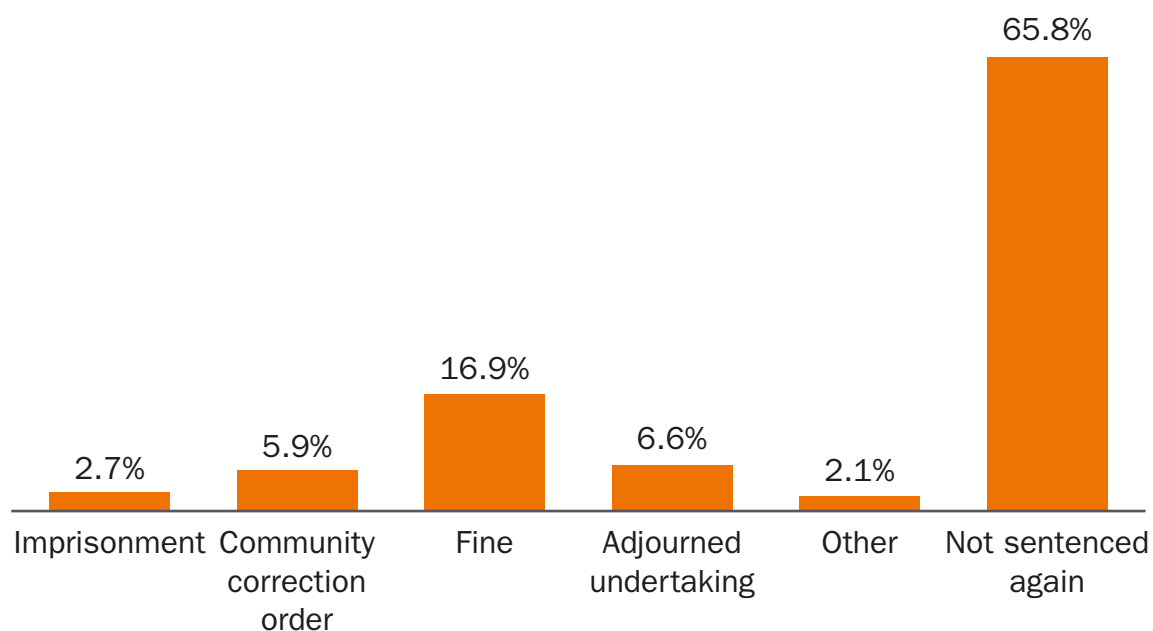


256. Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, *Report on Government Services 2022*, Part C, Table CA.4 (2022).

## Subsequent sentence types imposed

9.18 Figure 24 shows the sentence types that those 23,482 people received at their next sentencing event after receiving an adjourned undertaking. Two-thirds of people were not sentenced again at all. The most common sentence types on those subsequent occasions were fines (16.9%) and another adjourned undertaking (6.6%); few people received imprisonment (2.7%). This suggests that those people receiving an adjourned undertaking do not tend to reoffend with serious offending.

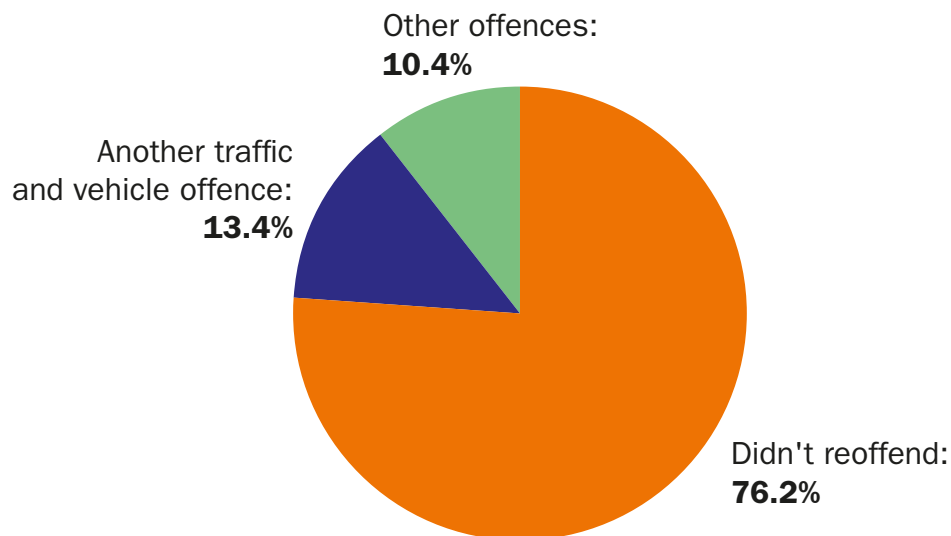
**Figure 24: Sentence types that people received after receiving an adjourned undertaking**



## Reoffending by people receiving adjourned undertakings for traffic and vehicle offences

9.19 Given the prevalence of traffic and vehicle offences, the Council separately analysed the reoffending patterns for the 5,412 people who received an adjourned undertaking in 2015 and 2016 in a case where the principal offence was a traffic and vehicle offence (Figure 25). They had an even lower reoffending rate than the rate for all people receiving adjourned undertakings (23.8% compared to 34.2%). And when they did reoffend, it was most commonly with another traffic and vehicle offence (13.4%). Just 10.4% of those 5,412 people reoffended with another type of offending, the most common of which were endangerment offences (2.0%), assault and injury offences (2.0%) and justice procedure offences (1.6%).

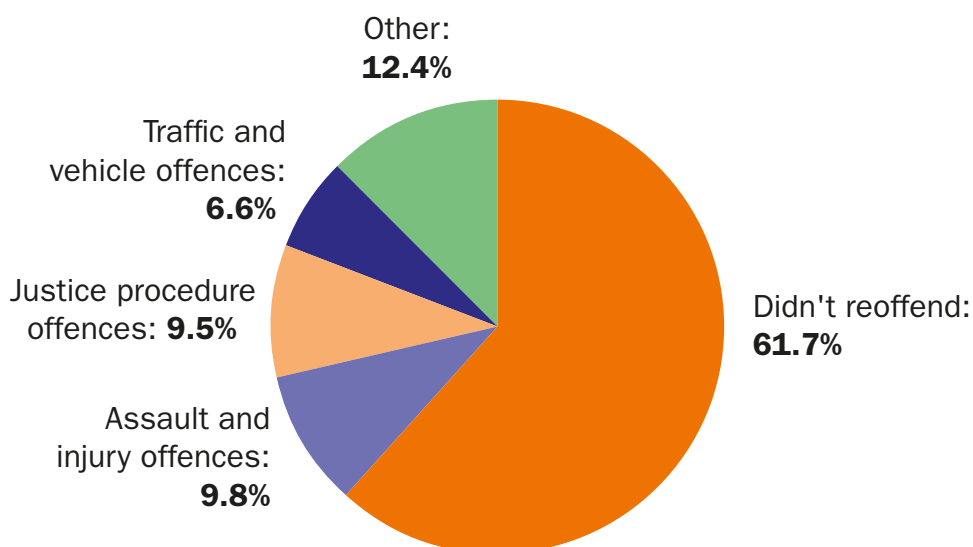
**Figure 25: Types of reoffending by people receiving an adjourned undertaking in 2015 and 2016 for traffic and vehicle offences (5,412 people)**



## Reoffending by family violence offenders

9.20 Given the prevalence of family violence offending in cases receiving adjourned undertakings, the Council also separately analysed the reoffending patterns for the 4,908 people who received an adjourned undertaking in 2015 and 2016 in a case involving family violence (Figure 26). Those offenders had a higher rate of reoffending than all people receiving an adjourned undertaking (38.3% compared to 34.2%). It is, however, much lower than the reoffending rate of people found guilty of breaching a family violence safety notice or intervention order (48.2%).<sup>257</sup> One of the reasons that the latter group had higher reoffending rates is because they may have committed more serious offending, particularly if they received imprisonment or a community correction order (CCO). However, it may also evidence the effectiveness of adjourned undertakings as a sentencing order in family violence cases to reduce reoffending (in comparison, for example, to fines). For the 38.3% of family violence offenders who did reoffend, the most common offence types were assault and injury offences (9.8%), justice procedure offences (9.5%) and traffic and vehicle offences (6.6%). These are also the most common reoffending behaviours of all people who breach family violence safety notices and intervention orders, but at much lower rates.<sup>258</sup>

**Figure 26: Types of reoffending by people receiving an adjourned undertaking in 2015 and 2016 for a case with a family violence flag (4,908 people)**



257. Sentencing Advisory Council, *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending* (2016) 33.

258. *Ibid* 36.

## Do we need a distinct breach offence?

- 9.21 The Council has on multiple occasions raised concerns about the separate and distinct criminalisation of breaches of court orders. In 2002, the *Pathways to Justice* report recommended, among other things, '[t]hat a breach of a conditional order no longer be a criminal offence'.<sup>259</sup> In its 2008 report on suspended sentences, the Council recommended that '[b]reach of a sentencing order ... should no longer constitute a separate offence', and that the benefit of criminalising breaches (improving future decision-makers' knowledge about a person's compliance) could be achieved through other mechanisms.<sup>260</sup> And in its 2017 report on breaches of court orders, the Council again suggested that rather than continuing to criminalise breaches of sentencing orders, 'it might be more appropriate to capture [compliance/breach] information in some other fashion without resorting to the criminal law'.<sup>261</sup>
- 9.22 The Tasmanian Law Reform Institute made the same recommendation in 2008. In response to their consultation paper asking, among other things, whether breaching an adjourned undertaking should become a criminal offence, '[b]oth the Chief Justice and Tasmania Police submitted that breach of this order should not be an offence'.<sup>262</sup> The Tasmanian Law Reform Institute agreed, recommending that 'breach of a conditional release order should not constitute an offence'.<sup>263</sup> This recommendation seems to have been accepted; it is still not an offence to breach an adjourned undertaking in Tasmania.
- 9.23 Victoria is one of only two jurisdictions in the country that criminalises breaches of adjourned undertakings (or equivalent orders). It is not an offence to breach an equivalent order in New South Wales, Tasmania, the Northern Territory, Queensland, the Australian Capital Territory or South Australia.<sup>264</sup> The only responses to breaches in those jurisdictions are to vary the order or revoke it and resentence the offender. Western Australia is the only other jurisdiction that makes it an offence to breach a conditional release order.<sup>265</sup>

259. Freiberg (2002), above n 245, 9, 116–119.

260. Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report – Part 2* (2008) 253–255.

261. Sentencing Advisory Council (2017), above n 247, xi, 25–26.

262. Tasmania Law Reform Institute, *Sentencing*, Final Report no. 11 (2008) 153.

263. *Ibid.*

264. *Sentencing Act 1997* (Tas) s 62; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 8; *Penalties and Sentences Act 1992* (Qld) s 33A; *Sentencing Act 2017* (SA) s 113; *Sentencing Act 1995* (NT) s 15; *Crimes (Sentence Administration) Act 2005* (ACT) pt 6.5.

265. *Sentencing Act 1995* (WA) s 131.

There, the person can be resentenced and fined up to \$1,000.<sup>266</sup> In Victoria, the person can also be resentenced but fined over \$1,800.

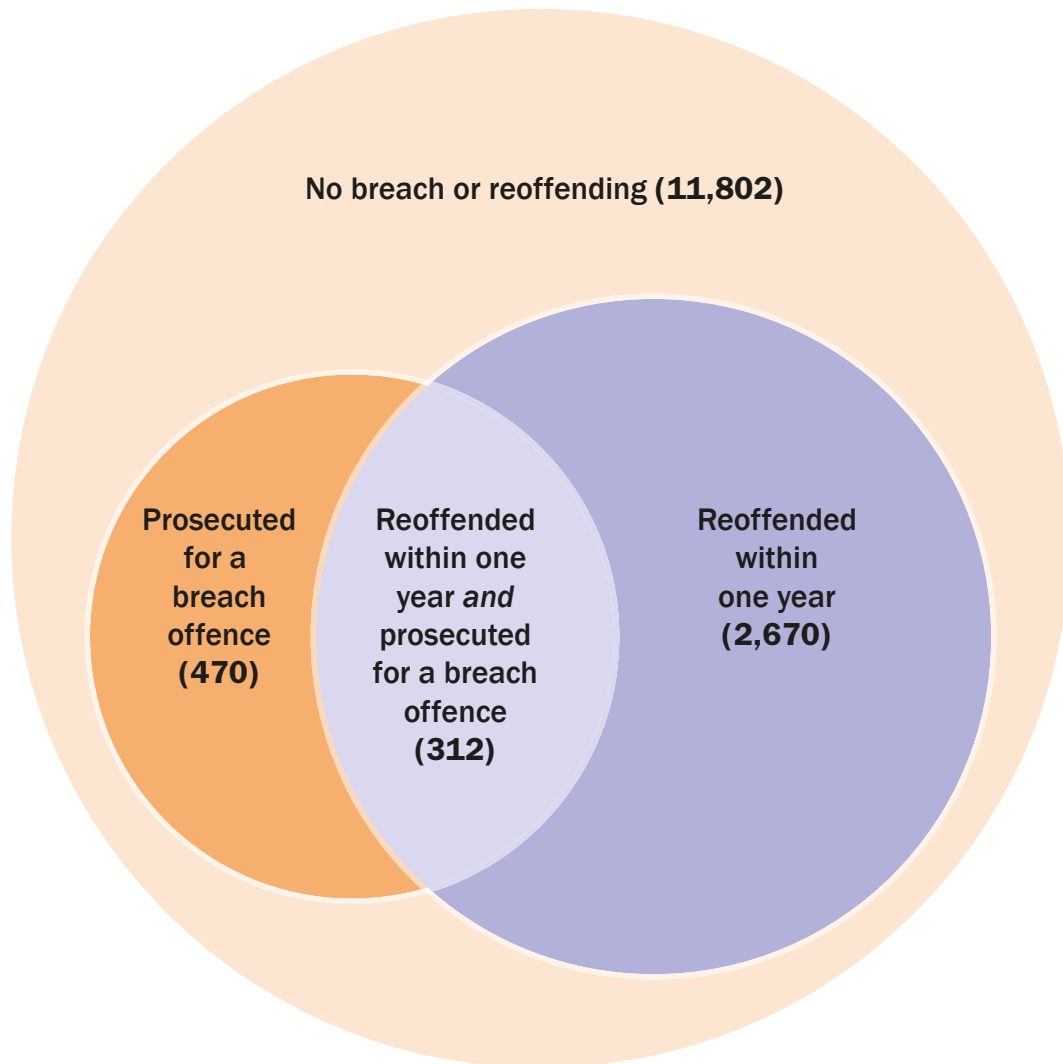
- 9.24 There are a number of arguments in support of decriminalising breaches of adjourned undertakings.
- 9.25 First, as the Council observed in 2017, the increasing number of breach offences being prosecuted each year are creating a significant amount of additional work for courts, accounting for 10% of criminal charges sentenced in Victoria each year.<sup>267</sup> In the context of the ongoing backlog of criminal cases as a result of COVID-19, decriminalising unnecessary offences may improve court efficiencies.
- 9.26 Second, the primary response by courts to proven breaches seems to be either resentencing the original offending or varying the order, both of which are possible regardless of whether there is a distinct breach offence. Resentencing someone for the original offending and/or sentencing them for the new offending may be considered sufficient without the need to separately punish them for the breach offence.
- 9.27 Third, there appears to be a significant and arguably inappropriate inconsistency in whether someone is prosecuted for a breach offence (Figure 27, page 83). There were 15,254 people who received a 12-month adjourned undertaking in 2015 and 2016. Of those people, 2,982 were known to have reoffended within 12 months. Given that reoffending automatically constitutes a breach of the adjourned undertaking, those people were all theoretically liable to be prosecuted and sentenced for breaching their adjourned undertaking as a result. However, this was not the case. Just 10.5% of those people (312) were found guilty of a section 83AC breach offence. The other 89.5% were not, despite being found guilty of offending that occurred during the period of their adjourned undertaking. This means that nine in 10 people who breach their adjourned undertaking by reoffending are *not*, for whatever reason, found guilty of breaching an adjourned undertaking.

**9 in 10 people who reoffend during their adjourned undertaking are not found guilty of a breach offence**

266. *Sentencing Act 1995* (WA) ss 132–133.

267. Sentencing Advisory Council (2017), above n 247, ix.

**Figure 27:** Overlap of people receiving a 12-month adjourned undertaking in 2015 or 2016 who reoffended during their undertaking and were prosecuted for a breach offence (15,254 people)



9.28 Conversely, there are some advantages to retaining a distinct breach offence. In particular, people making decisions in the criminal justice system – such as whether to bail a person, impose a certain sentencing order, release them on parole, etc. – may find information on compliance with court orders useful. Consistent non-compliance may, for example, militate against bailing a person, and that information is perhaps most easily ascertained by scrutinising their criminal history.

### Question 22: Decriminalising breaches

Should breaching an adjourned undertaking be decriminalised? If so, why? If not, why not?

## Successful completion of adjourned undertakings

- 9.29 At the end of the adjournment period, if the court is satisfied that the offender has complied with the conditions of the undertaking, the court must either discharge the offender (with conviction) or dismiss the charges (without conviction).<sup>268</sup>
- 9.30 The Council heard from stakeholders that the vast majority of adjourned undertakings are finalised 'on the papers' by a magistrate at an administrative court hearing. The people subject to the undertakings do not appear, but Victoria Police advised that they are typically asked to be present. During consultation, they suggested that there was not much value in having a police prosecutor present at that hearing, as they are rarely asked to comment and have no previous exposure to the case.<sup>269</sup>
- 9.31 One of the stakeholders responding to the Council's survey also suggested that it may be useful to send people who successfully complete adjourned undertakings a letter (or some form of communication) advising them that they have successfully completed their adjourned undertaking, giving them a sense of validation, encouragement and closure.

### Question 23: Successful completion

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

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

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268. *Sentencing Act 1991* (Vic) ss 72(6), 75(6).

269. Meeting with Victoria Police (19 January 2022).

# Appendix 1: Preliminary consultation

Date	Meeting
3 December 2021	Meeting with County Court
9 December 2021	Meeting with Magistrates' Court
10 December 2021	Meeting with Law Institute of Victoria
14 December 2021	Meeting with County Court
15 December 2021	Meeting with Law Institute of Victoria
16 December 2021	Meeting with Victoria Police
21 December 2021	Meeting with Federation of Community Legal Centres
22 December 2021	Meeting with Victorian Aboriginal Legal Service
17 January 2022	Meeting with Department of Justice and Community Safety
17 January 2022	Meeting with Department of Families, Fairness and Housing
18 January 2022	Meeting with County Court
19 January 2022	Meeting with Victoria Police
19 January 2022	Meeting with Victoria Legal Aid
21 January 2022	Meeting with Office of Public Prosecutions
21 January 2022	Meeting with Magistrates' Court
25 January 2022	Meeting with Criminal Bar Association
15 February 2022	Meeting with Centre for Forensic Behavioural Science
30 March 2022	Meeting with Judicial College of Victoria
2 May 2022	Meeting with Magistrates' Court

## Appendix 2: Method and data

This paper analyses adjourned undertakings imposed in the 10 years from 2011 to 2020 (the reference period). Unless otherwise specified, the data on adjourned undertakings in this paper is derived from CourtLink data that is regularly provided to the Council by Court Services Victoria and cleaned by the Council's data analysts.

### Surveying practitioners and judicial officers

In order to supplement available court data on the use of adjourned undertakings in Victoria, the Council developed a survey to distribute to prosecutors, defence lawyers, magistrates and judges to seek their views.<sup>270</sup> Because the survey was considered incapable of causing anything more than discomfort to the intended participants, the Council determined that there was no need to seek ethics approval for the survey.<sup>271</sup> The views of groups such as victims and the general community about the options for reform will be sought upon publication of this consultation paper.

### Survey development

The survey was developed iteratively based on internal feedback from the project team and other Council staff, as well as external feedback with representatives from each of the target cohorts. The initial questions in the survey were based on the identified gaps in court data, issues identified during preliminary consultations, and early research into sentence deferrals and adjourned undertakings. That first draft was intentionally overlong to ensure that as many key issues as possible were addressed. From there, the project team met to discuss whether each question was essential, optional or unnecessary, and significantly reduced the length of the survey. From there, the survey was shared internally to seek feedback. Once that feedback was implemented, the draft survey was sent to a judicial officer, a police prosecutor and a defence lawyer for feedback. Once that was implemented, the survey was finalised (see Appendix 3). Wherever possible, the questions were multiple choice in order to reduce the workload required by participants and increase the prospects of them filling in more of the survey. There were, though, also a number of qualitative questions seeking free-text responses.

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270. The same survey sought participants' views on section 83A sentence deferrals as well, but the results relating to deferrals will be discussed in a separate consultation paper (forthcoming).

271. See Department of Justice and Community Safety, 'Justice Human Research Ethics Committee' (justice.vic.gov.au, 2022).

## Participant recruitment

To recruit participants from the criminal justice system, the Council used a targeted, non-probability, respondent-driven snowball sampling (or chain-referral) method.<sup>272</sup> This involves making contact with initial study participants (or people with access to intended study participants) and asking those initial contacts to recruit other participants into the research. This recruitment methodology is particularly useful in accessing hard-to-reach populations, such as legal practitioners and judicial officers for whom the Council does not have contact details. It also increases the buy-in of the intended study participants if their participation is encouraged by someone within their own organisation or immediate network.<sup>273</sup> Further, while snowball sampling has sometimes been criticised for causing respondents to have similar characteristics to the initial people contacted by the researchers,<sup>274</sup> the Council was only interested in accessing a finite and identifiable sample of the Victorian population (criminal law practitioners and judicial officers), and only a handful of peak bodies needed to be contacted to (in theory) access the vast majority of that population.

The Council therefore met and spoke with senior representatives from nine target cohorts of criminal law practitioners and judicial officers in Victoria,<sup>275</sup> each of whom was likely to have access to a means of sending a bulk email to a subset of the intended study participants. Eight of the organisations agreed to email a hyperlink to the survey to the relevant people in their networks, along with a blurb explaining the survey, and they agreed to encourage participation by those receiving the email. The one exception was the Office of Public Prosecutions, which indicated that it did not have capacity to distribute the survey to their staff.

The Council sent the link to the survey to all nine initial contacts on Monday 21 February 2022, and almost all of the eight participating organisations advised that the link had been distributed to their networks within a week. The survey then remained open until 11:59 p.m. on Friday 11 March 2022 to allow most respondents a minimum of two weeks to participate.

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272. For a useful introduction to respondent-driven sampling, see Douglas D. Heckathorn, 'Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations' (1997) 44(2) *Social Problems* 174.

273. See, for example, Krista J. Gile et al., 'Methods for Inference from Respondent-Driven Sampling Data' (2018) 5(1) *Annual Review of Statistics and Its Application* 65.

274. See, for example, Bonnie H. Erickson, 'Some Problems of Inference from Chain Data' (1979) 10(1) *Sociological Methodology* 276.

275. This included the Chief Judge of the County Court, the Chief Magistrate, the president of the Law Institute of Victoria (LIV), the co-chair of the Criminal Law Section of the LIV, senior representatives of Victoria Legal Aid, the CEO of the Victorian Aboriginal Legal Service, the CEO of the Federation of Community Legal Centres, senior representatives from Victoria Police's legal services department, senior representatives of the Criminal Bar Association, and senior representatives from the Office of Public Prosecutions.

## Analysis of results

There were just 25 unique respondents to the survey: seven judges or magistrates, 16 criminal law practitioners who mainly defend, one criminal law practitioner who prosecutes and defends about equally, one criminal law practitioner who mainly prosecutes and no police prosecutors. The Council had originally planned to analyse the results of the survey using a combination of multivariate analysis (for responses that could be quantitatively measured) and reflexive thematic analysis (for responses that were more qualitative in nature). However, the low response rate meant that any results of such an analysis would not have been reliable. As such, the survey results discussed throughout this paper are designed to be illustrative, not representative.

## Confidentiality

In addition to participation in the survey being voluntary, the survey was conducted on a confidential and anonymised basis. The first question in the survey did ask participants for their email address as a mandatory field; however, they were advised that the primary aim of this was to ensure that the Council could exclude any duplicate entries (e.g. if someone left the survey but started again). Participants were also advised that a secondary purpose was to allow them to opt in (at the end of the survey) to either being contacted about their responses or receiving a link to the consultation paper once it was published. If they did not voluntarily opt in, their email address was exclusively used to avoid duplicate entries.

## Optional conditions of adjourned undertakings

The optional conditions attached to adjourned undertakings can be recorded in CourtLink using structured data fields (such as 'Court Fund Amount' and 'Justice Plan Indicator') or a free-text field named 'Further Order Conditions'.

Because the conditions are recorded in both structured and unstructured data, a variety of methods were used to derive the statistics for conditions of adjourned undertakings in this paper. Table A1 (page 89) summarises these methods.

As Table A1 shows, it was possible to use the structured data to determine the prevalence of some conditions of adjourned undertakings. However, most of the analysis relied on the unstructured text data because information on a number of common additional conditions (such as mental/medical health treatment, behaviour change or charitable donation) was only contained in the free-text field. Further, even when a

structured data field did exist, the free-text field was often used to record this data. For example, some cases had a value of 'N' in the Justice Plan Indicator field but the free-text field included comments such as 'to comply with the justice plan imposed this day'.

**Table A1: Methods for deriving data on conditions of adjourned undertakings**

Condition	Method
No conditions	Text field had a value of 'NULL', or had 'other' condition, that is, the condition did not fall within the below categories
Court fund	Text string search for 'court fund' and/or a non-zero value in the 'Court Fund Amount' variable
Mental/medical health treatment	Machine learning model
Charitable donation	Machine learning model
Behaviour change	Machine learning model
Driving course	Machine learning model and/or 'Road Trauma Awareness Seminar Indicator', variable = 'Y'
Drug/alcohol treatment	Machine learning model
Costs	Text string search for 'costs' and related terms, and/or a non-zero value in the 'Costs Amount' variable
Compensation	Text string search for 'compensation' and related terms, and/or a non-zero value in the 'Compensation Amount' variable
Apology	Text string search for 'apology' and related terms
Justice plan	Text string search for 'justice plan' and related terms and/or 'Justice Plan Indicator', variable = 'Y'
Judicial monitoring	Text string search for 'judicial monitoring' and related terms

While the text field could be used to identify the conditions imposed, it was not feasible to manually code the thousands of adjourned undertakings imposed during the reference period. The Council therefore utilised a number of automated methods to identify the most common conditions.

For some conditions, a relatively simple search for a term (or very slight variations of that term) was sufficient to determine the number of occurrences. For example, when an offender was required to apologise to someone as part of their undertaking, the term 'apology' or 'apologise' almost always appeared in the free-text.

For other conditions, there was far more variation in the terms used, so text-mining techniques were used. For example, consider the following three cases where the additional conditions were classified in the mental/medical health treatment category:

- to undertake a mental health assessment with a GP;
- to continue treatment for depression and anxiety;
- to continue with psychologist as required.

Text-mining techniques are used to systematically extract quantitative information from unstructured text data.<sup>276</sup> A recent application of this methodology in a criminological context is found in the Australian Institute of Criminology's examination of mentions of mental disorders in police narratives at domestic and family violence events.<sup>277</sup>

The key steps taken for the adjourned undertakings free-text data included:

- processing and filtering text, including:
  - removing punctuation;
  - 'stemming' words (i.e., eliminating variations among larger words – 'psychologist' and 'psychological' would both become 'psycholog'); and
  - removing stop words (i.e., small words such as 'of', 'the' and 'a', which are not useful for categorising data);
- transforming the text data into structured data using a 'document-term matrix' – a large table created using statistical software that shows the frequency of terms occurring in the collection of adjourned undertakings free-text fields. Rows in the matrix represented individual cases, and the columns represented terms; and
- developing machine learning models for selected conditions based on a sample of 500 cases in the document-term matrix. After the sample was manually coded for various conditions, 350 cases were used to 'train' the models, and then 150 cases were used to evaluate them. A model was developed for each of the following condition categories: medical/mental health treatment, charitable donation, behaviour change, driving course and drug/alcohol treatment. The performance of the models in classifying the evaluation set suggested that they provided reliable results.<sup>278</sup>

The models were then applied to the full dataset to determine whether the text in each case could be classified under the model's condition of the adjourned undertaking.

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276. Jonathan Benichimol et al., 'Text Mining Methodologies with R: An Application to Central Bank Texts' (2022) 8 *Machine Learning with Applications* 100286.

277. Armita Adily et al., *Text Mining Police Narratives for Mentions of Mental Disorders in Family and Domestic Violence Events*, Trends & Issues in Crime and Criminal Justice no. 629 (2021).

278. F1-scores (a standard evaluation measure for machine learning models) ranged from 0.83 for the drug/alcohol treatment model to 0.94 for the charitable donation model. An F1-score of 0.8 or above is generally considered reliable.

## Reoffending

The Council's reoffending database links different sentencing events using unique person identifiers. This allowed the tracking of individuals' prior and subsequent offences. This database was used to identify each offender who received an adjourned undertaking in 2019 and 2020 to analyse their prior offending, as well as each offender who received an adjourned undertaking in 2015 and 2016 to analyse their reoffending. Each offender was counted once, at the earliest sentencing event at which they received an adjourned undertaking in those two periods (the index sentence). That allowed for an identical follow-up period for each person.

## Appendix 3: Survey

The survey of legal practitioners and the judiciary was conducted via Survey Monkey. The text below is not a precise reflection of the survey's appearance, but it is a precise reflection of the survey's content. Other points to note include:

- participants who selected the last option for questions 2 and 3 were directed to a termination page because this indicated that they were not part of the target cohort;
- participants were only asked to respond to question 4 if they indicated that they usually worked in a mix of the Magistrates' Court and higher courts;
- participants were only asked to respond to question 6 if they indicated that they usually worked in regional or rural Victoria; and
- participants were only asked to respond to question 24 if they indicated that there was usually some non-compliance with undertakings.

## Introduction

Thank you for participating. We would like to hear from you about your experiences with deferrals and adjourned undertakings in adult courts in Victoria. We're seeking your views in relation to your role as a legal practitioner, police prosecutor or judicial officer.

There are more questions about sentence deferrals than about adjourned undertakings because court data about adjourned undertakings is more comprehensive.

The primary aim of this survey is to enhance our understanding of court data on deferrals and adjourned undertakings, especially on deferrals. This survey does not replace stakeholder consultation. We will be publishing consultation papers in the middle of the year, and we will welcome your submissions. You will also have the opportunity at the end of the survey to provide additional information and context to your responses.

This survey should take you about 15 minutes to complete.

## Demographic questions

### 1. What is your email address?

We ask for your email to avoid duplicate responses. We will not use your email to contact you unless you give us permission at the end of this survey.

All information you provide is confidential and is anonymised for the purposes of analysis.

### 2. Please identify your role in relation to sentencing

- I am a judge or magistrate
- I am a police prosecutor
- I am a legal practitioner who mainly prosecutes
- I am a legal practitioner who mainly defends
- I am a legal practitioner who prosecutes and defends about equally
- Other

### 3. In which adult jurisdiction do you usually work?

- The County Court or Supreme Court
- The Magistrates' Court
- A mix of the Magistrates' Court and higher courts
- I don't work in the adult jurisdiction

### 4. Because you work in multiple jurisdictions, we ask that you select a jurisdiction to keep in mind when answering questions about sentence deferrals and adjourned undertakings.

- Higher courts
- Magistrates' Court

### 5. In which part of Victoria do you usually work?

- Greater Melbourne area
- Rural or regional Victoria

### 6. In which justice region do you most often work? We ask that you please keep this region in mind when answering questions about sentence deferrals and adjourned undertakings.

- Barwon South West (including Geelong and Warrnambool)
- Gippsland (including Morwell and Bairnsdale)
- Grampians (including Ballarat and Horsham)
- Hume (including Wangaratta and Shepparton)
- Loddon Mallee (including Bendigo and Mildura)

## Sentence deferrals under s 83A

*\*Questions 7–22 are excluded here because they related exclusively to sentence deferrals.*

## Adjourned undertakings

Sections 72 and 75 of the *Sentencing Act 1991* (Vic) permit courts to sentence someone to an adjourned undertaking for a period of up to five years. Adjourned undertakings include mandatory conditions of good behaviour and attending court if required, as well as optional conditions. This section asks about your experience with adjourned undertakings.

### 23. In your experience, how do offenders who receive an adjourned undertaking usually engage with that sentence?

- The offender complies with all the conditions
- The offender engages positively with the conditions, but there are minor breaches along the way
- The offender tries to engage with the requirements, but there are significant breaches
- The offender does not try to engage with the conditions of the adjourned undertaking
- Cannot answer (e.g. because you do not typically see them again)

### 24. Does that non-compliance typically involve further offending?

- Often
- Sometimes
- Rarely or never
- Cannot answer

### 25. In your experience, what works well with adjourned undertakings as they currently operate?

You can interpret this question as broadly as you like. You may wish to consider the legislation, court practices, and available support programs.

**26. Based on your experience, how would you change the way adjourned undertakings currently operate? Please explain why you would make those changes.**

You can interpret this question as broadly as you like. You may wish to consider the legislation, court practices, and available support programs.

## Concluding questions

**27. Some of the questions in this survey have asked you to comment on what is common or typical. However, people who belong to certain groups might have different experiences with the process of having a sentence deferred, or be affected differently by the requirements of deferrals or adjourned undertakings.**

Such groups might include, for example, young adults, women, Aboriginal and Torres Strait Islander peoples, people with substance abuse or mental health issues, people experiencing homelessness, culturally and linguistically diverse people, and people in rural and regional Victoria.

**Is there anything else you would like us to know about the different experiences certain groups might have with sentence deferrals or adjourned undertakings?**

*\*Question 28 is excluded here because it related exclusively to sentence deferrals.*

**29. Do you have any further comments about deferrals or adjourned undertakings?**

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