

Reforming Adjourned Undertakings in Victoria

Final Report

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

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- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
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Reforming Adjourned Undertakings in Victoria Final Report

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Contents

Contributors vii

Acknowledgments viii

Chair's foreword ix

Executive summary and recommendations xi

Renaming adjourned undertakings xi

Purposes of adjourned undertakings xii

Conditions of adjourned undertakings xii

Adjourned undertakings in the sentencing hierarchy xvi

Decriminalising breaches of adjourned undertakings xviii

Restitution and compensation orders xviii

Communicating about adjourned undertakings xix

1. Introduction 1

Our approach 2

Structure of this report 4

The importance of consultation 4

2. Renaming adjourned undertakings 5

Stakeholder views 5

The Council's view 7

3. Purposes of adjourned undertakings 9

Revising the supplementary purposes 10

4. Conditions of adjourned undertakings 15

The requirement to be of good behaviour 15

Justice plan conditions 18

Payment conditions 21

Guidance about conditions 29

Funding programs and services 38

5. Adjourned undertakings in the sentencing hierarchy 41

Revising the hierarchy: adjourned undertakings and fines 41

Merging the provisions 46

Reforming the *Spent Convictions Act* 49

A new mid-tier community order? 50

A new combined order: imprisonment with an adjourned undertaking 53

6. Decriminalising breaches of adjourned undertakings 59

The prevalence of breach offences 59

Possible responses to breaches 60

Stakeholder views 61

The Council's view 62

7. Restitution and compensation orders 63

Stakeholder views 65

The Council's view 65

8. Communicating about adjourned undertakings 67

Redesigning the adjourned undertaking form 67

The need for a signature 71

Electronic copy of the adjourned undertaking form 72

Notifying offenders of expiry of their adjourned undertaking 73

Appendix 1: consultation and submissions 75

Meetings 75

Submissions 76

Bibliography 77

References 77

Legislation and regulations 79

Cases 80

Quasi-legislative materials 81

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The Council would like to thank the many individuals and organisations that contributed to this project over the last two years. Their insights have been invaluable in identifying the key issues, shaping our thinking and framing our final recommendations.

We especially thank the Magistrates' Court of Victoria for meeting with us multiple times during this project and providing us with the data on conditions attached to adjourned undertakings. That data has formed the basis for many of the recommendations in this report.

We would also like to thank legal research assistant Melanie Hull for her work on legal-checking this report.

Chair's foreword

There are certain common assumptions about the criminal justice system. That most crimes are crimes of violence. That most offenders go to prison. That those who don't go to prison get to 'walk free'. And that the people who cycle through the justice system have actively chosen a life of crime. These are the misconceptions upon which much crime fiction is based and that are promoted in the popular media. But they do not accurately represent the processing of crime and offenders in our criminal justice system.



The majority of criminal offences dealt with in that system are non-violent, and the most common sentencing outcome is a fine. The people who most frequently interact with the justice system are our most vulnerable: people experiencing mental impairment, those facing a past trauma and/or dealing with substance abuse. Many people's offending is relatively minor, or they will only have one interaction with the justice system in their lives. And far more often than not, the most effective way of protecting the Victorian community is not to imprison these people but to impose another type of sentence.

The Sentencing Advisory Council focused on cases involving low-level offenders when it began examining adjourned undertakings in 2021. Adjourned undertakings are the second most common sentencing outcome in Victoria, with over 17,000 imposed in 2019 (pre-COVID-19). Adjourned undertakings are very flexible in both their duration (up to five years) and the conditions that can be attached (any condition the court deems appropriate), thereby allowing them to be tailored to the circumstances of each case. In their current form, they were first introduced in Victoria in 1985. Yet they have never been the subject of detailed examination. Consequently, there is relatively little community awareness about these orders and how they operate.

Over the past two years the Council met with dozens of stakeholders, conducted a statistical examination of how adjourned undertakings are used, analysed the conditions attached to these types of orders, released a consultation paper with questions about

potential reforms, received written submissions in response to that consultation paper, developed draft options for reform, tested those options with individual stakeholders and at a consultation forum, and developed 26 final recommendations.

I thank the organisations and individuals that generously gave their time to this project over the last two years. Their contributions have very much shaped our thinking and the final recommendations in this report.

I also want to thank the project team for their efforts. At a time when the Council has been experiencing significant resourcing issues, the secretariat undertook a sizeable law reform exercise – involving extensive data analysis, legal research, consultation and policy development – in a relatively brief time period, and developed recommendations that address key issues in relation to adjourned undertakings and that have the potential to make the justice system a little fairer, and Victoria a little safer. By providing clear information about this under-examined but frequently employed sentencing option, this report also counters many of the misconceptions that exist about offenders and the operation of our criminal courts.

A handwritten signature in black ink, appearing to read 'M McMahon', with a stylized flourish at the end.

Professor Marilyn McMahon
Chair, Sentencing Advisory Council

Executive summary and recommendations

Adjourned undertakings perform a critical role in the Victorian criminal justice system. They are a low-end community order that requires the offender to be of good behaviour for a certain period of time, and they may also require the offender to comply with certain additional conditions, such as making a charitable donation or participating in a rehabilitation program. They are primarily designed to provide a response to less serious offending, to first-time offenders, to vulnerable offenders or even to serious offending if there are extraordinary circumstances. Because of this broad scope, adjourned undertakings are highly prevalent. In 2019 alone, there were over 17,000 adjourned undertakings imposed, mostly in the Magistrates' Court, making up 18% of all sentencing outcomes in adult courts that year. Yet despite the importance and prevalence of adjourned undertakings, this project has been the first detailed examination of their use since their introduction in 1985.

In that context, this report follows the consultation paper we published in August 2022 and presents 26 recommendations for reforms to adjourned undertakings and related orders. Those recommendations are a product of extensive data analysis, legal research and consultation over the last two years. Our overarching aim in making those recommendations is to refine a sentencing order that is already held in high regard by those who work in Victoria's criminal justice system. Adjourned undertakings are a highly flexible and useful order, and we do not want to fix what isn't broken or cause unintended consequences. With that in mind, we have grouped our recommendations according to certain themes.

Renaming adjourned undertakings

The terminology of 'adjourned undertaking', while technically accurate, is not particularly accessible. Stakeholders unanimously told us that these sentencing orders should be renamed. While many in the legal profession already refer to them as 'bonds', non-legal stakeholders were concerned that the term 'bond' could easily be misinterpreted as referring to financial conditions (for example, rental bonds and government bonds). We agree and recommend that adjourned undertakings be renamed as good behaviour orders.

Renaming adjourned undertakings

Recommendation 1: That the Victorian Government amend the *Sentencing Act 1991* (Vic) to rename adjourned undertakings as good behaviour orders.

Purposes of adjourned undertakings

The purposes of sentencing in Victoria are enshrined in section 5 of the *Sentencing Act*: just punishment, denunciation, deterrence, community protection and rehabilitation. These are, according to section 5, the ‘only’ purposes of sentencing. There is thus a tension between section 5 and section 70, the latter of which endeavours to outline the specific purposes of adjourned undertakings (and dismissals/discharges). We have made a number of recommendations related to section 70; these collectively are designed to (a) make it clearer that this is an enabling provision, not a limiting one, (b) remove outdated references to ‘trivial’ or ‘technical’ offences and (c) improve awareness of these considerations.

Purposes of adjourned undertakings

Recommendation 2: That section 70 of the *Sentencing Act 1991* (Vic) be amended to clarify that a court may impose an adjourned undertaking for any one or more of the listed purposes, and to include a catch-all provision enabling courts to impose an adjourned undertaking for any other purpose it considers appropriate in the circumstances.

Recommendation 3: That section 70(1)(b) of the *Sentencing Act 1991* (Vic) be amended to remove the words ‘trivial’ and ‘technical’.

Recommendation 4: That the current content of section 70 of the *Sentencing Act 1991* (Vic) be moved to be co-located with the general purposes of sentencing in section 5.

Conditions of adjourned undertakings

There are two mandatory conditions of all adjourned undertakings, and courts may also impose any other condition that they think appropriate in the circumstances. The flexibility of these optional conditions was one of the major reasons that most stakeholders in the criminal justice system see so much utility in adjourned undertakings – they can be tailored to the particular circumstances of each case and person. We conducted an Australian-first analysis of the types of conditions attached to adjourned undertakings and found that the most common were making charitable donations, continuing with medical (especially mental health) treatment, and participating in a behaviour change program, a driver education course or substance abuse treatment.

There were, though, a number of areas that we identified for improvement in relation to the conditions attached to adjourned undertakings.

Defining good behaviour. There is currently no definition of what it means to be of 'good behaviour' for the period of the adjourned undertaking. Stakeholders agreed that this makes it difficult to explain to people what is required. We recommend that 'good behaviour' be defined as not committing a further offence. While it may have been ideal to limit this to not committing further offences punishable by a term of imprisonment, this approach would exclude many driving offences from being a breach of the condition, and driving offences account for a quarter of all adjourned undertakings. Critically, this recommendation is interdependent with our recommendation to repeal the offence of breaching an adjourned undertaking. That recommendation limits the consequences of breaching the good behaviour condition to varying the adjourned undertaking, or cancelling it and resentencing the original offending while also taking into account compliance with the order prior to cancellation.

Defining 'good behaviour'

Recommendation 5: That the *Sentencing Act 1991* (Vic) be amended to specify that for the purpose of the condition to be of good behaviour during the period of an adjourned undertaking, good behaviour means 'not committing a further offence'.

Justice plans. Justice plans are programs of services for people with an intellectual disability. They can be imposed as conditions of either community correction orders (CCOs) or adjourned undertakings. It currently takes approximately 12 weeks for many people to be assessed as eligible for a justice plan and to have the plan of services prepared for the court. We recommend that the Department of Families, Fairness and Housing explore opportunities to speed up those processes in appropriate cases.

Justice plans

Recommendation 6: That the Department of Families, Fairness and Housing, in appropriate cases, support more efficient processing of target group assessments and the preparation of justice plans.

Payment conditions. There are two main ways that courts can currently order an offender to make a charitable donation as a condition of their adjourned undertaking. The first is to make the donation directly to a charitable organisation nominated by the court. The second is to give the money to the court, with those funds later distributed via the Court Fund.

There are two issues with ordering an offender to make a charitable donation directly. First, we found that magistrates' choices are playing a significant role in which charities are receiving funds. Second, the offender can claim their charitable donation as a tax deduction, which unfairly benefits those in higher income tax brackets.

There are also presently issues with the Court Fund, in that there is limited publicly available information about how it functions, how decisions are made about which organisations receive funding from it, how much money it receives and how that money is ultimately distributed.

We believe that the issues with the Court Fund can be resolved through greater transparency in the receipt and distribution of funds, whereas the issues with direct charitable donations cannot be remedied. We therefore recommend that courts should not be permitted to order donations be paid directly to charities, and that there should be more transparency in the Court Fund. We also recommend that courts should be required to consider the financial circumstances of the offender in deciding which conditions (if any) to attach to an adjourned undertaking, including whether to order a charitable donation condition and, if so, how much. Courts must currently consider a person's financial circumstances in the context of fines but not adjourned undertakings.

Payment conditions

Recommendation 7: That the *Sentencing Act 1991* (Vic) be amended to limit payment conditions (if any) of adjourned undertakings to contributions to the Court Fund.

Recommendation 8: That the Magistrates' Court review how to improve the operation, governance and transparency of the Court Fund.

Recommendation 9: That the *Sentencing Act 1991* (Vic) be amended to require courts to consider the financial circumstances of the offender in deciding which optional conditions (if any) to attach to an adjourned undertaking (for example, whether to order a payment to the Court Fund and, if so, the amount of such payment).

Guidance about conditions. In our consultation paper, we were able to analyse the types of conditions attached to almost 25,000 adjourned undertakings in 2019 and 2020. Following consultation with stakeholders about the nature and wording of some of those conditions, we recommend that the *Sentencing Act* be amended to include a list of factors that courts should consider in deciding which conditions to attach to an adjourned undertaking. These factors are designed to ensure that the conditions are as

few as necessary, pragmatically achievable, consistent with the objectives of adjourned undertakings, culturally safe and appropriate, and the least restrictive required to achieve the purposes of sentencing.

Guidance about conditions: legislative principles

Recommendation 10: That the *Sentencing Act 1991* (Vic) be amended to include a list of matters that courts must consider when attaching conditions to adjourned undertakings, including:

- the principle of proportionality;
- the principle of parsimony, in particular that the default position should be an adjourned undertaking with no conditions;
- the purposes for which a sentence may be imposed as set out in section 5 of the *Sentencing Act*;
- the purposes of an adjourned undertaking as presently set out in section 70 of the *Sentencing Act*;
- whether the condition is reasonably achievable during the period of the adjourned undertaking; and
- the availability of culturally appropriate programs and services.

We also recommend that some model wording be developed in the *Victorian Sentencing Manual* for some of the more common conditions attached to adjourned undertakings. For instance, we found numerous conditions that simply read ‘Continue to see Dr [Name]’ with no reference to what the offender should do if that doctor were to become unavailable for some reason. The aim of the model wording would not be to prescribe how conditions should be worded, but rather to assist practitioners and courts by providing initial wording capable of being easily adapted to suit the unique circumstances of each case. There should then be training for legal practitioners and judicial officers about conditions of adjourned undertakings.

Guidance about conditions: wording

Recommendation 11: That the Judicial College of Victoria expand the *Victorian Sentencing Manual* to include guidance about the wording of conditions (if any) attached to adjourned undertakings.

Recommendation 12: That the Judicial College of Victoria and the Law Institute of Victoria provide training for judicial officers and legal practitioners, respectively, about conditions of adjourned undertakings.

Paying for programs. One of the more consistent observations we heard from stakeholders is that requiring people who receive adjourned undertakings to pay for programs and services in which they are ordered to participate disproportionately and unfairly affects people with lower incomes. It is also inconsistent with the current practice of many programs and services being paid for as conditions of CCOs. We therefore recommend that the Department of Justice and Community Safety develop a resourcing model to ensure that when programs or services are ordered as conditions of adjourned undertakings, they can be paid for in appropriate cases. We acknowledge that it is not feasible or pragmatic for all conditions to be paid for, especially when paid for via other routes (for example, Medicare). We anticipate that courts would have discretion whether to order that a particular program be paid for, in light of the offender's financial circumstances.

Paying for programs

Recommendation 13: That the Department of Justice and Community Safety develop a resourcing model to ensure that when programs or services are ordered as conditions of adjourned undertakings, they can be paid for by the state in appropriate cases.

Adjourned undertakings in the sentencing hierarchy

The way the *Sentencing Act* currently operates means that courts cannot impose a fine if the purposes of sentencing could be achieved by imposing an adjourned undertaking. However, we heard from numerous stakeholders that the way fines and adjourned undertakings operate means that, in practice, an adjourned undertaking is often a more severe sentencing outcome than a fine. Fines have no ongoing behavioural obligations, whereas adjourned undertakings do. While a fine will always have a financial component, adjourned undertakings often have one as well (a charitable donation condition). The median fine amount imposed in Victoria (\$500) is the same as the median value of charitable donation conditions of adjourned undertakings (\$500). There is no offence of non-payment of a fine, but there is presently a distinct offence of breaching an adjourned undertaking. Further, there is a discretion with both orders whether to record a conviction. We therefore recommend that the *Sentencing Act* be amended so that there is no hierarchy between fines and adjourned undertakings, such that the focus is instead on the most appropriate sentencing outcome in each case.

Revising the hierarchy

Recommendation 14: That section 5(7) of the *Sentencing Act 1991* (Vic) be amended so that there is no hierarchy between fines and adjourned undertakings.

Most sentencing orders in the *Sentencing Act* have a single provision authorising courts to make the order (for example, fines, CCOs, and drug and alcohol treatment orders). For adjourned undertakings, section 72 empowers courts to impose one with conviction, and section 75 empowers courts to impose one without conviction. The same is true for discharges and dismissals, with sections 73 and 76 differentiated only by whether a conviction is recorded. We heard that having two provisions do the same thing based on whether a conviction is recorded can cause confusion, and that sometimes the intended order is mis-recorded as the other. To promote consistency and reduce the risk of mis-recorded convictions, we recommend merging these provisions.

Merging the provisions

Recommendation 15: That sections 72 and 75 of the *Sentencing Act 1991* (Vic) be merged into a single provision.

Recommendation 16: That sections 73 and 76 of the *Sentencing Act 1991* (Vic) be merged into a single provision, named ‘proven and dismissed’.

Recommendation 17: That subsections 7(g)–(j) be amended accordingly.

In 2021, Victoria introduced the *Spent Convictions Act*, which limits the period during which certain findings of guilt need to be disclosed. However, an inconsistency seems to have arisen. While fines are currently more severe in the sentencing hierarchy than adjourned undertakings, a fine imposed without conviction is spent immediately at the date of sentencing. But because adjourned undertakings have conditions (such as being of good behaviour) that last for the life of the order, those findings of guilt must be disclosed until the end of the order. Stakeholders were unanimous that adjourned undertakings imposed without conviction should be spent immediately, not at the end of the order. We agree.

Revising the *Spent Convictions Act*

Recommendation 18: That the *Spent Convictions Act 2021* (Vic) be amended so that adjourned undertakings without conviction are ‘spent’ at the date of sentencing.

Courts have been imposing imprisonment with an adjourned undertaking in an increasing number of cases in recent years, especially in cases involving time served prison sentences. This combination of sentences is, however, currently only possible in cases with two or more charges because the same offence cannot presently receive

both imprisonment and an adjourned undertaking. We therefore recommend that the Victorian Government consider introducing a new provision to the *Sentencing Act* – one that would be similar to how section 44 operates with combined orders of imprisonment with a CCO – enabling courts to impose imprisonment with an adjourned undertaking.

A new combined order

Recommendation 19: That the Victorian Government consider inserting a new provision into the *Sentencing Act 1991* (Vic) to expressly allow courts to impose a combined order of imprisonment with an adjourned undertaking.

Decriminalising breaches of adjourned undertakings

A person who breaches an adjourned undertaking, particularly if they do so by committing further offences, can (a) be sentenced for the new offences and/or (b) be resentenced for the original offending. In that context, prosecuting someone for the additional and specific offence of breaching a sentencing order will often constitute double, if not triple, punishment. Moreover, prosecution for breach offences seems to be highly inconsistent, with just 1 in 10 offenders who reoffend during their adjourned undertaking prosecuted for a distinct breach offence. With very strong stakeholder support, we recommend repealing the offence of breaching an adjourned undertaking. This would not, we note, limit the court's power to vary a sentence, or resentence the offender entirely, if they have breached the order.

Decriminalising breaches

Recommendation 20: That the offence of contravening an adjourned undertaking be repealed.

Restitution and compensation orders

When sentencing someone, courts can also make restitution and compensation orders. Restitution orders involve returning stolen property or money. Compensation orders involve paying a victim money for injury or for the loss of property or damage to it. When imposing an adjourned undertaking, it seems that courts can make a restitution or compensation order by three potential avenues. One is as a condition of the adjourned undertaking itself, making failure to pay a breach of the order. One is as an ancillary order via sections 84 and 85B of the *Sentencing Act*, the latter of which requires an application by the victim or prosecution (the court cannot make the order without an application).

And one is via sections 74 and 77 of the *Sentencing Act*, which we heard are sometimes used to enable ancillary compensation orders to be made without application. On closer examination, it isn't clear that this is what sections 74 and 77 were meant to do. Those provisions also create an unusual situation where victims can more easily receive compensation for injury in less serious cases (where adjourned undertakings are imposed) than in more serious cases (where CCOs are imposed). We therefore recommend that the Victorian Government review whether courts should be able to make own-motion ancillary compensation orders when imposing an adjourned undertaking.

Restitution and compensation

Recommendation 21: That the Victorian Government review whether courts should be able to make own-motion ancillary compensation orders for injury when imposing adjourned undertakings, discharges or dismissals.

Communicating about adjourned undertakings

Early in the project, the Magistrates' Court kindly provided the Council with a copy of its current adjourned undertaking form, which we reproduced in our consultation paper. Stakeholders raised several concerns with the current form, including that it is outdated and jargonistic, uses a small font, and includes references to conditions that are often not applicable. We agree with these concerns, and recommend that the Magistrates' Court redesign the form in consultation with experts in form design as well as people with lived experience of the criminal justice system.

Redesigning the form

Recommendation 22: That the Magistrates' Court, in consultation with experts in form design, as well as people with lived experience of the criminal justice system, review and revise the current adjourned undertaking form to improve accessibility and comprehensibility.

Currently, both the *Sentencing Act* and the adjourned undertaking form require offenders to physically or electronically sign the form to indicate that they have agreed to comply with the conditions of the order. We recommend moving away from the need for a signature, especially with the rise of Webex court hearings since the COVID-19 pandemic, instead revising both the legislation and the form so that courts can simply record that the offender has agreed to comply.

Requiring a signature

Recommendation 23: That the *Sentencing Act 1991* (Vic) be amended to remove the requirement that offenders have to give a ‘written’ undertaking to comply with the conditions of an adjourned undertaking.

Recommendation 24: That the Magistrates’ Court amend the adjourned undertaking form to enable courts to record an offender’s verbal consent to the conditions of an adjourned undertaking, rather than requiring a written or electronic signature.

We were told in consultations that the Magistrates’ Court currently emails an electronic copy of the finalised adjourned undertaking (a) as a matter of course when the sentencing hearing is online or (b) upon request when the hearing is in person. We recommend that courts (including the higher courts in relevant cases) always send an electronic copy of the adjourned undertaking form to offenders (and, if relevant, their lawyers), so that they can easily access it throughout the duration of the order.

Sending an electronic copy

Recommendation 25: That courts send an electronic copy of finalised adjourned undertaking forms to offenders (and, if relevant, their legal representatives).

At the end of the period of the adjourned undertaking, there is a hearing in open court where a magistrate will confirm, as best as possible, whether the offender has complied with the conditions of the order. After that hearing, there is currently no correspondence sent to the offender confirming that the order has been finalised. To promote positive reinforcement of the offender’s good behaviour and to provide a sense of closure, we recommend that the court send an electronic notification (via either SMS or email) that the offender has successfully completed their adjourned undertaking.

Notification of completion

Recommendation 26: At the end of the period of the adjourned undertaking, if the court is satisfied that the offender has observed the conditions of their adjourned undertaking, the court should send the offender electronic notification to this effect.

1. Introduction

- 1.1 A key function of the Sentencing Advisory Council is to provide advice to the Attorney-General on sentencing matters.¹ The aim of this project is to review the use of adjourned undertakings in Victoria and to advise the Attorney-General about any opportunities to improve their operation in law and practice.
- 1.2 Adjourned undertakings perform a critical role in sentencing in Victoria. They involve a person serving their sentence in the community while subject to two mandatory conditions – to be of ‘good behaviour’ and to attend court if called upon. Courts may also attach a wide range of additional conditions, such as making a charitable donation or participating in a rehabilitation program.
- 1.3 According to the current sentencing hierarchy in Victoria, adjourned undertakings are the least severe community order available. They are, though, also sufficiently broad in scope that they can be used for even relatively serious offending in some cases. They are primarily directed at first-time offenders, marginalised and vulnerable offenders, and people who have committed less objectively serious offending. For these people, the most appropriate way to achieve the various purposes of sentencing – such as rehabilitation and protection of the community – is often to limit their ongoing contact with the criminal justice system by imposing an adjourned undertaking, acknowledging that sometimes ‘the process is sufficient punishment’,² and ensuring that they are receiving appropriate support to reduce their risk of reoffending. As Vacro told us in their submission:
- Non-custodial sentences like adjourned undertakings have great potential to act as a hook for change if they connect people who are early in their contact with the justice system with the domains we know will help them move away from crime.³
- 1.4 Adjourned undertakings are also highly prevalent. As we observed in our consultation paper,⁴ they are the second most common sentencing outcome in Victoria, with over 17,000 imposed in 2019. Only fines are more common.

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

2. Arie Freiberg et al., *Change and Stability in Sentencing: A Victorian Study* (1996) 233.

3. Submission 4 (Vacro).

4. Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria: Consultation Paper* (2021) 1 (henceforth *Consultation Paper*).

Our approach

1.5 This is the first review of adjourned undertakings since they were introduced in 1985. We have examined court data, reviewed available literature on low-end orders, undertaken extensive consultation with Victorian stakeholders about potential areas for reform, published a consultation paper, received written submissions, developed draft options for reform, and tested them with stakeholders at a series of roundtables and meetings. This report and the recommendations contained herein are the result of that work and reflect the many valuable contributions of stakeholders along the way.

1.6 Overwhelmingly, we heard that adjourned undertakings are already perceived positively by stakeholders in the criminal justice system. For instance:

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

Submission 5 (Victoria Legal Aid)

In [our] experience, the inherent flexibility of adjourned undertakings seems to allow customisation to better achieve appropriate sentencing outcomes for people belonging to marginalised groups.

Submission 10 (Victoria Police)

[A]djourned undertakings are a practical and cost-effective justice response for someone who has committed low level offences, or who has no prior convictions ... [they] can act as a deterrent for poor choices and provide an opportunity for the person to demonstrate more appropriate and acceptable behaviour. Ultimately, an adjourned undertaking may divert someone away from the justice system at an earlier junction ... [preventing escalation] to a custodial sentence that may cause more harm.

Submission 6 (Women and Mentoring)

[T]he primary goal of any effective and humane criminal justice system is to ensure policy, legislation and budgetary decisions are all centred on prevention and early intervention. In that sense ... adjourned undertakings can be an important part of sentencing to prevent further contact with the criminal justice system.

Submission 7 (Jesuit Social Services)

The LIV considers Adjourned Undertakings to be an important but often overlooked component of Victoria's sentencing system ... they are a cost effective, flexible sentencing disposition that facilitates offender rehabilitation by minimising contact with the criminal justice system.

Submission 8 (Law Institute of Victoria)

[A]djourned undertakings are one of the most critical sentencing options available to our client base. This is because of the flexibility permitted under this disposition for the court ... in tailoring a sanction that can be supportive whilst reflecting the admonishment of the court. Adjourned undertakings are important because ... 1. They reduce stigmatisation ... 2. They promote rehabilitation ... 3. They minimise disruption to accused people's responsibilities (and protective factors)[.]

Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw)

Adjourned undertakings should be utilised more widely.

Stakeholder Survey, Respondent 1 (February 2022)

I would encourage greater use of adjourned undertakings as a sentencing option.

Stakeholder Survey, Respondent 6 (February 2022)

- 1.7 The major theme emerging from stakeholders was that the inherent flexibility of adjourned undertakings is what makes them a highly effective tool in the courts' arsenal of sentencing orders. Adjourned undertakings can be tailored to the unique circumstances of each case, offering the full gamut of punitive, supervisory and rehabilitative conditions. Stakeholders saw this flexibility as so critical that we were warned by multiple stakeholders not to 'fix what isn't broken' in our efforts to reform adjourned undertakings.
- 1.8 Our recommendations must be viewed through that lens, because that is how we have approached them. We have sought to improve a disposition that is already largely revered by those in the criminal justice system but that could also benefit from some modifications. We do not want to cause unintended consequences and undo any of the many positive features of adjourned undertakings or restrict their use in appropriate cases.

Structure of this report

1.9 Some key themes about areas of potential reform emerged from our consultations with stakeholders, and they have guided how we have structured this report:

Chapter 2 – renaming adjourned undertakings

Chapter 3 – purposes of adjourned undertakings

Chapter 4 – conditions of adjourned undertakings

Chapter 5 – adjourned undertakings in the sentencing hierarchy

Chapter 6 – decriminalising breaches of adjourned undertakings

Chapter 7 – restitution and compensation orders

Chapter 8 – communicating about adjourned undertakings.

The importance of consultation

1.10 Consultation is a cornerstone of the Council's work⁵ and provides an essential source of evidence when we consider potential reforms. This project involved several overlapping consultation stages:

- From November 2021 to September 2022, we met with 20 organisations, some on multiple occasions, including courts, police, prosecutors, defence lawyers, organisations that work with victims of crime, academics and community organisations. The aim of these consultations was to identify issues and seek stakeholder views on potential areas for reform.
- In February 2022, we circulated a survey to nine organisations in the legal profession that had agreed to distribute the survey to their staff. Although there were just 25 respondents, the quality of responses was high.
- In August 2022, we released a consultation paper that included novel data on the use of adjourned undertakings and asked 23 questions about potential changes to adjourned undertakings and related orders. We then received 11 written submissions and met with a number of other organisations.
- From February to April 2023, after having developed draft options for reform, we hosted a roundtable to seek stakeholder feedback and met individually with a number of organisations.

1.11 This iterative consultation process has been instrumental in the development of our recommendations. We hope all those who took the time to share their views along the way can see how useful their contributions have been in shaping our thinking throughout this report.

5. Indeed, it is one of our statutory functions: *Sentencing Act 1991* (Vic) s 108C(1)(e).

2. Renaming adjourned undertakings

2.1 The term ‘adjourned undertaking’ has been used to describe this sentencing order since it was introduced in 1985.⁶ Both words describe the order’s nature: it is an ‘undertaking’ because it is an agreement or promise by the offender, and it is ‘adjourned’ because at some later stage a magistrate will review the offender’s behaviour during the order. Despite the technical accuracy of the terminology, we asked stakeholders whether these orders should be renamed using more accessible language, particularly given the various names for similar orders around Australia.⁷

Stakeholder views

2.2 The feedback we received was unanimous that there should be a change in terminology.⁸ Victoria Legal Aid described the term *adjourned undertaking* as ‘confusing and unfamiliar’.⁹ The Australian Community Support Organisation (ACSO) described it as ‘confusing, particularly to those ... with English as a second language’.¹⁰ And Vacro said that the terminology is not well understood by the general public.¹¹

6. *Penalties and Sentences Act 1985 (Vic)* s 83 (repealed). The legislation does not use the exact term ‘adjourned undertaking’, instead calling it a ‘release on adjournment’ (following the giving of an undertaking). However, that language was the foundation for the present standard nomenclature of ‘adjourned undertaking’.

7. *Consultation Paper* 10.

8. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 4 (Vacro); Submission 5 (Victoria Legal Aid); Submission 6 (Women and Mentoring); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

9. Submission 5 (Victoria Legal Aid).

10. Submission 2 (Australian Community Support Organisation).

11. Submission 4 (Vacro).

2.3 However, while stakeholders were unanimous in advocating change to the terminology, there was less consensus about what the new terminology should be:

- (a) **Good behaviour order:** this was the terminology preferred by ACSO, saying it was more 'straightforward'. Vacro also commended this terminology.¹²
- (b) **Good behaviour bond:** Victoria Legal Aid, the Office of Public Prosecutions, the Victorian Aboriginal Legal Service, Victoria Police and the Law Institute of Victoria all supported the term 'good behaviour bond',¹³ largely because it is how most people working in the criminal justice system already describe adjourned undertakings ('bonds'). Victoria Police argued that this term 'appropriately ... signifies the idea that it is a partnership, alliance or bond between the parties'.¹⁴ But ACSO specifically opposed the term 'good behaviour bond' because the term 'bond' is sometimes used to reference monetary bond requirements.¹⁵
- (c) **Good behaviour agreement:** Jesuit Social Services suggested that 'good behaviour agreement' might be an accessible term.¹⁶ Fitzroy Legal Service, WEstjustice and Youthlaw also jointly submitted that this term 'is more empowering ... than something that just happens' to the offender, such as an order.¹⁷
- (d) **Conditional release order:** Women and Mentoring argued that the terminology of 'good behaviour' has paternalistic undertones, and that Victoria should follow the language of 'conditional release orders' used in New South Wales and Western Australia.¹⁸

12. Submission 4 (Vacro).

13. Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police).

14. Submission 10 (Victoria Police).

15. Submission 2 (Australian Community Support Organisation).

16. Submission 7 (Jesuit Social Services).

17. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

18. Submission 6 (Women and Mentoring).

The Council's view

2.4 In our consultation paper, we expressed the preliminary view that 'good behaviour order' might be the most appropriate term to describe this sentencing order.¹⁹ In part, this terminology was designed to distinguish these orders from the good behaviour bonds already available in the Children's Court.²⁰

2.5 All but one stakeholder suggested that the order should include the term 'good behaviour'. There were, though, different views about whether the term should be good behaviour 'bond', 'order' or 'agreement'. The majority of stakeholders – especially those working in the legal system – advocated the term 'good behaviour bond', telling us that it is already common parlance, with the term 'bond' used as a shorthand. There were good reasons for their suggestion. First, this change would synchronise terminology with what is apparently already common practice. And second, it would convey that the offender has agreed to abide by the conditions of the order.

2.6 Ultimately, however, the Council was persuaded by the submissions of ACSO and Vacro that the term 'good behaviour order' is more appropriate for two reasons:

- First, even if the language is commonly used by those in the legal profession, the term 'bond' can easily be misconstrued as requiring payment of money that is forfeited upon breach, as is the case with rental bonds and bail bonds. Even within the *Sentencing Act* itself, the term 'bond' refers to 'a condition requiring an offender to pay an amount of money ... which is subject to forfeiture'.²¹ While some adjourned undertakings have financial conditions, most do not. In comparison, the term 'good behaviour order' is much less likely to be misinterpreted as requiring the payment of a sum of money.
- Second, there is already precedent in the *Sentencing Act* for describing a sentence as an 'order' despite requiring the offender to consent to it. In particular, a community correction order (CCO) cannot be imposed unless the offender agrees to it.²² As far as the Council is aware, the use of the term 'order' in this context has not caused any confusion or issues. The term 'order' also more genuinely reflects that, while the offender is consenting to the order, it is not a true power balance between equal parties negotiating terms.

19. *Consultation Paper 10*. Note that the definition of 'good behaviour' is discussed below at [4.2]–[4.10].

20. *Children, Youth and Families Act 2005* (Vic) ss 367–372.

21. *Sentencing Act 1991* (Vic) s 48JA(1).

22. *Sentencing Act 1991* (Vic) s 37(c).

Renaming adjourned undertakings

Recommendation 1: That the Victorian Government amend the *Sentencing Act 1991* (Vic) to rename adjourned undertakings as good behaviour orders.

3. Purposes of adjourned undertakings

3.1 The *Sentencing Act* provides courts with a framework of objectives to consider in deciding the most appropriate sentence in a given case. These are known as the purposes of sentencing, and they are outlined in section 5 of the *Sentencing Act*. There are also, though, additional (or supplementary) purposes, in section 70, that courts must specifically consider in deciding whether to impose an adjourned undertaking, discharge or dismissal.

3.2 Section 5(1) provides that the only purposes of sentencing in Victoria 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; or
- (f) a combination of two or more of those purposes.

3.3 In the specific context of low-end orders (adjourned undertakings, dismissals and discharges), section 70(1) then specifies that:

70. Purposes of orders under this Division

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.

- 3.4 The precise relationship between these two provisions is not immediately apparent. For instance, what should a court do if the general purposes of sentencing suggest that an adjourned undertaking is the most appropriate outcome, but (for whatever reason) none of the supplementary purposes in section 70 apply?
- 3.5 Section 70 is unique in the *Sentencing Act*. Sections 18X and 36 specify the purpose(s) of a drug and alcohol treatment order and a community correction order (CCO), but those are the purposes for which those orders are generally available, not the purposes for which a court may impose those orders in any particular case. For instance, section 36 states that '[t]he purpose of a community correction order is to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender'.²³ This guides courts in understanding the intent behind this sentencing order but does not specify the objectives that the court should be trying to achieve when sentencing in any particular case.

Revising the supplementary purposes

- 3.6 In our consultation paper, we asked whether there was a need to amend the supplementary purposes in section 70 and, if so, how.²⁴

Stakeholder views

- 3.7 Each of the stakeholders whose written submission addressed this question believed that there were some useful amendments that could be made to the supplementary purposes.²⁵ They did, though, differ in what they believed the amendments might be.
- 3.8 The Office of Public Prosecutions suggested that it would be useful to clarify that the supplementary purposes are alternatives (by adding 'or' between each of them) because, while this is largely understood in practice, it is not immediately apparent on the face of the legislation.²⁶ We heard that the provision was generally operating as intended.

23. *Sentencing Act 1991* (Vic) s 36(1).

24. *Consultation Paper* 10.

25. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 8 (Law Institute of Victoria); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

26. Submission 3 (Office of Public Prosecutions).

But we also heard that there is a view by some that adjourned undertakings are just for trivial offences, and therefore section 70 could benefit from the addition of 'or' between each of the supplementary purposes. Similarly, there was a suggestion for the introductory language of section 70 to further specify that an order can be made under this division 'for any one or more of the following purposes'.²⁷

- 3.9 The Law Institute of Victoria suggested that section 70 would benefit from a catch-all purpose, such as 'where the court is of the view that it would otherwise be in the interests of justice to do so'.²⁸ The Law Institute argued that this would 'enable courts to impose Adjourned Undertakings in a broader range of matters than the law currently permits'.²⁹ Victoria Police similarly observed that there is a catch-all provision in New South Wales that could be useful in Victoria, allowing courts to impose an adjourned undertaking after taking into account 'any other matter that the court thinks proper to consider'.³⁰
- 3.10 The Law Institute of Victoria further suggested removing the word 'trivial' from the wording of section 70 in order to 'enhance clarity and certainty in the operation of the law, and promote the use of Adjourned Undertakings in a broader range of cases'.³¹ So too did Fitzroy Legal Service, WEstjustice and Youthlaw jointly suggest replacing 'trivial, technical or minor nature' in section 70(1)(b) with 'the objective seriousness of the offending ... in order to remove the association of adjourned undertakings with only very low-level offending'.³²
- 3.11 Victoria Legal Aid further suggested that the supplementary purposes could be removed in their entirety from the *Sentencing Act* because:
- [i]n our practice experience, it is rare for reference to be made to the purposes of sentencing in the legislation as a result of the extensive list of purposes for sentencing listed in section [5] of the *Sentencing Act 1991*. We consider the purposes are already largely addressed in this section and it would be beneficial to remove [section 70] to avoid the potential for unnecessary complexity in the sentencing exercise.³³

27. Submission 3 (Office of Public Prosecutions).

28. Submission 8 (Law Institute of Victoria).

29. Submission 8 (Law Institute of Victoria).

30. Submission 10 (Victoria Police), citing *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(2)(d).

31. Submission 8 (Law Institute of Victoria).

32. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

33. Submission 5 (Victoria Legal Aid).

3.12 One of the observations we also heard from stakeholders was that, among the legal profession, there is not universal awareness about the existence of section 70.³⁴ The Law Institute of Victoria agreed that it would be useful to co-locate the supplementary purposes specific to adjourned undertakings with the general purposes of sentencing in section 5 of the *Sentencing Act*.³⁵

The Council's view

- 3.13 The Council broadly agrees with the various submissions from stakeholders that there are some amendments that could be usefully made to section 70 of the *Sentencing Act* to better facilitate the use of adjourned undertakings in appropriate cases.
- 3.14 First, while we were told that section 70 is largely interpreted as only requiring one of the purposes to be achieved in order to unlock the availability of an adjourned undertaking, this should be clarified in the legislation by (a) adding the word 'or' between the various supplementary purposes and (b) amending the introductory text to specify that an order can be made 'for any one or more of the following purposes' (or similar language). There was no opposition to these reforms at our stakeholder roundtable.³⁶
- 3.15 Second, given the principle of parsimony – both at common law and in section 5(7) of the *Sentencing Act* – it seems reasonable to read the supplementary purposes in section 70 as enabling provisions, not restrictive ones. It would seem incongruous that a court would consider an adjourned undertaking the most appropriate sentencing outcome after considering the purposes of sentencing in section 5(1) but then feel hamstrung from imposing an adjourned undertaking because (for whatever reason) none of the supplementary purposes in section 70 seemed to apply. Further, while acknowledging that this is most likely how the provision operates in practice, it would be useful to expressly include a catch-all provision at the end of the supplementary purposes (such as 'any other purpose the court considers appropriate in the circumstances'). While these supplementary purposes may, as Victoria Legal Aid observed, add some 'complexity [to] the sentencing exercise', they serve a useful function in encouraging the use of adjourned undertakings.

34. Some of these comments were made by stakeholders in a confidential context; however, this was supported in our meeting with the Law Institute of Victoria: Meeting with Law Institute of Victoria (28 February 2023).

35. Meeting with Law Institute of Victoria (28 February 2023).

36. Stakeholder Roundtable (16 February 2023).

- 3.16 Third, we agree with the Law Institute of Victoria and Fitzroy Legal Service, WEstjustice and Youthlaw that the language of ‘trivial’ and ‘technical’ in section 70(1)(b) is not ideal. There has been a growing trend away from describing certain crimes as ‘technical’ offences.³⁷ And if the offending was indeed ‘trivial’, then this raises questions about the exercise of prosecutorial discretion to lay criminal charges in the first place. The term ‘minor offending’ seems sufficient on its own to capture the intent of that supplementary purpose. Attendees at our roundtable were broadly supportive of removing the words ‘trivial’ and ‘technical’ from the provision.³⁸
- 3.17 Finally, we see merit in relocating the supplementary purposes of adjourned undertakings (and dismissals/discharges) to co-locate them with the general purposes of sentencing in section 5. It is a key tenet of legislative drafting that ‘[p]oor organisation may obscure underlying principles’ and that, as such, ‘[t]he text should be structured according to the interests and priorities of the readers’.³⁹ It would be unsurprising to hear that busy or junior practitioners, and especially non-lawyers, would not expect additional purposes of sentencing to appear elsewhere in the *Sentencing Act* when section 5(1) begins ‘[t]he *only* purposes for which sentences may be imposed...’.⁴⁰ To overcome the apparent tension and overlap between the two provisions, they could be co-located, which may be a useful way of clarifying how they are designed to interact. One possible strategy in relocating the provisions (or even in not relocating them) could be to reframe them as a non-exhaustive list of factors (rather than as ‘purposes’) that courts should consider in deciding whether to impose an adjourned undertaking (or discharge/dismissal). This would equally resolve the current tension between sections 5 and 70, insofar as section 5(1) states that these are the ‘*only*’ purposes of sentencing, whereas section 70 seems to offer additional purposes in a specific context.

37. See, for example, Anastasia Powell and Nicola Henry, ‘Policing Technology-Facilitated Sexual Violence Against Adult Victims: Police and Service Sector Perspectives’ (2018) 28(3) *Policing and Society* 291, 301 (criticising the use of the term ‘technical’ in the context of breaches of family violence intervention orders).

38. Stakeholder Roundtable (16 February 2023).

39. Law Reform Commission of Victoria, *Plain English and the Law*, Report 9 (1987) [52]. See also Australian Government, Office of Parliamentary Counsel, *Plain English Manual* (2013) 25: ‘Even when the words and sentences in a Bill are clear, it’s more difficult to understand if the provisions aren’t properly arranged’.

40. *Sentencing Act 1991* (Vic) s 5(1) (emphasis added).

Purposes of adjourned undertakings

Recommendation 2: That section 70 of the *Sentencing Act 1991* (Vic) be amended to clarify that a court may impose an adjourned undertaking for any one or more of the listed purposes, and to include a catch-all provision enabling courts to impose an adjourned undertaking for any other purpose it considers appropriate in the circumstances.

Recommendation 3: That section 70(1)(b) of the *Sentencing Act 1991* (Vic) be amended to remove the words ‘trivial’ and ‘technical’.

Recommendation 4: That the current content of section 70 of the *Sentencing Act 1991* (Vic) be co-located with the general purposes of sentencing in section 5.

4. Conditions of adjourned undertakings

4.1 There are two mandatory conditions that must be attached to all adjourned undertakings in Victoria: the offender must (1) attend court if required and (2) be of good behaviour during the period of the adjourned undertaking.⁴¹ In addition, the court may include any other conditions it deems appropriate.⁴² This chapter considers potential reforms to the mandatory and optional conditions that can be attached to adjourned undertakings.

The requirement to be of good behaviour

4.2 All adjourned undertakings require the offender to be of good behaviour during the period of the order.⁴³ The term 'good behaviour' is not currently defined in the *Sentencing Act* or elsewhere. During preliminary consultation, several stakeholders raised concerns with the lack of definition, particularly given that offenders can be prosecuted for failing to comply with this condition and/or resentenced for their original offending. We therefore asked in our consultation paper whether there is a need to clarify the definition of 'good behaviour' in sections 72 and 75 of the *Sentencing Act*.⁴⁴

Stakeholder views

4.3 Submissions from stakeholders were unanimous in advocating a definition for 'good behaviour'.⁴⁵ Jesuit Social Services observed that the lack of definition 'can contribute to a subjective interpretation of what constitutes a breach of this condition'.⁴⁶ And the Office of Public Prosecutions provided examples of behaviours that had been considered potential breaches of adjourned undertakings but had not been prosecuted, such as:

- police attendance for a disturbance at the offender's residence, with no offence detected and no further action taken; and
- the granting of an intervention order against the offender.⁴⁷

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

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

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

44. *Consultation Paper* 42.

45. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

46. Submission 7 (Jesuit Social Services).

47. Submission 3 (Office of Public Prosecutions).

- 4.4 The Law Institute of Victoria cautioned that ‘any definition [of good behaviour] should not attempt to comprehensively define what the term means ... it should set the minimum standard’.⁴⁸
- 4.5 The Australian Community Support Organisation (ACSO) and the Office of Public Prosecutions favoured defining ‘good behaviour’ as not committing an offence punishable by a term of imprisonment.⁴⁹ This would mirror the approach to community correction orders (CCOs).⁵⁰ In a similar vein, the Law Institute of Victoria submitted that good behaviour should mean ‘not commit[ting] any further, non-trivial offences ... includ[ing] traffic infringements’.⁵¹ And Fitzroy Legal Service, WEstjustice and Youthlaw submitted a number of ways to potentially narrow the current definition, such as ‘only includ[ing] indictable and family violence-related offences’, or ‘exclud[ing] any offence that has a lesser penalty than the offence in relation to which an adjourned undertaking was originally imposed’.⁵²
- 4.6 Most stakeholders therefore favoured a relatively high threshold for the ‘good behaviour’ condition.
- 4.7 Some stakeholders, however, observed that a quarter of adjourned undertakings are imposed in cases where the most serious offence is a traffic-related offence,⁵³ and that when courts impose an adjourned undertaking, they expect that any similar behaviour by the offender would constitute a breach of the condition to be of good behaviour. Many offences in the *Road Safety Act* and related regulations have a maximum penalty of a fine⁵⁴ and would not be captured by a definition limiting ‘good behaviour’ to offences punishable by a term of imprisonment.
- 4.8 At our stakeholder roundtable, there was general support for defining good behaviour as ‘not committing a further offence’, with one participant noting that this was ‘better than not having a definition’ and another participant noting that this would make communication with offenders easier because ‘half the challenge is communicating to the client what good behaviour means’.⁵⁵

48. Submission 8 (Law Institute of Victoria).

49. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions). ACSO also suggested that good behaviour could include compliance with the other conditions of the adjourned undertaking.

50. *Sentencing Act 1991* (Vic) s 45(1)(a): ‘the offender must not commit ... an offence punishable by imprisonment’.

51. Submission 8 (Law Institute of Victoria).

52. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

53. *Consultation Paper* 21–22.

54. That is, offences for which the maximum penalty is a specified number of penalty units, meaning a term of imprisonment cannot be imposed: *Sentencing Act 1991* (Vic) s 111.

55. Stakeholder Roundtable (16 February 2023).

The Council's view

- 4.9 We have reached the view that good behaviour should be defined simply as to not commit another offence, rather than limiting it to offences punishable by a term of imprisonment.
- 4.10 We share the concern raised by some stakeholders that this definition does not preclude the possibility of minor regulatory offences (such as parking infringements) constituting a breach of the condition to be of good behaviour. We do, though, believe that the combination of prosecutorial and judicial discretion would mean that minor regulatory offences would be unlikely to be operationalised in that way. And, importantly, there are thousands of offenders subject to adjourned undertakings for driving-related behaviours each year, and it is critical that they understand that engaging in similar behaviour could result in them being resentenced for the original offending. While many drink-driving, drug-driving or speeding offences can result in imprisonment for second or subsequent offences, some do not and would not constitute a breach if 'good behaviour' was defined as not committing offences punishable by imprisonment.⁵⁶ Moreover, while some second or subsequent offences do carry a potential prison term, if the second driving offence is different from the first offence (for example, speeding and then drink-driving), the maximum penalty could still be a fine and therefore not breach the condition to be of good behaviour.
- 4.11 We do, however, want to reiterate that this recommendation for a relatively broad definition of 'good behaviour' is conditional on the implementation of our later recommendation that the specific offence of breaching an adjourned undertaking be repealed (see Chapter 6). That way the only potential consequences of committing a further offence would be to be resentenced for the original offending or to have the adjourned undertaking varied. The offender could not be prosecuted for a distinct breach offence.

Defining 'good behaviour'

Recommendation 5: That the *Sentencing Act 1991 (Vic)* be amended to specify that for the purpose of the condition to be of good behaviour during the period of an adjourned undertaking, good behaviour means 'not committing a further offence'.

56. See, for example, *Road Safety Act 1986 (Vic)* ss 49(3AAA)(b)–(c), referring to the applicable penalties for second and subsequent offences contrary to sections 49(1)(bb), (eb), (h) and (i).

Justice plan conditions

- 4.12 A justice plan condition can be attached to both adjourned undertakings⁵⁷ and CCOs.⁵⁸ It is one of the few express conditions that the *Sentencing Act* specifies can be attached to an adjourned undertaking. It requires someone with an intellectual disability (as defined in the *Disability Act 2006* (Vic)) to participate in services for a period of up to two years. In our consultation paper, we found that 0.4% of adjourned undertakings imposed in 2019 and 2020 included a justice plan condition (92 adjourned undertakings).⁵⁹
- 4.13 Justice plans were perceived favourably by most of the stakeholders we consulted. For instance, Victoria Legal Aid wrote that:

[a]djourned undertakings with justice plan conditions attached are an important and effective sentencing option for people with intellectual disabilities. In our experience, because ordering an assessment for a justice plan triggers engagement with disability services it can ensure people receive targeted specialist treatment that they may not have otherwise been able to access. It also supports people to navigate the National Disability Insurance Scheme, which many of our clients find extremely difficult. In addition, the use of justice plans as a condition of an adjourned undertaking can reduce a person's engagement with multiple agencies and unnecessary contact with the criminal justice system.⁶⁰

Stakeholder concerns about justice plans

- 4.14 While justice plans are generally perceived favourably, stakeholders raised several issues as well. One persistent issue is that the definition of 'intellectual disability' – a precondition to the imposition of a justice plan – is very narrow. As one stakeholder explained early in our consultations:

justice plans are limited because there has to be that declaration of intellectual disability ... if your client hasn't been identified as having an intellectual disability from an early age, such as no involvement, no historical information, often the person who does have the intellectual disability goes under the radar.⁶¹

57. *Sentencing Act 1991* (Vic) ss 3(1)(b) (definition of justice plan condition), 72(3), 75(3), 80(1)(b).

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

59. *Consultation Paper* 44.

60. Submission 5 (Victoria Legal Aid).

61. Meeting with Law Institute of Victoria (15 December 2021). See also Submission 5 (Victoria Legal Aid) ('We are also of the view that the court should be able to order a justice plan for all people with a disability'); Submission 10 (Victoria Police) ('VP supports broadening the eligibility criteria for justice plans. Limiting justice plans only to persons with intellectual disabilities may not support community safety as robustly as possible').

4.15 Stakeholders also raised concerns about the current timeframes for the preparation of justice plans. As we identified in our consultation paper, the preparation of a justice plan requires an initial target group assessment (an assessment of whether the offender meets the diagnostic criteria for an intellectual disability) and then the preparation of a justice plan; both processes have an estimated six-week timeframe.⁶² Victoria Legal Aid observed that these timeframes can lead to a 'standard waiting time for justice plans' of about '12 weeks':

This delay can lead to people experiencing anxiety due to court proceedings being prolonged and result in delays in receiving services. Additional resourcing to reduce the period for preparation would promote quicker connection to supports that address a person's needs and reduce the risk [of] a delay leading to disengagement from services.⁶³

4.16 In correspondence with the Council, the Department of Families, Fairness and Housing (DFFH) noted that there is currently just one psychologist in Victoria who completes target group assessments, and then a few dozen disability justice coordinators who prepare the plan of available services (among the various other aspects of their role).⁶⁴ While DFFH advised that there is currently a 'very productive individual in the role' of conducting target group assessments, they agreed that not having contingency measures 'poses potential critical risks for timelines'.⁶⁵ They also explained that the six-week timeframe is often important to the preparation of a justice plan, including that:

it provides an opportunity to meet with the client at least once, but ideally a couple of times, to build rapport, gauge their likelihood of complying, assess their attitude towards the offending behaviour, gather information, and involve them in developing their plan ...

Part 2 of the *Disability Act* stipulates that people with a disability have a right to participate actively in the decisions that affect their lives[.]⁶⁶

4.17 DFFH was therefore keen not to create unrealistic expectations by reducing the anticipated six-week timeframe for the development of a justice plan,⁶⁷ particularly when it can sometimes be difficult to coordinate meetings with the offender, or if the offender does not show up to appointments.⁶⁸ DFFH did, however, suggest that the process could be sped up by improved information-sharing systems and 'the addition of forensic disability staff at courts who can act as liaison'.⁶⁹

62. Consultation Paper 56.

63. Submission 5 (Victoria Legal Aid).

64. Email from Department of Families, Fairness and Housing to Sentencing Advisory Council (15 March 2023).

65. Email from Department of Families, Fairness and Housing to Sentencing Advisory Council (15 March 2023).

66. Email from Department of Families, Fairness and Housing to Sentencing Advisory Council (15 March 2023).

67. Meeting with Department of Families, Fairness and Housing (21 February 2023).

68. See, for example, *Re Chatters* [2017] VSC 2, [16].

69. Email from Department of Families, Fairness and Housing to Sentencing Advisory Council (15 March 2023).

Victoria Police also raised the possibility that ‘program suitability assessments’ could be conducted ‘prior to hearing dates’, which ‘may provide additional support to accused people’.⁷⁰

- 4.18 We were also told that another barrier to the use of justice plans is that there is a ‘lack of awareness among the legal profession and courts around the availability of justice plans as part of adjourned undertakings, not just CCOs’.⁷¹

The Council’s view

- 4.19 The restrictive eligibility criteria for justice plans are beyond the scope of the present review of adjourned undertakings.⁷²
- 4.20 We did, though, consider the current timeframes for target group assessments and the preparation of justice plans to be within scope, as these timelines directly affect the ability of offenders to access relevant services as part of their adjourned undertaking. In particular, 12 weeks seems like a significant amount of time for some offenders to potentially wait to begin accessing services if a court believes a justice plan could be appropriate. There can be good reasons for those timeframes in many cases, such as DFFH staff building a rapport with the client or experiencing difficulties in coordinating a meeting with them. However, DFFH also agreed that there may be potential opportunities to speed up those processes in appropriate cases. We therefore recommend that DFFH explore opportunities to promote more efficient processing of target group assessments and preparation of justice plans in appropriate cases. This recommendation received unanimous support when presented at our roundtable.⁷³

70. Submission 10 (Victoria Police).

71. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

72. This is partly beyond scope because any changes to justice plans would have a broader impact on people subject to CCOs than they would on people subject to adjourned undertakings. In our previous research, we found that there are about 200 justice plans attached to CCOs each year, compared to 59 justice plans attached to adjourned undertakings: Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) 13, 17; *Consultation Paper* 44. But also there have been multiple reviews over the last 20 years recommending an expansion of the restrictive eligibility criteria for justice plans, and our voice would add little to those efforts: Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Report* (2003) 126–127; 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; 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; 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; Department of Families, Fairness and Housing, *Review of the Disability Act 2006: Consultation Paper* (2021) 36–37, 62; Parliament of Victoria, *Legal and Social Issues Committee, Inquiry into Victoria’s Criminal Justice System* (2022) 559–560.

73. Stakeholder Roundtable (16 February 2023).

Justice plans

Recommendation 6: That the Department of Families, Fairness and Housing, in appropriate cases, support more efficient processing of target group assessments and the preparation of justice plans.

4.21 We were also concerned to hear that there might not be full awareness of the availability of justice plans as a condition of adjourned undertakings. Later in this report, we recommend that judicial officers receive training on the conditions of adjourned undertakings – that training should include reference to the availability of justice plans as conditions of adjourned undertakings.

Payment conditions

4.22 In our consultation paper, we discussed the two primary ways that a condition to make a payment is usually attached to an adjourned undertaking.⁷⁴ These are:

- requiring the offender to make a donation *directly* to ‘an organisation that provides a charitable or community service’; or
- requiring the offender to make a donation *indirectly* ‘to the court for payment to such an organisation’ (this is known as the Court Fund).

4.23 These payment conditions are distinct from ancillary orders – such as costs orders,⁷⁵ restitution orders and compensation orders – that are not part of the adjourned undertaking itself.⁷⁶ Instead, these are conditions of the adjourned undertaking, and failure to pay can constitute a breach (making it possible that the offender could be prosecuted for a breach offence and/or resentenced for the original offence).

74. There is most likely no substantive difference, but section 72(2)(c) of the *Sentencing Act 1991* (Vic) allows courts to attach any ‘condition’ to the undertaking, whereas section 75(2)(c) allows courts to attach any ‘special condition’.

75. While section 85K of the *Sentencing Act 1991* (Vic) creates a default presumption that each party to a criminal proceeding ‘must bear their own costs’, this is also ‘unless the court otherwise determines’, giving the court full discretion. Similarly, section 131(1) of the *Magistrates Court Act 1989* (Vic) provides that ‘the Court has full power to determine by whom, to whom and to what extent ... costs are paid’. And finally, section 401(1) of the *Criminal Procedure Act 2009* (Vic) specifies that ‘the costs of, and incidental to, all criminal proceedings in the Magistrates’ Court are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent the costs are to be paid’. As an indicator of the prevalence of costs in these cases, there was \$120,000 in costs awarded ancillary to adjourned undertakings in 2019: *Consultation Paper 58*.

76. Restitution and compensation orders are discussed in more detail in Chapter 7.

- 4.24 Following feedback from stakeholders during preliminary consultation, we posed three questions relating to the payment conditions attached to adjourned undertakings:
- Should courts continue to be permitted to attach payment conditions to adjourned undertakings at all?
 - If so, should courts continue to be permitted to order donations to specific charities (or types of charities)?
 - Should there be more transparency in how the Court Fund operates?⁷⁷
- 4.25 One of the reasons we asked whether payment conditions should continue to be available for adjourned undertakings is that these conditions are functionally very similar to a fine, except that the money is directed to a different place. Indeed, the Supreme Court in 2013 found that payment conditions for an adjourned undertaking were so similar to a fine that they were rendered impermissible,⁷⁸ because it conflicted with the principle of parsimony to permit a pecuniary penalty for a sentence less severe than a fine. Parliament quickly enacted legislation to clarify that payment conditions were nevertheless allowed.⁷⁹ We also heard from many stakeholders during early consultations that payment conditions disproportionately affect people with lower incomes.
- 4.26 There are then two reasons we asked whether courts should continue to be able to order donations to specific charities (or types of charities). First, individual magistrates' choices were affecting which charities receive the donations.⁸⁰ And second, while the offender must provide the court with a copy of the receipt as proof of payment, they nevertheless retain proof of the donation and can claim it as a tax deduction, which disproportionately benefits people with higher incomes.
- 4.27 Finally, the reason we asked whether there should be more transparency in the Court Fund is that there is very limited publicly available information about how much money is ordered to be paid into the Court Fund each year, how much is actually paid and how decisions about distributions are made or to which organisations funds are paid.

77. *Consultation Paper* 47–54.

78. *Brittain v Mansour* [2013] VSC 50, [50]–[51].

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

80. *Consultation Paper* 49–52.

Stakeholder views

4.28 One of the overwhelming themes to emerge from the submissions we received was that monetary conditions disproportionately affect people with lower incomes and can risk further entrenching them in a cycle of poverty and engagement with the criminal justice system. For example:

[M]onetary conditions are regressive and discriminate against those who are financially disadvantaged.

Submission 4 (Vacro)

The imposition of monetary penalties or mandated donations can be particularly costly for marginalised communities and people already experiencing disadvantage.

Submission 10 (Victoria Police)

Having to pay a fine or donation to a charitable organisation may add an additional burden to some of our most vulnerable community members, and further entrench them in cycles of offending or poverty.

Submission 6 (Women and Mentoring)

The imposition of a monetary penalty can add to the burden of people already experiencing financial pressure and disproportionately impact those of lower socioeconomic groups.

Submission 7 (Jesuit Social Services)

Failure to pay will be seen as being non-compliant and this places many people who are already experiencing financial distress in even further distress[.]

Submission 2 (Australian Community Support Organisation)

[W]e consider it important for judicial officers to be equipped with the tools to appropriately identify the potential impacts of requiring financial contributions ... This will ensure those experiencing financial stress are not being disproportionately impacted[.]

Submission 5 (Victoria Legal Aid)

4.29 The Victorian Aboriginal Legal Service further observed that an inability to comply with a payment condition can sometimes result in a person receiving a more severe sentence:

In many cases our clients cannot afford the financial burden of paying a financial penalty. As such, there have been circumstances where despite an adjourned undertaking being the most appropriate sentence for a client, the client may instruct their lawyer to accept a more severe penalty, like a Community Correction Order (CCO), because they do not have the financial ability to accept a financial condition, whereas they may have the ability or time to engage with the conditions of a CCO. Clients may also instruct their lawyer to accept a fine rather than an undertaking with a charitable donation condition, because a person who receives a fine can apply to the court to have the fine converted into unpaid community work hours. This option is not available for an adjourned undertaking ... A person should not receive a more serious sentence because they have a lower income.⁸¹

4.30 Despite these concerns, many stakeholders nevertheless remained of the view that payment conditions of adjourned undertakings remained appropriate in some cases.⁸² In part, a payment condition can be a punitive element of the sentence and therefore reduce the need for the court to record a conviction or impose a more severe sentence. And in part, a donation can demonstrate remorse, especially if the charity is somehow linked to the offending (for example, a donation to a women's shelter in a family violence case or to a road trauma charity for driving offences). The importance of a nexus between the offending and the selected charity was highlighted by multiple stakeholders. The Victorian Aboriginal Legal Service, for instance, wrote that:

Though the *Sentencing Act* does not specifically require charitable donation conditions to be relevant in some way to the offending, it is well accepted in practice the conditions attached to the offending should be both rehabilitative in nature and address themes of the offending.⁸³

4.31 Stakeholders had mixed views about whether courts should be able to order direct donations to charities. The Office of Public Prosecutions and the Law Institute of Victoria considered it important to maintain a nexus between the offending behaviour and the charity receiving the funds.⁸⁴

81. Submission 9 (Victorian Aboriginal Legal Service).

82. Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 8 (Law Institute of Victoria); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

83. Submission 9 (Victorian Aboriginal Legal Service).

84. Submission 3 (Office of Public Prosecutions); Submission 8 (Law Institute of Victoria). The Office of Public Prosecutions and Law Institute of Victoria did, though, suggest restricting payments to registered charities. Other organisations also supported the importance of a nexus between donations and the offending, without necessarily advocating the retention of donations to specific charities: Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police).

ACSO, on the other hand, observed that donations made directly to charities have a larger impact on people with lower incomes, due to the donations being tax deductible.⁸⁵ Similarly, the Victorian Aboriginal Legal Service described it as 'unconscionable that people who have the financial means ... are able to ultimately benefit from the donation'.⁸⁶

- 4.32 ACSO and the Law Institute of Victoria further agreed with the observation in our consultation paper that there seemed to be an issue with which organisations receive charitable donations.⁸⁷ ACSO noted that 'less than 200 groups [were] nominated' to receive charitable donations in 2019 and 2020, but there are 'more than 20,000 charitable org[anisation]s in Victoria'.⁸⁸
- 4.33 If charitable donation conditions remain a feature of adjourned undertakings, stakeholders largely preferred that donations were exclusively made to the Court Fund so long as there was improved transparency in the Court Fund's operation.⁸⁹ ACSO suggested that there should be 'an undertaking by the courts to audit the funds annually'.⁹⁰ The Law Institute of Victoria considered it 'imperative' that 'the Court Fund properly account for payments from the Court Fund to demonstrate their legal regularity' and 'to better perform a reparative effect by allowing the offender to understand where the donation is going'.⁹¹ The Victorian Aboriginal Legal Service recommended that the Magistrates' Court publish annual reports on the management and disbursement of donations made to the Court Fund.⁹² Fitzroy Legal Service, WEstjustice and Youthlaw cited examples where a failure to explain how the Court Fund operates led to 'a mistaken assumption that the money [would] be used to fund the court itself'.⁹³ And Victoria Police wrote that 'transparency would provide offenders insight into how their donation is helping ... [g]reater transparency in Court Fund operations may also be appropriate due to the significant volume of money moving through it'.⁹⁴

85. Submission 2 (Australian Community Support Organisation).

86. Submission 9 (Victorian Aboriginal Legal Service).

87. See, for example, Submission 2 (Australian Community Support Organisation); Submission 8 (Law Institute of Victoria).

88. Submission 2 (Australian Community Support Organisation); *Consultation Paper* 50–51.

89. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

90. Submission 2 (Australian Community Support Organisation).

91. Submission 8 (Law Institute of Victoria).

92. Submission 9 (Victorian Aboriginal Legal Service).

93. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

94. Submission 10 (Victoria Police).

- 4.34 Some stakeholders further observed that courts are not currently required to consider the financial circumstances of an offender in deciding whether to impose a payment condition of an adjourned undertaking and, if so, the value of that payment. In almost every scenario where the *Sentencing Act* currently anticipates that an offender will be required to pay a sum of money, there is an obligation on the court to consider ‘the financial circumstances of the offender’. This is the case for bond conditions of CCOs (section 48J), fines (section 52), superannuation orders (section 83F), compensation orders (sections 85H and 86), recovery of victims of crime compensation (section 87A) and cost recovery orders (section 87J). But the same is not true for adjourned undertakings.
- 4.35 In that context, many stakeholders were supportive of amending the *Sentencing Act* to specify that courts should take an offender’s financial circumstances into account when deciding whether to impose a charitable donation condition and the value of that donation.⁹⁵ ACSO ‘strongly suggest[ed]’ this reform,⁹⁶ the Law Institute of Victoria described it as ‘imperative’,⁹⁷ Victoria Legal Aid said in their experience ‘insufficient consideration’ is currently given to the effect of financial penalties with adjourned undertakings,⁹⁸ and the Victorian Aboriginal Legal Service said that in their experience ‘financial conditions ... are rarely, if ever, considered in light of the person’s financial situation’.⁹⁹

The Council’s view

- 4.36 There are four interrelated issues concerning payment conditions. The first is whether courts should continue to be able to order charitable donation conditions at all when imposing adjourned undertakings. We were persuaded that these conditions can constitute a punitive component of the sentence and potentially avoid the need for a more severe sentence type or the recording of a conviction. It is clearly also very common practice (about 30% of adjourned undertakings in 2019 and 2020 had a payment condition attached), and as we said at the outset of this report, we do not want to fix what isn’t broken. A major reform such as prohibiting payment conditions would require both a good reason and significant stakeholder support.

95. Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw); Stakeholder Roundtable (16 February 2023).

96. Submission 2 (Australian Community Support Organisation).

97. Submission 8 (Law Institute of Victoria).

98. Submission 5 (Victoria Legal Aid).

99. Submission 9 (Victorian Aboriginal Legal Service).

- 4.37 Moving to the second issue, we do not believe that conditions requiring offenders to make direct donations to specific charities (or types of charities) should continue to be permissible. While many stakeholders raised the perceived value of a nexus between offending and the type of charity receiving the money, this did not outweigh the countervailing considerations. Direct donations disproportionately affect people with lower incomes who would not receive the same level of deduction (if any). We found that the charities receiving the donations are often not related to the offending. We found that certain charities are more prominent at particular Magistrates' Court locations, even if the charity is not linked geographically to the court location. And in some cases, the chosen charity can even be antithetical to the purposes of sentencing. For example, we were told in consultation that ordering an offender to make a donation to a police-related charity, when one or more of the offences were committed against a police officer, can further fracture the offender's perception of, and relationship with, police, rather than serving a reparative function.¹⁰⁰
- 4.38 As such, we have reached the view that financial conditions should be limited to payments to the Court Fund. This leads to our third issue in relation to payment conditions. There is very little publicly available information about the Court Fund, such as how much money it receives each year, how decisions about distribution are made and how that money is eventually distributed. Given that the Court Fund received over \$2 million in 2019,¹⁰¹ that is a significant amount of money received by a public entity that is not currently accounted for. Further, while the Magistrates' Court provided us with a copy of the form to request funding from the Court Fund, that form was not – until very recently¹⁰² – publicly available online, which made it difficult for charitable organisations to be aware of the Court Fund as a potential source of funding. We therefore recommend that the Magistrates' Court review how to improve the operation, governance and transparency of the Court Fund. As a related benefit, increased transparency in the Court Fund would also allow courts to explain to offenders how charitable donation conditions are typically used. Courts could then, using a family violence case as an example, explain that a certain percentage of the Court Fund each year funds domestic violence charities.

100. Meeting with Fitzroy Legal Service (26 September 2022). These observations are borne out by our finding that the Victoria Police Blue Ribbon Foundation was the fourth most common charity or organisation that offenders who received adjourned undertakings were ordered to make a donation to in 2019 and 2020 (88 donations totalling \$60,000): *Consultation Paper* 51.

101. *Consultation Paper* 53–54.

102. Magistrates' Court of Victoria, 'Court Fund' (mcv.vig.gov.au, 2023).

4.39 The fourth and final issue is that the *Sentencing Act* does not currently require courts to consider a person's financial circumstances in deciding whether to order a payment condition, the value of a payment and how payment is to be made. We heard mixed views from stakeholders about whether courts are nevertheless generally making these enquiries despite the absence of this legislative requirement. It is, though, concerning to hear both Victoria Legal Aid and the Victorian Aboriginal Legal Service raise concerns that there are cases where such enquiries are not taking place. It would therefore be both practically and symbolically useful – and consistent with other sentencing dispositions – to amend the *Sentencing Act* to require courts to consider a person's financial circumstances before attaching a payment condition to an adjourned undertaking. This recommendation, we note, extends beyond conditions requiring donations to the Court Fund and would equally apply to courts deciding, for example, whether to order participation in a certain rehabilitation program and/or whether the offender should bear the cost of participating in a program (see [4.73]).

Payment conditions

Recommendation 7: That the *Sentencing Act 1991* (Vic) be amended to limit payment conditions (if any) of adjourned undertakings to contributions to the Court Fund.

Recommendation 8: That the Magistrates' Court review how to improve the operation, governance and transparency of the Court Fund.

Recommendation 9: That the *Sentencing Act 1991* (Vic) be amended to require courts to consider the financial circumstances of the offender in deciding which optional conditions (if any) to attach to an adjourned undertaking (for example, whether to order a payment to the Court Fund and, if so, the amount of such payment).

Guidance about conditions

- 4.40 In addition to the two mandatory conditions that are attached to all adjourned undertakings,¹⁰³ courts can include any other conditions they deem appropriate.¹⁰⁴ There is little guidance in the *Sentencing Act* about the additional conditions that courts may attach to adjourned undertakings, except that they can include charitable donation conditions¹⁰⁵ and/or justice plan conditions.¹⁰⁶ This broad flexibility allows courts to tailor conditions to the circumstances of the offending and the offender.
- 4.41 Using a machine learning model, we examined the optional conditions attached to almost 25,000 adjourned undertakings in 2019 and 2020 and presented the results of that analysis in our consultation paper.¹⁰⁷ Almost half of all adjourned undertakings (47%) had no optional conditions. The most common optional conditions were charitable donations, either paid to the Court Fund (24% of adjourned undertakings) or paid directly to a charity (7%); commencing or continuing with medical or mental health treatment of some sort (15%); participating in a driver education course (5%); participating in an anger management course or a men's behaviour change program (6%); and participating in substance abuse treatment (4%).
- 4.42 Even among these more common conditions, we identified some issues with their nature and wording in some cases. For instance, many adjourned undertakings required the offender to 'continue to see Dr [name]', without specifying what the offender should do if that treating doctor became unavailable for some reason (for example, if the doctor retired or moved interstate). It may be implied that the offender can see an alternative practitioner if circumstances require, but this is not immediately apparent, and the uncertainty could cause undue anxiety to the offender subject to the condition. It was also common for an adjourned undertaking to require the offender to comply with other court orders in place, such as bail or family violence orders. But adherence to those orders is already required by law, and these cross-referencing conditions can create an unnecessarily complex web of consequences for individual breach behaviours.

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

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

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

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

107. *Consultation Paper* 43–44.

4.43 There were also many bespoke conditions that seemed to be tailored to the specific circumstances of the case, and some of these raised concerns about either their nature or their wording. As just some examples:

- One condition required the offender to *successfully* obtain their driver licence. What if, despite their best efforts, they repeatedly fail the test?
- One condition required a young offender to ‘read up on the cost to the community of graffiti’. What amount of reading would satisfy this condition?
- One condition required the offender to ‘consider’ volunteering at a men’s shed. Is a passing thought sufficient?

4.44 We therefore asked in our consultation paper whether there was a need for guidance about the optional conditions that can be attached to adjourned undertakings.

Stakeholder views

4.45 First and foremost, stakeholders identified the flexibility in the conditions of adjourned undertakings as the primary strength of this sentencing order and opposed any reform that would interfere with that flexibility:

[A]djourned undertakings provide a flexible, problem-solving approach to sentencing. They are an essential tool to help address the underlying causes and risk factors for offending in a proportionate way, as the conditions of an order can be tailored to the needs of each person.

Submission 5 (Victoria Legal Aid)

[A]djourned undertakings ... connect people with programs and allow the conditions placed on the order to be tailored to each person.

Submission 7 (Jesuit Social Services)

[A]djourned undertakings are one of the most critical sentencing options available to our client base. This is because of the flexibility permitted under this disposition for the court to consider a broad range of circumstances and underlying causes in tailoring a sanction that can be supportive whilst reflecting the admonishment of the court.

Submission 11 (Fitzroy Legal Service, WEStjustice and Youthlaw)

- 4.46 Stakeholders also told us, however, that the nature and wording of conditions are sometimes less than ideal, especially if conditions are unrealistic or unclear (which can negatively affect the offender's ability to understand and comply with conditions).¹⁰⁸
- 4.47 The Office of Public Prosecutions noted that there is sometimes a 'lack of clarity' in conditions and that '[d]ifficulties often arise in relation to the scope of the condition and what constitutes compliance or a breach'.¹⁰⁹
- 4.48 Victoria Police also raised concerns about conditions that are not sufficiently clear, citing the example of a condition requiring 'regular contact with a Centrelink worker':
- There is no definition of 'regular' in context, nor an understanding of what the purpose of the contact is. This ambiguity is particularly difficult for culturally and linguistically diverse people to navigate as assumed meanings of certain terms or phrases do not or may not translate accordingly.¹¹⁰
- 4.49 Several stakeholders further raised concerns that there is often insufficient detail about what offenders should do if circumstances change and compliance with the condition is no longer possible or reasonable.¹¹¹
- 4.50 Fitzroy Legal Service, WEstjustice and Youthlaw also raised concerns about conditions requiring abstinence from substance use, because recovery from substance abuse is a process that typically involves two steps forward and one step back.¹¹² They argued that it is not reasonable to expect perfect compliance, and punishing predictable relapses along the way will only impede the offender's rehabilitation. It is for this reason, for example, that the specialist Drug Court in Dandenong tolerates positive urinalysis tests during the life of a drug and alcohol treatment order.¹¹³ It is more realistic to expect a *reduction* in substance use, rather than complete abstinence.

108. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

109. Submission 3 (Office of Public Prosecutions).

110. Submission 10 (Victoria Police).

111. Submission 2 (Australian Community Support Organisation); Submission 9 (Victorian Aboriginal Legal Service).

112. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

113. See, for example, KPMG, *Evaluation of the Drug Court of Victoria: Final Report* (2014) 59–60.

4.51 Collectively, stakeholders considered three potential forms of guidance that could be provided to courts in relation to the setting of optional conditions:

- **List of conditions:** most stakeholders opposed the inclusion of a list of optional conditions in the *Sentencing Act* because it could result in an ‘overloading’ of unnecessary conditions.¹¹⁴
- **Relevant considerations:** there was support for some form of guidance – especially legislative guidance – about the relevant considerations (for example, parsimony and proportionality) that courts should take into account in deciding which conditions to attach to an adjourned undertaking.¹¹⁵
- **Wording:** there was also considerable support for some model wording (capable of being modified as needed) of some of the most common optional conditions, particularly via the *Victorian Sentencing Manual*.¹¹⁶

4.52 Victoria Legal Aid offered some potential legislated principles that courts could consider in deciding which conditions to impose; many of these principles were mentioned and supported by other stakeholders as well:

- conditions should be proportionate to the offending;
- conditions should be no more restrictive than is required to meet the sentencing purposes set out in the *Sentencing Act*;
- conditions should only be imposed if they are capable of being fulfilled within the duration of the order; and
- conditions should reasonably relate to the purposes of imposing the order.¹¹⁷

114. Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria). The one exception here was Victoria Police, who observed that NSW legislation includes ‘broad and inclusive condition categories’ that could be useful: Submission 10 (Victoria Police), citing *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2).

115. Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid); Submission 7 (Jesuit Social Services); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Stakeholder Roundtable (16 February 2023); Meeting with Law Institute of Victoria (28 February 2023).

116. Submission 5 (Victoria Legal Aid); Submission 7 (Jesuit Social Services); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Stakeholder Roundtable (16 February 2023); Meeting with Law Institute of Victoria (28 February 2023).

117. Submission 5 (Victoria Legal Aid). On the importance of proportionality and ensuring the conditions were no more restrictive than necessary: Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service).

4.53 Other potential principles or factors suggested by stakeholders included that:

- conditions should be ‘reasonably achievable’;¹¹⁸
- courts should consider which services are both local and available;¹¹⁹ and
- courts should consider the availability of culturally appropriate services wherever possible.¹²⁰

4.54 The Victorian Aboriginal Legal Service also recommended that the *Sentencing Act* should be amended to (a) ‘emphasise the importance of culturally safe conditions’ and (b) ‘make clear that an adjourned undertaking without attached conditions is an available sentence, which is not clear in the existing legislation’.¹²¹ This view was shared by Victoria Police, who suggested that ‘courts may benefit from being prompted to consider the utility of an adjourned undertaking with no optional conditions at all’.¹²²

4.55 Finally, stakeholders told us that the availability of services in programs in regional areas is a consistent issue of concern. For example:

[T]here are certainly reduced services and supports in rural and regional areas that make the requirements of an adjourned undertaking often more costly than for clients in an accessible metro region. Any funding for supports within these orders much apply a loading to service costs in rural and regional areas.

Submission 2 (Australian Community Support Organisation)

[A]ccess to the support services and programs which may be a condition of an adjourned undertaking, are very limited in rural and regional Victoria. Specialist health, family violence, and other therapeutic programs have waitlists and gaps in many rural and remote areas. Poverty and a lack of access to transport options can also reduce accessibility.

118. Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria).

119. Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw); Stakeholder Roundtable (16 February 2023). On the need to consider the local services that are available, ACSO noted that such guidance ‘would support people in regional and remote areas as the ability to achieve a requirement would be based on access to the service’: Submission 2 (Australian Community Support Organisation).

120. Submission 5 (Victoria Legal Aid); Submission 9 (Victorian Aboriginal Legal Service). On the need for culturally appropriate services, the Victorian Aboriginal Legal Service noted that ‘Aboriginal specific rehabilitative programs, including drug and alcohol or behaviour change programs, regularly have limited capacity and long wait times for admission’: Submission 9 (Victorian Aboriginal Legal Service).

121. Submission 9 (Victorian Aboriginal Legal Service).

122. Submission 10 (Victoria Police).

This can compound the disadvantage experienced by rural and regional people who are subject to adjourned undertakings ... As such, adjourned undertakings requiring access to specific programs in regional and rural Victoria can set offenders up to fail and decrease public safety.

Submission 10 (Victoria Police)

Our practice experience has shown that people from regional and remote communities do not have the same access to services as those in metropolitan areas. This experience is reinforced by other increasing reports of shortages in allied health workers and a strong unmet need for allied health services in rural and regional areas ... in our experience, in rural Victoria there are instances where adjourned undertakings contain conditions that people cannot comply with during the period of the order because of delays in accessing services. This is particularly common when conditions relate to in demand services such as Men's Behaviour Change Programs. In such cases people are being brought back to court for breaching the order through no fault of their own.

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

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

Submission 5 (Victoria Legal Aid)

The Council's view

- 4.56 There was very limited stakeholder support for the specification of optional conditions for adjourned undertakings in the *Sentencing Act*, despite this currently being the case for CCOs.¹²³ This was largely because of the perceived risk that a specified list could lead to an overloading of conditions. We agree and do not recommend a specified list of optional conditions for adjourned undertakings in the *Sentencing Act*. It also better facilitates the flexible nature of the order to not have a specified list.
- 4.57 There are, however, two reforms relating to guidance about conditions that we recommend: first, introducing legislative principles that courts must consider in deciding which conditions (if any) to attach to adjourned undertakings; and second, amending the *Victorian Sentencing Manual* to include guidance about setting conditions of adjourned undertakings in relation to both relevant considerations and model wording of common conditions.
- 4.58 As to the first reform, we note that there is currently guidance about the 'matters to be considered when attaching conditions' to a CCO in section 48A of the *Sentencing Act*:

48A. Matters to be considered when attaching conditions

The court must attach conditions to a community correction order in accordance with—

- (a) the principle of proportionality; and
- (b) the purposes for which a sentence may be imposed as set out in section 5; and
- (c) the purpose of a community correction order set out in section 36.

- 4.59 We believe, for a number of reasons, that the inclusion of similar factors for consideration would be useful in the context of adjourned undertakings. There was, as discussed above, strong stakeholder support for this reform. It would be consistent with the approach taken in numerous other jurisdictions, where there is common law guidance about certain principles that apply in setting the conditions of orders equivalent to adjourned undertakings.¹²⁴ And it would provide courts with guidance about determining the most appropriate conditions (if any) in each particular case.

123. *Sentencing Act 1991* (Vic) pt 3A div 4. The only stakeholder that raised support for this was Victoria Police.

124. *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]. In *Bugmy*, the court held that conditions must reasonably relate to the purposes of sentencing in each particular case, be defined with a reasonable level of precision and not be unduly harsh, unreasonable or onerous.

4.60 We therefore see merit in amending the *Sentencing Act* to specify the principles or factors relevant to setting conditions of adjourned undertakings. At the very least, the provision should mirror the current matters that courts must consider when attaching conditions to a CCO. It also, however, seems reasonable for courts to take some additional considerations into account:

- The first is the principle of parsimony, the requirement to impose the least severe sentence necessary to achieve the purposes of sentencing. Half of all adjourned undertakings have no optional conditions imposed, and multiple stakeholders (such as the Victorian Aboriginal Legal Service and Victoria Police) advocated this as the default position for adjourned undertakings.
- The second is whether the condition is reasonably achievable – which we take to refer not only to the ability of the offender to comply with the condition but also to the availability of relevant services and programs (in terms of both wait times and local availability). Although there are challenges to providing a full suite of programs and services in regional areas, their more limited availability in those areas contributes to ‘postcode justice’. Courts should be required to consider the local availability and accessibility of any programs ordered.
- The third is whether there are any culturally appropriate programs and services available.

Guidance about conditions: legislative principles

Recommendation 10: That the *Sentencing Act 1991* (Vic) be amended to include a list of matters that courts must consider when attaching conditions to adjourned undertakings, including:

- the principle of proportionality;
- the principle of parsimony, in particular, that the default position should be an adjourned undertaking with no conditions;
- the purposes for which a sentence may be imposed as set out in section 5 of the *Sentencing Act*;
- the purposes of an adjourned undertaking as presently set out in section 70 of the *Sentencing Act*;
- whether the condition is reasonably achievable during the period of the adjourned undertaking; and
- the availability of culturally appropriate programs and services.

- 4.61 As to the second reform, we see significant value in the development of guidance in the *Victorian Sentencing Manual*, including both general guidance about how to word conditions (for example, using full sentences, rather than shorthand, to ensure that everyone understands what is intended) and model wording for some of the more common conditions attached to adjourned undertakings. The proposed guidance would not be prescriptive. Instead, it would offer judicial officers, particularly in the high-volume, time-pressured summary jurisdiction, some initial wording of conditions that could easily be modified to suit the circumstances of each case. That model wording should be flexible, easily adapted and non-binding. As such, we believe that the most appropriate source for this guidance would be the *Victorian Sentencing Manual*, produced by the Judicial College of Victoria.¹²⁵ We raised this possibility with the Judicial College, and they have already identified a possible location in the *Sentencing Manual* for that proposed guidance.¹²⁶
- 4.62 Once that guidance is developed, it would be useful to then inform the judiciary and profession about the new guidance. We therefore also recommend that, once the guidance has been published, training be provided (as Victoria Legal Aid has suggested¹²⁷) to judicial officers about framing conditions of adjourned undertakings and (as the Law Institute of Victoria has suggested¹²⁸) to practitioners about assisting courts by proposing the substance and wording of possible optional conditions.

Guidance about conditions: wording

Recommendation 11: That the Judicial College of Victoria expand the *Victorian Sentencing Manual* to include guidance about the wording of conditions (if any) attached to adjourned undertakings.

Recommendation 12: That the Judicial College of Victoria and the Law Institute of Victoria provide training for judicial officers and legal practitioners, respectively, about conditions of adjourned undertakings.

125. As a source of information and guidance about sentencing, the *Victorian Sentencing Manual* has been described by the Court of Appeal as ‘invaluable’: *Nguyen v The Queen* [2021] VSCA 211, [41].

126. Email from Judicial College of Victoria (28 March 2023).

127. Submission 5 (Victoria Legal Aid). In particular, Victoria Legal Aid wrote that there should be ‘practical education and materials to guide judicial officers ... about the types of optional conditions that may be appropriate to attach to adjourned undertakings’.

128. Meeting with Law Institute of Victoria (28 February 2023).

Funding programs and services

- 4.63 The effectiveness of adjourned undertakings often hinges on the availability and accessibility of appropriate, effective and culturally safe programs and services.
- 4.64 In our consultation paper, we found that, of the 24,787 adjourned undertakings imposed in the Magistrates' Court in 2019 and 2020, about 15% required the offender to participate in a rehabilitation program of some sort. This included behaviour change programs such as men's behaviour change programs and anger management courses (6%), driver education courses such as Amber Community's Road Trauma Awareness Seminar (5%), and drug and alcohol treatment programs (4%).¹²⁹
- 4.65 However, there is currently no direct funding available to pay for programs that are ordered as conditions of adjourned undertakings, leaving offenders to pay for the programs themselves, unless programs are otherwise subsidised (such as through Medicare). As just one example, one drink-driving education program is at least \$384 for two 3.5-hour sessions.¹³⁰ While these programs are often designed to reduce the offender's risk of reoffending and promote their rehabilitation, they can also have a negative financial impact on the offenders ordered to participate in them, disproportionately affecting people with lower incomes.
- 4.66 We therefore asked in our consultation paper whether there should be a way for programs ordered as a condition of an adjourned undertaking to be paid for by the state in appropriate cases.¹³¹

Stakeholder views

- 4.67 It has been an ongoing stakeholder concern throughout this project that rehabilitation programs ordered as conditions of adjourned undertakings are not funded; in particular, there is a risk that when offenders cannot afford those programs, they are set up to fail.¹³² There was overwhelming support for

129. *Consultation Paper* 43–44.

130. TaskForce, 'Behaviour Change Program' (taskforce.org.au, 2022). Even then, \$384 is the concession rate; the full price is \$417.

131. *Consultation Paper* 59–60.

132. Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid); Submission 10 (Victoria Police).

introducing some form of government funding for programs ordered as conditions of adjourned undertakings.¹³³ For instance:

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

Submission 5 (Victoria Legal Aid)

To increase compliance with and effectiveness of Adjourned Undertakings, it would be appropriate to provide funding for those programs directed as conditions of the order, especially for offenders from marginalised groups who would not otherwise be able to fund rehabilitative conditions of their order.

Submission 3 (Office of Public Prosecutions)

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

Submission 9 (Victorian Aboriginal Legal Service)

Where ordered for by the State, the State should be responsible for payment of these services. For those living on Centrelink payments, which place most people as living below the poverty line, placing conditions requiring payment to access and complete the requirement will most likely place them in a higher category for potential to reoffend in the future or for failure to comply.

Submission 2 (Australian Community Support Organisation)

4.68 In their submission, the Office of Public Prosecutions added that there is 'a stark difference' between adjourned undertakings and CCOs, because when a person receives a CCO, 'the State funds the conditions and programs', but this is not the case for offenders on adjourned undertakings.¹³⁴

133. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 6 (Women and Mentoring); Submission 7 (Jesuit Social Services); Submission 9 (Victorian Aboriginal Legal Service); Stakeholder Roundtable (16 February 2023).

134. Submission 3 (Office of Public Prosecutions).

The Council's view

- 4.69 The Council is persuaded by the strong support for program funding demonstrated by stakeholders who made submissions and attended our roundtable. They illustrated that there are several ways in which the current user-pays system creates inequity between offenders in different income brackets.
- 4.70 First, the requirement that offenders pay for their court-ordered programs 'means that a nominally equivalent sentence imposes a far greater burden on low-income earners than those on higher incomes'.¹³⁵
- 4.71 Second, courts are not presently required to consider the financial circumstances of the offender and the impact that paying for the program would have on them in ordering a program as a condition of their adjourned undertaking.
- 4.72 Third, if the program is not realistically affordable for the offender, they may feel obligated to request, or the court may feel obligated to impose, a more severe sentencing outcome, not because it is the most appropriate sentence but because the adjourned undertaking is not viable with that rehabilitation program as a condition.
- 4.73 That being said, we acknowledge that it may not be financially feasible to expect the state to pay for all rehabilitation programs attached to adjourned undertakings, especially for offenders who can more realistically afford to pay for those programs. If there is a need to prioritise payment for only *some* programs, this discretion should rest with the court after considering the financial circumstances of the offender. In that context, we note our earlier recommendation at [4.39] that courts should be required to consider the financial circumstances of the offender in deciding which optional conditions (if any) to attach to adjourned undertakings. Given the complexity of this matter, we recommend that the Department of Justice and Community Safety develop a resourcing model to ensure that conditions of adjourned undertakings can be paid for by the state in appropriate cases.

Paying for programs

Recommendation 13: That the Department of Justice and Community Safety develop a resourcing model to ensure that when programs or services are ordered as conditions of an adjourned undertaking, they can be paid for by the state in appropriate cases.

135. Submission 9 (Victorian Aboriginal Legal Service).

5. Adjourned undertakings in the sentencing hierarchy

- 5.1 This chapter explores the legislative framework within which adjourned undertakings currently operate in Victoria and recommends reforms to improve how adjourned undertakings and related orders are used.

Revising the hierarchy: adjourned undertakings and fines

- 5.2 The sentencing orders available for adults in Victoria – aside from those applicable to federal offences¹³⁶ – are outlined in the *Sentencing Act*. Imprisonment is the most severe sentence in what the Court of Appeal has described as a ‘loose hierarchy of sentencing options’.¹³⁷ Adjourned undertakings, discharges and dismissals sit together at the bottom of this hierarchy, which gives legislative effect to the principle of parsimony: courts must not impose sentences that are more severe than necessary to achieve the purposes of sentencing.¹³⁸ Most relevantly for present purposes, section 5(7) of the *Sentencing Act* provides that:

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.¹³⁹

- 5.3 That is, if an adjourned undertaking could be crafted to sufficiently achieve the purposes of sentencing in a particular case, then the court must not impose a fine (or other more severe order). It was against this backdrop that one of the most consistent observations made during consultation was that, although section 5(7) creates a rigid hierarchy between fines and adjourned undertakings, in practice none exists.

136. These are governed by the *Crimes Act 1914* (Cth).

137. *Bell v The Queen* [2016] VSCA 203, [47]; *Sentencing Act 1991* (Vic) ss 5(4)–(7).

138. *R v Piacentino* [2007] VSCA 49, [47]. This principle has, though, traditionally been applied exclusively in the context of prison sentences, prohibiting courts from imposing a prison sentence if any other disposition would adequately achieve the purposes of sentencing: *R v O'Connor* [1987] VR 496, 501.

139. *Sentencing Act 1991* (Vic) s 5(7).

This is because:

- both sentencing orders can include significant pecuniary conditions (a third of adjourned undertakings require a charitable donation of some sort), and in practice the median values of those fines and charitable donations are both \$500;¹⁴⁰
- for both sentencing orders, courts have discretion whether to record a conviction – albeit in practice convictions are recorded four times more frequently with fines (64%) than with adjourned undertakings (17%);
- some stakeholders told us that offenders often prefer a fine as a ‘once and done’ sentencing order, because an adjourned undertaking includes a mandatory condition to be of good behaviour for a period of time, and can also come with other optional conditions such as substance abuse treatment (4%) or driver education (5%),¹⁴¹ programs that offenders must often pay for themselves; and
- non-compliance with the conditions of an adjourned undertaking – including non-payment to the Court Fund or a charitable organisation – is currently a distinct offence that can be prosecuted,¹⁴² whereas non-payment of a fine is not.

5.4 Collectively, these points make it difficult to envisage many scenarios where the purposes of sentencing could not be achieved by an adjourned undertaking, rather than a fine. Yet in practice, fines are the most common sentence in Victoria, accounting for about half of all outcomes each year.¹⁴³ This is likely to be due to the pragmatic application of the spirit of parsimony, rather than strict adherence to the rigid hierarchy prescribed.

5.5 In that context, and mindful of the focused scope of this project, we asked in our consultation paper whether the placement of adjourned undertakings in Victoria’s sentencing hierarchy should be amended and, if so, how and why.¹⁴⁴

140. The median value of a charitable donation condition attached to an adjourned undertaking in 2019 and 2020 was \$500: see further, *Consultation Paper* 50. Similarly, the median fine in Victoria has consistently been \$500, regardless of inflation rates or changes in the value of penalty units: Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report* (2014) 29.

141. For a full list of optional conditions attached to adjourned undertakings, see *Consultation Paper* 44.

142. *Sentencing Act 1991* (Vic) s 83AC.

143. Sentencing Advisory Council, ‘Sentencing Outcomes in the Magistrates’ Court’ (sentencingcouncil.vic.gov.au, 2022).

144. *Consultation Paper* 64–65.

Stakeholder views

- 5.6 There was a range of responses. As Victoria Legal Aid observed in their submission, '[t]he question of where adjourned undertakings should sit in the sentencing hierarchy is complex'.¹⁴⁵
- 5.7 Victoria Police were broadly supportive of amending the hierarchy:
- [D]epending on an offender's financial situation, a fine may be more or less onerous than an adjourned undertaking ... Consideration could ... be given to making fines and adjourned undertakings of an equal standing in the hierarchy of sentencing. Judicial discretion could then be exercised to determine which sentence would be more appropriate in the individual's circumstances.¹⁴⁶
- 5.8 The Australian Community Support Organisation (ACSO) supported the suggested change in the sentencing hierarchy if it would 'reduce the impact ... of non-compliance with order conditions'.¹⁴⁷ And participants at our stakeholder roundtable also agreed that fines and adjourned undertakings should be at the same level in the sentencing hierarchy, with one participant noting that the current hierarchy is a 'big area of appeals' from the Magistrates' Court to the County Court.¹⁴⁸
- 5.9 Fitzroy Legal Service, WEstjustice and Youthlaw opposed the notion of having a sentencing hierarchy at all, because 'sentences imposed should meet the purposes of sentencing while addressing the particular circumstances of an accused person ... rather than simply moving up a scale'.¹⁴⁹
- 5.10 In contrast, Victoria Legal Aid contended that the current use of adjourned undertakings for more serious offending reflects a 'gap' in the current hierarchy and that, rather than revise the current hierarchy, the more appropriate solution would be to introduce a new sentencing order.¹⁵⁰

145. Submission 5 (Victoria Legal Aid).

146. Submission 10 (Victoria Police).

147. Submission 2 (Australian Community Support Organisation).

148. Stakeholder Roundtable (16 February 2023).

149. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

150. Submission 5 (Victoria Legal Aid).

The Council's view

- 5.11 In considering the placement of sentencing orders in Victoria's sentencing hierarchy, one of the challenges is that recording a conviction is discretionary and quasi-ancillary¹⁵¹ for almost all of those orders. In our consultation paper, we found that 83% of adjourned undertakings are imposed without conviction.¹⁵² In 2014, we found that 36% of fines are imposed without conviction.¹⁵³ Even community correction orders (CCOs) are sometimes imposed without conviction, particularly for people with no prior convictions and good prospects of rehabilitation.¹⁵⁴
- 5.12 For some people, recording a conviction may be the most severe aspect of their sentence, especially for first-time offenders with no criminal record. Among other things, a conviction can affect visa status, employability, access to housing, ability to travel, access to adoption and admission into certain professions. Being discharged with conviction¹⁵⁵ (a finding of guilt with no conditions other than the recording of a conviction) can be worse for some offenders than receiving a CCO without conviction. This, in our view, makes it difficult to definitively place any sentencing order (perhaps other than prison) into a definitive ranking of severity.
- 5.13 Nevertheless, we remain of the view that a revision of the hierarchy is required (see Figure 1, page 45).¹⁵⁶ Given that adjourned undertakings can be, and often are, more onerous than fines, we believe that section 5 of the *Sentencing Act* should be amended to remove the implication that fines cannot be imposed unless an adjourned undertaking can achieve the purposes of sentencing. The circumstances of the case should govern whether the court should impose one or the other.

151. By quasi-ancillary, we mean that the recording of a conviction is ancillary to imposition of a sentence, but a conviction can also be a relevant factor in deciding which sentence type to impose.

152. *Consultation Paper* 68–69.

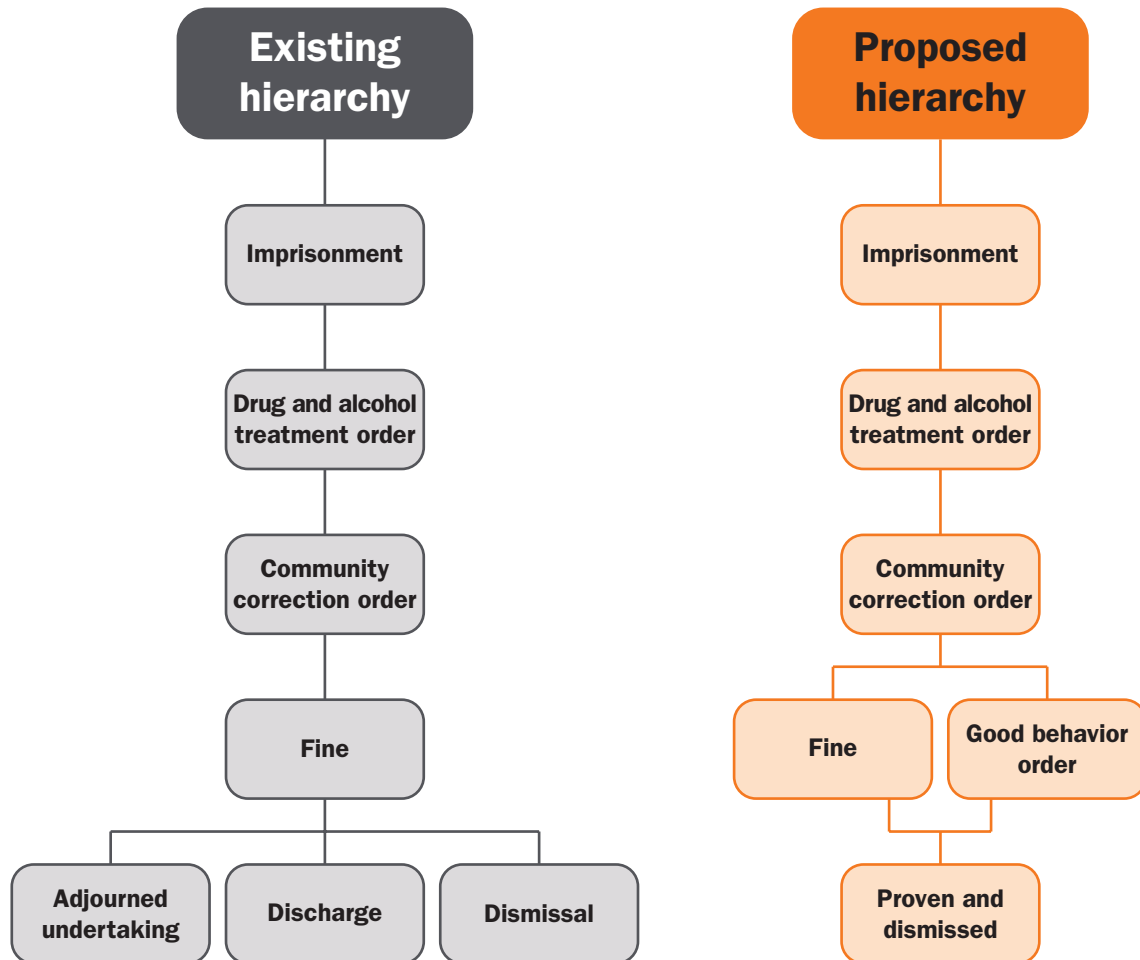
153. Sentencing Advisory Council (2014), above n 140, 32.

154. See, for example, *DPP v Eskander* [2022] VCC 653, [44]; *DPP v Yak* [2021] VCC 1554, [66]; *DPP v BK* [2021] VCC 1174, [40]–[41]; *DPP v Vella & Ors* [2020] VCC 659, [60].

155. *Sentencing Act 1991* (Vic) s 73.

156. The hierarchy depicted in Figure 1 accounts for other recommendations in this report, including renaming adjourned undertakings as good behaviour orders, merging discharges and dismissals into a single order, and renaming that single order as 'proven and dismissed'.

Figure 1: Existing and proposed sentencing hierarchies



Revising the hierarchy

Recommendation 14: That section 5(7) of the *Sentencing Act 1991* (Vic) be amended so that there is no hierarchy between fines and adjourned undertakings.

Merging the provisions

- 5.14 Prior to the introduction of the *Sentencing Act* in 1991, the process for determining whether to record a conviction was, according to the Attorney-General at the time, 'hopelessly complex'.¹⁵⁷ When the new Act came into force, it was intended to 'rationalise and simplify' the law about 'whether a conviction may be imposed'.¹⁵⁸ A result of this reform is that, for some sentencing orders (fines and CCOs), there is a single authorising provision (sections 37 and 49), and the discretion to record a conviction is governed separately and exclusively via section 8. Whereas for other sentencing orders (adjourned undertakings and discharges/dismissals), there are distinct provisions based on whether or not a conviction will be recorded (sections 72 and 75 and sections 73 and 76), bearing in mind the considerations outlined in section 8.
- 5.15 In our consultation paper, we asked whether sections 72 and 75 of the *Sentencing Act* should be merged and similarly whether sections 73 and 76 of the *Sentencing Act* should be merged.¹⁵⁹ This would unify the approach to all sentencing orders, by creating just one enabling provision for the imposition of an adjourned undertaking and another for discharge/dismissal, with the recording of a conviction still being governed by section 8 of the *Sentencing Act*.
- 5.16 As they stand, sections 72 and 75 are almost identical, with some idiosyncratic differences of no practical significance:
- section 72(1) specifies a 5-year limit for adjourned undertakings, whereas section 75(1) describes it as a 60-month limit;
 - section 75(2)(c) enables courts to attach 'any conditions' to an adjourned undertaking, whereas section 72(2)(c) allows courts to attach 'any *special* conditions'; and
 - under section 72, courts 'discharge the offender', but under section 75 courts 'dismiss the charge[s]'.

157. Victoria, Parliamentary Debates, Legislative Assembly, 19 March 1991, 339 (Mr Kennan, Attorney-General).

158. Victoria, Parliamentary Debates, Legislative Assembly, 19 March 1991, 339 (Mr Kennan, Attorney-General).

159. *Consultation Paper* 66–67.

- 5.17 Sections 73 and 76 are also quite similar, except that when a conviction is recorded, the person is discharged, and when no conviction is recorded, the charges are dismissed:

Section 73

A court may discharge a person whom it has convicted of an offence.

Section 76

A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) dismiss the charge.

Stakeholder views

- 5.18 Relatively few written submissions expressed a view about the potential merging of these provisions.¹⁶⁰ Those that did, however, supported merging the provisions. ACSO agreed with our observations in the consultation paper.¹⁶¹ Victoria Police said that ‘a merger would be a suitable approach to consolidate the sections’.¹⁶² And Fitzroy Legal Service, WEstjustice and Youthlaw said that while these were not ‘critical issues with respect to [their] clients’, they supported ‘combining [the] provisions into [a] single clause [to] reduce convolution within the legislation’.¹⁶³ One participant at the roundtable also added that (a) the orders can sometimes be mis-recorded as one another (for example, a discharge is recorded as a dismissal)¹⁶⁴ and (b) it can often be difficult to explain to victims that a dismissal or discharge does not equate to a finding of not guilty,¹⁶⁵ particularly given that both ‘discharge’ and ‘dismiss’ are elsewhere used in criminal legislation to mean that the case has ended without a finding of guilt.¹⁶⁶

160. The Law Institute of Victoria, for example, indicated that it ‘does not currently hold a view on this matter’: Submission 8 (Law Institute of Victoria).

161. Submission 2 (Australian Community Support Organisation).

162. Submission 10 (Victoria Police).

163. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

164. Other stakeholders confirmed this: for example, Meeting with Law Institute of Victoria (28 February 2023).

165. Stakeholder Roundtable (16 February 2023).

166. See, for example, *Criminal Procedure Act 2009* (Vic) ss 59(4)(b), 79(a), 141(4)(a).

The Council's view

- 5.19 The *Sentencing Act* has become increasingly complex over the years.¹⁶⁷ Even excluding endnotes, as some researchers recently did when exploring the increasing complexity of federal legislation,¹⁶⁸ the *Sentencing Act* has grown from its original 120 pages to now 541, more than four times its original size. In that context, merging a handful of provisions will not make much difference. It is, though, a step, however small, towards consistency and simplification. Moreover, doing so reduces the risk raised at our roundtable that the orders may be confused for one another.
- 5.20 We are therefore of the view that sections 72 and 75 should be merged, and sections 73 and 76 should be merged, to reflect that adjourned undertakings and discharge/dismissal are in fact individual sentencing orders. Importantly, this recommendation is predicated on such mergers not affecting courts' discretion to record a conviction, which should continue to be governed by the circumstances specified in section 8 of the *Sentencing Act*.¹⁶⁹ Nor should merging the provisions affect the recording of a conviction being a relevant consideration, in appropriate cases, in deciding the most appropriate sentence to impose.
- 5.21 We have also reached the view that the terms 'dismissal' and 'discharge' could easily be misinterpreted as suggesting that the offending was not found proven. Indeed, both terms are used elsewhere in Victoria's criminal justice legislation to say as much. We therefore recommend that these orders be renamed as 'proven and dismissed' to more clearly convey that the offences were found proven.

Merging the provisions

Recommendation 15: That sections 72 and 75 of the *Sentencing Act 1991* (Vic) be merged into a single provision.

Recommendation 16: That sections 73 and 76 of the *Sentencing Act 1991* (Vic) be merged into a single provision, named 'proven and dismissed'.

Recommendation 17: That subsections 7(g)–(j) be amended accordingly.

167. As was observed, for example, in Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

168. Lisa B. Crawford et al., 'Legislative Complexity: What Is It, How Do We Measure It, and Why Does It Matter?' (auspublaw.org, 2022).

169. That is, 'the nature of the offence ... the character and past history of the offender; and ... the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects': *Sentencing Act 1991* (Vic) ss 8(1)(a)–(c).

Reforming the *Spent Convictions Act*

- 5.22 In our consultation paper, we raised a potential inconsistency in how Victoria's new spent convictions legislation affected offenders who receive adjourned undertakings without conviction.¹⁷⁰ In particular, the legislation currently provides that offenders who receive adjourned undertakings without conviction do not have their finding of guilt spent until they are no longer subject to conditions.¹⁷¹ Given there are mandatory conditions (to attend court as required and to be of good behaviour) that apply for the entire period of all adjourned undertakings, this means that offenders who receive adjourned undertakings without conviction must disclose their findings of guilt until the end of their adjourned undertaking. As we found in our consultation paper, the vast majority of adjourned undertakings last for 12 months, and 83% of adjourned undertakings are imposed without conviction, so every year this issue would affect thousands of Victorians who must disclose findings of guilt for a considerable period of time.
- 5.23 The reason that this creates a potential inconsistency is that people who receive a fine without conviction, which is more severe than an adjourned undertaking without conviction according to the current sentencing hierarchy, have their conviction spent immediately at the date of sentencing. This is because there are no ongoing conditions associated with fines.
- 5.24 We therefore asked whether offenders who receive adjourned undertakings without conviction should have their findings of guilt spent at the date of *sentencing*, instead of at the end of their order.

Stakeholder views

- 5.25 Stakeholders were unanimously in support of the proposed reform, both in the written submissions we received¹⁷² and at our roundtable.¹⁷³
- 5.26 Vacro and ACSO made especial mention of the effect that the current legislation has on people's employability. Vacro were 'unequivocal' in advocating this reform, saying that it would allow people to access resources via employment sooner.¹⁷⁴

170. Consultation Paper 70.

171. *Spent Convictions Act 2021* (Vic) ss 7(1)(a), (2).

172. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 4 (Vacro); Submission 5 (Victoria Legal Aid); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

173. Stakeholder Roundtable (16 February 2023).

174. Submission 4 (Vacro).

And ACSO said that the current approach ‘unduly disadvantages thousands of people and has the potential to hold them within the justice cycle rather than moving forward with their lives’.¹⁷⁵

- 5.27 Further, Victoria Police, the Law Institute of Victoria, and Fitzroy Legal Service, WEstjustice and Youthlaw all noted the awkward incentivisation for offenders to acquiesce to, or actively seek, a more severe sentence (a fine) in order to have their finding of guilt spent immediately.¹⁷⁶

The Council’s view

- 5.28 In light of the unanimous stakeholder feedback on this proposed reform, we remain of the view expressed in the consultation paper that the *Spent Convictions Act* should be amended so that adjourned undertakings imposed without conviction are spent at the date of sentencing, rather than when the offender completes all conditions of the adjourned undertaking. This recommendation may be fruitfully considered during the upcoming review of the *Spent Convictions Act*.¹⁷⁷

Revising the Spent Convictions Act

Recommendation 18: That the *Spent Convictions Act 2021 (Vic)* be amended so that adjourned undertakings without conviction are ‘spent’ at the date of sentencing.

A new mid-tier community order?

- 5.29 In our consultation paper, we asked whether there was scope to increase the use of judicial monitoring as a condition of adjourned undertakings.¹⁷⁸ Judicial monitoring has been shown to have significant therapeutic benefits when used appropriately. We also found that it is occasionally, albeit very rarely, already used as a condition of some adjourned undertakings (20 of about 25,000 adjourned undertakings in 2019 and 2020).

175. Submission 2 (Australian Community Support Organisation).

176. Submission 8 (Law Institute of Victoria); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw). For example, Victoria Police observed that this anomaly could ‘be seen ... [as] an incentive to seek a more serious sentencing outcome (a fine) to have the conviction spent earlier’: Submission 10 (Victoria Police).

177. *Spent Convictions Act 2021 (Vic)* s 25.

178. *Consultation Paper* 36–41.

- 5.30 Numerous stakeholders raised concerns about promoting increased use of judicial monitoring with adjourned undertakings.¹⁷⁹ The main concerns raised were:
- **increased workload.** As noted in our consultation paper, over 17,000 adjourned undertakings were imposed in 2019 alone.¹⁸⁰ Increasing the use of judicial supervision as a condition of adjourned undertakings has the potential to significantly increase the workloads of courts, prosecutors and defence lawyers.
 - **disproportionate or unsuitable response.** One of the purposes of adjourned undertakings is to allow offenders to serve their sentence unsupervised in the community (noting that there are other purposes).¹⁸¹ It may be disproportionate and inconsistent to encourage more offenders who receive these orders to have increased engagement with the criminal justice system.
- 5.31 We were persuaded by the submissions we received that it would not be appropriate to actively encourage greater use of judicial monitoring as an optional condition of adjourned undertakings. And in any event, it is already possible either through the mandatory condition to attend court if required or via the broad discretion for a court to attach any condition it thinks appropriate in the circumstances of the case.¹⁸²
- 5.32 There were some stakeholders, however, who instead advocated a new mid-tier community order for which judicial monitoring would be appropriate, sitting somewhere between an adjourned undertaking and a CCO in the current sentencing hierarchy.
- 5.33 Fitzroy Legal Service, WEstjustice and Youthlaw said that this might ‘fill... a perceived gap in community-based sentencing options between adjourned undertakings and CCOs’.¹⁸³ Jesuit Social Services advocated a new ‘therapeutic order’ to ‘fill the gap between fines and community correction orders’.¹⁸⁴ The Victorian Aboriginal Legal Service, in another context, recently recommended that the Victorian Government ‘increase community-based sentencing options’

179. Submission 3 (Office of Public Prosecutions); Submission 5 (Victoria Legal Aid); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

180. *Consultation Paper 11*.

181. *Sentencing Act 1991* (Vic) s 70(1)(a). See further, Submission 5 (Victoria Legal Aid):

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

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

183. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

184. Submission 7 (Jesuit Social Services) ('This order would include a treatment component which can better respond to the needs of those with complex mental health, substance misuse or disabilities and ensure that these groups are not further entrenched in the justice system')

between adjourned undertakings and CCOs.¹⁸⁵ And Victoria Legal Aid suggested that adjourned undertakings are sometimes used in more serious cases 'to fill a gap in the sentencing hierarchy between fines and the more onerous and resource intensive CCO'.¹⁸⁶

- 5.34 At our stakeholder roundtable, participants had mixed views about the merits of a new mid-tier community order. Some participants supported the proposal, commenting that a 'gap' in the orders currently available could be filled by such an order, enabling more onerous conditions such as judicial monitoring without requiring the person to engage with Corrections Victoria, and that it would be useful to have 'more rungs' on the sentencing ladder to convey to offenders that they will receive more severe penalties when they reoffend.¹⁸⁷
- 5.35 Other participants, though, raised various concerns, including:
- the resource implications for courts and practitioners if some adjourned undertakings become mid-tier community orders with more onerous conditions;
 - the current availability (as conditions of adjourned undertakings) of various conditions suggested for the mid-tier community order;
 - a functional return to the previous system of community-based orders and intensive correction orders prior to the introduction of CCOs; and
 - the risk of the introduction of a new mid-tier community order enhancing the overall severity of sentencing outcomes in Victoria.¹⁸⁸

The Council's view

- 5.36 There is a genuine question about the potential utility of a new mid-tier community order sitting somewhere between an adjourned undertaking and a CCO. However, at our roundtable there were mixed views about such a reform that warrant further discussion. Moreover, recommending the introduction of such an order is beyond the scope of the present review.

185. Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* (2022) 58 (recommendation 62).

186. Submission 5 (Victoria Legal Aid). In particular, Victoria Legal Aid suggested that:
a new sentencing order should be created to fill the gap between fines and CCOs. A new 'therapeutic order' would give sentencing courts the authority to impose tailored sentences in a similar way adjourned undertakings are currently being used in more serious cases but with additional resourcing. We envisage such orders could have a treatment component supported by dedicated resourcing and a legislated option of judicial monitoring.

187. Stakeholder Roundtable (16 February 2023).

188. Stakeholder Roundtable (16 February 2023).

A new combined order: imprisonment with an adjourned undertaking

5.37 When the *Sentencing Act* first came into effect, section 36(2) (now repealed) allowed courts to ‘make a community-based order in respect of an offender in addition to ... a term of imprisonment of not more than 3 months’. This option was available regardless of whether the offender was being sentenced for one or multiple offences. When major sentencing reforms came into force 20 years later, a similar provision was enacted, allowing courts to ‘make a community correction order in addition to imposing a sentence of imprisonment only if ... the sum of all the terms of imprisonment to be served ... is 3 months or less’.¹⁸⁹ In effect, the combined option of imprisonment with a community order remained available. A similar version of that provision continues to exist today, except the maximum term of imprisonment that can be combined with a CCO is currently one year.¹⁹⁰ Imprisonment with a CCO is colloquially known as a ‘combined order’.¹⁹¹ And combined orders are highly prevalent, with thousands of them imposed every year.¹⁹²

5.38 There has, however, never been an equivalent provision expressly empowering courts to impose a combined order of imprisonment with an adjourned undertaking. To some extent, this makes sense – if the offending in the case as a whole is serious enough to justify a term of imprisonment, it could seem unusual to then also impose a less serious community order, rather than a CCO.¹⁹³ But there could also be good reason for this combination of sentencing orders in appropriate cases, especially if the offender does not need the more intense level of supervision or assistance associated with a CCO. We found that this combination of sentences is already occurring, at an increasing rate (about 250 a year), despite the absence of an express authorising provision. So we asked stakeholders for their views on whether the *Sentencing Act* should be amended to expressly empower the courts to impose this combined sentence, in the same way that section 44 currently does for combined orders of imprisonment with a CCO.

189. *Sentencing Act 1991* (Vic) s 44(1)(b) (in effect to 15 January 2012).

190. *Sentencing Act 1991* (Vic) s 44(1).

191. See, for example, *R v Dunn* [2020] VSC 708, [229]; *Younger v The Queen* [2017] VSCA 199, [36]; *DPP v Whelan & Anor* [2017] VCC 1746, [165]; *DPP v Harrington* [2017] VCC 288, [74]; Victoria, Parliamentary Debates, Legislative Assembly, 13 October 2016, 3860 (Martin Pakula, Attorney-General).

192. Sentencing Advisory Council, *Combined Orders of Imprisonment and CCOs in Victoria* (forthcoming).

193. As one stakeholder commented at our roundtable: ‘How do you reconcile it being the top and bottom end of the sentencing hierarchy?’: Stakeholder Roundtable (16 February 2023).

Stakeholder views

5.39 There was a variety of views from stakeholders about this potential reform.

5.40 Vacro, Victoria Legal Aid, Victoria Police, and Fitzroy Legal Service, WEstjustice and Youthlaw all supported a new combined order. Uniformly, they hoped that it could replace some of the current combined orders of imprisonment with a CCO. The aim of this would be to reduce unnecessary criminal justice system involvement for those offenders. For instance:

This would, in our view, be a better response to the increasing rate of time served prison sentences than imprisonment plus a community correction order, because it would reduce contact with the punitive end of the justice system and, if paired with resources and access to services, improve the reintegration experience.

Submission 4 (Vacro)

We support reforms that would enable a sentencing court to make an order for an adjourned undertaking in combination with a term of imprisonment. In our practice experience, this combination of orders can be effective where a judicial officer wants to emphasise the importance of the person remaining engaged in treatment upon release from custody but ongoing ... contact with Corrections is not necessary or beneficial ... [It] would ensure that this type of combination sentence could be made where there is a single charge before the court.

Submission 5 (Victoria Legal Aid)

In circumstances where a short custodial sentence is considered necessary, VP considers it may be advantageous for a combined sentence inclusive of an adjourned undertaking ... [which] can facilitate access to rehabilitative programs and services. This can often be in a less criminogenic manner than [CCOs] due to the reduced contact with the criminal justice system. Adjourned undertakings can also assist in transitioning out of a custodial setting[.]

Submission 10 (Victoria Police)

This option would be useful where a sentencing court has imposed a term of imprisonment and wants there to be structure or some oversight for an accused person upon their release, but where a CCO is not appropriate. This is particularly relevant where a person has existing supports in place ... requires engagement with services that are tailored to their needs, are unable to comply with the onerous requirements of a CCO, or have already served a substantial period of imprisonment. This amendment would effectively simplify the process of a sentencing option already being exercised. It is our experience that courts adopt this approach in practice by imposing imprisonment on one or a number of charges, and an adjourned undertaking on one or more of the other charges.

Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw)

We would certainly see value in it. We particularly see instances, particularly for time served, where the term of imprisonment is inevitable, but there is a desire ... an importance of keeping someone engaged in treatment, and the adjourned undertaking providing that flexibility is really important, but the person may not require ongoing engagement with Corrections.

Stakeholder Roundtable (16 February 2023)

- 5.41 Victoria Police, however, also cautioned that there is often a greater level of responsibility placed on offenders who receive adjourned undertakings, compared to CCOs, because they are typically responsible for organising and funding their own programs and services:

[A]n adjourned undertaking requires offenders to access and engage in rehabilitative programs at their own expense and through their own initiative. This contrasts with CCOs which include program funding, supervision and monitoring. For prison leavers without access to funds, housing and other resources, the obligations imposed by an adjourned undertaking may be inaccessible.¹⁹⁴

- 5.42 This was a concern shared by ACSO, which did not support the new combined order because of the onus it would place on offenders:

It is ACSO's concern that the creation of such an order would be likely to create additional barriers to success by a person subject to such an order. With adjourned undertakings as currently in place, there is no support provided and all provisions are at the cost of the person receiving the order ... ACSO is of the firm opinion that persons subject to such orders would be likely to fail due to financial restriction rather than poor behaviour ... If significant improvements in the provision of funding for support for persons to access the services noted in the adjourned undertaking was provided ACSO may reassess this position.¹⁹⁵

- 5.43 Fitzroy Legal Service, WEstjustice and Youthlaw were also concerned that courts would begin imposing adjourned undertakings in cases 'where previously they would not have imposed an additional community-based order upon release'.¹⁹⁶

- 5.44 ACSO also observed the risk that a failure to successfully complete the adjourned undertaking component of this combined order could reopen the sentencing discretion anew for the case as a whole, even though the offender has already successfully completed their term of imprisonment.¹⁹⁷

194. Submission 10 (Victoria Police).

195. Submission 2 (Australian Community Support Organisation).

196. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

197. Submission 2 (Australian Community Support Organisation).

We raised this risk with participants at our roundtable, and they agreed that this does present a risk, with one participant observing: '[y]ou've already served time in prison when you've then been contravened for the condition that was after the imprisonment. You can't separate them once you've joined them'.¹⁹⁸

The Council's view

- 5.45 We are of the view that there is utility in introducing a provision to the *Sentencing Act* that would specifically empower courts to impose a combined order of imprisonment with an adjourned undertaking. In no small part, our recommendation is a product of Victoria's current bail laws, which have quadrupled the rate of time served prison sentences to 20% of all prison sentences,¹⁹⁹ such that it would be useful to have a sentencing order that can reflect time spent on remand but also enable some measure of ongoing accountability and/or rehabilitation without resorting to a CCO.
- 5.46 This combination of sentencing orders – imprisonment with an adjourned undertaking – is already occurring at an increasing rate (up from 43 cases in 2011 to 247 in 2020). And the majority of those cases involved time served prison sentences (68%). Given it is already possible to impose imprisonment with an adjourned undertaking in cases where an offender is being sentenced for two or more offences, it seems illogical to preclude offenders who are being sentenced for a single offence from this combination if it is the most appropriate outcome.
- 5.47 We agree with Victoria Police and ACSO that there is a risk that imposing a combined order of imprisonment with an adjourned undertaking, rather than a CCO, could leave offenders in a more difficult position of having to organise and pay for relevant programs and services themselves, without the assistance of Corrections Victoria. However, there are some countervailing points that seem to mitigate that risk: (a) we found that less than 10% of adjourned undertakings seem to include a condition requiring participation in a program of any sort;²⁰⁰

198. Stakeholder Roundtable (16 February 2023).

199. See, for example, Sentencing Advisory Council, *Time Served Prison Sentences* (2020) 18 (finding that '[t]ime spent on remand seems to increase the likelihood that a court will ultimately impose a sentence of imprisonment ... Sentencing courts are more frequently being put in the position of having to impose sentences on people who have, for all intents and purposes, already been punished).

200. *Consultation Paper* 44 (finding that 47% of adjourned undertakings have no optional conditions at all, the most common conditions are donations and mental health or medical treatment, and the most prevalent program condition is participation in a behaviour change program, in 6.3% of adjourned undertakings, followed by driver education programs, in 4.6% of adjourned undertakings).

(b) when we reviewed the conditions imposed in past cases involving imprisonment with an adjourned undertaking, the programs in those cases were typically already funded and specifically targeted at offenders leaving prison;²⁰¹ and (c) we recommend elsewhere in this report that courts have discretion to order that programs be funded by the state in appropriate cases (again highlighting that there is an interplay between a number of our recommendations).

5.48 We also acknowledge the concern of Fitzroy Legal Service, WEstjustice and Youthlaw that the new order could result in ‘more’ community-based components for people who previously would not have received them. However, the principle of parsimony²⁰² suggests that this increase in community-based components should not occur. This is because people who previously would have received straight imprisonment (without a community component) should continue to receive such an order, whereas the new option – imposing an adjourned undertaking instead of a CCO as the community component of a combined sentence – provides courts with an avenue to impose a less severe sentence than they otherwise would impose under the present system, especially if the court does not see the involvement of Corrections as necessary.

5.49 Finally, we acknowledge ACSO’s concern about the risk of reopening the sentencing discretion as a whole for offenders who are not fully compliant with the adjourned undertaking component. There are, though, several factors that mitigate this risk:

- upon finding that an offender has breached an adjourned undertaking, courts already have the power to resentence the offender to a term of imprisonment²⁰³ (so long as the maximum penalty for the original offence allows for such a sentence);
- when considering resentencing an offender following a breach of the adjourned undertaking, courts would be required to consider the extent to which the offender has complied with the order²⁰⁴ (including the fact that they have already served a term of imprisonment); and to a lesser extent
- the aim of this new combined order is to, in appropriate cases, reduce the number of combined orders of imprisonment with a CCO, and CCO breaches can already lead to resentencing.

201. *Consultation Paper 14* (for example, a post-prison employment program managed by Vacro, a post-prison transition program managed by Vacro, a justice plan managed by the Department of Families, Fairness and Housing, and treatment plans with the Victorian Aboriginal Health Service and the NorthWestern Mental Health service).

202. See, for example, *R v Piacentino & Anor* [2007] VSCA 49, [47].

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

204. Analogously, see *Sentencing Act 1991* (Vic) ss 78(2), 83AS(2), 83ASA(6), 83AT(2).

5.50 In summary, this combination of sentences is already occurring in cases involving more than one charge, is inconsistently unavailable for offenders being sentenced for just one charge, and is capable of reducing unnecessary contact with the criminal justice system (particularly due to the principle of parsimony). There are also various reasons to believe that the potential risks either are unlikely to occur or are outweighed by the likely advantages of a new provision.

A new combined order

Recommendation 19: That the Victorian Government consider inserting a new provision into the *Sentencing Act 1991* (Vic) to expressly allow courts to impose a combined order of imprisonment with an adjourned undertaking.

6. Decriminalising breaches of adjourned undertakings

- 6.1 When the *Sentencing Act* came into effect, section 79 rendered it an offence for an offender to breach a condition of their adjourned undertaking. The maximum penalty for that offence has almost always been a level 12 fine (10 penalty units).²⁰⁵ The only real changes since 1991 are that the value of a penalty unit has increased considerably,²⁰⁶ and the breach offence is now in section 83AC.
- 6.2 In our consultation paper, we asked, for a variety of reasons, whether the offence of breaching an adjourned undertaking should be repealed.²⁰⁷ This chapter outlines the relevant data relating to breaches of adjourned undertakings, the reasons we asked whether breaches should be decriminalised and stakeholders' views on the issue.

The prevalence of breach offences

- 6.3 There has, in recent years, been an increase in the number of breaches of adjourned undertakings recorded by police each year, from about 300 to almost 1,300 in the decade to 2019.²⁰⁸ This does not necessarily mean that those offenders were charged with (or found guilty of) a breach offence. A recorded offence simply means that a police officer reasonably believes that an offence has occurred.²⁰⁹ Those breaches may have been constituted by reoffending (as a breach of the requirement to be of good behaviour), but they also may have been breaches of an optional condition, such as failure to make a donation.

205. There was a brief period from November 1997 to May 1999 when the offence was only punishable by a single penalty unit, but that seems to have resulted from a legislative oversight, rather than an intentional policy decision. In particular, section 12 of the *Sentencing (Amendment) Act 1997* (Vic) replaced the existing penalty scale for fines in the *Sentencing Act 1991* (Vic), making a level 12 fine equal to 1 penalty unit, whereas previously it was 10 penalty units. 18 months later, section 30 of the *Magistrates Court (Amendment) Act 1999* (Vic) replaced the reference to 'level 12 fine' in section 83AC of the *Sentencing Act 1991* (Vic) with 'level 10 fine', making the maximum 10 penalty units again.

206. From 1991 to 2002, the value of a penalty unit was precisely \$100. But since then it has increased almost every year: Sentencing Advisory Council, 'Fine' (sentencingcouncil.vic.gov.au, 2022).

207. *Consultation Paper* 81–83.

208. *Consultation Paper* 72. This was well in excess of the proportional increase in adjourned undertakings in the same period.

209. Crime Statistics Agency, 'Spotlight: Offence Types – Differences Between Recorded Offences and Criminal Incidents' (crimestatistics.vic.gov.au, 2018).

- 6.4 In the same timeframe, there was also an increase in the number of breaches of adjourned undertakings that were sentenced by courts (that is, the breach offences were charged and proven), from about 500 to 1,100 a year.²¹⁰ The most common outcome for breach offences tends to be for the court to find the charge proven and dismiss it, either with or without conviction (84% of charges).²¹¹
- 6.5 We also, however, found that breach offences are prosecuted very inconsistently. In 2015 and 2016, of the 15,000 people who received 12-month adjourned undertakings, about 3,000 of them were later sentenced for further offending that occurred during that 12-month period, meaning they breached the requirement to be of good behaviour. Yet of those 3,000 offenders, only about 300 (1 in 10) were charged with the offence of breaching their adjourned undertaking contrary to section 83AC of the *Sentencing Act*.

Possible responses to breaches

- 6.6 If breach behaviour is brought to the court's attention, courts have a number of options available, even if no charge of breach has been laid.²¹² First, the court can do nothing, which is the equivalent of confirming the order. Second, the court can 'vary the order', especially if the breach occurs because one of the conditions has become unfeasible for the offender for some reason. Third, the court can resentence the offender for the original offending. In deciding what course to adopt, the court must take into account the extent to which the offender has complied with the order thus far.²¹³
- 6.7 These are the same powers that a court can exercise if the offender is found guilty of the offence of breaching an adjourned undertaking: confirm the order, do nothing, vary the order or resentence the offender.²¹⁴
- 6.8 As such, repealing the distinct offence of breaching an adjourned undertaking would not affect the ability of the court to take whatever course it deems most appropriate in response to breach behaviour. It would simply mean that those powers could only be exercised under section 78, not under section 83AT as well.

210. *Consultation Paper 73*.

211. Sentencing Advisory Council, *Secondary Offences in Victoria* (2017) 30.

212. *Sentencing Act 1991* (Vic) s 78(1).

213. *Sentencing Act 1991* (Vic) s 78(2).

214. *Sentencing Act 1991* (Vic) s 83AT.

Stakeholder views

- 6.9 All of the written submissions and all of the stakeholders at our roundtable were unanimous in their view that the breach offence should be repealed.²¹⁵
- 6.10 Vacro described its response as ‘an unequivocal yes’ to decriminalisation.²¹⁶ The Law Institute of Victoria was equally emphatic, saying that it ‘supports entirely decriminalising the breaching of an adjourned undertaking’.²¹⁷ The Law Institute also observed that the financial penalties for breaches of adjourned undertakings may be wholly inappropriate if non-compliance was due to financial reasons (for example, not being able to afford payment for a particular rehabilitation or treatment program), making it ‘counterproductive to impose further financial burdens’.²¹⁸ The Law Institute instead advocated an approach geared towards helping offenders comply with their conditions.
- 6.11 Jesuit Social Services said that criminalising breaches of adjourned undertakings ‘serves to only further [people’s] entrenchment in the criminal justice system’.²¹⁹ And Women and Mentoring said that breach offences can ‘further entrench someone in the criminal justice system and contribute to their feelings of worthlessness and failure’.²²⁰
- 6.12 Victoria Legal Aid described the breach offence as ‘an unnecessarily punitive option for matters which are less serious’ and also observed the inconsistency in there being no equivalent breach offence for non-payment of fines, despite fines being more serious than adjourned undertakings in the current hierarchy.²²¹ Victoria Legal Aid suggested that the more appropriate response to breach behaviours is to consider whether the offender needs to be brought back before the court for resentencing. So too did the Law Institute.²²² And Victoria Police wrote that it ‘supports ... repeal of the offence in section 83AC ... so long as the court retains the ability to vary or cancel and resentence the adjourned undertaking ... there is no need to retain a standalone breach specific offence’.²²³

215. Submission 2 (Australian Community Support Organisation); Submission 3 (Office of Public Prosecutions); Submission 4 (Vacro); Submission 5 (Victoria Legal Aid); Submission 6 (Women and Mentoring); Submission 7 (Jesuit Social Services); Submission 8 (Law Institute of Victoria); Submission 9 (Victorian Aboriginal Legal Service); Submission 10 (Victoria Police); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw); Stakeholder Roundtable (16 February 2023).

216. Submission 4 (Vacro).

217. Submission 8 (Law Institute of Victoria).

218. Submission 8 (Law Institute of Victoria).

219. Submission 7 (Jesuit Social Services).

220. Submission 6 (Women and Mentoring).

221. Submission 5 (Victoria Legal Aid).

222. Submission 8 (Law Institute of Victoria).

223. Email from Victoria Police (6 April 2023).

The Council's view

6.13 We are of the view, especially in light of the remarkable stakeholder support, that the distinct offence of breaching an adjourned undertaking should be repealed. There are a number of reasons for this, many of which reflect observations we have made on previous occasions about the utility of so-called 'secondary offences' (specific offences of breaching court orders):²²⁴

- Victoria is one of only two jurisdictions in Australia (the other being Western Australia) that makes breaching these sorts of orders a distinct offence.
- Secondary offences make up about 10% of criminal charges sentenced in Victoria each year, a significant workload for those involved in criminal proceedings.
- The primary responses to breach offences are to find them proven and dismissed, with or without resentencing the original offending (and resentencing can occur regardless of there being a distinct breach offence).
- There are very inconsistent practices in prosecuting breach offences.

6.14 While we acknowledge the pragmatic utility of breach offences appearing on a person's criminal history, this alone does not justify retaining a criminal offence. There are other avenues through which that information could be recorded.

Decriminalising breaches

Recommendation 20: That the offence of contravening an adjourned undertaking be repealed.

224. Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report – Part 2* (2008) 253–255; Sentencing Advisory Council (2017), above n 211, 25–26. So too have other organisations: see, for example, Tasmania Law Reform Institute, *Sentencing*, Final Report no. 11 (2008) 153.

7. Restitution and compensation orders

- 7.1 This chapter considers a peculiar anomaly that has arisen in the *Sentencing Act*, which appears to have been interpreted as enabling courts to make own-motion ancillary compensation orders for victims of crime who are injured, but only in the context of low-end orders (adjourned undertakings, discharges and dismissals), not more severe sentencing orders such as community correction orders (CCOs) and imprisonment.
- 7.2 When sentencing someone, courts can make orders for restitution and/or compensation. Restitution orders involve returning stolen property or money. Compensation orders involve paying a victim money for injury or for the loss of property or damage to it. There seem to be three possible avenues by which courts can potentially make either a restitution or a compensation order when imposing an adjourned undertaking.
- 7.3 First, we found in our consultation paper that some courts have made restitution or compensation a condition of the adjourned undertaking itself. Compensation was, for example, a condition attached to 1.1% of adjourned undertakings (totalling \$231,000 over a two-year period).²²⁵ This approach makes failure to make restitution or compensation a breach of the adjourned undertaking.
- 7.4 Second, there are specific provisions of the *Sentencing Act* that enable courts to make ancillary restitution and compensation orders (separate to the sentencing order itself). There is no specified application process for a restitution order for stolen goods (via section 84) or a compensation order for property damage (via section 86), but there is a specified application process for a compensation order for personal injury (via sections 85B–85C). As a result, it seems that courts can make ancillary restitution orders for stolen goods and compensation orders for property damage in the absence of an application (own-motion orders), but they can't do the same when the compensation order relates to an injury (because an application is required).

225. Consultation Paper 44.

- 7.5 Third, the *Sentencing Act* includes two restitution and compensation provisions that are specific to dismissals, discharges and adjourned undertakings: sections 74 and 77. Before the introduction of those provisions, there had been some uncertainty about the availability of restitution and compensation orders in cases where a conviction was not recorded. The Victoria Sentencing Committee in their 1988 report²²⁶ found that there was ‘a need to simplify and rationalise restitution provisions and to ensure that this may be used whether or not the sanction imposed on the offender involves a conviction’.²²⁷ Sections 74 and 77 were therefore introduced to provide that courts ‘may make an order for compensation or restitution in addition to’ adjourned undertakings, discharges and dismissals regardless of whether a conviction is recorded.²²⁸ The question that these provisions raise is: do they confer an additional power on courts that section 85B does not – to make an own-motion ancillary compensation order relating to personal injury?
- 7.6 During our early consultations, some stakeholders told us that sections 74 and 77 have been interpreted this way, but inconsistently. In particular, we were told that some judicial officers are interpreting the provisions as a simple reminder that ancillary restitution and compensation orders are permissible when imposing low-end orders. But others are interpreting the provisions as conferring an additional power to make restitution and compensation orders above and beyond the powers in sections 84, 85B and 86 of the *Sentencing Act*.

226. That report was heavily influential in the drafting of the *Sentencing Act 1991* (Vic), described by the then Attorney-General as a ‘fundamental building block’: Victoria, Parliamentary Debates, Legislative Assembly, 19 March 1991, 336 (Mr Kennan, Attorney-General).

227. Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee*, vol. 1 (1988) 358.

228. Freiberg describes these provisions as confirmation that the low-end nature of discharges, dismissals and adjourned undertakings does not preclude ancillary orders such as restitution and compensation orders: Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 670–671.

Stakeholder views

7.7 In our consultation paper, we asked whether sections 74 and 77 should be repealed.²²⁹ Very few stakeholders responded to this question. The Office of Public Prosecutions contended that the provisions are redundant and could be repealed, though they did not actively advocate as such.²³⁰ We were also told that an own-motion process can often be more flexible and less formal. For instance, a victim support team advocated retaining the provisions because (a) they are already in use and (b) they can remove the need in some cases for victims to have to apply for compensation.²³¹

The Council's view

7.8 The current wording of the *Sentencing Act* has allowed a procedural anomaly to develop. Sections 74 and 77 do not appear to confer any additional power on courts, but they have been interpreted as doing so. In that way, they have allowed courts the ability to impose own-motion ancillary compensation orders for personal injury that are otherwise only available if an application is made via section 85C. On the one hand, this seems fairly uncontroversial. Own-motion orders are already possible for restitution orders for stolen goods and compensation orders for property damage. It therefore seems highly unusual that only victims of personal injury should be required to make an application to be compensated, when those whose goods have been stolen or property has been damaged do not.

7.9 However, sections 74 and 77 only apply to adjourned undertakings, dismissals and discharges. If these provisions are to operate as conferring some additional power on courts to make own-motion ancillary compensation orders for personal injury, they would only do so for less serious offending, whereas victims in cases where imprisonment or a CCO has been imposed would still need to make their own applications for compensation.

229. *Consultation Paper 67*.

230. Submission 3 (Office of Public Prosecutions).

231. Email from Victim Services, Support and Reform (7 November 2022).

7.10 Given the stakeholder feedback we received, we do not recommend repealing sections 74 and 77 as yet. Instead, we suggest that the Victorian Government review the extent to which compensation orders for personal injury should be available as own-motion ancillary compensation orders when courts impose low-end sentencing orders, as the same order would require an application from the victim or the prosecution when courts impose more severe sentences such as imprisonment or a CCO.

Restitution and compensation

Recommendation 21: That the Victorian Government review whether courts should be able to make own-motion ancillary compensation orders for injury when imposing adjourned undertakings, discharges or dismissals.

8. Communicating about adjourned undertakings

8.1 A criminal justice system can only function properly if it communicates effectively with all who come into contact with it, whether they be victims,²³² offenders,²³³ the legal profession, the media or the general community.²³⁴ For instance, offenders can only reasonably be expected to comply with the conditions of a sentencing order if they understand what those conditions mean and the consequences of non-compliance. This is difficult to achieve if the language used in the sentencing order is arcane or jargonistic, particularly for people who speak English as a second language or who have a cognitive impairment or learning difficulties. This chapter considers potential improvements in how courts communicate with offenders about adjourned undertakings, in particular:

- whether the adjourned undertaking form should be reviewed and revised to improve accessibility;
- how offenders can access a copy of the finalised order; and
- whether and how courts communicate with offenders who successfully complete their adjourned undertaking.

Redesigning the adjourned undertaking form

8.2 When an offender receives an adjourned undertaking, the court (through Courtlink²³⁵) produces a template form (CP230-9) that is amended with case-specific details, printed and then signed by both the magistrate and the offender. The offender is provided with a copy to take with them when they leave court at in-person hearings.

8.3 The Magistrates' Court provided us with a copy of the current adjourned undertaking form, which we reproduced in our consultation paper with their permission.²³⁶

232. See, for example, Rhiannon Davies and Lorana Bartels, 'Challenges of Effective Communication in the Criminal Justice Process: Findings from Interviews with Victims of Sexual Offences in Australia' (2020) 9(4) *Laws* 31.

233. See, for example, Beth A. Currie et al., 'Adults with Fetal Alcohol Spectrum Disorder: Factors Associated with Positive Outcomes and Contact with the Criminal Justice System' (2016) 23(1) *Journal of Population Therapeutics and Clinical Pharmacology* 37.

234. See, for example, Lawrence Singer and Suzanne Cooper, 'Improving Public Confidence in the Criminal Justice System: An Evaluation of a Communication Activity' (2009) 48(5) *Howard Journal of Criminal Justice* 485.

235. Courtlink is the official database of the Magistrates' Court and Children's Court.

236. *Consultation Paper* 62.

Our preliminary view was that the current form had multiple issues relating to accessibility, such as:

- using a very small font and relatively jargonistic language;
- always including references to certain optional conditions even if they are not applicable to each offender;
- failing to explain what the offender should do if they are experiencing difficulties in complying (for example, if their treating doctor is no longer available);
- inadequately explaining the circumstances in which the offender would need to return to court (or not) at the end of the adjourned undertaking;
- failing to explain that a breach can result in resentencing; and
- specifying an incorrect maximum fine for a breach offence.

Stakeholder views

8.4 Stakeholders who commented on the form shared our concerns:

In its current form, CP230-9 lacks clarity and causes confusion ... The form needs to have a simple layout and plain language to ensure it is accessible, particularly by culturally and linguistically diverse people or those with a low level of literacy.

Submission 10 (Victoria Police)

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

Submission 5 (Victoria Legal Aid)

The current adjourned undertaking form is convoluted and difficult to understand ... [and] causes unnecessary confusion and stress for many people ... VALS receives many enquiries from people who do not understand their obligations set out in the form ... who are unsure if they are required to attend court for their bond return ... The form should be amended to ensure that it can be understood by the sentenced person.

Submission 9 (Victorian Aboriginal Legal Service)

[The form] is currently cluttered, contains information that is not relevant to the accused person, uses jargonistic legal language, and fails to provide important information about what to do if there is an issue or the person is unable to comply with the condition/s of an order.

Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw)

- 8.5 Some of the specific changes suggested by stakeholders included:
- using a minimum 12-point font size and ensuring the form is available in larger font on request;
 - ensuring the form is written in plain English;
 - ensuring the form is available in languages other than English;
 - specifying what the offender should do if they become unable to comply with a condition (for example, if there is a significant waiting list for a specified program or their treating medical practitioner becomes unavailable);
 - making it clear that the offender does not need to attend court at the end of the specified period unless they are specifically advised to attend;
 - accepting verbal consent, rather than requiring a written signature; and
 - making it clear that one of the potential consequences of breach is being resentenced for the original offending.
- 8.6 Many of the organisations that represent offenders who receive adjourned undertakings – Victoria Legal Aid, the Victorian Aboriginal Legal Service, and Fitzroy Legal Service, WEstjustice and Youthlaw – shared examples of offenders who had attended court on their return date because they had not understood that they were not required to attend.²³⁷ They noted that having to attend court unnecessarily can cause significant disruptions to prosocial factors in an offender’s life – to work, childcare, travel, etc. It is important that offenders understand that they do not need to attend court unless required to do so.
- 8.7 If the adjourned undertaking form is reviewed, the Australian Community Support Organisation (ACSO) and Victoria Legal Aid further advocated that any redesign involve people with lived experience of the criminal justice system.²³⁸
- 8.8 Victoria Legal Aid, for instance, wrote that:
- [t]here are better outcomes and experiences when services are developed and operated by the people who use them. Lived experience leadership and coproduction, using human-centred design techniques, is needed to ensure our justice system is designed by those with lived experience to ensure it is tailored, effective and responsive. Accordingly, we recommend that adjourned undertaking forms be redesigned in consultation with people with lived experience of the justice system[.]²³⁹

237. Submission 5 (Victoria Legal Aid); Submission 9 (Victorian Aboriginal Legal Service); Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

238. Submission 2 (Australian Community Support Organisation); Submission 5 (Victoria Legal Aid).

239. Submission 5 (Victoria Legal Aid).

- 8.9 And ACSO 'strongly' suggested that there be 'detailed consultation on any redesign of the form with those subject to adjourned undertakings or other lived experience of justice involvement'.²⁴⁰

The Council's view

- 8.10 Once an offender leaves court, the adjourned undertaking form becomes their sole reference point of what is required of them throughout the period of the order. While they will have had the information on the form conveyed to them by the court,²⁴¹ it is crucial that the form be easily understood.
- 8.11 Given the numerous issues with the current form identified by stakeholders, the Council recommends that the Magistrates' Court review and revise the content, structure and layout of the form.²⁴² This should occur in consultation with experts in form design, especially those with experience of developing forms and other materials for marginalised populations, as well as people with lived experience of the criminal justice system.
- 8.12 One participant at our roundtable also observed that it could be helpful for the revised form to be shared with the higher courts to ensure consistency across jurisdictions.²⁴³

Redesigning the form

Recommendation 22: That the Magistrates' Court, in consultation with experts in form design and people with lived experience of the criminal justice system, review and revise the current adjourned undertaking form to improve accessibility and comprehensibility.

240. Submission 2 (Australian Community Support Organisation).

241. *Sentencing Act 1991* (Vic) s 95.

242. For a good example of the application of plain English principles to court form design, see Alison Paulin et al., *The Language of Protection Orders* (2020) 7.

243. Stakeholder Roundtable (16 February 2023).

The need for a signature

- 8.13 The current adjourned undertaking form requires a physical signature from the offender to consent to the order. The need for this physical signature most likely derives from the underpinning legislation. Sections 72 and 75 of the *Sentencing Act* specify that the order involves an ‘offender giving an undertaking’, and section 3 then defines *undertaking* to mean ‘a written undertaking by the offender in the prescribed form’.²⁴⁴ There is no ‘prescribed form’ in the *Sentencing Regulations 2021* (Vic). Instead, the current form was developed, and continues to be managed by, the courts themselves.
- 8.14 Given the rise of Webex court hearings in response to COVID-19, there may be a level of practical utility in moving away from the need for a physical (or electronic) signature as evidence that the offender has consented to the adjourned undertaking. Instead, the court could simply ask the offender if they consent to the order and reflect that consent in the order through, for example, a check-box.
- 8.15 This pragmatic shift away from requiring physical signatures may, however, need legislative reform, given that the *Sentencing Act* currently requires the offender to give a ‘written undertaking’.²⁴⁵ The precise nature of what textual amendments would be required to enable courts to record an offender’s verbal consent to the order is ultimately a matter for parliamentary counsel. We would, though, simply note that the term ‘undertaking’, as it appears in section 3 of the *Sentencing Act*, is currently used in multiple unique contexts throughout the *Sentencing Act*: an undertaking to assist authorities,²⁴⁶ bail undertakings,²⁴⁷ an undertaking following release on adjournment,²⁴⁸ an undertaking to attend court if sentencing is deferred²⁴⁹ or otherwise postponed,²⁵⁰ or an undertaking to comply with certain conditions upon the governor exercising the royal prerogative of mercy.²⁵¹ As such, any change to the definition of ‘undertaking’ could have broader implications than just its application to adjourned undertakings. However, we note that there is an interplay between many of our recommendations, and a shift in the terminology to ‘good behaviour order’ (see above at [2.6].) would reduce the overlapping terminology of ‘undertaking’.

244. *Sentencing Act 1991* (Vic) ss 3(1), 72(1), 75(1).

245. *Sentencing Act 1991* (Vic) s 3(1).

246. *Sentencing Act 1991* (Vic) ss 5(2AB)–(2AC), (2H)(a).

247. *Sentencing Act 1991* (Vic) ss 69F(1), 69FB(1), 83AK(a).

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

249. *Sentencing Act 1991* (Vic) s 83A(2)(b).

250. *Sentencing Act 1991* (Vic) s 101(3)(a).

251. *Sentencing Act 1991* (Vic) s 107.

- 8.16 Therefore, two separate reforms would most likely be necessary to remove the need for the offender to sign the undertaking: (1) legislative reform to overcome the current requirement that the offender give a written undertaking, and (2) amendment of the form itself to remove the need for a signature.

Requiring a signature

Recommendation 23: That the *Sentencing Act 1991* (Vic) be amended to remove the requirement that offenders have to give a ‘written’ undertaking to comply with the conditions of an adjourned undertaking.

Recommendation 24: That the Magistrates’ Court amend the adjourned undertaking form to enable courts to record an offender’s verbal consent to the conditions of an adjourned undertaking, rather than requiring a written or electronic signature.

Electronic copy of the adjourned undertaking form

- 8.17 Upon sentencing an offender to an adjourned undertaking, the court gives the person a hard copy of the finalised adjourned undertaking form to take with them when they leave court. During consultations, we were told that it is not reasonable to rely on offenders retaining this hard copy as the only reminder of the conditions of their order for the period of the order. Paper copies are easily damaged or lost, especially for offenders in less secure housing situations who might move frequently or whose lives are otherwise chaotic. As Fitzroy Legal Service, WEstjustice and Youthlaw told us:

It is our experience that many accused people do not [retain] or have difficulty retaining the hard copy adjourned undertaking form provided at court, particularly where the person is marginalised, vulnerable or young, and are thereafter unaware of their obligations.²⁵²

- 8.18 The Council understands that when an adjourned undertaking is imposed during online hearings (as have become more common since COVID-19), the courts will usually ask for the offender’s (or their legal representative’s) email address so that an electronic copy of the form can be emailed to them after the hearing. But we were also advised that this is not done automatically when matters are heard in person.

252. Submission 11 (Fitzroy Legal Service, WEstjustice and Youthlaw).

8.19 One solution would be for courts to always email a copy of the finalised adjourned undertaking form to the offender (and, if relevant, their legal representatives) and/or text them a hyperlink from which they can access the form, to ensure that they have an electronic copy for reference. When we raised this possibility with participants at our roundtable, there was general support from everyone present.²⁵³ Courts should be flexible, though, about the preferred medium by which offenders will receive an electronic copy of the form. There will be some offenders for whom an email address will be their preferred medium, and there will be others for whom an SMS will be more appropriate.

Sending an electronic copy

Recommendation 25: That courts send an electronic copy of finalised adjourned undertaking forms to offenders (and, if relevant, their legal representatives).

Notifying offenders of expiry of their adjourned undertaking

8.20 At the end of an adjourned undertaking, a magistrate (or judge) will, in open court, review relevant materials in Courtlink to assess the offender's compliance with the conditions of the adjourned undertaking (for example, whether they have provided a letter from a treating practitioner or confirmation of payment to the Court Fund). If the court is satisfied that the offender has observed the conditions of their adjourned undertaking, the court must discharge the offender or dismiss the charges without any further hearing of the matter.²⁵⁴

8.21 A police prosecutor is present for this review process, but the offender is not typically required to attend. At present, the court does not then communicate to the offender that the matter has been finalised. Stakeholders were concerned that the lack of communication with the offender that the matter has been finalised misses an opportunity for positive reinforcement of compliant behaviour.²⁵⁵

253. Stakeholder Roundtable (16 February 2023).

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

255. For example, in response to being asked in our stakeholder survey to name one thing they would change about adjourned undertakings, one respondent advocated '[f]or the court to confirm in writing the accused has complied. This would then put the accused at ease and also fulfill a broader issue of confidence in the court system'.

- 8.22 There is ample evidence to suggest that even small gestures of positive reinforcement of desirable behaviour can have significant effects.²⁵⁶ Advising offenders that their adjourned undertaking has been successfully completed, and showing that the court was invested in their compliance, can reinforce the 'good behaviour' shown by the person during the period of their order.
- 8.23 There is a question whether the language used in such a notification should be slightly guarded. On the one hand, there may have been breaches or reoffending during the period of the adjourned undertaking, and the court is not aware of this at the finalisation hearing. In such instances, sending notice of 'successful' completion could pose a reputational risk for the court, because the offender has not actually successfully completed their adjourned undertaking. On the other hand, the vast majority of people on adjourned undertakings do successfully comply with the conditions and don't reoffend during the period of the adjourned undertaking. And courts are already making a finding at the end of the adjourned undertaking that they are 'satisfied that the offender has observed their conditions', because that is a prerequisite of discharge/dismissal at the further hearing.²⁵⁷ Using positive language in the notification could potentially play a role in reinforcing the offender's positive behaviour, and that could be lost if the wording was watered down.
- 8.24 Either way, we are of the view that it would be useful for courts to send a notification to offenders that their adjourned undertaking has been finalised.

Notification of completion

Recommendation 26: At the end of the period of the adjourned undertaking, if the court is satisfied that the offender has observed the conditions of their adjourned undertaking, the court should send the offender electronic notification to this effect.

256. See, for example, Joel A. Dvoskin et al., 'What If Psychology Redesigned the Criminal Justice System?', in Joel A. Dvoskin et al. (eds), *Using Social Science to Reduce Violent Offending* (2011) 298; Stephen T. Higgins and Nancy M. Petry, 'Contingency Management: Incentives for Sobriety' (1999) 23(2) *Alcohol Research & Health* 122, 122; Danielle S. Rudes et al., 'Adding Positive Reinforcement in Justice Settings: Acceptability and Feasibility' (2012) 42(3) *Journal of Substance Abuse Treatment* 260.

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

Appendix 1: consultation and submissions

Meetings

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
31 August 2022	Meeting with Victorian Aboriginal Legal Service
2 September 2022	Meeting with No to Violence
2 September 2022	Meeting with Safe + Equal
5 September 2022	Meeting with Jesuit Social Services
5 September 2022	Meeting with Australian Multicultural Foundation
9 September 2022	Meeting with Magistrates' Court
13 September 2022	Meeting with Australian Community Support Organisation
13 September 2022	Meeting with Victim Services, Support and Reform
13 September 2022	Meeting with Vacro

Date	Meeting
26 September 2022	Meeting with Fitzroy Legal Service
7 October 2022	Meeting with Magistrates' Court
16 February 2023	Stakeholder Roundtable <ul style="list-style-type: none"> • Australian Community Support Organisation • Department of Justice and Community Safety • Fitzroy Legal Service • Office of Public Prosecutions • Victoria Police • Victoria Legal Aid • Victorian Aboriginal Legal Service
21 February 2023	Meeting with Department of Families, Fairness and Housing
28 February 2023	Meeting with Law Institute of Victoria
17 April 2023	Meeting with Magistrates' Court
19 April 2023	Meeting with County Court

Submissions

1. Confidential
2. Australian Community Support Organisation
3. Office of Public Prosecutions
4. Vacro
5. Victoria Legal Aid
6. Women and Mentoring
7. Jesuit Social Services
8. Law Institute of Victoria
9. Victorian Aboriginal Legal Service
10. Victoria Police
11. Fitzroy Legal Service, WEstjustice and Youthlaw

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