Statutory Minimum Sentences for Gross Violence Offences
Report

Sentencing Advisory Council
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Executive summary

Terms of reference

This report constitutes the Sentencing Advisory Council’s response to a request for advice from the Attorney-General on the introduction of statutory minimum sentences for the offences of intentionally causing serious injury and recklessly causing serious injury, when those offences are committed in circumstances of gross violence.

The terms of reference from the Attorney-General require advice on the way in which a minimum four-year non-parole period for adults, and a minimum period in detention of two years for children aged 16 or 17, might operate. The circumstances of gross violence suggested in the terms of reference are that an offender:

- plans in advance to engage in an attack intending to cause serious injury;
- engages in a violent attack as part of a gang of three or more persons;
- plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury; or
- continues to violently attack the victim after the victim is incapacitated.

The terms of reference indicate that a court should only be able to sentence below the statutory minimum in tightly defined exceptional circumstances.

The Council was specifically asked to provide advice on:

a. how the exceptional circumstances in which a court may impose a non-parole period of less than the statutory minimum sentence should best be specified;

b. how the factors making the offence one of gross violence to which the minimum sentence is applicable should best be specified;

c. the likely effects of recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the numbers of persons serving custodial and non-custodial sentences; and

d. any other matters the Council considers relevant.

The terms of reference do not ask the Council to consider the merits of a statutory minimum sentence scheme.

Consultation

The Council consulted with a wide variety of criminal justice, governmental and non-governmental stakeholders and held two discussion forums. The Council made a public call for submissions and received 26 written submissions.
Package of recommendations

This report contains a package of recommendations addressing both the form and content of the gross violence offences, as well as the special reasons for exemption from the statutory minimum sentences. The Council has formulated the package in accordance with the policy objectives and intent of the terms of reference. The recommendations are closely interrelated, and are all based on the inclusion of a severe injury threshold.

Structure

The Council has considered how best to structure gross violence offending. It recommends that, in the interests of clarity and simplicity, rather than forming aggravating circumstances to the sentencing considerations for existing serious injury offences, separate new offences should be created. One offence should involve the intentional infliction of severe injury, and the other offence should involve the reckless infliction of severe injury (corresponding with the existing offences of intentionally causing serious injury and recklessly causing serious injury).

Currently in Victoria, if a court sentences an offender to multiple terms of imprisonment, the court specifies a single non-parole period, rather than a separate non-parole period for each term of imprisonment.

The Council also recommends that, in sentencing for the proposed offences, the minimum non-parole period (or period of detention) should apply to the case as a whole.

Where there are multiple charges of gross violence, a single minimum statutory non-parole period (or period of detention) should apply to the whole case. It would remain open to a court to impose a non-parole period (or period of detention) greater than the minimum to take multiple charges into account if the court considers it appropriate having regard to ordinary sentencing principles.

Jurisdiction

The jurisdictional limit on the sentence that may be imposed by the Magistrates’ Court (and the proposed statutory minimum for adult offenders) means that the new offences cannot be determined summarily for adults in the Magistrates’ Court.

A separate question to resolve, however, was whether the new gross violence offences should be excluded from the Children’s Court jurisdiction, given the incompatibility of a two-year minimum sentence with the current sentencing powers of the Children’s Court, or whether the offences should be retained, with the jurisdictional limit of the Children’s Court for single charges increased to three years.

The Council has considered these options at length and recommends that the offences should be excluded from the Children’s Court jurisdiction by listing the gross violence offences in section 516(1)(b) of the Children, Youth and Families Act 2005 (Vic) alongside the seven death-related indictable offences currently excluded from that jurisdiction.

The primary reasons for this are that excluding the offences from that jurisdiction requires minimal legislative amendment and, unlike retaining the offences, does not distort the principles and operation of the Children’s Court. The safeguards of the indictable procedure may also be more appropriate for offences requiring a two-year minimum sentence, and such offences (given the requirement of severe injury coupled with high culpability) may be of the type that would be excluded from summary jurisdiction by the Children’s Court, in any event.
Injury threshold

The terms of reference propose that the reforms should apply to offences involving ‘serious injury’. The threshold for what constitutes ‘serious injury’ for the existing Crimes Act 1958 (Vic) offences of intentionally causing serious injury and recklessly causing serious injury is relatively low. For example, the Court of Appeal has held that relatively minor injuries (such as two black eyes and a grazed forehead) can constitute ‘serious injury’ for the purposes of those offences. The Council does not consider that such injuries are consistent with the intended policy (the policy announcement referred to attacks that are leaving victims with ‘terrible life-long injuries’) and recommends that the new offences with the statutory minimum sentences should only apply to situations involving a higher level of injury.

The Council recommends that the threshold should be ‘severe injury’. The Council recommends that this should be defined in legislation, and suggests a test similar to that of ‘serious injury’ in the Accident Compensation Act 1985 (Vic). This would cover injuries of a long-term nature involving serious impairment to, or loss of, a body function or serious disfigurement.

The Council’s recommendations on the substantive content of the gross violence offences (and the special reasons for exemption from a statutory minimum sentence) have been formulated on the basis of a severe injury threshold.

Gross violence factors

The Council considered each of the gross violence factors proposed in the terms of reference.

‘Plans in advance to engage in an attack intending to cause serious injury’

The Council notes that planning offending behaviour in advance significantly increases an offender’s culpability. The Council recommends that the proposed circumstance be included as an alternative element of the offence of intentionally causing severe injury.

As the proposed circumstance requires a plan in advance intending to cause injury, the Council recommends that planning in advance should not be included as an element of the new offence of recklessly causing severe injury.

‘Engages in a violent attack as part of a gang of three or more persons’

The Council notes that violent offending involving three or more co-offenders increases each offender’s culpability. However, the Council considers that the degree by which culpability is increased will depend on the extent of involvement of each offender in the offence. The law of complicity provides that co-offenders who may have limited involvement in offending can still be convicted of the offence. Ordinarily, a sentencing court can impose a sentence that appropriately reflects each co-offender’s level of culpability. Where a statutory minimum applies, the least culpable co-offender will still receive the minimum sentence.

The Council recommends against the use of the word ‘gang’, as it may require evidence of some form of common identity among co-offenders and limit the application of this element to formalised ‘gangs’, rather than simply offending in company.

In accordance with the policy objective to target highly culpable offenders, the Council recommends that this gross violence element be limited to those offenders who either themselves inflict severe injury, or act in concert to inflict severe injury. Those offenders who aid, abet, counsel or procure a gross violence offence should still be liable to conviction, but should not be subject to the statutory minimum sentences.
Statutory minimum sentences for gross violence offences

‘Plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury’

The Council notes that violent offending involving the use of a weapon carried for the purpose of that offending significantly increases an offender’s culpability. The Council recommends that this circumstance be included as an alternative element of both intentionally causing severe injury and recklessly causing severe injury, save that the words ‘deliberately or recklessly’ should be replaced with either ‘intentionally’ or ‘recklessly’ to correspond with the mental element of the relevant offence.

‘Continues to violently attack the victim after the victim is incapacitated’

The Council notes that an offender’s culpability is significantly increased in circumstances where that offender has continued to attack a victim after the victim is incapacitated. The Council has considered whether the term ‘incapacitated’ should be defined and concludes that to do so may unreasonably exclude otherwise highly culpable offending and that the term is an ordinary word capable of determination by the finder of fact.

The Council recommends that this circumstance be included as an alternative element of both intentionally causing severe injury and recklessly causing severe injury. The Council recommends that this element should also cover situations in which an offender continues to violently attack or cause injury to the victim after the victim is incapacitated (such as where an offender releases an unconscious victim allowing him or her to fall and sustain injury).

The Council recommends that the alternative elements of the new severe injury offences should be read disjunctively, such that proof of one element is sufficient to make out a gross violence offence. The Council considers that the presence of one gross violence element is sufficient for an offender to demonstrate a high level of culpability.
Exceptions to the statutory minimum sentences

In order to determine those circumstances that warrant exemption from the statutory minimum sentences, the Council adopted a merits-based approach to determining what ought to be ‘exceptional’, rather than an interpretation based on rarity or infrequency.

The Council recommends that the phrase ‘special reasons’ should be used to avoid confusion with other tests in Victorian law that use the phrase ‘exceptional circumstances’.

In light of the rationale of high culpability implicit in the gross violence elements of the new severe injury offences, the Council considered that exceptions to the imposition of a statutory minimum sentence should be based on circumstances that significantly diminish an offender’s culpability or that can be justified for public policy reasons.

The Council considered that, as a general statement test may be susceptible to broad interpretation and the clear policy objective is to tightly define exemptions from the statutory minimum sentences, the legislation should provide a list of special reasons. The list of special reasons should comprise those circumstances that are foreseeable and commonly regarded as appropriate exemptions on the basis of the rationales of diminished culpability and public policy.

As there are unforeseeable circumstances that may warrant a court determining that it is in the interests of justice to sentence an offender below the statutory minimum sentence, the list of special reasons should not be exhaustive.

A non-exhaustive list of special reasons will provide guidance to a court as to the kinds of circumstances that ought to warrant exemption from the statutory minimum sentence and the rationale behind such exemptions.

The Council recommends that the non-exhaustive list of special reasons should include at least the following:

- intellectual disability or cognitive impairment (including acquired brain injury);
- mental illness;
- particular psychosocial immaturity and/or particular vulnerability in custody; or
- assistance by the accused to police or an undertaking by the accused to assist the Crown.

The mere existence of one of the listed special reasons in a case should not automatically warrant exemption from the statutory minimum sentences. Instead, a court must consider whether it is also in the interests of justice to do so. For example, if in a particular case mental illness is raised on the part of the offender as a special reason, the court would have to consider issues such as the nature and severity of the mental illness, its relationship with the commission of the offence and the extent, if any, to which it may affect the offender’s moral culpability for the offence.

Under the existing dual track system, a court can sentence adult offenders aged 18 to 20 to detention in a youth justice centre rather than an adult prison if the court is satisfied of certain criteria (for example, if the offender is particularly immature or would be particularly vulnerable in an adult prison). The Council recommends that adult offenders aged 18 to 20 who commit the new severe injury offences but who satisfy the criteria for the dual track system should (in the absence of any other special reason) be subject to the minimum two-year period of detention that will be applicable to offenders aged 16 and 17.

In consultations, many stakeholders suggested other circumstances for inclusion as special reasons. The Council concluded that, while mitigating, many of those circumstances would not be consistent with the policy objectives. This does not preclude combinations of such circumstances from constituting special reasons; however, they could only do so if it were in the interests of justice having regard to the high levels of harm and culpability for the gross violence offences.
Likely effects on sentencing practices and numbers in custody

The Council was asked to provide the Attorney-General with advice on the likely effect of its recommendations on sentencing levels and on the numbers of persons serving custodial and non-custodial sentences.

To give some background for the likely impacts, the Council has provided information on the current sentencing practices for intentionally causing serious injury and recklessly causing serious injury.

Charges of intentionally causing serious injury against adult accused persons can only be heard in the higher courts. The majority of charges (72.7% in 2008–09) result in a sentence of imprisonment. Approximately one in five (21.0% in 2008–09) cases involving a charge of intentionally causing serious injury received a non-parole period equivalent to, or greater than, the proposed statutory minimum of four years.

Charges of recklessly causing serious injury against adult accused can be heard in either the Magistrates’ Court or the higher courts. A much higher proportion are heard in the Magistrates’ Court than in the higher courts. Of the 454 charges sentenced in the Magistrates’ Court in 2008–09, 17.4% received a sentence of imprisonment. Of the 158 charges sentenced in the higher courts in the same year, 42.4% received a sentence of imprisonment. Of all the cases involving a charge of recklessly causing serious injury in the higher courts, a small proportion (3.6% in 2008–09) received a non-parole period equivalent to, or greater than, the proposed statutory minimum of four years. The percentage of all cases for this offence in both the Magistrates’ Court and the higher courts receiving a non-parole period lower than, or another sentence less severe than, the proposed statutory minimum would be even smaller.

To advise on the likely effects of its recommendations, the Council has produced a set of estimates on the change in sentencing practices for adult offenders and the resultant numbers in custody, based on two possible scenarios:

1. a broad definition involving the presence of at least one of the gross violence factors; and
2. a recommended definition using the same ‘gross violence’ criteria as the broad definition, but restricted to cases where the victim received a ‘severe’ injury as a result of the offence.

The limited data available on the prevalence of the possible gross violence factors make it difficult to provide precise estimates. Based in part on an analysis of available sentencing remarks in the period 2008–09, the Council estimates that:

- the broad definition could result in a compound increase of 1,150 to 1,450 adult prisoners; and
- the recommended definition would result in a compound increase of approximately 200 adult prisoners.

Under each definition, the increase would stabilise at that level over time, taking a minimum of four years.

The inclusion of severe injury as an element of the new offences (in the recommended definition approach) means that, although there would be an increase in the number of offenders in custody, the scale of the increase would be much smaller. This is because the proportion of cases that involve the infliction of severe injury is substantially smaller than the proportion without severe injury and because many offenders who inflict severe injury already receive lengthy sentences of imprisonment.

Far fewer offenders aged 16 and 17 than adults are sentenced for the existing serious injury offences (approximately 100 per year). Under the broad definition above, the Council estimates that the number of children sentenced to a youth justice centre order could increase from approximately 20 to approximately 80 per year. Children will also be retained in custody for a much longer period of time than is currently the case.

Under the Council’s recommended definition, with a severe injury threshold, the overall impact would be less significant, but targeted at those offenders with a high level of culpability who have also inflicted a high level of harm.
Other relevant matters

The Council has also considered a number of other matters relevant to the introduction of statutory minimum sentences for the gross violence offences.

The Council has considered the impact on the number of pleas, plea negotiation, court costs and court delay.

In the overwhelming majority of cases involving the existing serious injury offences, the accused pleads guilty. For example, in 2008–09, 90% of charges for these offences in the higher courts were finalised by way of a guilty plea. Pleas of guilty in such cases provide significant benefits to the community. This is reflected in a reduction in sentence, which in turn provides an incentive to an accused person to plead guilty.

Stakeholders raised concerns that, under the statutory minimum scheme, there would be little, if any, incentive for an accused person to plead guilty to the new offences. In addition, under the broad definition approach, a very large number of cases that are currently dealt with as a plea of guilty in the Magistrates' Court would have to proceed as a committal in the Magistrates' Court and then to a contested trial in the County Court. Concerns were expressed that, in the absence of a significant injection of resources, this could overwhelm the system and lead to significant delays. The potential for this to occur is significantly reduced under the recommended definition approach.

Other matters that have been examined by the Council include:

- the potential for a disproportionate impact on certain kinds of offenders;
- the impact on Indigenous offenders, including the potential impact on the Koori Court;
- the impact on human rights obligations, including international human rights obligations;
- the loss of access to group conferencing and other rehabilitative and restorative measures;
- the impact on victims;
- issues of recidivism and deterrence; and
- custodial and future costs.

While, in accordance with the terms of reference, the Council has provided estimates of the likely impact of the changes, there is a substantial degree of uncertainty. This is because much will depend on such matters as the evidence of the factors in particular cases, charging practices, plea negotiation and the interaction of the new offences (and the imposition of statutory minimum sentences) with a proposed new baseline sentencing scheme. Accordingly, the Council considers it important that after the scheme is implemented and a sufficient number of cases have been sentenced, the impact of the scheme should be monitored.
Summary of recommendations

Recommendation 1

The Council recommends the creation of two new offences.

While the precise wording is to be determined by parliamentary counsel, the Council recommends that the elements of the new offences should be as follows:

**Intentionally causing severe injury in circumstances where the offender:**
- plans in advance to engage in an attack intending to cause severe injury;
- causes severe injury while in company with two or more persons, where both the offender and at least two other persons cause severe injury or act in concert with one another to cause severe injury;
- plans in advance to carry and use a weapon in an attack and intentionally uses the weapon to inflict severe injury; or
- continues to attack the victim, or cause injury to the victim, after the victim is incapacitated.

**Maximum penalty: 20 years’ imprisonment (Level 3).**

**Recklessly causing severe injury in circumstances where the offender:**
- causes severe injury while in company with two or more persons, where both the offender and at least two other persons cause severe injury or act in concert with one another to cause severe injury;
- plans in advance to carry and use a weapon in an attack and recklessly uses the weapon to inflict severe injury; or
- continues to attack the victim, or cause injury to the victim, after the victim is incapacitated.

**Maximum penalty: 15 years’ imprisonment (Level 4).**

Severe injury should be defined exhaustively to cover:
- long-term serious impairment or loss of a body function; or
- long-term serious disfigurement; or
- loss of a foetus.

Each offence should be indictable only (in contrast to the existing offence of recklessly causing serious injury, recklessly causing severe injury should not be triable summarily in the Magistrates’ Court).

In any case in which a court sentences a person for one of the new offences, if the person was aged 18 years or older at the time of committing the offence, the court must (unless an exception applies):
- impose a sentence of imprisonment of no less than four years for the charge of intentionally causing severe injury or recklessly causing severe injury; and
- if the court fixes a non-parole period, the non-parole period must be no less than four years.

In cases in which sentences of imprisonment are imposed for more than one charge, courts should continue to fix a single non-parole period.
In any case in which a court sentences a person for intentionally causing severe injury or recklessly causing severe injury and that person was aged 16 or 17 years at the time of committing the offence, the court must (unless an exception applies) impose for that offence a youth justice centre order of no less than two years, during which time the offender is not eligible for parole.

Persons found guilty of the new offences on the basis that they aided, abetted, counselled or procured the offence should not be subject to the statutory minimum sentence.

**Recommendation 2**

The offences of intentionally causing severe injury and recklessly causing severe injury should be excluded from the jurisdiction of the Children’s Court, provided that they are framed as separate offences requiring a severe injury threshold in accordance with Recommendation 1.

The offences of intentionally causing severe injury and recklessly causing severe injury should be listed in section 516(1)(b) of the *Children, Youth and Families Act 2005* (Vic) along with the seven death-related indictable offences currently excluded from the jurisdiction of the Children’s Court.

**Recommendation 3**

The exceptional circumstances should be called ‘special reasons’.

The special reasons should be framed in a non-exhaustive list.

That list should include:

- intellectual disability or cognitive impairment (including acquired brain injury);
- mental illness;
- particular psychosocial immaturity and/or particular vulnerability in custody; and
- assistance by the accused to police or an undertaking by the accused to assist the Crown.

The legislation should provide that the court may impose a sentence (including a non-custodial sentence) other than the statutory minimum non-parole period, where the court considers that a lesser sentence is appropriate because of both the existence of special reasons and that it is in the interests of justice.

Where a youthful offender (18 to 20 years of age) is convicted of intentionally causing severe injury or recklessly causing severe injury and satisfies the eligibility criteria for youth detention under the dual track system, that offender should be subject to the same statutory minimum period of detention imposed on a 16 or 17 year old offender convicted of intentionally causing severe injury or recklessly causing severe injury.

The legislation should provide scope that a combination of reasons can be found to constitute special reasons.
Chapter 1
Introduction

Terms of reference

1.1 In April 2011, the Attorney-General wrote to the Sentencing Advisory Council asking it to advise him on the introduction of statutory minimum sentences for the offences of intentionally causing serious injury and recklessly causing serious injury when committed with gross violence.

1.2 The letter outlined the government’s policy in the following terms:

• A four-year minimum sentence (i.e. non-parole period) will apply to adult offenders, and a two-year minimum detention sentence will apply to juvenile offenders aged 16 or 17.

• The minimum sentence is to apply save in tightly defined exceptional circumstances, such that the circumstances of the case are so unusual that the court is entitled to assume parliament could not have intended those circumstances to be covered.

• The minimum sentence is to apply where the offence involves gross violence, such as where the offender:
  – plans in advance to engage in an attack intending to cause serious injury;
  – engages in a violent attack as part of a gang of three or more persons;
  – plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury; or
  – continues to violently attack the victim after the victim is incapacitated.
1.3 The Attorney-General also asked the Council to advise on:

a. how the exceptional circumstances in which a court may impose a non-parole period of less than the statutory minimum sentence should best be specified;

b. how the factors making the offence one of gross violence to which the minimum sentence is applicable should best be specified;

c. the likely effects of recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the numbers of persons serving custodial and non-custodial sentences; and

d. any other matters the Council considers relevant.

1.4 The proposed statutory minimum sentences for serious injury offences committed in circumstances of gross violence form part of the government’s announced program of sentencing reforms, which include the introduction of baseline sentences. The Attorney-General has requested that the Council provide its advice by 5 September 2011 and separate advice on baseline sentences by 29 February 2012.

1.5 The Attorney-General has not asked the Council to advise him on the merits of the policy of introducing the statutory minimum sentences. A significant number of both the submissions and comments received by the Council from stakeholders in consultations strongly objected to the introduction of statutory minimum sentences, particularly for young offenders and child offenders aged 16 and 17. Many stakeholders were of the view that discretion is a fundamental principle of sentencing that allows a court to tailor a sentence to the unique requirements of a particular case, and consequently, any form of fixed penalty, however carefully structured, could not entirely avoid unjust outcomes. A number of stakeholders explicitly stated that their submissions or comments to the Council, addressing the particular questions raised in the terms of reference, were not to be seen as acquiescence to, or endorsement of, the proposed reforms.

1.6 While acknowledging these concerns, the Council has confined its advice to the terms of reference.

1.7 As a public statutory authority, it is unlawful for the Council ‘to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’. To that end, in developing its advice, the Council has had regard to the potential implications for human rights contained in the Charter of Human Rights and Responsibilities Act 2006 (Vic) as a result of the proposed reforms. This is discussed in Chapter 8 ([8.61]–[8.66]).

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1 Section 108C(1)(f) of the Sentencing Act 1991 (Vic) provides that one of the Council’s functions is ‘to advise the Attorney-General on sentencing matters’.

2 Submission 1 (Anonymous); Submission 2 (G. Defteros); Submission 4 (L. Reddaway); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Vicotorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 16 (Berry Street); Submission 17 (Federation of Community Legal Centres Victoria); Submission 18 (Mental Health Legal Centre); Submission 19 (Springvale Monash Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania); Submission 25 (Liberty Victoria).

3 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 38(1).
The offences

Intentionally causing serious injury

1.8 Intentionally causing serious injury is the most serious of the non-fatal injury offences that can be charged against an alleged offender in Victoria.

1.9 Section 16 of the Crimes Act 1958 (Vic) provides that:

A person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence.

1.10 The maximum penalty for this offence is Level 3 imprisonment (20 years maximum).

1.11 The offence involves three elements that must be proved beyond reasonable doubt:

1. The accused caused serious injury to another person;
2. The accused intended to cause that serious injury; and
3. The accused caused the serious injury without lawful excuse.

1.12 ‘Serious injury’ is not exhaustively defined in legislation. Section 15 of the Crimes Act 1958 (Vic) provides that:

injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function …

serious injury includes—

(a) a combination of injuries; and

(b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm[.]

1.13 It has been held that ‘serious injury’ is an ordinary English term. Therefore, if there is a jury trial, it is for the jury to determine, as a question of fact, whether the victim’s injuries qualify as ‘serious’.4

1.14 Although the issue of whether a particular injury is ‘serious’ is a question of fact, appellate courts have given some guidance on the meaning of serious injury. The Court of Criminal Appeal has contrasted ‘serious injury’ with injuries that would be commonly regarded as ‘slight, superficial or trifling’.5 In practice, this has set the threshold for ‘serious injury’ at a relatively low level. The Court of Appeal has held, for example, that two significant black eyes together with grazes around the top of the head and face may be sufficient for a jury to form the view that these constituted a ‘serious injury’.6

4 R v Welsh and Flynn (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, King and Tadgell JJ, 16 October 1987).
5 Ibid 18 (Tadgell J).
1.15 The second element listed above – the accused person’s intention to cause serious injury – differentiates intentionally causing serious injury from recklessly causing serious injury. To satisfy the mental element of intentionally causing serious injury, it is not enough for the prosecution to prove that the accused intended to do the act that caused the serious injury; the prosecution must also prove that the accused intended to cause serious injury.\(^7\)

1.16 As intention is a state of mind, unless the accused acknowledges that he or she had the relevant intention (for example, by pleading guilty to the offence), the accused person’s state of mind must be inferred from his or her behaviour. This can be done only if the sole inference that could reasonably be made from the accused person’s behaviour is that he or she intended to cause serious injury.\(^8\)

Recklessly causing serious injury

1.17 Section 17 of the Crimes Act 1958 (Vic) provides that:

A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.

1.18 The maximum penalty for this offence is Level 4 imprisonment (15 years maximum).

1.19 This offence differs from intentionally causing serious injury only in the mental element required to be proved.

1.20 The element of ‘recklessness’ will be satisfied for this offence if the prosecution proves beyond reasonable doubt that the accused foresaw that his or her actions would probably cause serious injury and that he or she was indifferent as to whether or not serious injury would actually result.\(^9\)

Again, as this relates to the accused person’s state of mind, it is necessary that the only inference that can be drawn from the accused person’s behaviour is that he or she had this state of mind.

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\(^7\) Westaway v The Queen (1991) 52 A Crim R 336; \(R\ v\ Wilson\ and\ Jenkins\) [1984] AC 242.

\(^8\) R v Schonewille [1998] 2 VR 625, 632.

Jurisdiction

1.21 Both intentionally causing serious injury and recklessly causing serious injury are indictable offences, meaning that they may be tried on indictment in the higher courts before a jury.

1.22 Recklessly causing serious injury is also triable summarily (in the Magistrates’ Court) if:
  • the court considers the charge appropriate to be dealt with summarily; and
  • the accused consents.\(^\text{10}\)

1.23 The seriousness of the particular charge of recklessly causing serious injury is a key factor that will determine whether the court views it as appropriate to be heard in the Magistrates’ Court.\(^\text{11}\)

1.24 For summary and indictable offences that are tried and sentenced in the Magistrates’ Court, the longest term of imprisonment that may be imposed is two years.\(^\text{12}\) If the case involves multiple charges committed at the same time, the longest total effective sentence that may be imposed is five years.\(^\text{13}\)

1.25 Both intentionally causing serious injury and recklessly causing serious injury are triable summarily in the Children’s Court, unless the court considers the charge unsuitable for summary hearing or the child objects to summary hearing.\(^\text{14}\)

Legislative history

1.26 In 1986, the maximum penalty for intentionally causing serious injury was 15 years’ imprisonment.\(^\text{15}\) In 1992, the maximum penalty was reduced to Level 4 imprisonment (12.5 years).\(^\text{16}\) In 1997, the maximum penalty was increased to Level 3 imprisonment (20 years),\(^\text{17}\) and this remains the maximum penalty.

1.27 In 1986, the maximum penalty for recklessly causing serious injury was 10 years’ imprisonment.\(^\text{18}\) In 1997, the maximum penalty was increased to Level 4 imprisonment (15 years),\(^\text{19}\) and this remains the maximum penalty.

\(^{10}\) Criminal Procedure Act 2009 (Vic) s 29(1).

\(^{11}\) Criminal Procedure Act 2009 (Vic) s 29(2)(a). The Magistrates’ Court must also have regard to the adequacy of sentences available to the court, having regard to the criminal record of the accused, whether a co-accused is charged with the same offence and any other matter that the court considers relevant: Criminal Procedure Act 2009 (Vic) ss 29(2)(b)–(d).

\(^{12}\) Sentencing Act 1991 (Vic) ss 113–113A.

\(^{13}\) Sentencing Act 1991 (Vic) s 113B.

\(^{14}\) Children, Youth and Families Act 2005 (Vic) ss 356(3)(a)–(b).

\(^{15}\) Crimes (Amendment) Act 1985 (Vic) s 8.

\(^{16}\) Sentencing Act 1991 (Vic) s 119(1) (section now repealed).

\(^{17}\) Sentencing and Other Acts (Amendment) Act 1997 (Vic) s 60(1); sch 1.

\(^{18}\) Crimes (Amendment) Act 1985 (Vic) s 8.

\(^{19}\) Sentencing and Other Acts (Amendment Act) 1997 (Vic) s 60(1); sch 1.
Framework for sentencing serious injury offences in adult courts

1.28 The sentencing of adults for serious injury offences in the Magistrates’ Court and in the higher courts is governed by the provisions of the Sentencing Act 1991 (Vic) and the principles of sentencing developed by the common law.

1.29 If there is any conflict between a new specific provision dealing with the statutory minimum sentences and an existing general provision or principle, the new specific provision will prevail. However, the existing provisions and principles will continue to apply where there is no conflict.

1.30 The only purposes for which a court may impose a sentence in Victoria are:

- just punishment – to punish the offender to an extent and in a way that is just in all of the circumstances;
- deterrence – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character;
- rehabilitation – to establish conditions that the court considers will enable the offender’s rehabilitation;
- denunciation – to denounce the type of conduct engaged in by the offender;
- community protection – to protect the community from the offender; or
- a combination of two or more of these purposes.

1.31 When deciding the sentence to impose in a particular case, the factors that the court must take into account include:

- the maximum penalty for the offence;
- current sentencing practices;
- the nature and gravity of the offence;
- the offender’s culpability and degree of responsibility for the offence;
- whether the crime was motivated by hatred or prejudice;
- the impact of the offence on any victim of the offence;
- the personal circumstances of any victim of the offence;
- any injury, loss or damage resulting directly from the offence;
- whether the offender pleaded guilty to the offence;
- the offender’s previous character; and
- the presence of any aggravating or mitigating factors.

20 Smith v The Queen (1994) 181 CLR 338.
21 Sentencing Act 1991 (Vic) s 5(1).
22 Sentencing Act 1991 (Vic) s 5(2).
23 If the court gives a reduction in sentence for this reason, the judge or magistrate must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty: Sentencing Act 1991 (Vic) s 6AAA.
1.32 These factors are broad enough to take into account factors of the type proposed by the Attorney-General as constituting gross violence. However, in doing so, courts must apply the principle of parsimony, which is reflected in sections 5(3)–(7) of the Sentencing Act 1991 (Vic). In particular, section 5(3) provides that:

A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

1.33 Section 5(4) of the Sentencing Act 1991 (Vic) states that:

A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.

1.34 As indicated earlier, existing general provisions such as these would be subject to a new, more specific provision dealing with the statutory minimum sentences. For example, although in a case involving an offence by an adult within the new scheme the court must impose a non-parole period no shorter than four years, section 5(3) of the Sentencing Act 1991 (Vic) would still be relevant and would have the effect that the court must not impose a sentence longer than that unless the longer sentence is necessary to achieve the purpose or purposes for which the sentence is being imposed.

1.35 When a court imposes a sentence of imprisonment for more than one offence, the court must impose a separate sentence for each offence. The sentences are served concurrently (at the same time) unless the court directs that they are to be partially or wholly cumulative.24

Serious offender provisions

1.36 While prior offending is considered an aggravating factor as a component in the analysis of the ‘offender’s previous character’,25 in accordance with the considerations in section 5 of the Sentencing Act 1991 (Vic), prior offending may also be relevant for the ‘serious offender’ provisions in part 2A of that Act.

1.37 An offender will be regarded as a ‘serious violent offender’ under part 2A of the Sentencing Act 1991 (Vic) if the offender has been convicted and sentenced to a period of imprisonment or detention in a youth justice centre for a prior offence of causing serious injury (whether intentional or reckless). If the offender is found to be a serious offender, and the court considers that imprisonment for the relevant offence is justified, the court, in determining the length of the sentence:

a. must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
b. may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances.26

24 Sentencing Act 1991 (Vic) s 16. This is subject to certain exceptions, such as if the term of imprisonment is imposed in default of payment of a fine or sum of money, in respect of a prison offence or escape offence, or if the offence is committed while on parole or on bail in relation to another offence: Sentencing Act 1991 (Vic) s 16(1A).

25 Sentencing Act 1991 (Vic) s 6(a).

26 Sentencing Act 1991 (Vic) s 6D.
Further, part 2A of the *Sentencing Act 1991* (Vic) reverses the general statutory presumption that sentences are to be served concurrently, instead stating that every term of imprisonment imposed on a serious offender for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or other sentence imposed.

**Non-parole period**

If the total effective sentence imposed on an offender is a term of imprisonment of two years or more, the court must fix a non-parole period, unless the court considers it inappropriate to do so because of the nature of the offence or the past history of the offender.

The non-parole period must be at least six months less than the term of the sentence and is fixed in respect of the aggregate period of imprisonment that an offender being sentenced for multiple offences is liable to serve: in other words, the total effective sentence.

The non-parole period has multiple purposes. It can serve the interests of the community in the same way as the head sentence does, by providing for some element of community protection as well as personal and general deterrence. Punishment, deterrence and the offender’s prospects for rehabilitation are relevant not only to the imposition of a sentence of imprisonment but also to the setting of a non-parole period. But the community also has an interest in the rehabilitation of the offender. One purpose of a non-parole period is to promote the likelihood that the offender will be rehabilitated. This does not mean that when setting a non-parole period the court should impose the shortest time required for a parole board to form a proper view of the offender’s prospects of rehabilitation. Although the non-parole period provides a benefit to the offender, its purpose is to serve the interests of the community rather than those of the offender.

27 *Sentencing Act 1991* (Vic) s 16(1).
28 *Sentencing Act 1991* (Vic) s 6E. A term of imprisonment imposed on a serious offender within the meaning of part 2A of the *Sentencing Act 1991* (Vic) is also listed as an exception to the statutory presumption of concurrency: *Sentencing Act 1991* (Vic) s 16(1A)(c).
29 *Sentencing Act 1991* (Vic) s 11(1). If a court sentences an offender to imprisonment for 12 months or more but less than two years, it has discretion as to whether to fix a non-parole period. Parole is not possible for sentences less than 12 months.
30 *Sentencing Act 1991* (Vic) s 11(3).
33 *Bugmy v The Queen* (1990) 169 CLR 525.
34 Ibid.
Framework for sentencing serious injury offences in the Children’s Court

1.42 The sentencing of children in Victoria is largely undertaken by the Children’s Court of Victoria (‘Children’s Court’), which operates as a ‘specialist court’ under the distinct legislative scheme set out in the Children, Youth and Families Act 2005 (Vic).

1.43 The reasoning underlying the establishment of a different institution and sentencing framework for child offenders emerges from the recognition that children lack the emotional and developmental maturity of adults – they are ‘less able to form moral judgments, less capable of controlling impulses [and] less aware of the consequences of acts, in short they are … less blameworthy than adults’.

1.44 Given the distinct nature of youth and youth offending, specialised responses to child crime have been developed. Children sentenced under the Children, Youth and Families Act 2005 (Vic) are subject to different sentencing principles and sanctions from those that offenders sentenced under section 5 of the Sentencing Act 1991 (Vic) are subject to. There is, for example, particular emphasis placed by the Children’s Court on the rehabilitation of offenders and the need to divert young people from custody and from further involvement in the criminal justice system.

Jurisdiction of the Children’s Court

1.45 Seven death-related indictable offences are specifically excluded from the jurisdiction of the Children’s Court. Any charge against a child of murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death must be heard and determined in the Supreme Court or the County Court.

1.46 The Children’s Court has jurisdiction to hear and determine summarily charges against children for all other indictable offences, including the offences of intentionally causing serious injury and recklessly causing serious injury.

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35 Children, Youth and Families Act 2005 (Vic) s 1(d).
36 Submission 21 (Youthlaw).
38 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).
40 Children, Youth and Families Act 2005 (Vic) s 516(1)(b). The Children’s Court can, however, conduct committal proceedings in respect of these excluded offences: Children, Youth and Families Act 2005 (Vic) s 516(1)(c).
41 To be a ‘child’, an accused person must have been aged 10 or above (but under the age of 18) at the time of the offence, and must have been under the age of 19 at the time proceedings were commenced: Children, Youth and Families Act 2005 (Vic) s 3.
1.47 Charges against children for indictable offences other than the seven death-related offences may also be dealt with in the Supreme Court or the County Court if:

- the child objects to the charge being heard summarily; or
- the Children’s Court considers the charge unsuitable to be determined summarily given the existence of ‘exceptional circumstances’.

1.48 While there are serious injury cases that the court has considered to be unsuitable for summary hearing, such cases are rare. The Supreme Court has held that, in applying this provision, the Children’s Court should relinquish its ‘embrace jurisdiction’ sparingly and with great reluctance, and doing so cannot be a matter of mere convenience.

Children’s Court sentencing principles, sanctions and processes

1.49 Section 362 of the Children, Youth and Families Act 2005 (Vic) sets out the matters to be taken into account in sentencing. Although the word ‘rehabilitation’ is not specifically used in that section, the principle of rehabilitation nevertheless underpins the first four of the principles set out in sections 362(1)(a)–(d), which include the preservation of family and home, the continuation of education and employment and the minimisation of stigma.

1.50 While the principle of rehabilitation is generally considered the primary purpose of sentencing in the Children’s Court, in individual cases where it is considered ‘appropriate’, the emphasis on rehabilitating the offender will be qualified by the need to protect the community, deter the particular offender from committing further offences and/or ensure that the offender is held to account for his or her actions. General deterrence (the deterrence of people other than the

42 Children, Youth and Families Act 2005 (Vic) s 356(3)(a).
43 Children, Youth and Families Act 2005 (Vic) s 356(3)(b).
44 For example, Victoria Police v CB [2010] VChC 3 (24 June 2010).
46 H v Rowe and Ors [2008] VSC 369 (19 September 2008) [12] (Forrest J). The importance of rehabilitation may also be evidenced by the fact that sections 362(a)–(d) of the Children, Youth and Families Act 2005 (Vic) are given primacy of place in the section: Richard Fox and Arie Freiberg, Sentencing: State and Federal Law in Victoria (2nd ed., 1999) 830.
47 Children, Youth and Families Act 2005 (Vic) s 362(g).
48 CNK v The Queen [2011] VSCA 228 (10 August 2011) [10]. In this case the Court of Appeal stated that section 362(1)(g) of the Children, Youth and Families Act 2005 (Vic) is ‘concerned with the protection of the community through specific deterrence’. It aims to dissuade the child from reoffending through the child’s experience of a criminal sanction. See also H v Rowe and Ors [2008] VSC 369 (19 September 2008) [12] (Forrest J). Other commentators regard specific deterrence (together with the principle of punishment) to instead be encapsulated in sections 362(1)(e)–(f) of the Children, Youth and Families Act 2005 (Vic), where appropriate: Power (2001–), above n 36 [11.1.4]. See also Sentencing Advisory Council, Does Imprisonment Deter? A Review of the Evidence (2011).
particular offender) is not specifically mentioned in section 362 as a factor to be taken into account in sentencing and is not a relevant purpose for sentencing children under the Children, Youth and Families Act 2005 (Vic).50

1.51 If the Children’s Court finds that a child has good prospects of rehabilitation, the court may be particularly conscious of the need to select a sentencing option least likely to undermine that rehabilitative potential — that is, a non-custodial option that allows for the continuation of productive activity and the retention of relationships and minimises the stigma to the child.51 Non-custodial sentence dispositions in the Children’s Court range from undertakings and good behaviour bonds to the supervisory orders of probation, youth supervision orders and youth attendance orders.52

1.52 The court may also make use of rehabilitative, restorative and therapeutic measures (such as group conferencing)53 and programs undertaken during sentence deferral (such as anger management and drug and alcohol counselling) to address the causes of offending behaviour and to better tailor the sentence to the needs of the child.54

1.53 Given the principle of parsimony (see [1.33]) and the particular emphasis on rehabilitation in the Children’s Court, detention operates as a sanction of last resort.55 The maximum period of detention that can be imposed by the Children’s Court for children aged above 15 where the case involves a single charge is two years in a youth justice centre, and where the child is convicted of more than one charge in a case, three years in a youth justice centre.56

Sentencing children in the higher courts

1.54 A child may be convicted and sentenced in the County or Supreme Court for a serious injury offence when he or she has also been charged with an excluded offence, or when the Children’s Court has excluded its summary jurisdiction on the basis of ‘exceptional circumstances’, or because the child (or in some cases the parent) requested the matter be heard in a higher court. Such an offender is both a ‘child’ for the purposes of the Children, Youth and Families Act 2005 (Vic)57 and a ‘young offender’ for the purposes of the Sentencing Act 1991 (Vic).58

1.55 A higher court may sentence a child under either the Children, Youth and Families Act 2005 (Vic) or the Sentencing Act 1991 (Vic), unless the court wishes to impose a sentence of detention or imprisonment, in which case the child must be sentenced under the Sentencing Act 1991 (Vic).59

50 CNK v The Queen [2011] VCSA 228 (10 August 2011) [12]. See [3.44].
51 Prior to the sentencing stage, there is also significant emphasis placed by the youth justice system on diverting children from formal court processes altogether, through formal and informal cautioning programs and initiatives such as the ‘ROPES’ program.
52 Children, Youth and Families Act 2005 (Vic) s 360(1).
54 Submission 1 (Anonymous) noted that sentence deferral may provide an incentive for a child offender to address underlying causes of offending and to alter his or her behaviour. Children, Youth and Families Act 2005 (Vic) s 416(3) (a) provides that the court must, in sentencing the child, take into account the child’s behaviour during any deferral.
55 Children, Youth and Families Act 2005 (Vic) s 361.
56 Children, Youth and Families Act 2005 (Vic) ss 413(2)–(3).
57 Children, Youth and Families Act 2005 (Vic) s 3.
58 A ‘young offender’ is a person under the age of 21 years at the time of sentencing: Sentencing Act 1991 (Vic) s 3.
59 Children, Youth and Families Act 2005 (Vic) s 586.
1.56 Youth detention can only be imposed in the higher courts pursuant to sections 32–35 of the Sentencing Act 1991 (Vic). Under those sections, the maximum period of detention that may be imposed by the County or Supreme Court (regardless of how many charges the child is sentenced for in the same proceeding) is three years.60

1.57 Alternatively, in the higher courts, children may be sentenced to imprisonment under the Sentencing Act 1991 (Vic). Depending on the particular charges, the court may impose a sentence of imprisonment up to the statutory maximum (life imprisonment).61 If a higher court sentences a child to a term of imprisonment of two years or more, it must fix a non-parole period, unless it considers the fixing of such a period to be inappropriate.62 When a child is sentenced to imprisonment, the Adult Parole Board has the power to administratively transfer the child to serve the sentence (or a portion of the sentence) in a youth detention facility.63

1.58 When a child is sentenced under section 7(1) of the Sentencing Act 1991 (Vic), the County or Supreme Court takes into account the purposes, principles and factors set out in section 5 of that Act,64 although the court may also be guided by factors set out in the Children, Youth and Families Act 2005 (Vic).65

1.59 As is the case with the Children’s Court, the youthfulness of the offender is a ‘primary consideration’ when a higher court sentences a child under the Sentencing Act 1991 (Vic).66 However, this is a ‘general proposition’ only and not of ‘universal or axiomatic application’.67 Where the offending is, for example, particularly grave,68 the offender’s youth and prospects for rehabilitation ‘must be subjugated to other considerations’,69 such as specific and general deterrence, and denunciation.

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61 Life imprisonment is the most severe sanction that may be imposed; Sentencing Act 1991 (Vic) s 109(1). A court may also decline to set a non-parole period in respect of a sentence of life imprisonment if it considers the fixing of such a period inappropriate: Sentencing Act 1991 (Vic) s 11(1). There is also provision for ‘indefinite sentences’: Sentencing Act 1991 (Vic) ss 18A–18P.
62 Sentencing Act 1991 (Vic) ss 11(1)–(2).
63 Children, Youth and Families Act 2005 (Vic) ss 471–472 (youth justice centre or youth residential centre).
64 Director of Public Prosecutions v SJK; Director of Public Prosecutions v GAS [2002] VSCA 131 (26 August 2002); See further Power (2011–), above n 37 [11.1.13].
65 R v KMW; R v RJB [2002] VSC 93 (15 March 2002) [57] (Coldrey J). This was a manslaughter case involving offenders aged 14 and 16 years old.
Dual track system

1.60 The dual track system provides adult courts with the option of sentencing ‘young offenders’ (defined
in section 3 of the Sentencing Act 1991 (Vic) as those offenders aged under 21) who satisfy the
eligibility criteria for detention in a youth justice centre, rather than an adult prison. 70

1.61 The system is intended to prevent immature and vulnerable offenders from entering the adult prison
system. To access dual track, the court must receive a pre-sentence report and be satisfied that
there are reasonable prospects for the rehabilitation of the young offender or the young offender is
particularly impressionable, immature or likely to be subjected to undesirable influences in an adult
prison. 71 In determining whether to make a youth justice centre order the court must have regard
to the nature of the offence and the age, character and past history of the young offender. 72

1.62 The maximum period that a court may order a young offender to be detained in a youth justice
centre is two years for the Magistrates’ Court or three years for the County or Supreme Court. 73
These maxima apply regardless of how many charges the young offender is sentenced for in the
same proceeding. 74

1.63 Given the limitation on the term of a dual track order, the imposition of a four-year minimum non-
parole period will preclude an offender aged 18 to 20 from accessing dual track, unless eligibility for
dual track entitles a court to sentence a young offender as a 16 or 17 year old for the purposes of
the minimum sentence (see [4.70]–[4.82]).

1.64 Nine stakeholders referred to the importance of retaining the dual track system for eligible serious
injury offenders, given the need to provide suitable detention options for vulnerable 18 to 20 year
olds and given the success of the dual track system in rehabilitating offenders (see [4.74]–[4.76]). 75

70 Sentencing Act 1991 (Vic) s 32.
71 Sentencing Act 1991 (Vic) s 32(1).
72 Sentencing Act 1991 (Vic) s 32(2).
73 Sentencing Act 1991 (Vic) s 32(3).
75 Submission 1 (Anonymous); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court
Barristers Association); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of
Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian
Aboriginal Legal Service); Submission 21 (Youthlaw). The importance of the dual track system and the need to
retain it was also discussed in the Council’s Child Offenders Discussion Forum (1 June 2011).
Chapter 2
Specification of gross violence factors

Structural issues

2.1 Before examining the substantive issue of factors that should constitute gross violence, there are a number of preliminary issues to be considered regarding the manner in which such factors should be specified.

2.2 Gross violence is proposed as an aggravated form of the offences of intentionally causing serious injury and recklessly causing serious injury, for which statutory minimum sentences will apply.

2.3 It is important to note that the proposed aggravated forms of intentionally causing serious injury and recklessly causing serious injury are not intended to cover every possible case where the offending behaviour demonstrates a high level of culpability or harm (or both). The gross violence scheme will not replace the existing serious injury offences. Further, given the maximum penalties for the existing serious injury offences, offenders convicted of intentionally causing serious injury or recklessly causing serious injury may still receive a sentence that far exceeds the proposed statutory minimum sentences for offending behaviour that does not involve any gross violence factors, but is otherwise considered by a sentencing court to warrant a long term of imprisonment.

Sentencing consideration of aggravated offending

2.4 As discussed at [1.31] above, in sentencing an offender for any offence, a court must have regard to a number of factors that may aggravate an offence. These include the nature and gravity of the offence, the offender’s culpability and degree of responsibility for the offence, the impact of the offence on any victim, the victim’s personal circumstances and any injury, loss or damage resulting from the offence.76

2.5 These factors are required to be considered by the court when determining the sentence that should be imposed within the range of available penalties legislated for the relevant offence. Different considerations apply when aggravated forms of offending are legislated, rendering an offender liable to a different penalty.

76 Sentencing Act 1991 (Vic) ss 5(2)(c)–(db).
Legislating different penalties for aggravated offending

2.6 There are a number of ways in which a different penalty can be legislated for aggravated forms of offending. These include enacting separate offences, specifying statutory aggravating factors and establishing legislative schemes for certain defined categories of offences or offenders.

Separate aggravated offences

2.7 The most common way in which aggravated forms of offending are prescribed different penalties is through enacting a separate offence. For example, section 75 of the Crimes Act 1958 (Vic) provides a maximum penalty of 15 years’ imprisonment for the offence of robbery, while section 75A of the Crimes Act 1958 (Vic) specifies a maximum penalty of 25 years’ imprisonment for armed robbery.

2.8 Separate offences have been enacted for the aggravated forms of many offences in the Crimes Act 1958 (Vic). They include burglary (aggravated burglary), intentionally or recklessly causing injury (intentionally causing serious injury and recklessly causing serious injury), threats to inflict serious injury (threats to kill) and conduct endangering persons (conduct endangering life). In each of these cases, the separate aggravated form of the offence specifies a higher maximum penalty.

2.9 One consequence of enacting separate offences is that the circumstances that aggravate the offending become elements of the offence to be proved to the jury or trier of fact. For example, in order for the offence to be proved, and for the higher maximum penalty to be available at sentencing, the element of armed robbery that constitutes the aggravated form of robbery (the use of a firearm, offensive weapon or explosive) must be proved beyond reasonable doubt in addition to the elements of robbery.

2.10 An accused person acquitted of an aggravated form of an offence, for example, armed robbery, may in some circumstances still be found guilty of the non-aggravated form in the alternative, robbery. If the trier of fact (whether a jury or magistrate) is not satisfied that the aggravating element has been proved beyond reasonable doubt, but is satisfied that the elements of the non-aggravating form of the offence have, the trier of fact may acquit on the charge of the aggravated form and find the person guilty of the non-aggravated form of the offence.

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77 Crimes Act 1958 (Vic) s 76 (burglary); Crimes Act 1958 (Vic) s 77 (aggravated burglary).
78 Crimes Act 1958 (Vic) s 16 (intentionally causing serious injury); Crimes Act 1958 (Vic) s 17 (recklessly causing serious injury).
79 Crimes Act 1958 (Vic) s 21 (threats to inflict serious injury); Crimes Act 1958 (Vic) s 20 (threats to kill).
80 Crimes Act 1958 (Vic) s 23 (conduct endangering persons); Crimes Act 1958 (Vic) s 22 (conduct endangering life).
81 Or imitation firearm, or imitation explosive.
82 Crimes Act 1958 (Vic) s 75A(1).
2.11 For most criminal offences, one maximum penalty applies to the entire range of criminal conduct falling within the offence description. For some criminal offences, specific aggravating factors are included in the legislative description of the offence and intended to reflect the fact that the relative seriousness of the offending conduct is higher if the statutory aggravating factor is present. The maximum penalties that apply to the aggravated forms of the offence are generally higher than the penalty for the non-aggravated form of the offence.

2.12 For example, section 45 of the Crimes Act 1958 (Vic) contains the offence of sexual penetration with a child under 16. The offence is described in section 45(1) as follows:

A person who takes part in an act of sexual penetration with a child under the age of 16 is guilty of an indictable offence.

2.13 Different penalties are then legislated in sections 45(2)(a)–(c) depending on the presence (or absence) of statutory aggravating factors.\(^\text{83}\) Section 45(5) explicitly states that the aggravating circumstances that give rise to the different maximum penalties are not elements of the offence, but must be stated in the indictment.

2.14 In practice, although not strictly elements of the offence, the statutory aggravating factors must still be proved beyond reasonable doubt by the prosecution. Section 45(6) provides that an accused person who disputes a circumstance of aggravation (but does not contest the charge of the offence) may plead not guilty to the offence, and section 45(7) provides that, in such a case, the circumstances of aggravation are to be determined by a jury.

2.15 While section 45 of the Crimes Act 1958 (Vic) creates a single offence with statutory aggravating factors, the various provisions of that section require the circumstances of aggravation to be treated as though they do in fact create separate offences. As a result, legislating different penalties for aggravated offending by using statutory aggravating factors in the manner of section 45 of the Crimes Act 1958 (Vic) may be criticised for unnecessarily complicating the usual charging, pleading and sentencing process, and for lacking clarity and transparency.

2.16 The proposed aggravating circumstances of gross violence would need to be proved to the same standard as those required to prove the statutory aggravating factors relevant to sexual penetration with a child under 16.

2.17 If an offender pleads guilty to a charge, but not to the statutory aggravating factors of gross violence, there would still be a contest on those issues, to determine if the statutory aggravating factors apply. This would essentially shift the contest of issues from a trial (where the factual matters would be determined by a jury) to the plea in mitigation at sentencing (where the court determines factual matters).

2.18 To avoid this, similar provisions would be required, specifying that the statutory aggravating factors (while not elements of the offences of intentionally causing serious injury and recklessly causing serious injury) are still to be charged on the indictment. Thus an accused person who disputes a circumstance of aggravation may plead not guilty to the non-aggravated form of the offence and, in such a case, the circumstances of aggravation are to be determined by a jury.

\(^\text{83}\) Section 45(2)(a) of the Crimes Act 1958 (Vic) prescribes a maximum penalty of 25 years if the child was under 12. Section 45(2)(b) prescribes a maximum penalty of 15 years if the child was aged between 12 and 16, but under the care, supervision or authority of the offender; and section 45(2)(c) prescribes a 10 year maximum penalty for every other case (being the non-aggravated form).
2.19 This approach reflects the rule of practice affirmed in *Kingswell v The Queen*.\(^{84}\) Although that case concerned a Commonwealth offence (and the issues that flow from the right to trial by jury in section 80 of the *Australian Constitution*), it considered the broad principles governing what matters should properly be determined by a jury, affirming that:

questions of fact affecting the liability of the accused to punishment should be decided by the jury when the trial is on indictment. The position is different when circumstances said to aggravate the offence are relevant only to the exercise of the sentencing discretion of the judge.\(^{85}\)

2.20 In determining what is a circumstance that affects liability and what is a circumstance that aggravates the offence, Gibbs CJ and Wilson and Dawson JJ (with Mason J agreeing) held that:

The existence of a particular circumstance may increase the range of punishment available, but yet not alter the nature of the offence, if that is the will of the Parliament.\(^{86}\)

2.21 A similar position was taken in *Cheung v The Queen*.\(^{87}\) Although that case did not concern statutorily defined sentencing factors, but rather the sentencing range,\(^{88}\) Gleeson CJ and Gummow and Hayne JJ restated the general principles:

The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender’s conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge.\(^{89}\)

2.22 The Council considers that the proposed gross violence circumstances alter the nature of the offending behaviour — the circumstances increase the culpability of the offender because of the manner in which the offence has been committed. As a result, they are matters of fact that ought to be put to the jury, similar to the statutory aggravating factors for the offence of sexual penetration with a child under 16.

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\(^{84}\) *Kingswell v The Queen* (1985) 159 CLR 264.
\(^{85}\) Ibid 280.
\(^{86}\) Ibid 276 (emphasis added).
\(^{87}\) *Cheung v The Queen* (2001) 209 CLR 1.
\(^{88}\) A range that included life imprisonment as the maximum penalty.
\(^{89}\) *Cheung v The Queen* (2001) 209 CLR 1, 9 (emphasis added).
Other statutory schemes of aggravated offending

2.23 Other legislative schemes can provide for different penalties based on aggravated offending, primarily focusing on repeat offenders – such as part 2A of the Sentencing Act 1991 (Vic),90 or multiple offences – such as part 2B of the Sentencing Act 1991 (Vic).91 The aggravating circumstance of prior offending is not an element of the various offences that fall within the schemes, and the fact of prior offending becomes relevant only after the offender has been convicted and the court then considers what penalties are available.92

Stakeholders’ views

2.24 Of the 26 submissions received by the Council,93 nine94 were expressly in favour of framing gross violence as a separate offence. The remaining submissions were silent on the issue, and none proposed framing gross violence as statutory aggravating factors.

The Council’s view

2.25 The Council considers that gross violence should be framed as new, discrete offences. Separating offences into aggravated and non-aggravated forms provides clarity and transparency by removing any potential doubt as to the particular offending behaviour that:

• is alleged on an indictment;
• may be pleaded to by an accused person; or
• a jury or the trier of fact has determined as proved beyond a reasonable doubt.

2.26 Creating separate gross violence offences means that the existing offences of intentionally causing serious injury and recklessly causing serious injury would be available as alternatives. This would mean that, if the jury were satisfied that the accused intentionally caused the relevant injury but were not satisfied beyond reasonable doubt of the alleged gross violence elements, the jury could find the accused not guilty of the gross violence offence but guilty of the existing offence of intentionally causing serious injury.

2.27 Separate offences will also maintain for prosecutors the scope to exercise their prosecutorial discretion and accept a plea to a non-aggravated form of the offence, in circumstances where they consider it appropriate. The potential impact on pleading practices is discussed further at [8.3]–[8.16].

90 Sentencing Act 1991 (Vic) pt 2A. Where offenders have been previously convicted (and sentenced to a term of imprisonment or detention in a youth justice centre) for arson, drug, serious violent sexual or violent offences, the court must regard protection of the community as the principle purpose for the sentence, and may impose a longer sentence than that which is proportionate to the gravity of the offence.
91 Sentencing Act 1991 (Vic) pt 2B. Offenders sentenced for a third conviction (regardless of the prior penalty) for certain prescribed serious property offences are subject to a doubled maximum penalty or 25 years (whichever is lesser).
92 See section 245 of the Criminal Procedure Act 2009 (Vic) for the procedure governing proof of previous convictions by criminal record.
93 Submission 7 was a joint submission from the Victorian Bar Council and the Criminal Bar Association of Victoria.
94 Submission 6 (Crime Victims Support Association); Submission 9 (Children’s Court Barristers Association); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 26 (Office of Public Prosecutions Victoria).
Statutory minimum sentences for gross violence offences

Should the minimum sentence apply to the case as a whole or to an individual charge?

2.28 The terms of reference describe the minimum sentence to be imposed for gross violence in terms of a ‘four year minimum sentence (i.e. non-parole period)’ for adults and a ‘two year minimum detention sentence’ for child offenders aged 16 and 17. An issue to be resolved is how the minimum sentence should apply in cases in which there may be either one charge of a gross violence offence along with other offences or multiple charges of gross violence offences.

Fixing a non-parole period

2.29 In the adult jurisdiction (excluding dual track offenders) when an offender is sentenced to a term of imprisonment of two years or more, the court must fix a non-parole period, unless considered inappropriate. The non-parole period must be at least six months less than the term of the sentence.

2.30 The non-parole period is fixed in respect of the aggregate period of imprisonment that an offender being sentenced for multiple offences is liable to serve, being the total effective sentence. In other words, the non-parole period applies on a case basis, rather than to individual charges.

2.31 In cases where an offender is sentenced for more than one charge, the court will first determine the sentence applicable for each individual charge, then determine the total effective sentence through a process of either cumulating the individual sentences or making them run concurrently (or ordering an amount of partial cumulation). The court will then determine the non-parole period, if applicable, in respect of that total effective sentence.

2.32 Presently, when sentencing a child to detention in a youth residential centre, or when sentencing a child (or adult offender in the dual track system) to detention in a youth justice centre, the court does not specify a non-parole period. At any time during that sentence, the Youth Parole Board can release the offender on parole. Similarly, if it considers it appropriate, the Youth Parole Board can revoke parole and recall an offender to detention at any time during that sentence.

2.33 The terms of reference propose the creation of a new type of sentencing order for the Children’s Court jurisdiction, being a two-year minimum sentence of detention, during which time the offender is not eligible for parole.

95 Sentencing Act 1991 (Vic) s 11(1). Where the term of imprisonment is 12 months or more but less than 24 months, the court has discretion to fix a non-parole period: Sentencing Act 1991 (Vic) s 11(2). Parole is not possible for sentences less than 12 months.

96 Sentencing Act 1991 (Vic) s 11(3).


98 For child offenders aged 10 to 15 years.

99 For child offenders aged 15 to 17 years or adult offenders in the dual track system aged 18 to 20 years.
Stakeholders’ views

2.34 Of the 26 submissions received by the Council, only two expressed a view on this issue.

2.35 One stakeholder (Crime Victims Support Association) proposed that the non-parole period should apply on a charge basis and that statutory minimum periods should be cumulated to recognise cases where there are multiple victims. In its view:

> there is no fundamental wrong in an offender receiving eight or even twelve years imprisonment if indeed they had caused so much injury as to permanently restrict the quality of life of two or three innocent victims.\(^{100}\)

2.36 Another stakeholder (Children’s Court Barristers Association) was expressly in favour of the statutory minimum non-parole period being applied on a case basis. In its view, there should be ‘no cumulation of the whole or part of a separate mandatory minimum’.\(^{101}\)

The Council’s view

2.37 The Council is of the view that the minimum sentence should apply on a case basis consistent with current law.

2.38 Where there are multiple charges of gross violence, a single statutory minimum non-parole period will apply to the whole case. It remains open to a court to impose a non-parole period greater than the minimum to take multiple charges into account if the court considers it appropriate having regard to ordinary sentencing principles.

2.39 Section 16(1) of the *Sentencing Act 1991* (Vic) establishes a general rule that multiple terms of imprisonment are to be served concurrently. This does not apply in certain situations (for example, if an offence is committed while on parole).\(^{102}\) It is also open to a court to depart from the general rule and order that separate terms of imprisonment are to be partially or wholly cumulated. This occurs most commonly when separate terms of imprisonment are imposed for offences involving separate victims.

2.40 The gross violence policy will establish a statutory minimum non-parole period. It is open to the court to impose a non-parole period longer than the minimum. Accordingly, in an appropriate case, a court could – as the Crime Victims Support Association recommends – cumulate separate sentences involving separate victims and so impose a non-parole period much longer than the four-year minimum.

2.41 As the policy involves the creation of a statutory minimum, however, it is appropriate for the minimum to operate in a way that is consistent with the general rule regarding concurrency.

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\(^{100}\) Submission 6 (Crime Victims Support Association).

\(^{101}\) Submission 9 (Children’s Court Barristers Association).

\(^{102}\) *Sentencing Act 1991* (Vic) s 16(1A)(d).
Substantive issues – the injury threshold

Serious and severe injury

2.42 The terms of reference propose that the gross violence factors are to be applied to the offences involving ‘serious injury’. Although the gross violence factors represent a higher level of culpability by the offender (and the presence of such factors in a case may result in the infliction of a high level of injury), the factors do not in themselves require the infliction of a level of injury higher than ‘serious injury’, as it is currently determined.

2.43 As discussed in Chapter 1, ‘serious injury’ has been broadly interpreted. It is not exhaustively defined in legislation. Section 15 of the *Crimes Act 1958* (Vic) provides that:

*injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function …

serious injury includes—

(a) a combination of injuries; and

(b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.[1]

2.44 It has been held that it is for the jury to determine, as a question of fact, whether the victim’s injuries qualify as ‘serious’. The Court of Appeal found that:

> There is no exclusive definition of the word ‘serious’ in the Act. It was left to the jury to determine as a matter of fact what injury or injuries in combination might properly be categorised as being serious having regard to the fact that the word ‘serious’ is an ordinary English word, the meaning of which must be taken as well as understood by the members of the jury. This accordingly required that it be left to the jury to determine as a fact whether the injuries as it found them to have been should have been properly treated as ‘serious’ injuries.103

2.45 Serious injury has been held to encompass injuries ranging from ‘two significant black eyes … together with grazes around the top of the head and face’104 to near-fatal catastrophic injuries that leave the victim ‘severely disabled and [requiring] permanent support’.105

2.46 At the lower end of the serious injury spectrum, the types of injuries that can presently constitute ‘serious injury’ do not appear consistent with the intent of the proposed reforms.

2.47 In the media release announcing the proposal, the then leader of the Victorian Liberal Nationals Coalition (and now Premier), the Hon Mr Ted Baillieu MP, referred to ‘attacks that are leaving victims with terrible life-long injuries’.106 Similarly, when discussing the rationale behind the proposal, the Attorney-General has recently stated:

> But there are circumstances where people engage in violence that is so gross both in terms of its culpability and the degree of injuries inflicted that you need to put people behind bars both for effective deterrence and for the effect of protecting the community.107

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103 *R v Welsh and Flynn* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, King and Tadgell JJs, 16 October 1987) 10.


105 Director of Public Prosecutions v Terrick; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457, 462.

To better inform its understanding of the prevalence, nature and severity of violent assault injuries, the Council met with Professor Peter Cameron, Academic Director of the Emergency and Trauma Centre, Alfred Hospital. The Council also discussed with Professor Cameron a number of issues surrounding different approaches to defining injury.\(^{108}\)

**Stakeholders’ views**

A number of submissions expressed concern that the current threshold for ‘serious’ injury would mean that the statutory minimum sentences would apply to a significant number of cases that may have the gross violence factors described in the policy but do not involve the level of injury that appears to be the intent of the proposal.

Of the 26 submissions received by the Council, nine were in favour of a threshold of injury greater than ‘serious’ injury.\(^{109}\) The Victorian Bar Council and the Criminal Bar Association of Victoria (endorsed by Liberty Victoria)\(^{110}\) also commented on the problematic definition of ‘serious’ injury under the present law. The remaining submissions were silent on the issue.

It was suggested by stakeholders that a category of ‘severe’ injury should be required for gross violence, defined as being an injury that ‘causes permanent impairment’,\(^{111}\) or is ‘such that the victim is impacted in a life-long way, rather than simply having a serious but temporary injury’,\(^{112}\) ‘is permanent or life-threatening’\(^{113}\) or ‘is life threatening or where the effect of the injury is prolonged and substantial’.\(^{114}\)

The Law Institute of Victoria (endorsed by the Federation of Community Legal Centres Victoria and the Victorian Aboriginal Legal Service) submitted that the offence should contain an element of ‘severe’ injury in order to ‘capture only the gravest offending and the most culpable offenders’.\(^{115}\) The Law Institute of Victoria proposed\(^{116}\) that a definition be used similar to that found in section 134AB(37) of the *Accident Compensation Act 1985* (Vic), which provides that:

> **serious injury** means—
> (a) permanent serious impairment or loss of a body function; or
> (b) permanent serious disfigurement; or
> (c) permanent severe mental or permanent severe behavioural disturbance or disorder; or
> (d) loss of a foetus.


\(^{108}\) Meeting with Professor Peter Cameron (17 June 2011).

\(^{109}\) Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 9 (Children’s Court Barristers Association); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).

\(^{110}\) Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 25 (Liberty Victoria).

\(^{111}\) Submission 1 (Anonymous); Submission 5 (B. Herbert).

\(^{112}\) Submission 14 (Centre for Multicultural Youth).

\(^{113}\) Submission 21 (Youthlaw).

\(^{114}\) Submission 22 (Victoria Legal Aid).

\(^{115}\) Submission 11 (Law Institute of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria).

\(^{116}\) Submission 11 (Law Institute of Victoria).
Statutory minimum sentences for gross violence offences

The Council’s view

2.53 The Council considers that the new offences should apply to offending behaviour that involves the infliction of ‘severe’ injury.

Defining ‘severe’ injury

2.54 One approach to defining ‘severe’ injury is to simply refer to severe injury and leave the determination of what level of injury constitutes that definition to the jury or the finder of fact. However, in the absence of a definition that provides clear guidance as to the types of injuries that are intended to be covered – as with serious injury – it is possible that the threshold of severe injury could similarly broaden over time.

2.55 Consequently, a definition similar in form to the one proposed by the Law Institute of Victoria is to be preferred. *Barwon Spinners Pty Ltd and Ors v Podolak*17 discussed the definition of ‘serious injury’ for the purposes of the *Accident Compensation Act 1985* (Vic). That Act had been amended to replace the expression ‘long-term’ with the word ‘permanent’. The court read the word ‘permanent’ to mean that it ‘conveys the probability that the impairment or other condition will last and not mend or repair – or at least not to any significant extent’.18 For the purposes of the *Accident Compensation Act 1985* (Vic), the definition of ‘serious injury’ in section 134AB(37) is further qualified by subsection 134AB(38), which requires (in part) that the definition is:

- to be satisfied by reference to the consequences to the worker of any impairment or loss of a body function, disfigurement or mental or behavioural disturbance or disorder, as the case may be, with respect to—(i) pain and suffering; or (ii) loss of earning capacity[.]

2.56 The purpose of the *Accident Compensation Act 1985* (Vic) is to govern civil claims for monetary compensation as a result of workplace accidents. An assessment of the nature of the injury inflicted for the purposes of satisfying an element of a criminal offence is independent of considerations of consequences for earning capacity.19 As a result, if similar terminology to that used in the *Accident Compensation Act 1985* (Vic) is to be adopted for the purposes of defining ‘severe injury’ within a criminal offence, it should be emphasised that any jurisprudence carried by those terms that apply in the field of civil injury compensation schemes is not intended to be imported.

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17 *Barwon Spinners Pty Ltd and Ors v Podolak* (2005) 14 VR 622.

18 *Barwon Spinners Pty Ltd and Ors v Podolak* (2005) 14 VR 622, 633. The court also noted that the term ‘permanent’ is also used elsewhere in the *Accident Compensation Act 1985* (Vic) in a different context, and drew attention to the difficulty this may cause for medico-legal opinions that use the word ‘permanent’ to convey a different meaning to that expressed in this section.

19 However, when sentencing, a court will consider the impact of any injuries upon a victim, including any injury, loss or damage resulting directly from the offence, and this may include such matters as a loss of earning capacity; *Sentencing Act 1991* (Vic) ss 5(2)(d)(a), (d(b).
'Long-term'

2.57 Limiting the type of injuries caused to ‘permanent’, rather than ‘long-term’, is likely to exclude those cases where severe injury has been inflicted on a victim but the victim is making a steady but protracted recovery. Such a victim may have an injury that will ‘mend or repair’ but over the course of a long time, and so could not be strictly considered ‘permanent’.

2.58 In the criminal law context, the requirement for the permanency of a medical condition to be proved beyond reasonable doubt would be unnecessarily restrictive given the intent of the proposed reforms. Consequently, although the precise wording is a matter for the Office of the Chief Parliamentary Counsel to determine, the phrase ‘long-term’, or similar wording that does not exclude severe injuries that may improve over time, is to be preferred.

Psychiatric injury exclusion

2.59 While the infliction of any form of psychiatric injury is serious, it would rarely be inflicted without a physical injury. There is a possibility that a victim with a propensity to develop a psychiatric disorder may develop a psychiatric disorder as a result of an assault, the nature of which would not otherwise satisfy the physical definition of ‘severe injury’ or even ‘serious injury’. It is therefore a question of policy as to whether psychiatric injuries are to be excluded from the gross violence offences.

2.60 While the Accident Compensation Act 1985 (Vic) definition of ‘serious injury’ also refers to a ‘permanent severe mental or permanent severe behavioural disturbance or disorder’, the intent of the proposed reforms suggests that such injuries should be excluded as they do not require any component of physical injury.

Estimated proportion of cases with severe injury – higher courts

2.61 In order to provide an estimate of the proportion of cases that may contain each of the proposed gross violence factors and the severe injury level, the Council collected information about sentencing factors by analysing higher courts sentencing remarks. Sentencing remarks were available for 228 of the 249 cases of intentionally causing serious injury and recklessly causing serious injury sentenced in the period from July 2008 to June 2009.

2.62 In Victoria, there is a large number of factors relating to the offence, the victim and the offender that a sentencing judge must take into account in sentencing. While ideally all of these factors would be measurable, the data collection is limited to those that are reliably and consistently included in sentencing remarks.

2.63 The purpose of sentencing remarks is to communicate to the offender, the victim and the community the sentence handed down and the reasons for that sentence, not to provide a database for researchers. The remarks are produced in a narrative form and will differ between judges and between cases depending on the judge’s view of how best to communicate his or her reasons. Information was generally not collected for factors that were very rarely referred to or, when mentioned, were too problematic to classify meaningfully.

120 Accident Compensation Act 1985 (Vic) s 134AB(37).

121 Another difficulty in using sentencing remarks is that, while a positive reference to a factor reliably indicated that the factor was present in a case, the absence of any reference to a factor could mean that it was not present, or that it was present but was not referred to. Where a decision was made to collect data on a particular factor, if the factor was not mentioned in remarks, the factor for that case was coded as ‘not stated’.
2.64 Figure 1 presents a breakdown of the type of injuries sustained by victims of serious injury offence charges sentenced in the higher courts in 2008–09.

2.65 In order to distinguish ‘severe’ from ‘not severe’ injury, the Council coded charges with ‘severe injury’ as being those involving head, chest or lung injuries that also required hospitalisation.\textsuperscript{122}

2.66 Of the 256 charges\textsuperscript{123} of intentionally causing serious injury and recklessly causing serious injury in 2008–09 it is estimated that 48, or 18.8%, involved severe injury, on the basis of those coded factors.

2.67 The estimated number of cases in the higher courts that satisfy the severe injury criteria and also involve a gross violence circumstance will be discussed separately for each of the proposed gross violence circumstances.

\textbf{Figure 1:} Percentage of causing serious injury charges by offence and by injury sustained by victim, higher courts, 2008–09

\begin{itemize}
\item Cuts or lacerations
\item Bruising
\item Broken bones
\item Lost consciousness
\item Head injuries
\item Scarring
\item Chest or lung injuries
\item Permanent disability
\end{itemize}

Injuries sustained by victim

- ICSI (n = 112)
- RCSI (n = 144)
- Total (n = 256)

\textsuperscript{122} Injuries sustained by the victim were determined using statements in sentencing remarks according to eight predetermined injury categories. Counts within injury categories represent the number of victims who had one or more injuries that fell into that injury category. When a victim had injuries that fell into multiple categories, the victim was counted once within each relevant category. While the injury categories are generally self-explanatory, head injuries included any head injury except for surface injuries such as cuts or bruises to the face. Lost consciousness refers to when a victim lost consciousness during, or as a result of, the offence, and broken bones refers to any broken bones sustained as a result of the offence, including fractures to the skull or broken ribs.

\textsuperscript{123} Several of the 249 cases contained more than one charge.
### Estimated proportion of cases with severe injury – Magistrates’ Court

2.68 An analysis of sentencing remarks is only possible for the higher courts, as sentencing remarks are not produced in the Magistrates’ Court. However, it is likely that those cases of recklessly causing serious injury that are presently heard summarily in the Magistrates’ Court do not involve severe injury as proposed by the ‘severe injury’ threshold.

2.69 A magistrate must consent to the hearing of an indictable offence that is triable summarily in the jurisdiction of the Magistrates’ Court. If the injury in a particular case is of such a severity that the jurisdictional limit of the Magistrates’ Court would prevent a sufficient penalty from being imposed on the offender, then the application to be heard in that court would be refused.

2.70 Victoria Legal Aid has commented that:

> It is our experience that it is extremely rare that [recklessly causing serious injury] cases are either initiated or determined in the summary stream where the injuries are life threatening or genuinely serious.\(^{124}\)

### Estimated proportion of cases with severe injury – Children’s Court

2.71 In the absence of data on the prevalence of relevant factors in serious injury cases heard in the Children’s Court, the Council consulted legal practitioners, police prosecutors and the court itself for their estimates of the prevalence of severe injury.

2.72 Victoria Legal Aid represents the overwhelming majority of people charged with criminal offences heard in the Children’s Court.\(^{125}\) Victoria Legal Aid lawyers who practice in the Children’s Court advised the Council that approximately 2% of cases involving the offence of recklessly causing serious injury and approximately 5% of cases involving intentionally causing serious injury would involve permanent injuries of a kind that would fall within the definition of ‘severe injury’ proposed by the Council.\(^{126}\)

2.73 The Children’s Court concurred with these estimates.\(^{127}\)

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\(^{124}\) Email from Victoria Legal Aid to the Sentencing Advisory Council, 29 July 2011.

\(^{125}\) Meeting with Victoria Legal Aid (6 May 2011). About 98% of children are represented by Victoria Legal Aid, 51% of these in-house.

\(^{126}\) Email from Victoria Legal Aid to the Sentencing Advisory Council, 11 August 2011.

\(^{127}\) Email from His Honour Judge Grant, President of the Children’s Court, to the Sentencing Advisory Council, 12 August 2011.
Substantive issues – factors suggested in the terms of reference

2.74 The terms of reference suggest four factors describing circumstances that should constitute gross violence. Each circumstance will be examined in the order in which it appears in the terms of reference.

Severe injury prerequisite

2.75 The recommendations for each gross violence circumstance have been formulated by the Council on the basis that those circumstances will constitute alternative elements of new gross violence offences that require the infliction of severe injury, as discussed above. The scope of each gross violence element has been determined on that basis to ensure that each element is in accordance with the intent of the proposed reforms and does not exclude offenders with a high level of culpability.

2.76 In the absence of a severe injury threshold, the scope of each gross violence element would need to be reassessed in order to ensure that each element does not include offenders that would not satisfy the high level of culpability that is the intended focus of the reforms.

Plans in advance to engage in an attack intending to cause serious injury

Policy basis

2.77 Planning by an offender is considered a circumstance that aggravates offending behaviour and increases the offender’s culpability. Planning demonstrates the offender has contemplated the commission of a crime and is evidence of the deliberate intent of the offender to commit the crime.

2.78 Some acts of planning may even constitute the elements of separate ‘preparatory’ offences. These offences are intended to be used in circumstances where an offender has engaged in conduct that is preparatory to offences such as theft, robbery or burglary but is insufficient to satisfy the elements of the completed offence or an ‘attempt’ (for example, an attempted armed robbery).

2.79 Planning that constitutes an agreement between persons to commit a criminal offence or offences may also be prosecuted as a ‘conspiracy to commit’, when the planned offence is not committed. Additionally, persons who plan or premeditate an offence by counselling or procuring others to commit that offence (and the offence is then committed) may be charged as principal offenders pursuant to section 323 of the Crimes Act 1958 (Vic).

2.80 In sentencing, premeditation and planning by the offender are considerations a court may have regard to when determining ‘the offender’s culpability and degree of responsibility for the offence’.

128 R v Lowe [2009] VSCA 268 (25 November 2009) [13]: ‘[p]remeditation is, as is well established, a circumstance of aggravation’.


130 Crimes Act 1958 (Vic) ss 321(1)–(4).

The recent case of Bowen v The Queen[132] held that significant weight may be given to those factors:

In light of the aggravating factors particular to the appellant’s offending, especially the level of premeditation and pre-planning involved … the sentencing judge was entitled to give great weight to the need for denunciation, retribution, just punishment and general deterrence, and less weight to the factors tending to mitigate the appellant’s offending behaviour.[133]

Definitional issues

2.81 A critical definitional issue for this circumstance is the question of what should constitute ‘plans in advance’. How far in advance of the commission of the offence must the offender have formed the plan? The extent of planning and the resulting weight it brings to bear on the offender’s culpability will vary considerably between cases.

2.82 For example, there is an objective difference between a case where an intoxicated offender walks across a bar room intending to violently assault a person who the offender believes has just insulted him or her and a case where an offender wears a disguise, arms himself or herself with a weapon, then hides outside a person’s house, intending to violently assault that person when he or she leaves the house.

2.83 Both scenarios might be described as involving the offender ‘planning in advance’, but the latter scenario demonstrates significantly more planning and, as a result, a higher level of culpability. Clearly, the proposed reforms should cover the latter scenario. However, to what extent lesser amounts of planning should be covered is a matter of scope, and such differences in the amount of planning are not easily defined.

2.84 As the Victorian Bar Council and the Criminal Bar Association of Victoria elaborated in their submission:

Premeditation comes in degrees. At present, this is reflected in the sentencing process. Premeditation is properly treated as an aggravating feature of an offence, but the weight it is given in a particular case will depend on the circumstances, including length of time the offender had to contemplate their actions. Under the proposed laws, it appears that a simple dichotomy of ‘planned’ and ‘unplanned’ offences is proposed. This will give rise to real difficulty in practice.[134]

2.85 B. Herbert similarly submitted:

There is no typical case, so the degree of planning will vary and should be assessed on a case-by-case basis. Premeditation should be characterised by deliberate purpose, previous consideration and some degree of planning.[135]

2.86 While the precise wording is a matter for the Office of the Chief Parliamentary Counsel to determine, the intent of the circumstance should be to capture genuine ‘prior planning’, ‘pre-planning’ or ‘planning in advance’, rather than mere intent in advance of the offending behaviour. Non-spontaneous planning as an aggravating factor is often described in sentencing remarks as ‘pre-planning’. While ‘pre-planning’ may be strictly a tautology, it may also be considered synonymous with the term ‘plans in advance’, despite that particular term being rarely used.

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133 Ibid [45].
134 Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 25 (Liberty Victoria).
135 Submission 5 (B. Herbert).
136 A text-based search of available sentencing remarks from the County Court of Victoria for the years 1999 to 2010 revealed that the word ‘pre-planning’ appeared 453 times. The phrases ‘plans in advance’ and ‘planned in advance’ did not appear in any of the available sentencing remarks.
Stakeholders’ views

2.87 Of the 26 submissions received by the Council, seven discussed this factor. The remaining submissions were silent on the issue.

2.88 Many of the submissions that mentioned this factor either criticised the factor in general terms for being too vague in defining what constitutes ‘plans in advance’, or went further and proposed a rewording of the factor to emphasise premeditation as a necessary element, such that the planning should not be ‘immediate or spur of the moment’.

2.89 Youthlaw has emphasised that even when there may be some level of premeditation, as a result of their ‘incomplete maturation of self-control and judgment’, young offenders do not necessarily consider the consequences of their actions, and further, they are more susceptible to negative peer influence. As a result of these factors: ‘planning’ may not be an indication of a young person’s culpability and is not reflective of rational and deliberate decision making … the vulnerability of young people due to their age means that their irresponsible conduct is not as morally reprehensible as that of an adult.

The Council’s view

2.90 The Council considers that the new offence of intentionally causing severe injury should include, as one of the alternative gross violence elements, that the offender planned in advance to engage in an attack intending to cause severe injury.

2.91 Ultimately, satisfaction of this circumstance as an element of gross violence is a question of fact to be determined by the jury or finder of fact beyond reasonable doubt. Any ambiguity in the evidence that goes towards the element of premeditation or pre-planning should be resolved in favour of the accused.

2.92 The terms of reference suggest that the proposed gross violence factor will apply where the offender plans in advance ‘intending to cause serious injury’, and consequently excludes the reckless form of the offence at the planning stage.

2.93 While it is conceivable that a person could have planned in advance to engage in an attack intending to cause serious injury, but ultimately the person only recklessly caused serious injury (perhaps to a person other than the intended victim), there would be an inconsistency in the mental element required for the satisfaction of the offence. For the sake of clarity and consistency, this particular factor should not be included in the new offence of recklessly causing severe injury.

Estimate of proportion of cases that may involve this factor

2.94 As discussed at [2.61] above, the Council analysed sentencing remarks for the period from July 2008 to June 2009, identifying factors that were reliably and consistently included in those remarks. However, information was generally not collected for factors that were very rarely referred to or when mentioned were too problematic to classify meaningfully.

137 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 11 (Law Institute of Victoria); Submission 17 (Federation of Community Legal Centres Victoria); Submission 22 (Victoria Legal Aid); Submission 25 (Liberty Victoria).

138 Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 25 (Liberty Victoria).

139 Submission 11 (Law Institute of Victoria).

140 Submission 21 (Youthlaw).
2.95 One such problematic factor is premeditation or planning in advance. Given the varying degrees of behaviour that such a factor can represent (and consequently the varying degrees of culpability reflected in the sentence), this factor was not coded in the Council’s data. As a result, the Council cannot provide an estimation of the proportion of cases that may involve this factor.

Engages in a violent attack as part of a gang of three or more persons

Policy basis

2.96 A violent attack by a group of people – particularly against a single victim – is regarded as a more serious form of offending than an attack by one individual. Violence as part of a group increases the individual offender’s culpability for a number of reasons. The Court of Appeal has held that:

An assault in company is more frightening and – almost always – more lethal than an assault by one, not least because the action of each tends to encourage the others. It is also more cowardly, because of the overwhelming physical superiority of the attackers.\(^{141}\)

2.97 That case involved an attack on a single individual by three co-offenders, and this gross violence circumstance appears to be intended to cover similar situations where one or more victims are outnumbered by a group of offenders.

Stakeholders’ views

2.98 Stakeholders were particularly concerned with this circumstance. Of the 26 submissions received by the Council, 17 discussed this factor.\(^{142}\) The remaining submissions were silent on the issue.

2.99 The primary concerns regarding this factor were that:

- the use of the word ‘gang’ is problematic and has the potential to be discriminatorily applied to young people or members of ethnic minorities;\(^{143}\)
- offending in company is typical of youth offending, and such a factor would capture a disproportionately high number of youths regardless of their role in the offending behaviour;\(^{144}\) and
- the level of complicity required for this factor is not specified, and co-offenders on the periphery, or aiding and abetting, would be brought within this circumstance.\(^{145}\)

\(^{141}\) Director of Public Prosecutions v Terrick; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457, 477.

\(^{142}\) Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 6 (Crime Victims Support Association); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 19 (Springvale Monash Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services); Submission 25 (Liberty Victoria); Submission 26 (Office of Police Prosecutions Victoria).

\(^{143}\) Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 6 (Crime Victims Support Association); Submission 9 (Children’s Court Barristers Association); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services).

\(^{144}\) Submission 1 (Anonymous); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services).
Definitional issues – ‘gang’

2.100 In determining what amounts to a ‘gang’, an analysis of youth gangs in the United Kingdom found that:

[a]n overview of the literature reveals no consensus about what constitutes a gang, and there is disagreement over how far such groups can be viewed solely in terms of their criminal activities or whether their primary function is to serve social and emotional needs … Meanwhile gang culture has been reflected in styles adopted by individual young people who may not be involved in any criminal group or even in minor offending. Some commentators, therefore, caution against the use of the term ‘gang’ in relation to young people since this may lend a spurious glamour to the minor forms of delinquency committed by groups, and actively encourage them to become involved in more serious offending.146

2.101 The use of the word gang was criticised by stakeholders both for the potential to unfairly discriminate against members of ethnic minorities and for the fact that it most commonly pertains to groups of children or youths.

2.102 One stakeholder submitted that the term gang ‘can have a discriminatory effect on certain ethnic groups’,147 and the Children’s Court Barristers Association commented that ‘[y]oung people from non-Caucasian backgrounds are often labelled as gangs because of their easily distinguishable appearance’.148 Similarly, the Crime Victims Support Association commented that ‘[i]n a multicultural society we must be careful not to punish people who merely wish to associate with those they perceive as their own kind’.149

2.103 Whether this factor requires some element of membership to an identifiable group or common identity was queried by Victoria Legal Aid, which submitted:

The term ‘gang’ is also difficult, and whether a ‘gang’ would need to have a common identity and purpose, and the extent it would need to be organised are necessary considerations.150

2.104 The Children’s Court Barristers Association noted that ‘[p]ractitioners in the Children’s Court criminal jurisdiction rarely come across formalised gangs’. In those circumstances, limiting this gross violence factor to those individuals who identify as a ‘gang’ – in the sense of maintaining a common identity – would likely exclude a significant proportion of otherwise highly culpable offenders who offend in company, but for whom no common identity could be proved. It is therefore preferable to exclude the word ‘gang’ and describe the aggravating factor as offending ‘in company’.

145 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 19 (Springvale Monash Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services); Submission 25 (Liberty Victoria).
147 Submission 1 (Anonymous).
148 Submission 9 (Children’s Court Barristers Association).
149 Submission 6 (Crime Victims Support Association).
150 Submission 22 (Victoria Legal Aid).
Definitional issues – targeting youth offending

2.105 This factor is far more likely to target children and youths if the word ‘gang’ is used (and, by extension, potentially exclude adults offending in company). Research has suggested that juvenile gangs ‘can be seen as one of the types of peer association which are an essential feature of most young people’s transition to adulthood’.151

2.106 Even without the use of the word ‘gang’, however, this factor may be likely to capture a disproportionately high number of young offenders, given their tendency to offend in groups.152 This feature of youth offending was emphasised by a number of stakeholders153 and was of particular concern to them when considering the scope of the proposed gross violence offences. Significantly, those concerns often related to offending involving injuries at the low end of the spectrum of ‘serious injury’, and not to injuries of a higher level as proposed by the Council.

2.107 Stakeholders commented generally that ‘[y]oung people hang out in groups as a matter of course’,154 ‘[i]t is established that young people are far more likely to congregate in groups’155 and ‘[y]outh have a tendency to congregate for various reasons’.156 Youthlaw submitted that:

Young people often gather in groups and this is characteristic of the nature of socialising that occurs within that age group. Due to limited resources and a lack of appropriate places to hang out with friends, young people meet in public spaces such as parks and shopping centres. Young people from migrant and refugee backgrounds are particularly likely to hang out in groups in public spaces due to a lack of space at home, and safety concerns such as fear of racism and bullying. This means that young people hanging out in groups are far more visible and likely to come to the attention of authorities.157

2.108 Victoria Legal Aid was particularly concerned that, if the current ‘serious injury’ threshold was to apply, this factor may extend to cases where children aged 16 and 17 were involved in a school fight, and gave the following example:

A school fight involving a number of young people where a participant suffers a bruised eye [and] a cut to the head (a ‘serious injury’ under the current definition that includes a combination of injuries). This would almost certainly be ‘recklessly causing serious injury’ in circumstances of ‘gross violence’ yet it will capture a significant number of common scenarios involving people who have often had no previous involvement with the criminal justice system.

While punishment is plainly warranted for the conduct engaged in by these young people, the community would not reasonably expect them to spend a minimum of two years in prison.158

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153 Submission 1 (Anonymous); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services).
154 Submission 1 (Anonymous).
155 Submission 9 (Children’s Court Barristers Association).
156 Submission 5 (B. Herbert).
157 Submission 21 (Youthlaw).
158 Submission 22 (Victoria Legal Aid).
2.109 Given the potential scope for this factor to draw in a significant proportion of all serious injury offending by young offenders, a number of stakeholders thought that this factor should be excluded altogether for children aged 16 and 17.159

2.110 As discussed at [2.47] above, the intent of the reforms is to target offenders who both are highly culpable and inflict high levels of injury. With the incorporation of a severe injury threshold, it is intended that scenarios of young offending in company, such as the example above, that involve relatively minor injuries (but would still fall within the definition of ‘serious injury’) should be excluded from the gross violence offences.

2.111 Where the level of injury to a victim satisfies the definition of ‘severe’ injury, and the offending occurs in circumstances where the offender has high culpability, considerations that may explain the nature of youth offending in company become less relevant. From the victim’s perspective, an attack by a group of three or more offenders, each of whom is aged 16 or 17 years old, resulting in severe injury, is unlikely to be subjectively different from a similar attack, inflicting similarly severe injury, in which the offenders were all aged above 17.

2.112 An important factor that distinguishes the seriousness of offending and the level of culpability between offenders in company is the extent to which each offender participated in the offending behaviour and consequently each offender’s criminal responsibility for the offence. While the same point can be made for adult offenders, the Victorian Council of Social Service submitted:

[If] the offence involves a group of three or more young people it is important to determine the role each of the young people played rather than assume each is equally culpable.160

Definitional issues – complicity

2.113 Offending in company and in groups, in particular, raises issues relating to the law of complicity. Complicity is concerned with the assigning of criminal responsibility to offenders based on the extent of their involvement in joint offending behaviour. Complicity has been described as ‘one of the most conceptually confusing areas of criminal law theory’.161

2.114 Stephen J, in Johns v The Queen, noted the problem of differentiating between offenders prosecuted as principal offenders (because of the law of complicity) and offenders who had different levels of culpability, in circumstances where a mandatory penalty applied:

[P]arties to a crime may not share precisely the same mens rea and, as well, to one of them special considerations may apply, as where diminished responsibility is raised … But, those cases apart, so long as what is in question is within the scope of the common purpose neither reason nor fairness suggests that … distinction … should be drawn. Each of the parties has complicity in the crime: each has knowingly assisted, in different ways, in its commission. Where the crime in question does not involve a mandatory sentence, their respective roles may of course bear upon the sentences to be imposed upon conviction, but not necessarily in a manner favourable to the accessory before the fact, who may prove to be the more blameworthy of the two.162

159 Submission 1 (Anonymous); Submission 14 (Centre for Multicultural Youth); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services).

160 Submission 8 (Victorian Council of Social Service).


2.115 Given the imposition of a statutory minimum sentence, which will prohibit a court from reducing a sentence below the minimum for gross violence offences even where there was limited complicity (such as aiding and abetting), it is a question of policy as to what level of complicity this circumstance is intended to cover.

2.116 One stakeholder submitted that, in the absence of clear expression, ‘the question of degree of culpability of “hangers on” will be fraught and take up a great deal of Court time’,\(^\text{163}\) and the Office of Public Prosecutions Victoria noted in general that ‘[t]he extent to which an accused is liable under the [gross violence] proposal for the actions of others must be clarified’.\(^\text{164}\)

2.117 The different levels of complicity within the criminal law of Victoria are as follows:\(^\text{165}\)

1. **Principals in the first degree**

   This category includes:
   
   - an accused person or persons who commit the physical elements of the offence (in other words the actual criminal acts or omissions);\(^\text{166}\)
   - an accused person who is present at the scene with the person who commits the physical elements of the offence and is there by reason of a pre-concert or agreement with that person to commit the crime (‘acting in concert’);
   - an accused person who forms an agreement with another person or persons to commit the crime and a party other than the accused commits a criminal act or acts that were not agreed to, but that the accused could foresee as a possible consequence of the pre-concert or agreement (‘extended common purpose’);\(^\text{167}\) and
   - an accused person who is not present, but participates in some way and a party other than the accused commits the criminal acts in accordance with a pre-concert or agreement (‘joint criminal enterprise’).

2. **Principals in the second degree**

   This category includes those who are present and help, encourage (by words or behaviour) or convey to the principal offender their assent and concurrence in their commission of the crime (‘aiding and abetting’).

3. **Principals in the third degree**

   This category includes:
   
   - those who bring about the commission of a crime but were not present at the scene of the crime, regarded as accessories before the fact (‘counselling or procuring’); and
   - those who aid the commission of a crime by impeding the apprehension, prosecution, conviction or punishment of an offender, regarded as accessories after the fact (‘accessories’) and are charged with the offence of being an accessory under section 325 of the *Crimes Act 1958* (Vic).

\(^{163}\) Submission 1 (Anonymous).

\(^{164}\) Submission 26 (Office of Public Prosecutions Victoria).


\(^{166}\) The acts or omissions of the accused ‘need not be the sole cause [of the injury] but [they] must be a substantial or significant cause viewed in a commonsense and practical way': directions given by the trial judge approved in McAuliffe v The Queen (1995) 183 CLR 108, 118.

\(^{167}\) An accused person need not be present at the scene of the crime to be charged as a principal under the law of extended common purpose: Johns v The Queen (1979–1980) 143 CLR 108, 118.
2.118 Section 323 of the Crimes Act 1958 (Vic) provides that a person acting as a principal in the second and third degree, as described above, who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender.

2.119 There are two questions to be answered on the issue of complicity:

1. What level of involvement by the three or more offenders should be sufficient for this element to be satisfied and the gross violence offence to be made out?

2. How should the law of complicity apply once the offence of gross violence has been made out?

Complicity within this element of gross violence

2.120 As to the first question regarding the level of involvement, a number of stakeholders expressed the view that it should:

- exclude ‘non-principal and non-active participants’ and only apply to ‘principal offenders and not those who are merely present’;
- be limited to situations where the ‘group deliberately came together for the purpose of committing an act of gross violence’ or ‘for the sake of committing a crime’;
- be limited to ‘a group of three or more people each of whom takes an active physical role in the attack and where the person to whom the severe injury is caused is significantly outnumbered’.

2.121 In their submission, Youthlaw elaborated that young people are often included in group offending by way of simply being present at the time of the offence. In the absence of a statutory minimum sentence, judicial officers can look at the offender’s level of involvement in the offence (as well as the personal circumstances of the offender) in determining the appropriate sentence. However, where a statutory minimum is to apply, Youthlaw submitted:

'It is imperative that these offences only apply in relation to principal offenders, and not those who are merely present at the time of the offence or who are merely accessories.'

2.122 For the statutory minimum sentences to apply to the most appropriate offenders, the level of complicity covered by the severe injury offences should accord with those offenders whose involvement in the offending reflects a high level of culpability.

2.123 The use of the word ‘gang’ in the terms of reference suggests that something more than spontaneous offending in company is intended to be covered. Some element of planning or intent to attack in a group seems to be the kind of behaviour — representing a high level of culpability — that the proposal seeks to cover. To that end, extending liability to encompass offending behaviour where there has been an agreement (whether express or implied) to inflict severe injury by a group of offenders is warranted. This would extend liability from principal offenders who actually inflict injury themselves to principal offenders who act ‘in concert’.

168 Submission 21 (Youthlaw).
169 Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw).
170 Submission 10 (Child Safety Commissioner).
171 Submission 6 (Crime Victims Support Association).
172 Submission 22 (Victoria Legal Aid).
173 Submission 21 (Youthlaw).
2.124 The law of acting in concert was clearly expressed in *R v Lowery and King (No 2)*,\(^{174}\) where the court held:

The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime.\(^{175}\)

### Exclusion of ‘extended common purpose’, ‘joint criminal enterprise’ and lesser forms of complicity

2.125 Aside from physically committing the offence or acting in concert, another two forms of offending by principals in the first degree exist, being ‘extended common purpose’ and ‘joint criminal enterprise’ (as discussed at [2.117] above). Both forms of liability arise pursuant to an agreement to commit criminal acts.

2.126 In the case of ‘extended common purpose’, the accused agrees with co-offenders to commit a criminal act (such as a bank robbery using loaded firearms); however, a further criminal act (such as shooting and wounding a bank employee) is committed by an offender other than the accused. If this further criminal act was foreseeable by the accused as a possible consequence of a co-offender enacting their common purpose (to rob a bank using loaded firearms), the accused will be held liable as a principal in the first degree for the further criminal act (the injury to the bank employee).

2.127 In the case of ‘joint criminal enterprise’ (which is most commonly used in connection with the prosecution of drug trafficking offences), the accused has entered into an agreement similar to acting in concert, but is not physically present when the offence is committed; for example, a person who purchases a property and then knowingly allows other co-offenders to cultivate cannabis on that property, but is not present at the property when the cannabis is cultivated, will still be a principal offender under the law of ‘joint criminal enterprise’.\(^{176}\)

2.128 In the context of the gross violence offences, these extended forms of principal liability in the first degree would introduce a significant amount of complexity to the gross violence circumstance of offending in company. Given that the intent of the gross violence offences is to target offenders who are themselves highly culpable, limiting liability for this gross violence element to those who physically commit the offence, or act in concert, is to be preferred.

2.129 Similarly, the forms of complicity for principals in the second degree (aiding and abetting) and third degree (counselling or procuring or being an accessory) should also be excluded from the forms of complicity required to make out this element of gross violence.

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\(^{174}\) *R v Lowery and King (No 2)* [1972] VR 560.

\(^{175}\) Ibid 560.

Statutory minimum sentences for gross violence offences

The application of complicity in general

2.130 Regarding Question 2 [2.119], if the level of complicity is limited within this circumstance of gross violence, then once an offence is made out in reliance on this circumstance, the effect of the law of complicity in general will need to be addressed.

2.131 For example, if aiding and abetting co-offenders are excluded from this circumstance such that only co-offenders who are principal offenders by virtue of actually inflicting the injury or acting in concert are to be covered and three co-offenders satisfy this condition and the offence is made out, a fourth co-offender who aided and abetted may also be charged as a principal offender.\(^{177}\) Given the intent of the proposal to apply to those individuals with a high level of culpability, that fourth co-offender should be convicted of the offence but should not be liable to the statutory minimum sentence. This exclusion of the statutory minimum sentence should be automatic, and should not depend on the existence of ‘exceptional’ or ‘special’ circumstances as discussed in Chapter 4.

2.132 Similarly, where the other gross violence circumstances are made out, the Council considers that principal offenders in the second degree (who aid or abet) or principals in the third degree (who counsel or procure or who are accessories) should still be liable to prosecution, but should not be liable to the statutory minimum sentence.

Estimate of proportion of cases that may involve this factor – higher courts

2.133 An analysis of available sentencing remarks for the higher courts in the year 2008–09 conducted by the Council identified the presence of ‘co-offenders’. These were defined as persons, other than the offender, involved in the offending behaviour, but they need not have been directly involved in every offence; nor were they required to have been charged.

2.134 Given that definition, the estimated number of charges involving two or more ‘co-offenders’ includes those charges involving three or more principal offenders. As a result, this estimate represents the outer limit of those charges in which this gross violence element might be present.

2.135 Of the 256 charges\(^ {178}\) of intentionally causing serious injury and recklessly causing serious injury in 2008–09, it is estimated that 66, or 25.8%, involved two or more ‘co-offenders’.

2.136 When the severe injury threshold is applied (as discussed at [2.61]–[2.67]) the estimated number of intentionally causing serious injury and recklessly causing serious injury charges for that period that involved both two or more ‘co-offenders’ and ‘severe’ injury is 12, or 4.7% of all charges.

The Council’s view

2.137 The Council considers that the new offences of intentionally causing severe injury and recklessly causing severe injury\(^ {179}\) should include this circumstance as one of the alternative gross violence elements. However, the element should exclude the words ‘as part of a gang of’, and instead describe the offending as ‘in company with’.

2.138 The Council also considers that the level of complicity required to satisfy this element should be limited to those offenders who, with two or more persons, each inflict severe injury, or act in concert with one another to inflict severe injury.

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177 By virtue of section 232 of the Crimes Act 1958 (Vic).
178 Where sentencing remarks were available.
179 As ‘acting in concert’ requires a pre-agreement to commit the criminal acts (but does not require a pre-agreement as to the form of intent), this element should apply to both the intentional and the reckless forms of the severe injury offences.
2.139 While it is a matter for the Office of the Chief Parliamentary Counsel to determine the appropriate wording, the element could be expressed as:

[the offender] causes severe injury while in company with two or more persons, where both the offender and at least two other persons cause severe injury or act in concert with one another to cause severe injury.

2.140 The Council considers that other forms of complicity – including ‘extended common purpose’, ‘joint criminal enterprise’, ‘aiding’, ‘abetting’, ‘counselling’ or ‘procuring’ or being an ‘accessory’ – should be excluded from the forms of complicity that constitute this element of either intentionally causing severe injury or recklessly causing severe injury.

2.141 Where this element is satisfied and a severe injury offence is committed, the laws of complicity should still apply generally, so that a principal in the second or third degree (a person who aids, abets, counsels or procures the commission of that offence) is also guilty of an offence. However, the Council considers that the statutory minimum should only apply to the two forms of principal in the first degree described above (2.139), and the exclusion of principals in the second or third degree should not depend on the existence of ‘exceptional’ circumstances.

Plans in advance to carry and use a weapon

Policy basis

2.142 The use of weapons has long been considered a factor that increases the seriousness of offending and so increases the culpability of the offender. Aggravated forms of offending have been legislated that specifically cover the use of weapons and provide for an increased maximum penalty. For example, the offence of aggravated assault with a weapon carries a maximum penalty of two years, compared with a maximum penalty of 15 penalty units or three months for simple assault.

Similarly, the offence of armed robbery carries a maximum penalty of 25 years, compared with a maximum penalty of 15 years for robbery.

2.143 The seriousness of weapon use (in the context of armed robbery) was discussed in R v Bortoli, where the Court of Appeal stated:

Armed robbery is a particularly serious offence because of the impact of threatened violence upon its victims and because the use of a weapon carried with it the risk of serious injury or death.

2.144 Where violence is not just threatened but inflicted through the use of a weapon, the culpability of the offender is significantly increased. In regard to this gross violence circumstance, a violent assault with a weapon by an offender who planned in advance and then carried a weapon to use in an attack represents an even higher level of culpability.

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180 R v Ivan Leonard Storey [1998] 1 VR 359, 371: “Aggravating” and “mitigating” must be understood in a wide sense, and without, for example, drawing the distinction which might be drawn between the significance for another purpose on the one hand of a circumstance which renders the crime more serious (for example, the use of a weapon) and on the other hand of a prior or subsequent conviction. (emphasis added).

181 Summary Offences Act 1966 (Vic) s 24(2). This also includes an assault by kicking.

182 Summary Offences Act 1966 (Vic) s 23.

183 Crimes Act 1958 (Vic) s 75A(2).

184 Crimes Act 1958 (Vic) s 75(2).


186 Ibid [23].
Definitional issues – ‘plans in advance’

2.145 The same definitional issues arise for this gross violence circumstance as those discussed for the ‘plans in advance’ circumstance above at [2.80]–[2.85]. The immediate question being, how far in advance of the commission of the offence must the offender have formed the plan? The extent of planning and the resulting weight it brings to bear on the offender’s culpability will vary considerably between cases.

2.146 As discussed at [2.86], the circumstance should be phrased so as to capture genuine ‘prior planning’, ‘pre-planning’ or ‘planning in advance’, rather than mere intent in advance of the offending behaviour.

Definitional issues – ‘to carry’

2.147 The plain meaning of ‘to carry’ a weapon suggests to move the weapon from one location to another by means of having the weapon on the offender’s physical person, or in a bag or some form of container under the offender’s control. In other words, the weapon must be at the location of the offending behaviour as a result of the offender having carried it there.

2.148 Improvised weapons, or those that are spontaneously obtained at the time of the offending may or may not satisfy this requirement of having been ‘carried’, depending on the circumstances. For example:

- During an assault in a park, an offender grabs a tree branch and uses it to violently assault a victim.
- An offender breaks into a home and takes a knife from a kitchen drawer and then uses it to violently assault the occupant sleeping upstairs.
- A offender believes that he or she was insulted by a victim in a pub. The offender immediately walks over to the victim, holding a half-full beer glass and smashes that glass on the victim’s head.
- An offender believes that he or she was insulted by a victim in a pub. A short time later, when the victim leaves the pub and walks to his or her car outside, the offender follows, carrying an empty beer glass, and then smashes the glass on the victim’s head.

2.149 Ultimately, satisfaction of this circumstance as an element of gross violence is a question of fact to be determined by the jury or finder of fact beyond reasonable doubt. Any ambiguity that the accused did not ‘carry’ the weapon, which creates reasonable doubt, must be resolved in favour of the accused.

2.150 It is important to reiterate that, where a particular element of gross violence is not proven (such as where there is ambiguity as to whether a weapon was ‘carried’ by an offender or spontaneously used), the offences of intentionally causing serious injury or recklessly causing serious injury will still be available. Given the maximum penalties for those offences, an offender may still receive a lengthy sentence when his or her level of culpability or the harm inflicted is high, regardless of the absence of a gross violence element.

Definitional issues – ‘an attack’

2.151 In order to satisfy the offence of gross violence involving this element (as with the other proposed elements), a severe injury must be either intentionally or recklessly inflicted. The element describes the intent of the offender in carrying the weapon for ‘use in an attack’, but does not narrow that intent to causing a specific degree of injury, or indeed, any injury at all. It may be, for example, that the offender initially intended to use the weapon only as a threat during an attack.

2.152 As discussed above at [2.142], the intent to use a weapon, even for the purpose of only threatening a victim, is an aggravating feature of a violent assault, and more so where injury ultimately results. In those circumstances, it is sufficient to establish a high level of culpability that an offender carried a weapon with the intent to use it in an attack, regardless of whether or not the offender carried a weapon with the intent to inflict severe injury.
Stakeholders’ views

2.153 Of the 26 submissions received by the Council, nine discussed this factor.187

2.154 Concerns were raised that this may capture youths who carried weapons for self-protection.188 Youthlaw also expressed concern that this gross violence factor would also disproportionately affect vulnerable offenders who carry weapons for utilitarian purposes.189

2.155 A 2005 report on the carriage and use of knives and syringes by offenders in Victoria190 drew a distinction between the populations that carry knives for protection or self-defence (which included a disproportionately high number of young offenders) and the populations that ultimately used knives in offending. The report concluded:

[there] is evidence suggesting that the age and other profiles of people who carry [weapons] are different from offenders who have used these weapons. The age at which carrying weapons peaks is lower than the age of most offenders and victims of knife and syringe related crime. That is, it appears there are two populations: the younger cohort who carry these weapons and ultimately grow out of the habit and an older cohort who, primarily through an association with drug-related crime, are evidenced in crime and hospitalisation data.191

2.156 The proposed circumstance is limited to those cases where the offender carried the weapon for the purpose of using it in a planned attack. On a plain reading, this circumstance would exclude cases involving the use of weapons already in the possession of the offender that were carried for other purposes (including for self-protection, or utilitarian needs).

2.157 The onus of proving that the weapon was carried for the purpose of ‘use in an attack’ lies with the Crown, and, as with the other elements of this circumstance, any ambiguity that the accused did not carry the weapon for the purpose of using it in an attack, which creates reasonable doubt, must be resolved in favour of the accused.

Subsume factor into ‘plans in advance’

2.158 Victoria Legal Aid submitted that all of the gross violence factors should only apply to intentional, and not reckless, conduct, on the basis that the offences should be targeted at those offenders with the highest culpability, given the statutory minimum sentence. Accordingly, Victoria Legal Aid submitted that this factor should be subsumed into the ‘plans in advance’ factor.

2.159 In that regard, it is noted that this circumstance differs from the circumstance of ‘plans in advance’ discussed above, as that circumstance refers to a plan in advance ‘intending to cause’ serious injury. As the Council has recommended, that gross violence element is properly limited to the intentional form of the new severe injury offences, and should be excluded from the reckless form.

187 Submission 1 (Anonymous); Submission 3 (P. Jones); Submission 5 (B. Herbert); Submission 9 (Children’s Court Barristers Association); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).

188 Submission 9 (Children’s Court Barristers Association); Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw).

189 For example, a homeless youth who carries a knife for the purpose of cutting up food: Submission 21 (Youthlaw).


191 Ibid vii.
2.160 The increased culpability that the present circumstance appears intended to cover, however, is the fact that an offender has planned in advance to carry and use a weapon in an attack. It is that fact, and the offender’s subsequent use of a weapon to inflict injury — irrespective of whether that use was intentional or reckless — that is an aggravating feature of the offending behaviour. On that basis, including this element within the intentional and reckless forms of the severe injury offences is to be preferred.

‘Deliberate’ or ‘intentional’?

2.161 The terms of reference propose that, having planned in advance to carry and use a weapon, the offender then ‘deliberately or recklessly’ uses that weapon. A deliberate action is one that is a conscious act on the part of the accused, and not the result of an automatic, unconscious act — such as an involuntary muscle spasm.\(^{192}\)

2.162 This, however, is a separate consideration from the mental element (mens rea) of a criminal act. An offender may deliberately use a weapon, such as deliberately stabbing a person with a knife, while still being reckless as to the consequences of that deliberate weapon use. To avoid confusion with considerations of automatism\(^{193}\) (which is concerned with non-deliberate, unconscious acts by an accused person), the words ‘deliberately or recklessly’ should be removed and the element should instead refer to where the offender either ‘intentionally’ or ‘recklessly’ uses the weapon, depending on the form of the offence being described.

Estimate of proportion of cases that may involve this factor – higher courts

2.163 The Council analysed available sentencing remarks for the higher courts in the year 2008–09 to identify the presence of a ‘weapon’.\(^{194}\)

2.164 The estimated number of charges involving the use of a weapon includes those charges in which a weapon was carried for the purposes of an attack. However, this number also includes every other use of a weapon, including weapons spontaneously obtained at the time of offending, other objects (such as a tree branch) used as a weapon or weapons carried for purposes other than an attack. As a result, the estimate represents the outer limit of those charges in which this gross violence element might be present.

2.165 Of the 256 charges\(^{195}\) of intentionally causing serious injury and recklessly causing serious injury in 2008–09, the Council estimates that 163, or 63.7%, involved the use of a weapon.

2.166 When the severe injury threshold is applied (as discussed at [2.61]–[2.67]) the estimate of intentionally causing serious injury and recklessly causing serious injury charges for that period involving both a weapon and ‘severe’ injury is 32, or 12.5% of all charges.

The Council’s view

2.167 The Council considers that the new offences of intentionally causing severe injury and recklessly causing severe injury should include this element as one of the alternative gross violence elements. However, the element should exclude the words ‘deliberately or recklessly’ and refer to the offender either ‘intentionally’ or ‘recklessly’ using a weapon to inflict severe injury, depending on the form of the offence.

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\(^{192}\) Ryan v The Queen (1967) 121 CLR 205, 214–215.

\(^{193}\) See Freckleton and Andrewartha (2010), above n 161, 163–165.

\(^{194}\) The categories used for ‘weapon’ included the following: bat/bar/club, bottle/glass, firearm, knife, syringe, ‘other weapon’, ‘multiple weapons’, or ‘not stated’.

\(^{195}\) Where sentencing remarks were available.
Continued attack after the victim is incapacitated

Policy basis

2.168 An offender who continues to physically attack a victim after the victim is incapacitated demonstrates a high level of culpability, both because of the gratuitous nature of the violence and because of the potential for the victim to sustain very serious injuries.

2.169 ‘Incapacitation’ suggests a variety of possible situations for the victim (see [2.171]–[2.173]), but the proposed factor seems intended to cover those circumstances where a victim is unable to defend him- or herself from violence being inflicted by an offender. The violence might therefore be considered gratuitous, in the sense that it is wanton and not directed towards achieving any end by the offender, such as the victim’s submission.196

2.170 It follows that, if a victim is incapacitated, depending on the extent of that incapacitation, continued violence by an offender is likely to result in more serious injury than if a victim had some capacity to defend him- or herself.

Definitional issues

2.171 To be incapacitated is to be ‘deprived of capacity; made incapable or unfit’197 or ‘debilitated’,198 which encompasses a potentially broad range of circumstances for the victim. At one end of the spectrum, the victim may be backed into a corner, unable to escape the offender’s continued assault; at the other end, the victim may be lying on the ground, unconscious.

2.172 A number of cases that involved violent attacks after the incapacitation of a victim (to the point where the victim was rendered unconscious) have resulted in catastrophic injuries.199 However, significant long-term injuries can still be inflicted without the victim losing consciousness. Further, from the victim’s perspective, a continuing attack when conscious, but unable to defend oneself, may be objectively worse than being unconscious when the injury is inflicted.

2.173 In this regard, a victim who lacks the ‘capacity’ to defend him- or herself is ‘incapacitated’, irrespective of whether or not the victim is unconscious, and should come within the ordinary meaning of that word. Ultimately, it is a question for the jury or finder of fact as to whether or not the victim was ‘incapacitated’ within the plain meaning of the word, and any ambiguity in the evidence that the victim was not ‘incapacitated’, which creates reasonable doubt, must be resolved in favour of the accused.

196 This is not to say that the infliction of violence in other circumstances is to be excused, only that this kind of violence demonstrates an increased level of culpability.
199 For example, R v Empsey [2004] VSCA 243 (9 December 2004); Director of Public Prosecutions v Lawrence (2004) 10 VR 125; R v Ali [2003] VSC 182 (4 June 2003); Director of Public Prosecutions v Terrick; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457.
Stakeholders’ views

2.174 Of the 26 submissions received by the Council, eight discussed this factor.200

2.175 The essential concern of most stakeholders was the issue of definition – querying what would constitute ‘incapacitation’. It was considered ‘too nebulous and difficult to define’201 and ‘ambiguous and potentially of very broad application’,202 and would require ‘[f]orensic and medical evidence’.203

2.176 In terms of proposing an alternative definition, one stakeholder submitted that incapacitation should cover ‘[c]ontinuing an attack after a person has submitted or been rendered unconscious’ or ‘[c]ontinually kicking a person that is defenceless on the ground’.204 The Law Institute of Victoria (endorsed by the Federation of Community Legal Centres Victoria) commented that it should be defined as ‘loss of consciousness, or inability to remove themselves from the situation’,205 while Victoria Legal Aid submitted that ‘incapacitated’ should be defined as ‘rendered incapable of defending him or herself’.206

Intention and knowledge of incapacitation

2.177 Victoria Legal Aid also recommended that this circumstance be narrowed on the basis of the offender’s knowledge and intention, such that it should be expressed as:

where the accused continues a violent attack on a person after that person has been incapacitated (i.e. rendered incapable of defending him or herself) and where the offender is aware that the person has been incapacitated and intends to cause severe injury to the person following their incapacitation.

2.178 The increased culpability from an attack that continues beyond the point at which a victim is incapacitated arises from the gratuitous, wanton nature of the violence. To limit the scope of this factor to circumstances where the infliction of such violence was intended to cause severe injury after incapacitation is likely to exclude highly culpable offending that occurs in the absence of this intention. Further, the infliction of severe injury may have occurred before the victim was incapacitated, and so a secondary intent may be irrelevant.

2.179 Victoria Legal Aid also proposed that the circumstance be limited to those cases where the offender was aware that the victim was incapacitated. Again, the intent of the circumstance appears to be to target a form of violence that, by its very nature, is indifferent to the consequences for the victim. To require the Crown to prove that the offender was aware (and not, for example, that the offender ought to have reasonably known) that the victim was incapacitated would similarly limit the scope of this circumstance and exclude highly culpable offending where the offender simply had no regard to the capacity of the victim.

200 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 17 (Federation of Community Legal Centres Victoria); Submission 22 (Victoria Legal Aid); Submission 23 (Liberty Victoria).

201 Submission 1 (Anonymous).

202 Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 25 (Liberty Victoria).

203 Submission 5 (B. Herbert).

204 Submission 3 (P. Jones).

205 Submission 11 (Law Institute of Victoria); Submission 17 (Federation of Community Legal Centres Victoria).

206 Submission 22 (Victoria Legal Aid).
Violently attack or 'cause injury'

2.180 In a recent violent assault case, the victim was held by the offender in a headlock from behind with such force that the victim became unconscious. The offender then released his grip on the victim, causing the victim to fall forward to the ground. The serious injury sustained by the victim was not an immediate result of the headlock, but rather the blunt head trauma caused as the victim fell to the ground, unconscious, and so unable to protect his head from the impact.207

2.181 There may be some doubt as to whether allowing an unconscious victim to fall to the ground is considered a circumstance where the offender ‘continued to violently attack’ the victim. Clearly, by his actions, the offender caused the serious injury that was inflicted, but the manner in which the injury was inflicted may not represent a continuing violent ‘attack’ on the plain meaning of those words.

2.182 Where a victim is incapacitated to the point her or she becomes unconscious, it may be that severe injury, while caused by an offender, is also an indirect result of the victim falling or being allowed to fall. In order that such cases might come within this circumstance and to properly reflect the high level of culpability involved, after the words ‘continues to violently attack the victim’ the words ‘or cause injury to the victim’ or a similar phrase should be included.

Estimate of proportion of cases that may involve this factor – higher courts

2.183 The Council analysed available sentencing remarks for the higher courts from the year 2008–09 to identify the presence of incapacitation. The circumstance of a continued attack while the victim is unable to defend him- or herself was not a consistently or reliably mentioned factor, and so was not specifically coded. However, under the category of injury sustained by the victim, ‘loss of consciousness’ was coded.

2.184 The estimate for the number of cases involving incapacitation is presented here using ‘loss of consciousness’ as a proxy for this circumstance; however, this figure is strongly qualified as merely providing a rough estimate.

2.185 The recording of a loss of consciousness does not necessarily mean that an attack occurred after the victim was rendered unconscious. For example, a loss of consciousness would be recorded in recklessly causing serious injury ‘one-punch’ cases, where a victim is rendered unconscious by a single punch and sustains serious injury (usually from falling down). The only act of violence by the offender may have been a single punch, without any further violence and without the intent to cause serious injury.

2.186 Similarly, a victim may sustain very serious injuries from a continuing attack after the victim is unable to defend him- or herself, but during which the victim does not lose consciousness. In those circumstances, ‘loss of consciousness’ would not be recorded.

2.187 As a result, the number of cases in which the victim is attacked after being ‘incapacitated’ in the sense of being unable to defend him- or herself can only be roughly approximated through analysis of the factor of ‘loss of consciousness’.

2.188 Of the 256 charges208 of intentionally causing serious injury and recklessly causing serious injury in 2008–09, the Council estimates that the victim lost consciousness in 60 charges, or 23.4%.

2.189 When the severe injury threshold is applied (as discussed at [2.65]–[2.67]) the estimate of intentionally causing serious injury and recklessly causing serious injury charges for that period that resulted in both the victim being rendered unconscious and the infliction of severe injury was 17, or 6.6%.

207 Director of Public Prosecutions v Karazisis; Director of Public Prosecutions v Bogtstra; Director of Public Prosecutions v Kontoklotsis [2010] VSCA 350 (17 December 2010) [138].
208 Where sentencing remarks were available.
The Council’s view

2.190 The Council considers that the new offences of intentionally causing severe injury and recklessly causing severe injury should include this element as one of the alternative gross violence elements.

2.191 As with the other elements of gross violence, the infliction of severe injury (either intentionally or recklessly) is required, regardless of whether the infliction of severe injury occurs before or after the victim becomes incapacitated.

2.192 While the precise wording is a matter for the Office of the Chief Parliamentary Counsel, the Council considers that the word ‘violently’ should be excluded, as a ‘violent’ attack may be considered a tautology. Further, the Council considers that the element should include reference to where the offender continues to ‘cause injury’ to a victim, so as to include those circumstances where an injury results from the offender’s behaviour; but may not be considered part of an ‘attack’.

2.193 The Council does not consider that it should be a requirement of this element that the offender either intended to cause severe injury after the victim was incapacitated or must have had knowledge of the victim’s incapacitation.

Basis for selecting factors

2.194 All of the suggested factors relate to the offender’s culpability – in other words, his or her blameworthiness or moral fault – rather than the consequences of the offending. Of the proposed factors, two are concerned with preparatory matters (planning in advance to offend and possession of a weapon for the purpose of the offence with subsequent use) and two are concerned with the form of violence inflicted (the infliction of violence after incapacitation of the victim and an attack by a group of three or more persons).

2.195 Each of these factors increases the offender’s culpability and logically may also aggravate the victim’s injuries, but that consequence is not required. To be consistent with the rationale of the reforms, other proposed additional or alternative factors should therefore go towards questions of the offender’s culpability.

Additional/alternative factors

2.196 As discussed at [2.75], the Council’s recommendations on the gross violence circumstances are based on a framework in which those circumstances are elements of proposed offences involving the infliction of severe (and not serious) injury. The Council’s analysis of proposed additional or alternative factors submitted by stakeholders was also made in the same context.
Prior offending

2.197 Some stakeholders submitted that first-time offenders should be excluded from the scope of the gross violence offences. It was submitted by one stakeholder that a child aged 16 or 17 should only come within the gross violence offence if he or she ‘has previously (within the preceding 2 years) been found guilty by a court (not cautioned or given ‘ROPES’) of an indictable offence involving violence to the person.’209 Similarly, the Law Institute of Victoria (endorsed by the Federation of Community Legal Centres Victoria and the Victorian Aboriginal Legal Service) submitted that ‘a new offence of “gross violence” must be defined to preclude first time offenders’.210

2.198 Given the severe injury threshold recommended by Council, gross violence offences will represent a very high level of culpability for the offender; in terms of both the manner in which the offending is committed and the consequential injuries inflicted on the victim. In those circumstances, the fact that an offender may have no prior record of violent offending is a far less mitigating consideration than it might otherwise be.

2.199 As a result, to exclude first-time offenders who commit a gross violence offence would be inconsistent with the intent of the reforms, and the Council is of the view that the offences of intentionally causing severe injury and recklessly causing severe injury should not exclude first-time offenders.

Multiple factors

2.200 The proposed gross violence circumstances in the terms of reference are listed disjunctively, such that any one circumstance is sufficient to make out an offence of gross violence. Some stakeholders submitted that more than one circumstance should be required.

2.201 One stakeholder submitted that planning, severe injury and the use of a weapon should all be required before the offence of gross violence is made out.211 The Law Institute of Victoria (endorsed by the Federation of Community Legal Centres Victoria) submitted that at least two of the proposed factors should be required in order to make out the offence of gross violence.212

2.202 Following the same rationale for not excluding first-time offenders above, given the severe injury threshold recommended by Council, proof of one of the alternative elements of gross violence will represent a very high level of culpability for the offender. In those circumstances, the Council considers that a requirement that an offender satisfy multiple gross violence elements would unreasonably limit the application of the offences and exclude already highly culpable offenders.

Exclusion of the reckless form

2.203 As discussed at [1.15] above, the offences of intentionally causing serious injury and recklessly causing serious injury differ on the basis of the state of mind required to be proved by the Crown. To be guilty of intentionally causing serious injury, the offender must have intended both to commit the act or acts that caused the serious injury and to cause the serious injury that resulted. To be guilty

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209 Submission 1 (Anonymous).
210 Submission 11 (Law Institute of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria).
211 Submission 1 (Anonymous).
212 Submission 11 (Law Institute of Victoria); Submission 17 (Federation of Community Legal Centres Victoria).
of recklessly causing serious injury, the offender must have intended to commit the act or acts that caused the injury, and foresaw that those actions could cause serious injury, but was indifferent as to whether or not serious injury would actually result.

2.204 Some stakeholders were of the view that the gross violence offences should only apply ‘where intention, and not recklessness, is the requisite state of mind’,\(^{213}\) or ‘to intentional not reckless conduct’.\(^{214}\)

2.205 The Law Institute of Victoria submitted that this exclusion should be made on the basis that ‘only the most culpable and blameworthy offenders, and the gravest type of offending’ should come within the scope of the gross violence offences.\(^{215}\)

2.206 It was also submitted that limiting the statutory minimum sentence to only the intentional form of gross violence would recognise that, as proposed by the terms of reference, the statutory minimum for the intentional and reckless forms is identical, and so, it is argued, the proposal does not account for the different levels of culpability. The Law Institute of Victoria stated:

> It is inconceivable that an offence where an offender intends to cause a serious injury should carry the same mandatory minimum as an offence with the lesser mental element of recklessness.\(^{216}\)

2.207 It is quite common, however, that offences that incorporate an intentional and a reckless form of offending have a single maximum penalty.\(^{217}\) The form of mental element will then ordinarily form one of a number of considerations weighed up by the court when determining sentence.

2.208 The Crime Victims Support Association also stated that, ‘the minimum sentence for recklessly causing serious injury and intentionally causing serious injury are the same, even though the mens rea [is] different’ and suggested that, because of this, ‘[t]he parity principle would be foregone and the respect for the legal system would be diminished’.\(^{218}\)

2.209 In determining a maximum penalty, parliament accounts for differences in the level of seriousness (including considerations of culpability) such that a court cannot exceed a proportionate sentence for even the most serious example of an offence. The same is not true for a minimum sentence. Two offences with different levels of culpability may have the same minimum sentence, provided that the minimum sentence is not disproportionate to the least serious example of offending for the offence with the lesser form of culpability.

2.210 In other words, if parliament considers that the minimum sentence is proportionate to the level of culpability present in the reckless form of gross violence offending, then it is immaterial that the same minimum sentence applies to the intentional form. As a minimum, it remains within the discretion of the court to impose a sentence that exceeds the minimum prescribed by parliament for the intentional form of gross violence.

2.211 In those circumstances, the Council considers that the new offences, framed as intentionally causing severe injury and recklessly causing severe injury, should have the same statutory minimum sentence.

\(^{213}\) Submission 11 (Law Institute of Victoria); Submission 17 (Federation of Community Legal Centres Victoria).

\(^{214}\) Submission 22 (Victoria Legal Aid).

\(^{215}\) Submission 11 (Law Institute of Victoria); Submission 17 (Federation of Community Legal Centres Victoria).

\(^{216}\) Submission 11 (Law Institute of Victoria); Submission 17 (Federation of Community Legal Centres Victoria).

\(^{217}\) Including the following: Crimes Act 1958 (Vic) s 20 (threats to kill); Crimes Act 1958 (Vic) s 21 (threats to inflict serious injury); Crimes Act 1958 (Vic) s 25 (setting traps etc. to kill).

\(^{218}\) Submission 6 (Crime Victims Support Association).
Creation of new gross violence offences

2.212 As discussed at [2.25]–[2.27], the Council recommends that two new gross violence offences, covering the intentional and the reckless mental element should be created. As discussed at [2.3], although the gross violence offences represent an aggravated form of serious injury offending, they are not intended to cover every serious injury case in which the offending behaviour is highly culpable or causes severe harm.

Maximum penalties

2.213 The existing offences of intentionally causing serious injury and recklessly causing serious injury will still be available to prosecute cases that may include very high levels of injury and high levels of culpability, despite not involving any element of gross violence. The current maximum penalties for intentionally causing serious injury (20 years) and recklessly causing serious injury (15 years) will apply to those cases.

2.214 While the maximum penalties for the new gross violence offences could be increased to reflect the fact that they concern an aggravated form of offending, this is arguably already reflected in the fact that statutory minimum sentences will apply. Increasing the maximum penalty for gross violence offences – for example, 25 years for the intentional form and 20 years for the reckless form – may generate inconsistencies with other offences. The maximum penalty for manslaughter, for example, is currently 20 years.

2.215 In any event, the Council notes that maximum penalties are currently under review and it is likely that the question of consistency with other offences will be reassessed in the near future.

Jurisdiction

2.216 The Council considers that both forms of the severe injury offences should be indictable only. Although recklessly causing serious injury is presently an indictable offence that may be tried summarily, the level of harm and culpability present in the severe injury offences (and the proposed statutory minimum sentence) means that the offence is unsuitable to be heard in the summary jurisdiction.

2.217 The question of framing the two-year statutory minimum sentence for children and the resulting jurisdictional questions are discussed in Chapter 3.

Relationship with other offences

2.218 The new offences may, at common law, be considered to include the lesser offences of intentionally causing serious injury and recklessly causing serious injury, such that if the gross violence elements are not proved, but the elements of the lesser offences are, then the jury may acquit on the gross violence offences and find guilt on the lesser offences.

2.219 The Council notes that, if there is doubt on this issue, parliament may also legislate that the lesser offences are to be statutory alternatives to the new offences. In any event, intentionally causing serious injury and recklessly causing serious injury may still be charged on an indictment, in the alternative.
Possible consequential amendments

2.220 There are a number of other consequential amendments that will need to be considered as a result of the creation of the new offences. The new offences may be considered appropriate to include within:

- the definition of ‘serious offence’ in section 3 of the Sentencing Act 1991 (Vic);
- the list of ‘violent offences’ that are ‘serious offender offences’ in schedule 1 of the Sentencing Act 1991 (Vic); and
- the investigatory or procedural requirements, such as those in schedule 8 of the Crimes Act 1958 (Vic), for the provision of forensic samples.
Recommendation 1

The Council recommends the creation of two new offences.

While the precise wording is to be determined by parliamentary counsel, the Council recommends that the elements of the new offences should be as follows:

**Intentionally causing severe injury in circumstances where the offender:**
- plans in advance to engage in an attack intending to cause severe injury;
- causes severe injury while in company with two or more persons, where both the offender and at least two other persons cause severe injury or act in concert with one another to cause severe injury;
- plans in advance to carry and use a weapon in an attack and intentionally uses the weapon to inflict severe injury; or
- continues to attack the victim, or cause injury to the victim, after the victim is incapacitated.

**Maximum penalty: 20 years’ imprisonment (Level 3).**

**Recklessly causing severe injury in circumstances where the offender:**
- causes severe injury while in company with two or more persons, where both the offender and at least two other persons cause severe injury or act in concert with one another to cause severe injury;
- plans in advance to carry and use a weapon in an attack and recklessly uses the weapon to inflict severe injury; or
- continues to attack the victim, or cause injury to the victim, after the victim is incapacitated.

**Maximum penalty: 15 years’ imprisonment (Level 4).**

Severe injury should be defined exhaustively to cover:
- long-term serious impairment or loss of a body function; or
- long-term serious disfigurement; or
- loss of a foetus.

Each offence should be indictable only (in contrast to the existing offence of recklessly causing serious injury, recklessly causing severe injury should not be triable summarily in the Magistrates’ Court).

In any case in which a court sentences a person for one of the new offences, if the person was aged 18 years or older at the time of committing the offence, the court must (unless an exception applies):
- impose a sentence of imprisonment of no less than four years for the charge of intentionally causing severe injury or recklessly causing severe injury; and
- if the court fixes a non-parole period, the non-parole period must be no less than four years.

In cases in which sentences of imprisonment are imposed for more than one charge, courts should continue to fix a single non-parole period.

In any case in which a court sentences a person for intentionally causing severe injury or recklessly causing severe injury and that person was aged 16 or 17 years at the time of committing the offence, the court must (unless an exception applies) impose for that offence a youth justice centre order of no less than two years, during which time the offender is not eligible for parole.

Persons found guilty of the new offences on the basis that they aided, abetted, counselled or procured the offence should not be subject to the statutory minimum sentence.
Chapter 3
Framing the two-year statutory minimum for children

3.1 The terms of reference propose a two-year minimum sentence for children aged 16 or 17 for offences of gross violence.

3.2 The Council has approached the terms of reference on the basis that the reference to age means age at the time of committing the offence, and that a two-year minimum sentence of detention will apply to 16 and 17 year olds, regardless of whether the child is sentenced in the Children’s Court or in a higher court (i.e. the child will not be subject to a four-year minimum if sentenced in the County or Supreme Court).

The two-year term as a minimum period in detention

3.3 Under Victorian law, if a court sentences an adult offender (in other words, someone who is 18 years or older at the time of the offence) to imprisonment, the Adult Parole Board\(^{219}\) may release the offender on parole if the court has set a non-parole period and that period has expired.\(^{220}\)

3.4 In contrast, if the Children’s Court sentences a child (a person under 18 years of age at the time of the offence) to detention under a youth justice centre order, there is no provision for the magistrate to set a non-parole period. However, the Youth Parole Board may, in its administrative capacity, release the offender on parole at any point during the order.\(^{221}\) There is also no provision for the setting of a non-parole period by the County or Supreme Court when sentencing a young offender to a youth justice centre order under sections 32–35 of the Sentencing Act 1991 (Vic); if deemed eligible by the Youth Parole Board, the offender may also be released on parole at any point during the order.

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\(^{219}\) Where the adult has been transferred to a youth justice centre, it is the Youth Parole Board that is vested with the responsibility to parole the offender.

\(^{220}\) A non-parole period can also be set for a child sentenced to imprisonment by the County or Supreme Court.

\(^{221}\) In making a decision as to whether to grant parole to an offender, the Youth Parole Board takes into account a number of factors, including the interests and risks to the community, the capacity of parole to assist rehabilitation and the offender’s conduct in custody.
3.5 The terms of reference make it clear that the four-year minimum sentence proposed for adults is intended to function as a minimum non-parole period. However, neither the terms of reference nor the media release announcing the gross violence policy is explicit as to whether the two-year period for children is either:

a. a two-year sentence during which eligibility for parole is retained (on the basis that an offender released on parole is ‘regarded as being still under sentence and as not having served his or her period of detention’); or

b. a two-year minimum period in detention, during which access to parole is excluded.

3.6 In the Children’s Court, for a child sentenced for a single charge (for which a two-year sentence is the maximum that can be imposed), interpretation ‘b’ would preclude the child from accessing parole. The child would be released after the two-year period without any period of supervision in the community. In the Children’s Court, for children sentenced for more than one charge (for which three-years is the maximum aggregate term), the two-year period in detention would effectively create a two-year minimum non-parole period. The child may still be eligible for parole if his or her total effective sentence is greater than two years.

3.7 A two-year minimum non-parole period would also operate in relation to children sentenced by a higher court to youth detention (for which the maximum term of detention is three years), or imprisonment (for which the maximum term in jail is currently 20 years for intentionally causing serious injury or 15 years for recklessly causing serious injury). A child sentenced in a higher court may be eligible for parole if the total sentence imposed on that child is longer than two years.

3.8 Submissions from stakeholders appear to have assumed interpretation ‘b’ – that the reference to two years is to a minimum period in detention. Given the intent underlying the gross violence policy to target those offenders who are highly culpable, and given that the minimum proposed for adult offenders is a non-parole period, the Council has also adopted this interpretation.

3.9 The consequence of a minimum period in detention is that the child will be detained for at least two years and will be ineligible for parole during that time. Given the current sentencing powers of the court, children sentenced for a single charge of a severe injury offence in the Children’s Court will be released from custody at the completion of their sentence without any access to parole. Children sentenced for more than one charge in the Children’s Court, or sentenced by the higher courts, may have access to parole prior to their release if their total effective sentence is longer than two years.

222 The terms of reference state: ‘a two year minimum detention sentence will apply to juvenile offenders aged 16 or 17’.
223 The media release states: ‘a two year statutory minimum sentence will apply, which is the maximum period of detention in a juvenile justice centre which the Children’s Court is permitted to impose for an offence under current law’: Ted Baillieu, ‘Violent Thugs to Face at Least Four Years in Jail for Gross Violence’ (Media Release, 24 November 2010) 2.
224 Section 413(3)(b) of the Children, Youth and Families Act 2005 (Vic) provides for an ‘aggregate term’ of detention. The term ‘aggregate’ is used in this paper to refer to the total effective sentence, rather than to the method of sentencing set out in section 9 of the Sentencing Act 1991 (Vic), which provides for the aggregate sentencing of two or more offences founded on the same facts, or form, or are part of, a series of offences of the same or similar character. Magistrate Peter Power, in his sentencing manual on the Children’s Court, expresses the opinion that sections 410–413 of the Children, Youth and Families Act 2005 (Vic) do not permit aggregate sentencing on multiple charges in the Children’s Court. According to Magistrate Power, the Children’s Court must impose separate sentences of detention on each individual charge (sentences may then be ordered to be concurrent, partly concurrent or cumulative): Power (2001–), above n 37 [11.1.7]. It is the Council’s understanding that aggregate sentencing does occur in the Children’s Court. It is noted, however, that a case in the Children’s Court may be comprised of offences that are not founded on the same facts or as part of a similar series of offences.
Should the Children’s Court have jurisdiction to determine gross violence charges?

3.10 Twenty of the 26 submissions received by the Council addressed issues relating to the two-year minimum sentence for children.226

3.11 Of these 20 submissions, none explicitly addressed the question of whether gross violence offences should be heard by the Children’s Court, or excluded from that jurisdiction.

3.12 Seven submissions, however, stated that the two-year minimum sentence is incompatible with the jurisdiction of the Children’s Court as set out in the Children, Youth and Families Act 2005 (Vic).227 Reasons for incompatibility included that the two-year minimum would:

- contravene the principles of sentencing in the Children, Youth and Families Act 2005 (Vic), particularly the primacy of rehabilitation;228
- be incompatible with the jurisdiction of the Children’s Court, in particular the sentencing limitations on the court (a two-year maximum sentence for offenders convicted of a single charge)229 and the court’s lack of power to impose a non-parole period;230 and
- prevent the court from individualising sentence dispositions (given the two-year maximum applicable to offenders sentenced for a single charge),231 negate the incentive to plead guilty232 and undermine the specialist nature of the Children’s Court.233

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226 Submission 1 (Anonymous); Submission 2 (G. Defteros); Submission 5 (B. Herbert); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 16 (Berry Street); Submission 17 (Federation of Community Legal Centres Victoria); Submission 19 (Springvale Monash Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services); Submission 24 (Uniting Church in Australia); Submission 25 (Liberty Victoria).

227 Submission 1 (Anonymous); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 23 (Jesuit Social Services). Victoria Legal Aid detailed some of the complications arising from a two-year minimum sentencing regime in its submission (Submission 22), but did not explicitly refer to the incompatibility of such a regime.

228 Submission 1 (Anonymous); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 23 (Jesuit Social Services). One stakeholder also submitted that a minimum sentencing scheme contradicts the sentencing hierarchy and principle of parsimony set out in the Children, Youth and Families Act 2005 (Vic) – Submission 1 (Anonymous).

229 Submission 14 (Centre for Multicultural Youth); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw). The Children’s Court Barristers Association (Submission 9) and Victoria Legal Aid (Submission 22) both referred to sentencing limitations of the Children’s Court, but did not explicitly refer to the incompatibility of a two-year minimum.

230 Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw).

231 Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service).

232 Submission 1 (Anonymous).

233 Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw).
In addition to those seven submissions, 12 other submissions (although not specifically referring to incompatibility with the Children’s Court jurisdiction) referred to the fact that the statutory minimum does not comply with, or detracts from, the need for rehabilitation in sentencing children.\textsuperscript{234}

The principle of rehabilitation plays a central role in the sentencing of children in Victoria,\textsuperscript{235} and this focus, rather than mandatory and/or minimum sentencing laws has been said to contribute to Victoria’s relatively low imprisonment and crime rates compared with other jurisdictions.\textsuperscript{236} Many of the submissions that discussed children referred in detail to the importance of rehabilitation in dealing with child criminal behaviour, given the nature of youth and youth offending.\textsuperscript{237}

Submissions referred to the immaturity of the adolescent brain and the fact that children may have less developed decision-making abilities, may be less able to appreciate the consequences of their actions and may therefore be more prone to behaviour that is peer influenced, opportunistic, impulsive and one-off,\textsuperscript{238} with such behaviour being viewed as more amenable to rehabilitation.\textsuperscript{239} It was submitted that the cognitive and emotional ‘developmental tasks of adolescence may be further compounded’\textsuperscript{240} for children who have been abused, traumatised or neglected in their early life.\textsuperscript{241} It was submitted that, although cognitive immaturity does not excuse violent behaviour, the factors relating to cognitive immaturity should be taken into account in sentencing a child.\textsuperscript{242}

Most submissions referring to children suggested that a minimum sentence should not apply to child offenders.\textsuperscript{243} If applied, it was submitted that the minimum sentence should be reduced.\textsuperscript{244}

\begin{footnotesize}
\begin{enumerate}
\item Submission 2 (G. Defteros); Submission 5 (B. Herbert); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 13 (Whitelion); Submission 19 (Springvale Monash Legal Service); Submission 22 (Victoria Legal Aid); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania); Submission 25 (Liberty Victoria).
\item Submission 16 (Berry Street) referred to the need for restorative responses for those with abusive and violent childhood experiences; however, the word rehabilitation was not used.
\item See [1.44].
\item Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw).
\item Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 16 (Berry Street); Submission 22 (Victoria Legal Aid); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).
\item Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 22 (Victoria Legal Aid).
\item Submission 14 (Centre for Multicultural Youth).
\item Submission 1 (Anonymous); Submission 14 (Centre for Multicultural Youth). These factors were also discussed in the following submissions: Submission 5 (B. Herbert) and Submission 16 (Berry Street).
\item Submission 14 (Centre for Multicultural Youth).
\item Submission 2 (G. Defteros); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Victorian Council of Social Service); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania); Submission 25 (Liberty Victoria). Other stakeholders suggested a minimum sentencing scheme would be highly detrimental in relation to children – Submission 10 (Child Safety Commissioner) – or suggested more generally that minimum sentences should not apply to offenders of any age – Submission 19 (Springvale Monash Legal Service); Submission 23 (Jesuit Social Services).
\end{enumerate}
\end{footnotesize}
or should only apply to very restricted categories of offenders (such as those with prior violent offences who have committed severe injury offences), because of the need – particularly in the Children’s Court context – to tailor sentences to the individual circumstances of the child and the offence, with due regard to the principle of rehabilitation.

3.17 Other arguments made by stakeholders against the imposition of a statutory minimum sentence on children included that the penalty will not deter or reduce youth offending (and that the principle of general deterrence is, in any case, inconsistent with the principles of sentencing in the Children’s Court); that a two-year minimum sentence may contravene fundamental human rights instruments (such as the Convention on the Rights of the Child and the Charter of Human Rights and Responsibilities Act 2006 (Vic), and that the minimum sentence may discriminate against young people – in particular, against the most disadvantaged and vulnerable of juveniles.

3.18 Submissions referred to the importance of early interventionist, diversionary and rehabilitative responses to child criminality that take into account the ‘confluence of factors’ that may lead to youth offending, including mental illness, poverty, homelessness and drug and alcohol dependence as well as the impact of trauma, neglect and abuse, family instability and disengagement from school.

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244 Victoria Legal Aid submitted that minimum sentences should not apply to young offenders because a minimum sentencing regime cannot be designed to limit the risk of inappropriate custody. Victoria Legal Aid submitted that, if however, a minimum regime was implemented, that the minimum sentence for children ‘should be much less than two years’: Submission 22 (Victoria Legal Aid).

245 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 11 (Law Institute of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 22 (Victoria Legal Aid).

246 Stakeholders contended that a two-year minimum may instead increase the risk of reoffending: Submission 2 (G. Defteros); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelson); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania). See [8.79]–[8.94].

247 See further the discussion of CNK v The Queen [2011] VCSA 228 (10 August 2011) [3.51]–[3.53].

248 Submission 8 (Victorian Council of Social Service); Submission 11 (Law Institute Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 22 (Victoria Legal Aid). See [8.54]–[8.60].

249 Submission 8 (Victorian Council of Social Service); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service). See [8.61]–[8.66].

250 Submission 14 (Centre for Multicultural Youth). See [8.31]–[8.34].

251 Submission 1 (Anonymous); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelson); Submission 14 (Centre for Multicultural Youth); Submission 16 (Berry Street); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).

252 Submission 1 (Anonymous); Submission 2 (G. Defteros); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelson); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 16 (Berry Street); Submission 19 (Springvale Monash Legal Service); Submission 21 (Youthlaw); Submission 23 (Jesuit Social Services); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).

253 Submission 14 (Centre for Multicultural Youth).
3.19 Many of the issues raised in the submissions discussed above related to the merits of the policy to introduce statutory minimum sentences for offences of gross violence committed by children. The Attorney-General has not asked the Council to advise on the merits of the policy, and the Council makes no comment on those issues in relation to the merits of the policy.

3.20 Many of the issues, however, are also relevant to a key issue relating to the implementation of the policy, as outlined below.

### Incompatibility with the current jurisdictional limit of the Children’s Court

3.21 Under the *Children, Youth and Families Act 2005* (Vic), the maximum period of detention that can be imposed by the Children’s Court on offenders who are 16 and 17 year olds at the time of the offence is two years where the case involves a single charge, and three years where the child is convicted of more than one charge in a case.\(^{255}\)

3.22 Consequently, the minimum sentence of two years for offenders charged with one gross violence offence is the same as the maximum possible sentence that the court can impose given the current sentencing powers of the Children’s Court.

3.23 It is unclear how many gross violence cases under the proposed regime would involve a single charge – and therefore be subject to no more and no less than a sentence of two years’ detention. Some guidance, however, may be drawn from the number of serious injury offenders sentenced for a single charge during the 2006–09 period. More than one in every four serious injury cases before the Children’s Court involved offenders being sentenced for a single charge (28.0% of recklessly causing serious injury cases and 15.0% of intentionally causing serious injury cases).\(^{256}\)

3.24 This means that, for the proportion of these cases that also involves gross violence criteria (including severe injury):\(^{257}\)

- the Children’s Court will have no power to individualise sentences; and
- offenders sentenced for a single charge of gross violence will be precluded from accessing parole prior to their release.

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\(^{254}\) Many submissions also referred to the need to take into account the disadvantage experienced by Indigenous offenders: see [8.39]–[8.52]. Reference was also made to the link between violent offending and offenders having been bullied at an early stage, susceptibility to peer pressure (associated with developing identity), parental incarceration, the offender’s involvement in child protection and other disadvantage: Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw); Submission 23 (Jesuit Social Services); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).

\(^{255}\) *Children, Youth and Families Act 2005* (Vic) ss 413(2)–(3). Custodial orders under the *Children, Youth and Families Act 2005* (Vic) must also not exceed the maximum term if the offence was committed by an adult: *Children, Youth and Families Act 2005* (Vic) s 413(2).

\(^{256}\) Of the 401 intentionally cause serious injury (ICSI) and recklessly cause serious injury (RCSI) cases between 2006 and 2009, 104 involved a single charge. Of the 321 RCSI cases, 91 were sentenced for a single charge and 13 of the 89 ICSI cases were sentenced for a single charge.

\(^{257}\) For an estimation of the number of such cases, see Chapter 7.
Individualising sentence

3.25 For cases involving only one charge of gross violence, a magistrate would have no discretion to individualise sentence length on the basis of the nature of the offence, the culpability of the child or the child’s rehabilitative potential. In the absence of special reasons, unequal offenders will received the same sentence, such that the ‘worst of the worst get the same result as the least culpable offender’. A child with no prior offences, who has just turned 16 and who has significant prospects for rehabilitation, will receive the same two-year sentence as an offender who is almost 18 and who has many prior convictions for offences of violence and few prospects for rehabilitation. Similarly, the Children’s Court would not be able to impose a shorter sentence for offenders who plead guilty.

3.26 There are likely to be significant flow-on effects from this lack of discretion to take into account mitigating factors. Children who no longer have an incentive to plead guilty are unlikely to admit guilt, resulting in an increased number of contests and appeals – with consequential delay and cost. Given that a child’s behaviour will not alter the minimum sentence of two years, offenders would also have no incentive to engage in rehabilitative measures prior to sentencing or to assist authorities.

3.27 It has also been contended that the specialist nature of the Children’s Court – being a court equipped with the necessary expertise and tools (such as group conferencing) to ‘appropriately sentence a young person consistent with the principles of rehabilitation’ – would be undermined.

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258 Special reasons are discussed in Chapter 4.
259 Submission 21 (Youthlaw).
261 One stakeholder noted that the child may, for example, be highly remorseful and have changed his or her life circumstances by becoming drug free and becoming engaged in employment, schooling or training: Submission 1 (Anonymous).
262 Submission 9 (Children’s Court Barristers Association).
263 Submission 9 (Children’s Court Barristers Association); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services). See [8.17]–[8.29].
264 Victoria Legal Aid submitted that providing an incentive to assist authorities may be particularly important in relation to violent group offending: Submission 22 (Victoria Legal Aid).
265 Submission 21 (Youthlaw).
3.28 In the absence of an increase to the maximum term of detention that the Children’s Court has jurisdiction to impose, a child sentenced to the two-year minimum period of detention for a single charge of a severe injury offence would have no prospect of parole – rendering the Youth Parole Board redundant in such cases.\footnote{Submission 1 (Anonymous). Implications for parole were also referred to in submissions by Youthlaw (Submission 21) and Jesuit Social Services (Submission 23). In a case involving multiple charges, if the court were to impose a sentence longer than two years, it would effectively be setting a non-parole period, although it is currently not empowered to do so.}

3.29 Parole enables a child to serve part of his or her sentence in the community, under the guidance and intensive supervision of a parole officer. In determining whether a child is eligible for parole, the Youth Parole Board takes into account a variety of factors, including the interests of, and risks to, the community, the capacity for parole to assist rehabilitation and the child’s conduct in custody.\footnote{Other factors taken into account include the nature and circumstances of the offences, the young person’s criminal history, previous community-based dispositions and compliance, and family and community support networks: Department of Human Services, Youth Parole Board and Youth Residential Board Annual Report 2009–2010 (2010) 3.} While on parole, offenders receive support and assistance through various programs and services, which are intended to aid the offender’s transition from detention to the community. If a child breaches his or her parole by reoffending or failing to observe the conditions of his or her parole plan, parole may be cancelled and the child may be returned to custody.\footnote{Department of Human Services (2010), above n 267, 6. Parole can be cancelled by the Youth Residential Board or the Youth Parole Board: Children, Youth and Families Act 2005 (Vic) ss 456, 460.}

3.30 As submitted by Victoria Legal Aid, the ‘sophistication of the Youth Parole Board’s approach to these issues will be lost’ under a minimum sentencing regime.\footnote{Submission 22 (Victoria Legal Aid).} Offenders sentenced to a minimum two-year sentence in detention for a single charge of a severe injury offence will be unable to access the rehabilitative benefits of parole,\footnote{Submission 10 (Child Safety Commissioner).} even if they may have significant rehabilitative potential\footnote{Submission 21 (Youthlaw).} and are unlikely to reoffend. On completion of his or her two-year sentence the child will be released into the community, and his or her sudden return (rather than transition) back into the community will not be supported or supervised.

3.31 Given the prevalence of significant disadvantage and vulnerability among child offenders (which are risk factors for further offending), an assisted transition is particularly important. Without a supported transition from detention into the community, many children may not successfully readjust to the community. The likelihood of reoffending may be increased by the fact that children facing detention with no prospect of parole have no incentive to engage in therapeutic treatment programs. Further, there may be less incentive to behave while in custody, as, in the absence of parole, their behaviour would not have any bearing on the length of time they are required to serve in detention.

3.32 A two-year minimum sentence also creates the anomaly that an offender who has committed two gross violence offences, and for example, is given a two-year minimum with a head sentence of 28 months, may be better supported in his or her rehabilitation and more likely to re-engage with the community after his or her detention than an offender who has committed a single gross violence offence.
Reframing the two-year statutory minimum for children

3.33 The Council has examined two options, both of which are predicated on the adoption of a severe injury threshold, to address these difficulties.

Option A – increase the jurisdictional limit of the Children’s Court

3.34 Option A would involve amending section 413 of the Children, Youth and Families Act 2005 (Vic) to enable the Children’s Court to impose a youth justice centre order of up to three years for a single charge of an offence to which the statutory minimum sentence applies.\(^\text{272}\) Currently the longest such order the court can impose for a single charge is two years.

3.35 Among other legislative changes, this option would also require the introduction of a new parole regime for children, which would allow the Children’s Court to impose non-parole periods for severe injury offences (see [3.54]–[3.62]).

Option B – exclude gross violence offences from the jurisdiction of the Children’s Court

3.36 Option B would simply involve amending section 516(1)(b) of the Children, Youth and Families Act 2005 (Vic) to list the severe injury offences alongside the seven death-related indictable offences currently automatically excluded from the jurisdiction of the Children’s Court.

Consideration of options

Scope for sentence individualisation and parole

3.37 Each option would address the two problems identified earlier relating to the individualisation of sentences and parole.

3.38 Although Option A gives some scope for the Children’s Court to individualise a sentence and to provide room for a period of transition (i.e. parole) into the community after the offender has served the minimum two-year period in detention, this scope appears to be relatively limited in practice.

3.39 For example, if the maximum duration that the Children’s Court can impose is three years and the offender pleads guilty, which can commonly result in an average reduction in sentence of approximately 25% (at least in the higher courts),\(^\text{273}\) the sentence would be reduced to 27 months. This would leave only three months during which there could be any possibility of release on parole (after serving the minimum 24 months). If there were no aggravating factors and some substantial mitigating factors, it may be appropriate to reduce the sentence further; however, this may leave no room or insufficient room for release on parole. In the adult jurisdiction, a non-parole period is required to be at least six months less than the head sentence\(^\text{274}\) in recognition of the fact that offenders require a significant period of time on parole to aid their transition into the community.

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\(^{272}\) The Council does not express a view on whether the jurisdictional limit of the Children’s Court should be increased for cases involving a single charge of other any other indictable offence.


\(^{274}\) Sentencing Act 1991 (Vic) s 11(3).
3.40 By contrast, if the offender were to be sentenced under Option B by the County Court (which has a much higher maximum penalty available), the court would then have more flexibility in dealing with a reduction for a guilty plea and other sentencing factors. The court may take into account mitigating factors before determining that a three-year sentence in a youth justice centre is appropriate. The County Court therefore has more scope to individualise sentences and to impose a meaningful period during which the offender would be eligible for parole.

Children’s Court as gatekeeper

3.41 Under Option A, if the Children’s Court did not have sufficient scope to deal with a particular case appropriately, it could decide that the case should be determined in a higher court.275 This may be the primary advantage of Option A – that children who are charged with committing a gross violence offence remain, in principle, within the jurisdiction of the Children’s Court. The Children’s Court would have the power to decide, on a case-by-case basis, whether it should deal with a particular gross violence offence or, if there are exceptional circumstances,276 refer the matter to be dealt with by a higher court.

3.42 This option is consistent with the view that it is desirable for the Children’s Court to retain jurisdiction over child offending, given the specialist nature of the Children’s Court and the expertise of Children’s Court magistrates277 to deal with juvenile criminal behaviour.278 The President of the Children’s Court, Judge Grant, advised the Council that the court would be reluctant to relinquish its jurisdiction over serious injury offences.279 Judge Grant noted that the court has power, pursuant to section 356(3)(b) of the Children, Youth and Families Act 2005 (Vic), to refuse summary jurisdiction where it considered a charge unsuitable ‘by reason of exceptional circumstances’ to be determined summarily. If the court did refuse summary jurisdiction, the charge would be heard and determined in a higher court.280

3.43 Generally, higher courts may sentence children under either the Children, Youth and Families Act 2005 (Vic) (with some sentencing restrictions)281 or the Sentencing Act 1991 (Vic).282 A related benefit of Option A is that, when a severe injury charge is heard in the Children’s Court and is not proven beyond reasonable doubt283 but the offender is found guilty of an alternative offence

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275 See [1.47]–[1.48]. However, when an offender is charged with specifically excluded offences as well as a severe injury offence, the Children’s Court will not have the power to retain the case within its jurisdiction; the offender will have his or her case heard and determined in a higher court (although the Children’s Court can conduct committal proceedings in relation to such charges).

276 ‘Exceptional circumstances’ under section 356(3)(b) of the Children, Youth and Families Act 2005 (Vic) are determined by the Children’s Court having regard to considerations such as the nature, significance and gravity of the alleged offence(s), circumstances personal to the offender and matters concerning the administration of justice: Office of Public Prosecutions v BW [2010] VChC 2 (13 May 2010) [11]; Victoria Police v CB [2010] VChC 3 (24 June 2010) [11].

277 Submission 2 (G. Defteros).

278 The converse view is that these specialist sentencing principles and practices will, in any case, be severely compromised by the operation of a minimum sentencing scheme.

279 Meeting with His Honour Judge Grant, President of the Children’s Court (9 August 2011).

280 Meeting with His Honour Judge Grant, President of the Children’s Court (9 August 2011).

281 The Supreme and County Courts can impose any sanction available under the Children, Youth and Families Act 2005 (Vic) except for orders of detention. Custodial orders can only be made pursuant to sections 32–35 of the Sentencing Act 1991 (Vic): Children, Youth and Families Act 2005 (Vic) s 586.

282 A child offender is both a ‘child’ for the purposes of the Children, Youth and Families Act 2005 (Vic) and a ‘young offender’ for the purposes of the Sentencing Act 1991 (Vic) (defined in section 3 as a person under the age of 21).

283 Or the court finds that there are special reasons to exempt the offender from the minimum sentence: see Chapter 4.
(such as intentionally causing serious injury), the offender is sentenced for that offence by a specialist Children’s Court magistrate or judge who has expertise in dealing with children and the specialist processes, procedures and sentencing principles applicable to that court.284 For example, if the magistrate is considering imposing a supervisory order on a child acquitted of gross violence but convicted of intentionally causing serious injury, group conferencing remains potentially available.

3.44 The advantage of retaining in the Children’s Court an offender charged with gross violence (because of the possibility of conviction on a lesser charge) may be less significant after the decision of the Court of Appeal in CNK v The Queen.285 In that case, the Court of Appeal concluded that a child acquitted in the Supreme Court of attempted murder (an offence specifically excluded from the Children’s Court jurisdiction), but convicted of offences exclusively within the jurisdiction of the Children’s Court, should be sentenced as if the sentencing were exclusively governed by the provisions of the [Children, Youth and Families Act 2005 (Vic)].286 On this approach, although a child sentenced in a higher court does not have access to the specialist jurisdiction established for children, the child will still be sentenced under the sentencing scheme set out in the Children, Youth and Families Act 2005 (Vic) and not under the framework set out in the Sentencing Act 1991 (Vic).287

3.45 The advantage of retaining the offences within jurisdiction is also qualified by the fact that many of the specialist processes of the court would be greatly restricted by the introduction of minimum sentences, even if the jurisdictional limit were increased to three years. For example, the current emphasis in the Children’s Court on rehabilitative and restorative processes, such as the deferral of sentence to undertake group conferencing or to engage in treatment programs, is unlikely to apply to offenders subject to a minimum sentence – compromising the specialist nature of the Children’s Court to deal with juvenile criminal behaviour.

3.46 Group conferencing will not be available to offenders subject to a minimum custodial sentence288 and if the child receives a two-year sentence, regardless of his or her behaviour prior to sentencing, there may be no incentive to engage in rehabilitative programs and interventions aimed at addressing the underlying causes of violent criminal behaviour.289

284 This would prevent defendants being ‘pulled up’ into the jurisdiction of higher courts (for example, because of group offending involvement) and therefore being potentially subject to the principles and processes of higher courts.
286 Ibid [82].
287 In CNK v The Queen [2011] VSCA 228 (10 August 2011), the Court of Appeal held that a child sentenced in a higher court for offences that are within the jurisdiction of the Children’s Court (and unlikely to be excluded on the basis of exceptional circumstances) should be subject to a maximum of two years in custody, not three years as is available under section 32(3)(b) of the Sentencing Act 1991 (Vic). This is because ‘[a]ny other result would have the effect of treating the applicant unequally with any other child in like circumstances, solely because he had been proceeded against, unsuccessfully’ for a specifically excluded offence (in this case, attempted murder): CNK v The Queen [2011] VSCA 228 (10 August 2011) [86]. If, however, a higher court decides to impose a custodial sentence on a child who is ‘entitled’ to be sentenced in accordance with the Children, Youth and Families Act 2005 (Vic), although the principles of that Act are relevant, the custodial order must be made pursuant to sections 32–35 of the Sentencing Act 1991 (Vic).
288 Group conferencing is only available where the magistrate is considering imposing a supervisory order and not a custodial order. See [8.68].
289 One stakeholder noted that, regardless of their conduct prior to sentencing, the child will be subject to a two-year minimum sentence: Submission 1 (Anonymous).
Sentencing principles and practices

3.47 The primary disadvantage of Option A is that it may require a range of significant changes to the principles and practices of the Children’s Court in order to accommodate statutory minimum sentences.

3.48 The provisions governing sentencing in the Children’s Court, which are contained in the Children, Youth and Families Act 2005 (Vic), currently emphasise the rehabilitation of the offender as a primary purpose. This can be contrasted with the Sentencing Act 1991 (Vic) in relation to adult offenders, which refers to rehabilitation but does not give that purpose precedence over other sentencing purposes, such as deterrence and punishment.

3.49 It was submitted that a statutory minimum sentencing regime departs from ‘widely accepted sentencing principles that regard rehabilitation as a primary consideration when dealing with young people’. The primacy generally attributed to rehabilitation in the Children’s Court would be displaced in favour of other purposes of sentencing.

3.50 In the media release proposing the introduction of minimum sentences for gross violence, the notion of general deterrence was used in justification of the policy in addition to community protection:

Too often, current sentencing laws fail to deliver penalties that will protect the community and deter would-be offenders … We need to make it clear that those who deliberately set out to take part in violent attacks, or who continue to inflict horrific injuries on incapacitated victims, will spend a long time behind bars.

3.51 General deterrence is not listed in section 362 of the Children, Youth and Families Act 2005 (Vic) as a sentencing principle applicable in the Children’s Court, and it was recently held by the Court of Appeal that general deterrence is ‘entirely foreign’ to the sentencing scheme set out in the Children, Youth and Families Act 2005 (Vic). According to the Court of Appeal in CNK v The Queen, the application of general deterrence would be incompatible with the principles of section 362(1) of the Children, Youth and Families Act 2005 (Vic) – which are ‘all directed at an assessment of the particular offending, and of the particular offender’. The principle of general deterrence is, on the other hand, unconnected with the particular offender and aims to deter others by making an ‘example’ of the child; it ‘treats the offender as a means to an end, as an instrument for effecting a broader community interest’. The application of general deterrence would also, according to the Court of Appeal, be in direct conflict with the court’s obligation to ‘minimise the stigma to the child’ and the ‘unambiguous command of [section] 362(1) … that no greater sentence should be imposed on the child than the nature and circumstances of the child’s offending require’.

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290 See [1.50]–[1.52].
291 Submission 21 (Youthlaw).
293 CNK v The Queen [2011] VSCA 228 (10 August 2011) [12]. The Court of Appeal unanimously allowed an appeal against the decision in Director of Public Prosecutions v Hills (No 1) [2011] VSCB 88 (18 March 2011). In that case, the sentencing judge held that the factors set out in section 362 of the Children, Youth and Families Act 2005 (Vic) are not exclusive and that general deterrence and denunciation are relevant sentencing principles to be taken into account under the Children, Youth and Families Act 2005 (Vic). The Court of Appeal disagreed, finding that ‘the language of s 362(1), and the nature of the matters to which regard must be had, are such as to preclude any consideration of general deterrence’: CNK v The Queen [2011] VSCA 228 (10 August 2011) [7].
294 CNK v The Queen [2011] VSCA 228 (10 August 2011) [39].
295 Ibid [12].
296 Ibid [14]. This is because ‘to treat the child as a vehicle for general deterrence would amount to “making an example” of the child, for the purpose of deterring others’: CNK v The Queen [2011] VSCA 228 (10 August 2011) [14].
297 Ibid [13]. If this occurred, the court would therefore ‘have breached its obligation to secure “as far as practicable” the objectives set out in s 362(1): CNK v The Queen [2011] VSCA 228 (10 August 2011) [14].
A statutory minimum sentence, if based on the purpose of general deterrence, would not be compatible with the current Children's Court sentencing framework. However, a statutory minimum sentence may, in practice, be at least partially compatible with the last three subsections of section 362(1) of the Children, Youth and Families Act 2005 (Vic). These provisions relate to the suitability of the sentence to the child; the need, if appropriate, to ensure that the child is aware of the responsibility that he or she must bear for his or her criminal behaviour; and the need, if appropriate, to protect the community or any person from the violent or wrongful acts of the child.

If general deterrence is a primary purpose of the statutory minimum sentence, this purpose would be more compatible with the sentencing framework applicable to the higher courts than that applicable to the Children's Court.

**Legislative implications of Option A**

Option A would pose substantial complications for the Children's Court jurisdiction as it is currently framed. Significant modifications to the Children, Youth and Families Act 2005 (Vic) would be required.

It is unusual for changes to be made to a summary jurisdiction threshold to accommodate a single offence. Option A, however, would require amendment to section 413 of the Children, Youth and Families Act 2005 (Vic) to enable the Children's Court to impose a youth justice centre order of up to three years for a single charge of gross violence (the current limit is two years).

While the threshold for single charges would need to be increased, the limit for multiple charges would not (the Children's Court can currently impose an aggregate term of three years for multiple charges). There are a number of reasons for this:

- The overall gravity of multiple offences is not necessarily greater than a single offence. For example, a case involving an offender who commits a gross violence offence in mitigating circumstances and who is also charged with a minor offence (for example, possession of a drug of dependence for which the offender had been charged a month earlier) would not necessarily result in a longer sentence than a case involving an offender who commits a single gross violence offence in particularly aggravated circumstances and who has numerous prior convictions for violence.

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298 The Council does not suggest that the principle of general deterrence be incorporated into the Children, Youth and Families Act 2005 (Vic).

299 Children, Youth and Families Act 2005 (Vic) ss 362(1)(e)–(g).

300 The Magistrates' Court Act 1989 (Vic) sch 4, cl 9 (now repealed) provided authority for the Magistrates' Court to impose a term of imprisonment of up to three years for a single charge of offences under sections 71(1) and 72(1) of the Drugs, Poisons and Controlled Substances Act 1981 (Vic). This provision was repealed with the introduction of the Criminal Procedure Act 2009 (Vic). Those offences are still triable summarily; however, the maximum term of imprisonment that can be imposed for a single charge is now two years' imprisonment: Criminal Procedure Act 2009 (Vic) sch 2, cl 6.

301 The Council does not express a view on whether the jurisdictional limit of the Children's Court should be increased for cases involving a single charge of any other indictable offence.

302 There is no requirement that the offences subject to determination in a proceeding in the Children's Court, or to which the maximum of three years' imprisonment applies, were committed at the same time or were of similar character. This can be compared with other provisions that deal with multiple offences. See for example: Criminal Procedure Act 2009 (Vic) s 242(1), which provides higher courts with the power to hear and determine a ‘related summary offence’ (defined in section 3) if an accused person pleads or is found guilty of an indictable offence; Sentencing Act 1991 (Vic) s 113B sets a maximum cumulative term of five years' imprisonment in the Magistrates' Court, which applies in respect of ‘offences committed at the same time’ unless a term is expressly provided by an Act.
• Ordinarily, sentences for multiple offences imposed by the Children’s Court in the same case are to be served concurrently. 303

• The procedure of the Children’s Court, as a court of summary jurisdiction, differs substantially from procedure on indictment in the higher courts. In the Children’s Court, a trial is conducted before a magistrate or judge (in the case of the President of the Children’s Court), 304 who sits as the trier of both law and fact. For cases involving the imposition of sentences longer than three years, trial by jury and the procedural safeguards (including different avenues of appeal) applicable to cases heard in the higher courts may be more appropriate.

• A youth justice centre order of greater than three years is inconsistent with sections 32–35 of the Sentencing Act 1991 (Vic), which preclude a young offender from being sentenced to youth detention if a total period of custody longer than three years is required. Where a maximum of three years is inadequate, the offender will be sentenced to adult imprisonment, although the court may recommend the offender be administratively transferred to a youth facility by the Adult Parole Board. 305

• Offenders are generally only detained in youth justice centre facilities until the age of 21. 306 A child sentenced to a three-year youth justice centre order at almost 18 years of age may remain in a youth justice centre (if not paroled) until he or she turns 21. A significantly longer sentence may require transfer to an adult facility during the course of the child’s term, or imprisonment in an adult facility from the outset. 307

• While the Magistrates’ Court has the jurisdiction to impose a total sentence of up to five years’ imprisonment for a case involving multiple charges, 308 it does not follow that the Children’s Court should have a comparable limit, because ‘time has a wholly different dimension for children than it does for adults’. 309

303 Unless the court otherwise provides, any period of detention in a youth justice centre for an offence shall be concurrent with any period of detention in respect of other offences the child is convicted of in the same proceedings: Children, Youth and Families Act 2005 s 413(3)(a). This presumption also operates to sentences imposed under the Sentencing Act 1991 (Vic).

304 The responsibility for the practice and procedure of the Children’s Court is vested in a County Court judge (currently His Honour Judge Grant), who sits as President of the Children’s Court.

305 See for example, Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 248; Director of Public Prosecutions v Sako [2010] VSC 223 (11 February 2010) [65].

306 Only persons under the age of 21 can be sentenced to youth justice detention: Children, Youth and Families Act 2005 (Vic) s 413; Sentencing Act 1991 (Vic) ss 32–35. While juvenile detention facilities generally accommodate offenders under the age of 21, some young offenders may be retained in facilities beyond this date. For example, the Youth Parole Board may decide not to transfer an offender, who has, by the age of 21, only a few months left to serve in detention or on parole: Meeting with His Honour Judge Bourke, Chair Youth Parole Board and Youth Residential Board (21 June 2011).

307 However, a statutory minimum sentence of two years for a 20 year old sentenced to dual track (see [4.70]–[4.82]), will mean that youth justice centre facilities may accommodate the offender up to the age of 23 (the offender may be eligible for parole at 22 years of age).

308 In the Magistrates’ Court, the maximum cumulative term of imprisonment (of five years) applies in respect of ‘offences committed at the same time’ unless expressly provided by an Act; Sentencing Act 1991 (Vic) s 113B. There is no jurisdictional limit in respect of accumulated total sentences for offences committed on separate occasions: Judicial College of Victoria, ‘Maximum Cumulative Term in Magistrates’ Court’, Victorian Sentencing Manual (2005–) [12.5.3.7] <http://www.justice.vic.gov.au/emanuals/VSM/default.htm> at 1 August 2011. In the Children’s Court, the maximum aggregate term is not restricted to offences ‘committed at the same time’.

If the offending behaviour — whether it involves a single charge or multiple charges — requires a sentence longer than three years, the court could exercise its discretion to exclude the case from its summary jurisdiction, and it would be heard on indictment in the higher courts.

If the Children’s Court were to retain jurisdiction over severe injury offences, a new parole regime would be required, which would allow the Children’s Court to impose non-parole periods for severe injury offences.

A provision would be required to the effect that, if a court sentences an offender to a youth justice centre order for a severe injury offence (where that offender is not excluded from the two-year minimum on the basis of special reasons), the court must fix a two-year period during which the offender is not eligible to be released on parole.

If the court sentences a child for more than one charge, the two-year minimum non-parole period would need to apply as an aggregate period of detention in respect of the case as a whole (and not merely in respect of the gross violence charge). Under this option, there should be no provision requiring the non-parole period to be six months less than the head sentence, given the minimal discretion available for a magistrate to individualise sentences between two and three years. The time spent by the child in remand prior to being sentenced for a severe injury offence should be declared time served for the purposes of the non-parole period. Other associated amendments may be required, including an amendment to part 5.5 of the Children, Youth and Families Act 2005 (Vic) to preclude the Youth Parole Board from ordering parole in severe injury cases prior to the expiry of the two-year mandatory minimum.

Under Option A, amendments would also be required so that the Children’s Court would be precluded from applying provisions in the Children, Youth and Families Act 2005 (Vic) that would allow the court to reduce a sentence below the two-year minimum on the basis of the offender’s guilty plea and behaviour during deferral, a pre-sentence report obtained during deferral or other mitigating factors (where these factors do not constitute special reasons, such as assistance to authorities). These special reasons may, however, be taken into account in determining the head sentence.

The overall effect of the necessary amendments is that Option A would significantly distort the Children’s Court jurisdiction as it is currently framed. According to some stakeholders, the complications of incorporating a minimum sentencing regime in the Children’s Court jurisdiction would be ‘irreconcilable’.

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301 See [1.47]–[1.48].
311 This can be compared with section 11(3) of the Sentencing Act 1991 (Vic), which requires a non-parole period to be at least six months less than the total effective sentence.
312 See for example, Corrections Act 1986 (Vic) s 74.
313 Children, Youth and Families Act 2005 (Vic) s 362A: where the court imposes a less severe sentence than it would otherwise have imposed because the child pleaded guilty to the offence, and the sentence imposed includes a youth justice centre order, the court must state for each offence the sentence it would have imposed but for the plea of guilty. See also Children, Youth and Families Act 2005 (Vic) s 367(1)(c). These provisions, while not analogous to section 5(2)(e) of the Sentencing Act 1991 (Vic), which requires a court to have regard to an offender’s plea of guilty, ‘implicitly, refer to the mitigating weight of a plea of guilty by a child’: Director of Public Prosecutions v Hills (No 1) [2011] VSC 88 (18 March 2011) [14]. See also Power (2011–), above n 37 [11.2.8].
314 Children, Youth and Families Act 2005 (Vic) s 416(3)(a).
315 Children, Youth and Families Act 2005 (Vic) s 416(3)(b). The Children’s Court must order the production of a pre-sentence report if it is considering detaining the child in a youth justice centre: Children, Youth and Families Act 2005 (Vic) ss 412(1)(e), 571(2).
316 Children, Youth and Families Act 2005 (Vic) s 362(5). See [4.62]–[4.69].
317 Submission 21 (Youthlaw). It is noted that in its submission, Youthlaw did not consider whether the proposed offences should be excluded or retained in jurisdiction, only that they are incompatible.
Statutory minimum sentences for gross violence offences

Legislative implications of Option B

3.63 In contrast, Option B would involve amending section 516(1)(b) of the Children, Youth and Families Act 2005 (Vic) to list the gross violence offences alongside the seven death-related indictable offences that are currently automatically excluded from the jurisdiction of the Children’s Court.

3.64 Other legislative changes required for Option B will need to be enacted for other purposes, including establishing a statutory minimum for adults and retaining the option of dual track under the Sentencing Act 1991 (Vic). For example, higher courts will require the power to impose a non-parole period for youth justice centre orders under sections 32–35 of the Sentencing Act 1991 (Vic). This will be required to retain dual track for 18 to 20 year old offenders.

The Council’s view

3.65 In summary, for the Children’s Court to hear severe injury offences, significant modifications to the Children, Youth and Families Act 2005 (Vic) would be required, including the introduction of a new parole regime, enabling magistrates to impose a two-year minimum period of detention during which the offender would be ineligible for parole. The advantages of retaining a child within the specialist jurisdiction of the Children’s Court would be compromised where an offender is subject to a two-year minimum detention sentence – there would be minimal scope to individualise sentences or to allow for a meaningful parole period, and group conferencing and other programs and processes would be unavailable. In any event, offending that satisfies the definition of gross violence (requiring severe injury coupled with high culpability) may be of the type that would be excluded from summary jurisdiction by the Children’s Court in favour of the ‘fullest range of sentencing options’ provided for in the Sentencing Act 1991 (Vic).

3.66 By contrast, Option B would require minimal legislative amendment. The provision of non-parole periods is already common practice in the higher courts (except when a higher court sentences a child to a youth justice centre, see [1.54]–[1.59]). If a child is sentenced to a term of imprisonment, the usual non-parole provisions may apply. Importantly, the operation of sentencing in the Children’s Court would not be compromised.

3.67 The Council therefore considers that Option B is to be preferred, and the offences of intentionally causing severe injury and recklessly causing severe injury should be excluded from the jurisdiction of the Children’s Court.

318 For example, a provision precluding the reduction of a sentence lower than the statutory minimum on the basis of an offender’s plea of guilty, assistance to authorities or because of other mitigating factors.

319 See [4.70]–[4.82].

320 See for example, Victoria Police v CB [2010] VChC 3 (24 June 2010) [14]. In that case, a child offender left one of his victims with life threatening and life changing injuries after stabbing him 13 times in the back and abdomen. The offender is likely to have satisfied the ‘severe injury’ threshold and may have satisfied one of the elements for gross violence.

321 The Court may currently exclude an offence from jurisdiction if it considers that exceptional circumstances exist. In determining whether exceptional circumstances exist, the court takes into account considerations such as the nature, significance and gravity of the alleged offence(s), circumstances personal to the offender and matters concerning the administration of justice: Office of Public Prosecutions v BW [2010] VChC 2 (13 May 2010) [11]; Victoria Police v CB [2010] VChC 3 (24 June 2010) [11]. See further, A Child v A Magistrate of the Children’s Court and Ors (Unreported, Supreme Court of Victoria Practice Court, Cummins J, 24 February 1992) 11; DL (A Minor by his Litigation Guardian) v A Magistrate of the Children’s Court Duncan Reynolds and Ors (Unreported, Supreme Court of Victoria, Practice Court, Vincent J, 9 August 1994) 3.

3.68 As with the seven death-related offences currently excluded from the jurisdiction of the Children’s Court, it is recognised that some offences are too serious to be tried in the Children’s Court. As offences of gross violence require severe injury and high culpability, sanctions available under the Sentencing Act 1991 (Vic) may be appropriate, as is the case for the excluded offences.

3.69 Further, as the offences of gross violence are so grave that a two-year minimum sentence is required, the procedural safeguards of the higher courts (such as the need for a committal proceeding, trial by jury and the provision of appeals to the Court of Appeal) are more appropriate for children who are charged with this offence than summary procedures (and those safeguards will also apply to adults charged with this offence).

3.70 It must be emphasised that this recommendation is contingent on the adoption of a severe injury threshold. With a severe injury threshold, it is likely that only a very small number of matters will be excluded from the jurisdiction of the Children’s Court as outlined in the scenarios at [7.46]–[7.49]. As a result, there is not likely to be a significant shift in the workload of the Children’s Court, and the integrity of the Children’s Court will be retained.

**Recommendation 2**

The offences of intentionally causing severe injury and recklessly causing severe injury should be excluded from the jurisdiction of the Children’s Court, provided that they are framed as separate offences requiring a severe injury threshold in accordance with Recommendation 1.

The offences of intentionally causing severe injury and recklessly causing severe injury should be listed in section 516(1)(b) of the Children, Youth and Families Act 2005 (Vic) along with the seven death-related indictable offences currently excluded from the jurisdiction of the Children’s Court.
Chapter 4
Exceptional circumstances for imposing a sentence less than the statutory minimum

Rationale underlying the selection of circumstances

Submissions

4.1 Of the 26 submissions received by the Council, 23 discussed exceptional circumstances either commenting on the test generally, or specifying particular circumstances that stakeholders considered ought to be included. The structure and substantive content of the exceptional circumstances were the elements of the proposed reforms most discussed by stakeholders in their written submissions.

Terms of reference

4.2 The terms of reference propose a test for exceptional circumstances as follows:

the circumstances of the case are so unusual that the court is entitled to assume Parliament could not have intended those circumstances to be covered.

323 Submission 1 (Anonymous); Submission 3 (P. Jones); Submission 5 (B. Herbert); Submission 6 (Crime Victims Support Association); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 16 (Berry Street); Submission 17 (Federation of Community Legal Centres Victoria); Submission 18 (Mental Health Legal Centre); Submission 19 (Springvale Monash Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 23 (Jesuit Social Services); Submission 24 (Uniting Church of Australia Synod of Victoria and Tasmania); Submission 25 (Liberty Victoria); Submission 26 (Office of Public Prosecutions Victoria).
4.3 A number of stakeholders queried what evidence, in practice, a court would need to examine in order to decide the counterfactual question of what parliament had not intended.\textsuperscript{324} The test as proposed, although providing context to the intent of the gross violence policy, would not readily lend itself to clear application if directly incorporated into legislation.

4.4 The phrase ‘exceptional circumstances’ is used for a number of different tests within the criminal law of Victoria.\textsuperscript{325} In the context of the reinstatement of a suspended sentence, the Court of Appeal in\textit{R v Ioannou}\textsuperscript{326} said:

\begin{quote}
[the circumstances …] must be clearly unusual or quite special or distinctly out of the ordinary. As these expressions indicate, the circumstances cannot fall within the range of normally anticipated consequences, behaviours or exigencies. Steggall is not authority for the proposition that circumstances can only be exceptional if they are beyond reasonable expectation or contemplation.\textsuperscript{327}
\end{quote}

4.5 The fact that circumstances are ‘exceptional’ or ‘unusual’ suggests they are rare or infrequent. However, infrequency does not always imply merit. Similarly, there may be circumstances that are not infrequent but still deserving of inclusion as an exemption to the imposition of the statutory minimum sentence. Victoria Legal Aid submitted that:

\begin{quote}
We strongly recommend that the exemption not be based around a requirement that the case be ‘exceptional’ or ‘unusual’. The fact that a case is different or unique does not mean that mandatory sentencing either should or should not apply. It simply says that the case is unusual.\textsuperscript{328}
\end{quote}

4.6 To determine in what circumstances a court should be able to impose a sentence of less than the statutory minimum for a severe injury offence, the Council has adopted the approach of assessing the merits of particular circumstances, in light of the rationale behind the gross violence circumstances as well as sentencing purposes and public policy considerations.

4.7 For example, the rationale for the inclusion of the proposed gross violence factors seems to be that they are all circumstances that significantly increase the culpability of the offender. It is logical that the converse of that rationale — in other words, circumstances that significantly lessen the culpability of the offender — should constitute the basis for determining whether particular circumstances merit exemption to the imposition of the statutory minimum sentence.

\begin{footnotes}
\item[324] At the discussion forums conducted by the Council, a number of participants were concerned that this test would require courts to engage in an analysis of media reports or parliamentary records to determine what circumstances parliament considered, and, by deduction, what was not considered.
\item[325] \textit{Bail Act 1977 (Vic) s 4(2)}: the statutory presumption against the grant of bail for certain offences may be overcome if ‘the court is satisfied that exceptional circumstances exist’; \textit{Children, Youth and Families Act 2005 (Vic) s 345(1)}: children are to be proceeded against by summons unless the ‘circumstances are exceptional’; \textit{Sentencing Act 1991 (Vic) s 3(5A)}: the court must restore a suspended sentence if an offender is convicted of another offence punishable by imprisonment committed during the operational period of that suspended sentence, unless there are ‘exceptional circumstances’.
\item[326] \textit{R v Ioannou} (2007) 17 VR 563.
\item[327] Ibid 568.
\item[328] Submission 22 (Victoria Legal Aid).
\end{footnotes}
Structural questions

4.8 Before examining the substantive question of what circumstances should merit exemption from the statutory minimum period, there are significant structural questions to be resolved regarding how the exceptional circumstances should be expressed.

General test or list of circumstances?

4.9 An initial question is whether exceptional circumstances should be framed as a general test, or whether particular circumstances should be specified.

4.10 A recent example of the use of a general test for ‘exceptional circumstances’ in Victorian law was the amendments to the Sentencing Act 1991 (Vic) by the Sentencing (Suspended Sentences) Act 2006 (Vic), which sought to limit the use of suspended sentences for serious offences. The amendments introduced a general test, requiring that a court could only suspend a sentence of imprisonment for a serious offence where it found there were ‘exceptional circumstances’ and that ‘it was in the interests of justice’ to do so.329

4.11 Despite these reforms, a monitoring report produced by the Council in 2010 on the use of suspended sentences330 found that there had been no significant change in the rate of suspended sentences imposed for serious offences since the reforms were introduced. One of the reasons for this may be that the phrase ‘exceptional circumstances’ – in the absence of an accompanying list of the kind of circumstances intended to be covered – is capable of broad interpretation.

4.12 The Office of Public Prosecutions Victoria referred to the example of the general ‘exceptional circumstances’ test for suspended sentences for serious offences, including the proportion of cases found to be ‘exceptional’, and expressed concern that a similarly broad test ‘may undermine the [gross violence] proposal if exceptional circumstances are found in those proportions’.331

4.13 One stakeholder considered that there should be a statutory test accompanied with examples.332 Others considered that there should be a broad test and the question of merit should be left to judicial discretion, allowing a court to take into account a range of circumstances or factors including those not specified in legislation.333 The Crime Victims Support Association took the view that a general statement test was to be preferred, arguing that detailing a list of circumstances ‘would become less finite and highly susceptible to interpretation’ over time.334

4.14 The Children’s Court Barristers Association was concerned that the proposal should not adopt the same exceptional circumstances test for children as has been developed in the adult jurisdiction.335

4.15 The Council accepts the concerns of stakeholders that, without some element of discretion, it is likely that cases deserving of exemption from the statutory minimum may be disallowed. The Council is also mindful that the clear intent of the policy from the terms of reference is to define more tightly the kind of circumstances that may be considered worthy of exemption from the statutory minimum.

329 Sentencing Act 1991 (Vic) ss 27(2B) (now amended).
331 Submission 26 (Office of Public Prosecutions Victoria).
332 Submission 1 (Anonymous).
333 Submission 15 (Victorian Aboriginal Legal Service); Submission (Youthlaw).
334 Submission 6 (Crime Victims Support Association).
335 Submission 9 (Children’s Court Barristers Association).
4.16 In light of this, the Council does not consider that a general test for exceptional circumstances, leaving full discretion to the court to determine what kind of circumstances are to be exempt, would be consistent with the policy as set out in the terms of reference. It considers that a list of circumstances that merit exemption would be a more effective way to achieve the policy objectives.

Exhaustive or non-exhaustive list?

4.17 The Centre for Multicultural Youth expressly did not support an exhaustive listing of exceptional circumstances for the reason that ‘some young people will have exceptional circumstances that have not been specified in the offence’.336 A number of stakeholders submitted that a non-exhaustive/non-restrictive list of factors should be legislated, thereby allowing other factors to be taken into account.337

The Council’s view

4.18 The Council considers that the circumstances that merit an exception to the statutory minimum should be expressed as a non-exhaustive list.

4.19 By their very nature, circumstances that are ‘exceptional’ are not readily anticipated. If the circumstances that are listed are taken to be exhaustive, then unanticipated unusual cases, which are deserving of exemption, will be excluded and injustice may result.

4.20 A non-exhaustive list of circumstances will provide a court with guidance on the rationale behind the choice of the listed circumstances and therefore the kinds of circumstances that merit exemption from the statutory minimum sentence.

Special reasons

4.21 A number of stakeholders identified that the use of the term ‘exceptional circumstances’ is likely to generate confusion with a number of existing exceptional circumstances tests, such as those for bail or restoration of a suspended sentence.338

4.22 It was suggested that ‘special circumstances’339 or a similar phrase be adopted to distinguish this test of exemption, and avoid importing the jurisprudence relating to the use of ‘exceptional circumstances’ in a different context.

The Council’s view

4.23 For the reasons outlined in [4.21]–[4.22], the Council considers that those exceptions to the statutory minimum sentences should be described as ‘special reasons’.

336 Submission 14 (Centre for Multicultural Youth).
337 Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).
338 See [4.4].
339 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 11 (Law Institute of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria).
In the interests of justice

4.24 Although a special reason may exist within a case, that, in and of itself, may not be sufficient to warrant exemption from the statutory minimum sentence. The test should therefore refer to the fact that an offender may be exempt from the minimum sentence because of the existence of ‘special reasons’ and that it is in the interests of justice to do so, based on consideration of the offender’s culpability or his or her suitability for a custodial sentence.

4.25 Whether or not the particular facts in a given case give rise to special reasons will depend on the unique circumstances relating to an offender and his or her offending behaviour. The Council’s identification of the kinds of circumstances that ought to be considered by a court when determining exemption from the statutory minimum sentence does not presuppose that, in every case in which there is a submission that special reasons exist, the exemption should automatically apply.

4.26 Similarly, the listing of special reasons does not preclude other factors or circumstances that are not listed from being considered by a court as deserving of exemption from the statutory minimum sentence. The purpose of a non-exhaustive list is to provide guidance to the court on the kinds of circumstances that deserve exemption (and the rationale behind that exemption) and to allow for the inclusion of deserving but unanticipated circumstances.

4.27 It is properly left to the discretion of the sentencing judge to determine whether special reasons exist. The exercise of this discretion is subject to review by the Court of Appeal on a sentence appeal by either the offender or the Crown. The Crown’s right of appeal against a sentence that it considers manifestly inadequate represents a safeguard against an unduly broad interpretation of the non-exhaustive list of circumstances.\(^{340}\)

\(^{340}\) As discussed above, there has been criticism of the apparently broad interpretation of ‘exceptional circumstances’ for the purposes of imposing a suspended sentence on an offender convicted of a serious offence. This was based on the proportion of cases that still received a suspended sentence after this general test was introduced. However, in its 2010 monitoring report on suspended sentences in Victoria, the Council found that, at the time of publication, no sentence appeals had been brought by the Crown concerning exceptional circumstances in the context of the imposition of a suspended sentence for a serious offence: Sentencing Advisory Council (2010), above n 330, 14. Subsequently this issue has been considered in Director of Public Prosecutions v Gerrard [2011] VSCA 200 (30 June 2011).
Non-exhaustive list of special reasons

The Council’s view

4.28 Having considered a broad range of submissions (which included a large number of potential ‘special reasons’) and in light of the rationale of diminished culpability and other sentencing and public policy considerations, the Council considers that the non-exhaustive list of special reasons should include at least the following:

- intellectual disability or cognitive impairment (including acquired brain injury);
- mental illness;
- particular psychosocial immaturity and/or particular vulnerability in custody; and
- assistance by the accused to police or an undertaking by the accused to assist the Crown.

4.29 The Council also recommends that where an offender is eligible and satisfies the criteria for sentencing under the dual track system, that offender should become subject to the two-year minimum period of detention applicable to 16 and 17 year old offenders.

4.30 The mere existence of a circumstance described in the non-exhaustive list should not automatically constitute a ‘special reason’. The circumstance should be present to a sufficient degree that the court considers it to be in the interests of justice that exemption from the statutory minimum sentence is warranted.

4.31 As stated above, the list of special reasons is not intended to be exhaustive, but rather is intended to explicitly state those circumstances that are the most foreseeable and appropriate for exemption as they accord with the rationale of significantly diminished culpability, or are in the interests of public policy. Each special reason will be examined in the order in which it appears in the list above.

Intellectual disability or cognitive impairment (including acquired brain injury)

4.32 In the Disability Act 2006 (Vic), ‘intellectual disability’ refers to a person over the age of five who has both significant sub-average general intellectual functioning and significant deficits in adaptive behaviour, each of which must manifest before the age of 18.\(^\text{341}\)

4.33 A cognitive impairment is one that affects the ability to think, concentrate, formulate ideas, reason and remember and may have been acquired later in life as a result of an accident or illness – such as through acquired brain injury.\(^\text{342}\)

4.34 There is often overlap in the definition of mental conditions; for example, intellectual disability is often defined to include cognitive impairment. Similarly, section 50 of the Crimes Act 1958 (Vic) defines cognitive impairment (in the context of sexual offences against persons with a cognitive impairment) as follows:

- cognitive impairment includes impairment because of mental illness, intellectual disability, dementia or brain injury.

\(^\text{341}\) Disability Act 2006 (Vic) s 3.
4.35 Although that definition incorporates mental illness, intellectual disability and cognitive impairment are usually distinguished from mental illness (discussed below) on the basis of a physiological component, such that the disturbance to normal thinking is a result of a developmental or physical impairment rather than a psychiatric or psychological disorder.  

4.36 The Attorney-General has stated that:

The government has made clear all along that there will be provision for exceptional circumstances, and we have asked the Sentencing Advisory Council to advise on its scope. This is so that exactly the sort of issues … such as mental illness or intellectual disability, can be taken into account.  

4.37 The circumstance of intellectual disability or cognitive impairment was considered an important special reason for exemption from the statutory minimum sentence by the majority of stakeholders that identified particular circumstances worthy of exemption. This circumstance was often combined with submissions on mental illness (discussed below).

4.38 The Crime Victims Support Association submitted that mental health or cognitive impairment should not be a special reason for exemption. It submitted that the defence of ‘mental impairment’ – to the extent that the offender cannot be held legally responsible for their actions – already exists.  

Though it is true that a defence of mental impairment exists, there are many cases above this threshold where consideration is given to the effect of mental disorder or cognitive impairment in the sentencing stage of the trial. If the offender has an intellectual disability or cognitive impairment, this factor, along with the degree to which it is present and the extent to which it was related to the offending behaviour, will have a bearing on the level of the offender’s culpability.


345 Submission 1 (Anonymous): ‘intellectual physical or mental disability or serious illness’; Submission 5 (B. Herbert): ‘mental health issues or any disability/disabilities affecting the offender at the time of the offence’; Submission 7 (Victoria Bar Council and the Criminal Bar Association of Victoria) endorsed by Submission 25 (Liberty Victoria): ‘a person with an intellectual disability’; Submission 10 (Child Safety Commissioner): ‘children and young people who have a disability, a mental illness’; Submission 11 (Law Institute of Victoria), endorsed by Submission 15 (Victorian Aboriginal Legal Service) and Submission 17 (Federation of Community Legal Centres Victoria): ‘mental illness or impairment’; Submission 12 (Youth Affairs Council of Victoria): ‘an intellectual or learning disability’; Submission 14 (Centre for Multicultural Youth): ‘young people who have a cognitive impairment that impacts on their offending, and/or their ability to cope in custody’; Submission 21 (Youthlaw): ‘young people who have a cognitive impairment, intellectual disability or acquired brain injury’; Submission 23 (Jesuit Social Services): ‘intellectually disabled and mental illness sufferers’. Victoria Legal Aid (Submission 22) referred to a ‘cognitive impairment’ but discussed this factor as including ‘intellectual disability, mental illness or acquired brain injury’.

346 Further, the Crime Victims Support Association submitted that defining the degree of cognitive impairment would be contested, due to its subjective nature. They also submitted that ‘[a]s mental impairment is as much an impairment to rehabilitation as it is to obeying the law’, the exemption should not apply on the basis of the need to prevent reoffending: Submission 6 (Crime Victims Support Association).

347 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.
The Law Institute of Victoria (endorsed by the Federation of Community Legal Centres Victoria and the Victorian Aboriginal Legal Service) submitted that the principles for sentencing offenders with ‘impaired mental functioning’ established in R v Tsiaras\(^ {348}\) and affirmed in R v Verdins\(^ {349}\) should apply to the gross violence offences, such that impaired mental functioning should be a special reason for exemption from the statutory minimum sentence.\(^ {350}\)

**R v Verdins**\(^ {351}\) held that:

Impaired mental functioning, whether temporary or permanent (‘the condition’), was relevant to sentencing in at least the following ways:

1. The condition could reduce the moral culpability of the offending conduct, as distinct from the offender’s legal responsibility. Where that was so, the condition affected the punishment that was just in all the circumstances; and denunciation was less likely to be a relevant sentencing objective.
2. The condition could have a bearing on the kind of sentence that was imposed and the conditions in which it was to be served.
3. Whether general deterrence was to be moderated or eliminated as a sentencing consideration depended upon the nature and severity of the symptoms exhibited by the offender; and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence was to be moderated or eliminated as a sentencing consideration likewise depended upon the nature and severity of the symptoms of the condition as exhibited by the offender; and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) could mean that a given sentence would weigh more heavily on the offender than it would on a person in normal health.
6. Where there was a serious risk of imprisonment having a significant adverse effect on the offender’s mental health, this factor tending to would tend to mitigate punishment.\(^ {352}\)

Critically, the first-mentioned reason is the fact that an impaired mental functioning may ‘reduce the moral culpability’ of the offender (separate from the legal responsibility of the offender), which is in accordance with the primary rationale for the special reasons.

Whether or not impaired mental functioning does, in fact, reduce the culpability of the offender is still dependent on whether or not the mental impairment had some substantial connection with the offending behaviour: As Victoria Legal Aid noted in their submission:

> The Court of Appeal has been vigilant to ensure that merciful sentences are only imposed on people with those conditions where there is a genuine link between the condition and the offending.\(^ {353}\)

Similarly, the mere existence of impaired mental functioning should not be sufficient to constitute a special reason unless that impairment is of a sufficient degree that culpability is diminished.

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\(^{349}\) R v Verdins; R v Buckley; R v Vo (2007) 16 VR 269.

\(^{350}\) Impaired mental functioning was held to include ‘a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness’: R v Verdins; R v Buckley; R v Vo (2007) 16 VR 269, 271. Thus, mental impairment is relevant to both the special reasons of ‘Intellectual disability or cognitive impairment (including acquired brain injury)’ and the special reason of ‘Mental illness’ discussed below.

\(^{351}\) R v Verdins; R v Buckley; R v Vo (2007) 16 VR 269.

\(^{352}\) Ibid 269.

\(^{353}\) Submission 22 (Victoria Legal Aid).
4.44 Aside from the issue of reduced culpability at the time of offending, the impact of impaired mental functioning is a consideration at the time of sentencing when the court considers how heavily a sentence of imprisonment may weigh on that offender – compared with an offender of normal health – or how imprisonment may adversely affect the offender’s mental impairment (see the Verdins factors five and six [4.40]). These considerations are particularly important for a court to consider in determining whether an offender should be exempt from a statutory minimum.

Mental illness

4.45 The Mental Health Act 1986 (Vic) defines ‘mental illness’ as:

a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.354

4.46 The same considerations that apply to the special reason of ‘intellectual disability or cognitive impairment’ above apply to the special reason of mental illness. Mental illness was also mentioned by a significant number of stakeholders as a circumstance worthy of exemption from the minimum sentence.355

4.47 The Law Institute of Victoria (endorsed by the Federation of Community Legal Centres Victoria and the Victorian Aboriginal Legal Service) submitted that the Verdins considerations discussed above should also apply to mental illness as a form of ‘impaired mental functioning’ in accordance with [4.40]. Further, the comments by the Attorney-General at [4.36] explicitly refer to ‘mental illness’ as being a potential ‘exceptional circumstance’.

Case example

The offender 37, had significant cognitive impairment as a result of an acquired brain injury from a long history of alcohol abuse. The offender agreed with two co-offenders to confront two people that they believed had assaulted a 14 year old relative. The offender and the co-offenders obtained metal bars to use as weapons and then drove to the victims’ house, where a violent assault occurred, during which the two victims sustained serious head injuries. The offender herself did not inflict injuries but was involved in the assault before being quickly disarmed by another person. The offender was convicted of intentionally causing serious injury as a principal in the first degree by her acting in concert with the two co-offenders.
4.48 In a recently published report, the Mental Health Legal Centre extensively examined the first-hand experiences of people with a mental illness as they encountered the criminal justice system. In its submission to the Council, the Centre noted:

Critically, the report highlights the need for judicial discretion to take into account the impact of a person’s mental illness on their offending behaviour, to not only be preserved, but enhanced. We strongly oppose any move to fetter this discretion, which, in our view could result in criminalising the conduct of a person when unwell and where the provision of appropriate care, treatment and support services would be a more appropriate outcome than incarceration in prison.

4.49 As with the special reason of ‘intellectual disability or cognitive impairment’ above, in order for an offender’s mental illness to be seen as reducing culpability, it must be of a sufficient degree and have some connection to the offending behaviour.

4.50 The same considerations discussed above as to the impact of the offender’s impaired mental functioning (as a result of mental illness) at the time of sentencing are relevant. In determining whether the offender should be exempt from the statutory minimum sentence, the court should consider how heavily a sentence of imprisonment may weigh on a mentally ill offender – compared with an offender of normal mental health – or how imprisonment may adversely affect the offender’s mental impairment.

Case example

The offender, 40, suffered from chronic schizophrenia involving paranoid delusions, auditory hallucinations and disorganised behaviour. The offender’s mental illness included persecutory delusions, and the belief that other persons were controlling her thoughts. One afternoon the offender had an argument with her daughter, who lived with her. Having obtained a can of petrol near a lawnmower outside her house, the offender spread petrol inside her house in front of her daughter while arguing. The offender threw lit matches on the floor but was stopped by her daughter. After going in and out of the house a number of times, the offender continued to throw lit matches and started a fire that spread rapidly. The offender and her daughter ran outside the house through the flames and both were badly burned. The offender’s daughter remained in hospital for 11 weeks receiving skin grafts to her hands, face and legs, and was permanently scarred. The offender was hospitalised for treatment to her burns and developed a pulmonary embolism and deep vein thrombosis. She was also held in a psychiatric ward. At the time of sentencing, the offender was in stable accommodation and employed part-time, had undergone psychiatric treatment and was on medication successfully treating her mental illness. The offender’s daughter wrote a victim impact statement asking that the court ensure her mother received a sentence that provided for her medical care rather than a custodial sentence.

356 Mental Health Legal Centre Inc, Experiences of the Criminal Justice System – The Perspectives of People Living with Mental Illness (2010).
Particular psychosocial immaturity and/or particular vulnerability in custody

4.51 As discussed above, one of the primary rationales for exemption from the statutory minimum is that the offender has a significantly diminished level of culpability.\(^{357}\)

4.52 Research in developmental psychology supports the view that several characteristics of adolescence distinguish young offenders from adults in ways that mitigate culpability. These adolescent traits include deficiencies in decision-making ability, increased impulsivity and greater vulnerability to external coercion, particularly from peer associates. As reflected by the Victorian Council of Social Service (quoting the Office of the Chief Science Advisor in New Zealand):

[t]here is an inherent conflict between the practical focus on using chronological age to determine rights and obligations and the highly individualistic processes of maturation.\(^{358}\)

4.53 Specific research into psychosocial immaturity of children has focused on the effect of psychosocial measures, such as:

autonomy, independence, emotional temperance, future-time perspective, and perspective of others, on antisocial outcomes ... [and has found] that psychosocial immaturity peaks at age 15 and then dissipates. Indeed, most psychosocial variables appear relatively stable beyond age 18, with the exception of emotional temperance which improves through the mid to late twenties. Similarly, contemporaneous research has investigated psychosocial maturity in relation to competence to stand trial, finding that decision making incompetence is mainly seen in adolescents ages 15 and below.\(^{359}\)

4.54 A number of offenders, however, fall outside of the standard development trajectory, and those few individuals will display particular psychosocial immaturity that is out of step with their chronological age. Victorian law implicitly recognises that people mature at different rates, and that their chronological age may not always represent their developmental age.

4.55 For example, the existence of the dual track system in Victoria is recognition of the fact that some offenders aged 18 to 21 years are, from a developmental perspective, more like children than adults.

4.56 Further, in addition to the statutory minimum age of responsibility (for children under 10 years of age), there is a presumption at common law that a child aged under 14 is ‘incapable of crime’ (‘\textit{doli incapax}\’).\(^{360}\) In order to commence a criminal action against a child aged between 10 and 14, the prosecution must rebut the presumption by proving beyond reasonable doubt that ‘the child understood that his or her act or omission was “seriously wrong”.’\(^{361}\) The designation of this ‘intermediate zone’, during which children are presumed incapable of criminal behaviour until evidence is adduced otherwise, recognises that children may not automatically develop an understanding of the wrongfulness of their criminal behaviour upon reaching a particular age.\(^{362}\)

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\(^{357}\) See [4.7] above.


\(^{362}\) Crofts (2008), above n 361, 171.
4.57 Offenders aged 16 or 17 years are no longer within that ‘intermediate zone’; however, children aged 16 and 17 years similarly may not mature at a steady and constant rate.\textsuperscript{363}

4.58 Although a number of stakeholders have argued that the psychosocial immaturity of children should exclude all children from the operation of the minimum sentence,\textsuperscript{364} the clear intent of the gross violence policy is to encompass children aged 16 and 17. It is noted that under the policy the different levels of maturity of children are reflected in the different minimum sentences that will apply.

4.59 For this reason, in order for a person’s psychosocial immaturity to be seen as reducing culpability, it must be of a sufficient degree and have some connection to the offending behaviour: the offender must demonstrate a particular level of immaturity.

4.60 By referring to ‘particular’ psychosocial immaturity, the factor will be consistent with the criteria that are applied when a court considers eligibility for dual track sentencing (see [1.60]–[1.64]), which (in addition to prospects for rehabilitation) is concerned with the offender’s particular impressionability, immaturity or likelihood of being subject to undesirable influences in adult prison.\textsuperscript{365}

4.61 Aside from the issue of reduced culpability at the time of offending, the impact of particular psychosocial immaturity is a consideration at the time of sentencing when the court must consider how heavily a custodial sentence may weigh on the offender, compared to an offender of normal developmental maturity. Considerations of a young person’s particular vulnerability in custody, which may or may not arise from his or her immaturity, are also important in determining whether an offender should be exempt from a statutory minimum.

**Case example**

The offender, 16, was convicted of intentionally causing serious injury and a number of other drug-related offences. The offender and a 22 year old co-offender arranged to meet the victim under the pretence of selling him drugs. When the victim and three others arrived at the rendezvous point, he was confronted by the offender armed with a baseball bat and the co-offender armed with a machete, whom demanded money from the victim and his companions. After an argument, the co-offender caused serious injury to the victim with the machete. The offender had no prior convictions and was described in a psychological report as having serious immaturity and an extremely fatuous and childlike presentation. While the offender knew that the offences were serious, his understanding in terms of the impact on the victims was limited. He believed he belonged to an environment that demanded demonstrations of serious criminal activity, and, in an extremely childlike manner, he had participated in these offences impulsively and under the influence of his older co-offender. Psychiatric reports found that the offender did not go through a formal decision-making process; nor did he think of ways to extricate himself, as a more mature person might do. He failed to consider possible options because he lacked experience and had difficulty projecting the course of events into the future. The immediate reward of peer approval weighed more heavily on his behaviour than the possibility of apprehension by the police and a serious criminal conviction.

\textsuperscript{363} Ibid 170.

\textsuperscript{364} Submission 1 (Anonymous); Submission 5 (B. Herbert).

\textsuperscript{365} Sentencing Act 1991 (Vic) ss 32–35.
Assistance by the accused to police or an undertaking by the accused to assist the Crown

4.62 One of the most significant ways in which the investigation and prosecution of offences is achieved is through the assistance provided by an offender who undertakes to give evidence against co-accused. An undertaking to assist the Crown in this manner is particularly valuable if there has been offending in a large group, for example, and a victim or victims may be unable to give evidence as to the identity of, or the specific role played by, individual offenders.

4.63 Cooperation with the authorities is a basis for mitigation of sentence at common law. The Sentencing Act 1991 (Vic) also recognises the relevance of promised assistance, with provision requiring the recording of benefits given.\(^{366}\) Legislation also provides for an appeal against sentence if an offender fails to comply with any undertaking given to assist the Crown.\(^{367}\)

4.64 In these circumstances, while the assistance that is provided does not directly reduce the culpability of the offender, nevertheless, from a public policy perspective, the reduction in sentencing provided to an offender for assisting can be justified on the grounds that it goes towards the proper administration of justice, and secures the conviction of offenders who might otherwise avoid prosecution.

4.65 The policy underpinning the reduction in sentence afforded to offenders who assist, or undertake to assist, the authorities was stated by the Court of Appeal in \textit{R v Su}:\(^{368}\)

> The courts have for long recognised that it is in the interests of the community to foster dishonour among thieves, in the sense that an offender should be encouraged to inform on others. That encouragement is seen to lie in the giving of ‘discounts’ to those who provide, as best they can, information to police which may assist in the detection of other offenders.\(^{369}\)

4.66 This factor was specified by a number of stakeholders as being an appropriate basis for exemption from the statutory minimum sentence.\(^{370}\) The Crime Victims Support Association suggested that this circumstance should be appropriate for exemption where it was combined with a low risk of the offender reoffending.\(^{371}\)

4.67 As offending in company is one of the proposed gross violence elements of the new severe injury offences, it is likely that the prosecuting authorities would seek to encourage an offender to give evidence against co-offenders in order to secure a conviction. In the absence of the ability to provide a reduction in sentence for an offender who undertakes to give assistance, there would be no incentive for that offender to do so. The result would be that a conviction would be harder to secure, and, it is conceivable that all co-offenders would escape prosecution and conviction.

\(^{366}\) Sentencing Act 1991 (Vic) s 5(2AB).
\(^{367}\) Criminal Procedure Act 2009 (Vic) ss 260–262.
\(^{369}\) Ibid 77.
\(^{370}\) Submission 7 (Victoria Bar Council and the Criminal Bar Association of Victoria); Submission 11 (Law Institute of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 22 (Victoria Legal Aid); Submission 25 (Liberty Victoria).
\(^{371}\) The Crime Victims Support Association considered that the offender should be required to demonstrate a low-risk of reoffending in a number of ways, including that the offender had turned him- or herself in, and the probability was that the offender would not have been otherwise suspected or apprehended; Submission 6 (Crime Victims Support Association).
4.68 As Victoria Legal Aid noted:

The impacts of fewer accused people assisting the authorities, especially in cases of violent group offending are obvious and profound. 372

4.69 Some stakeholders 373 noted that a similar consequence has been observed in the Commonwealth jurisdiction since the introduction of mandatory minimum sentences for aggravated offences related to people smuggling. 374 In those cases, prior to the mandatory sentencing regime, it had been possible for a sentencing court to take into account assistance to the authorities provided by a co-offender (for example, a deckhand giving evidence against the captain of a people smuggling boat). However, without the ability for a court to impose a sentence less than the mandatory minimum, there is no incentive for an offender to provide assistance to authorities, with the result – according to stakeholders – that far more trials are contested and far less evidence from co-accused is available to prosecute those trials.

**Case example**

The offender was 18 at the time of offending. The victim was attacked by a group of 15 or so people, including the offender, who kicked the victim twice while he was on the ground. A number of people continually kicked, punched and hit the victim with a baseball bat (which belonged to the offender, but which he did not use) while the victim was on the ground, unable to defend himself. The offender later gave an undertaking to the Crown to assist in the prosecution of his co-accused. The evidence of the offender was very significant and some co-accused may not have been charged but for his assistance. The offender was held to be acting in concert, and so equally responsible for the actions of his co-accused; he was also assessed as having a low risk of reoffending.

372 Submission 22 (Victoria Legal Aid).
373 Comments made by attendees at the Adult Offenders Discussion Forum (31 May 2011).
374 Migration Act 1958 (Cth) s 236B.
Satisfaction of the criteria for sentencing under the dual track system

4.70 As discussed at [1.60]–[1.64] the ‘dual track’ system of sentencing in Victoria provides that adult offenders aged 18 to 20 who are found to be eligible may be sentenced to detention in a youth justice centre rather than an adult prison.

4.71 The requirements for eligibility are that the court:

- believes that there are reasonable prospects for the rehabilitation of the young offender; or
- believes that the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in adult prison.

4.72 The rationale behind the dual track system is a recognition that, while offenders may have reached adulthood in a strict legal sense, in terms of their maturity and development many offenders are developmentally closer to children than adults.

4.73 Under the terms of reference, a minimum four-year non-parole period will apply to those offenders aged 18 or above convicted of a gross violence offence. Given that the maximum dual track order is three years in a higher court, offenders otherwise eligible for dual track will be required to serve their term of custody in adult prison.

4.74 The importance of dual track and the need to retain the system for immature and vulnerable 18 to 20 year olds convicted of gross violence offences were emphasised by a number of stakeholders. Whitelion commented in its submission that inappropriate incarceration can lead to an escalation of offending behaviour, and that the dual track system provides a means of avoiding the potentially contaminating effect of moving a young, vulnerable person to adult prison. Whitelion also submitted that dual track allows young offenders to serve detention in an environment appropriate for their age, while adult imprisonment would deny the opportunity for 18 to 20 year old offenders to access support and rehabilitative programs that are available through the youth justice system.

4.75 The need to retain the system of dual track is also supported by strong evidence that 18 to 20 year old offenders are uniquely capable of being rehabilitated. The Youth Parole Board statistics suggest that 18 to 20 year olds sentenced to youth justice facilities have better outcomes than other age groups. The Youth Parole Board’s Annual Report for 2009–10 noted that:

Three-quarters of clients 18 years or more and four fifths of those 20 years or more successfully completed parole.

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376 Sentencing Act 1991 (Vic) s 32(1)(a)–(b). In determining whether to make a youth detention order, the court must receive a pre-sentence report and must have regard to the nature of the offence and the age, character and past history of the young offender: Sentencing Act 1991 (Vic) s 32(2).


378 Submission 1 (Anonymous); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw). The importance of the dual track system was also mentioned by stakeholders at the Child Offenders Discussion Forum (1 June 2011).

379 In its submission, Whitelion referred to the escalation of offending behaviour that may result when a young person is exposed to the adult correctional system: (Submission 13).

380 Submission 13 (Whitelion).

381 Department of Human Services (2010), above n 267, cited by Submission 8 (Victorian Council of Social Service).
4.76 This evidence suggests that, as young adults gain maturity, there is a greater rehabilitative potential, reflected by the better outcomes for that cohort than for younger offenders.\(^{382}\) This rehabilitative potential may be compromised if young offenders are denied access to dual track sentencing. As stated by Curran and Stary in their article on the dual track system:

To place a young offender in an adult prison … more often than not, simply has the effect of temporarily removing the young person from the community without any effective attempts at rehabilitation.\(^{383}\)

4.77 In order for those offenders to retain access to juvenile detention facilities, a number of stakeholders suggested that youthful offenders aged 18 to 20 who satisfy the eligibility requirements for dual track should be considered cases with special reasons, and so should be exempt from the statutory minimum sentence.\(^{384}\) As has been submitted by the Children’s Court Barristers Association:

it cannot be the intention of Parliament that a young person deemed to be at risk in an adult custodial setting (risk of criminal influence, violence or exploitation) must be sent to prison when an alternative exists.\(^{385}\)

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**Case example**

The offender, 20, was convicted of one count of recklessly causing serious injury. The offender and five other youths aged between 14 and 17 gathered in a park and consumed alcohol. They later became involved in an argument with men in front of a shop near the park. The offenders left and then returned from the park, four of whom (including the offender) were armed with pieces of wood they had removed from a seat at a bus shelter; another was armed with a fluorescent light tube. The youths attacked eight people in the shop, one of whom sustained serious injuries described as severe and permanent (including loss of intellectual potential, epilepsy, disordered heart functioning and loss of ability to concentrate). Although the offender did not attack the person who was seriously injured, the Crown case was that the offenders acted in concert. The offender migrated to Australia when he was six, and his mother had become mentally ill while he was still young, such that her affairs were administered by the state. The offender used cannabis and became addicted to amphetamines and also consumed alcohol daily. The offender was considered an immature youth who mixed with much younger people (who were the initiators of the offending). He would be vulnerable in adult prison and a pre-sentence report concluded that he was suitable for a youth justice centre order.

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\(^{382}\) Meeting with His Honour Judge Bourke, Chair Youth Parole Board and Youth Residential Board (21 June 2011).


\(^{384}\) Submission 9 (Children’s Court Barristers Association); Submission 10 (Child Safety Commissioner); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth).

\(^{385}\) Submission 9 (Children’s Court Barristers Association).
The Council’s view

4.78 Offenders aged 18 to 20 who presently satisfy the criteria for dual track – that is, they are particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison – are subject to the same custodial provisions applicable to children under the Sentencing Act 1991 (Vic). The Council considers that, consistent with this rationale, rather than being exempt from a statutory minimum for this special reason, those offenders who satisfy the eligibility criteria for dual track unless the existence of ‘special reasons’ exempt those offenders from a minimum sentence) should become subject to the two-year minimum detention in a youth justice centre that will apply to 16 and 17 year olds.

4.79 As discussed above, an offender can only be sentenced to a dual track order if he or she is under the age of 21 at the time of sentencing. Further, the maximum term of a youth justice centre order is three years. Therefore, this may result in youth justice centres accommodating offenders of 23 years of age (a gross violence offender who is 20 years old at the time of sentencing may be eligible for parole at 22 years of age after serving the two-year minimum). Consistent with the proposed amendments for children aged 16 and 17 convicted of a gross violence offence, a court sentencing an offender aged 18 to 20 for a gross violence offence, who is eligible for dual track, should receive a sentence with a non-parole period of two years in detention, in accordance with the statutory minimum. After having served two years in detention, that offender, if a parole period is applicable, will then be supervised by the Youth Parole Board.

4.80 To allow for this sentencing option, provision will need to be made in sections 32–35 of the Sentencing Act 1991 (Vic) to enable the higher courts to impose a non-parole period on young offenders sentenced to detention in a youth justice centre for offences of gross violence. The parole provision should state that if a court sentences an offender to a youth justice centre order for a gross violence offence (where that offender is not excluded from the two-year minimum on the basis of special reasons), the court must fix a two-year period during which the offender is not eligible to be released on parole.

4.81 The imposition of non-parole periods for young offenders under sections 32–35 of the Sentencing Act 1991 (Vic) should be limited to the new severe injury offences. There should be no provision requiring the non-parole period to be six months less than the head sentence, in order to retain some discretion for the judge in individualising sentences (see [3.25]). Other associated amendments would be required, such as an amendment to section 458 of the Children, Youth and Families Act 2005 (Vic) to restrict release on parole by the Youth Parole Board in relation to offences carrying a statutory minimum.

4.82 Many of these legislative changes would, in any case, be required if the severe injury offences were excluded from the jurisdiction of the Children’s Court as recommended by the Council (see [3.65]–[3.70]).

386 And are not exempted from the statutory minimum for any other special reason.
Other suggested special reasons

4.83 A number of other circumstances were suggested in submissions as being deserving of exemption from the statutory minimum sentences. The Council notes that many of these factors were submitted on the understanding that they would operate to exclude offenders convicted of gross violence offences that involved serious, as opposed to severe, injury. Given the high threshold of harm and culpability that is proposed for the severe injury offences, a number of otherwise mitigating circumstances are likely to have less weight when measured against the seriousness of the offending behaviour implicit in those offences.

4.84 In determining what circumstances should be listed as ‘special reasons’, the Council has considered those circumstances that are foreseeable as justifiable exemptions. The Council’s recommendation that these circumstances form a non-exhaustive list acknowledges that there may be unforeseeable circumstances that warrant exemption from the statutory minimum. However, given the high level of harm and culpability represented by the gross violence offences, and the clear intent that exemptions from the statutory minimum be tightly defined, the Council considers that the factors discussed below (although mitigating) do not amount to ‘special reasons’ in isolation, consistent with the policy objectives.

4.85 Similarly, the fact that a particular circumstance does not exempt an offender from the statutory minimum sentence does not mean that a court cannot consider the circumstance as mitigating. As gross violence offences represent a very high level of both harm and culpability, the sentence that may be imposed by a court can extend far beyond the statutory minimum, up to the statutory maxima for the gross violence offences. Consequently, an offender may still receive a reduction in sentence based on the existence of the kinds of circumstances proposed by stakeholders.

4.86 In analysing these circumstances, the Council has adopted the useful categorisation employed by Victoria Legal Aid, which separated suggested exceptional circumstances into three categories:

1. circumstances personal to the offender;
2. circumstances relating to the case; and
3. public policy exemptions.
Circumstances personal to the offender

Youthfulness/immaturity

4.87 One stakeholder submitted that, given that ‘most of the risky and impulsive behaviours of adolescence reflect incomplete maturation of self-control and judgment’, age or youthfulness in and of itself should be an exceptional factor. Alternatively, it should be taken into account with other factors – such as experience of disadvantage, lack of priors, involvement by child protective services, exposure to trauma or crime and drug and alcohol issues – in determining special reasons.

4.88 Youthlaw further submitted that, in determining whether special reasons exist, judicial officers should be expressly required to take into account the principles of sentencing children consistent with section 362 of the Children, Youth and Families Act 2005 (Vic).

4.89 It was submitted that the reason for allowing an exception for age or youthfulness is that a statutory minimum is intended to attach to offences committed in circumstances of heightened culpability, yet the cognitive immaturity of a child is considered to detract from his or her individual culpability. Young people are also said to be more receptive to rehabilitation and more vulnerable in detention environments.

4.90 While the Council acknowledges these submissions, it is the clear intent of the gross violence policy to encompass children aged 16 and 17. It is noted that the policy acknowledges the different level of maturity of children as reflected in the different minimum sentence that will apply. The inclusion of ‘youth’ as a special reason would frustrate the intent of the policy.

Youthfulness and lack of prior offending

4.91 Some stakeholders suggested that the two-year minimum should only apply to youths who demonstrate ‘a pattern of violent offending’ and should not apply to first-time offenders. Victoria Legal Aid submitted that first-time offenders should be excluded because they have ‘never previously had the opportunity to receive a sentence designed to address underlying issues’ and that ‘imprisonment should ordinarily be a sentence of last resort when other options have failed’.

4.92 As discussed at [2.47] the high level of harm and culpability present in gross violence offences means that the fact that the offence was committed by a first-time offender, or a young offender with no history of violent offending, is not likely to be a sufficient consideration in and of itself to justify exemption from the statutory minimum.


388 Submission 21 (Youthlaw).

389 Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw). Other stakeholders suggested that the established case law on exceptional circumstances is not appropriate for children and that a broader test should apply: Submission 9 (Children’s Court Barristers Association); Submission 19 (Springvale Monash Legal Service).

390 Submission 21 (Youthlaw).

391 Submission 14 (Centre for Multicultural Youth).

392 Submission 19 (Springvale Monash Legal Service).

393 Submission 5 (B. Herbert).

394 Submission 5 (B. Herbert); Submission 11 (Law Institute of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).

395 Submission 22 (Victoria Legal Aid). Victoria Legal Aid did not submit that imprisonment is never appropriate for first-time offenders – only that the sentencing judge should retain his or her discretion to sentence first-time offenders to a sanction less severe than the two-year minimum.
Youthfulness and evidence of rehabilitation

4.93 Evidence of rehabilitation\(^{396}\) (not merely prospects of rehabilitation)\(^{397}\) was suggested by stakeholders as justifying exemption from the minimum, to the extent that it is in the interests of the community that the young person not be detained.\(^{398}\) The Children’s Court Barristers Association\(^{399}\) provided an example of the case where there may be a lengthy delay between offence and charge, during which time the young person may have ‘disassociated themselves from co-offenders, stayed out of trouble, returned to school and returned to live with family’.\(^{400}\)

4.94 Evidence of rehabilitation between the offending behaviour and the sentencing of the offender was considered particularly important in circumstances of delay.\(^{401}\) However, as discussed at [4.85], while evidence of rehabilitation is an example of a factor that will mitigate against sentence, the high level of harm and culpability present in gross violence offences means that this circumstance is not likely to be a sufficient consideration in and of itself to justify exemption from the statutory minimum sentence.

Youthfulness and other factors

4.95 A number of submissions referred to the need to deal with juvenile offenders differently than adults under the exceptional circumstances provisions.\(^{402}\) It was submitted that young offenders present with a range of vulnerabilities (often in combination) including,\(^{403}\)

- disadvantage;
- a disproportionately high level of intellectual, mental health or cognitive impairment issues (including acquired brain injury);
- drug, alcohol and other substance abuse issues;
- homelessness;
- disengagement from school and family breakdown;
- responsibility as carer;
- abuse or neglect;
- post-traumatic stress;
- being victims of crime or domestic violence among other factors;
- trauma of refugee experience, including cultural dislocation, loss of established social networks, and the practical demands of resettlement; and
- trauma from substantiated childhood violence, abuse or neglect, and the impact such trauma may have on the social, emotional and cognitive development and level of functioning of children.

\(^{396}\) Submission 1 (Anonymous); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 5 (B. Herbert): ‘Post-offence/Pre-sentence behaviour (evidence of rehabilitation)’. The Law Institute of Victoria (Submission 11) discussed ‘evidence of substantial rehabilitation’ referring to both adult and child offenders.

\(^{397}\) Prospects of rehabilitation have also been suggested as one of the factors to be taken into account in determining special reasons: Submission 5 (B. Herbert).

\(^{398}\) Submission 1 (Anonymous).

\(^{399}\) Submission 9 (Children’s Court Barristers Association).

\(^{400}\) Submission 9 (Children’s Court Barristers Association).

\(^{401}\) Submission 1 (Anonymous).

\(^{402}\) Submission 12 (Youth Affairs Council of Victoria).

\(^{403}\) Submission 10 (Child Safety Commissioner); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 16 (Berry Street).
4.96  Stakeholders submitted that young people who have experienced trauma may have diminished ability to regulate their moods and control their behaviour,404 and may therefore be more likely to exhibit challenging, and at times, violent behaviour.405 Berry Street commented that:

(1) It is reasonable for a court to presume that parliament would not have intended that children and young people that have diminished capacity stemming from childhood violence and abuse, and have been or are in the care of the state, be subjected to statutory minimum sentences.406

4.97  As discussed at [4.85], while all of these factors may mitigate against sentence, the high level of harm and culpability present in the proposed gross violence offences means that these individual circumstances are not likely to be sufficient considerations in and of themselves to justify exemption from the statutory minimum.

Significant delay not attributable to the offender plus evidence of rehabilitation

4.98  One stakeholder submitted that an exception should be ‘[s]ignificant delay in the commencement of prosecution proceedings where the delay is not attributable to the accused’.407 The Children’s Court Barristers Association submitted that, in some unusual cases, significant delay in addition to evidence of rehabilitation should constitute an exemption from the statutory minimum sentence.408

4.99  Although this factor is relevant to all offenders, and will properly be considered in mitigation of a sentence, evidence of rehabilitation between the offending behaviour and the sentencing of the offender may be particularly important for a child.409

4.100 Although significant delay not attributable to the offender is mitigating from a public policy perspective, and evidence of the offender’s rehabilitation since offending will also be considered mitigating, neither factor diminishes the high level of harm and culpability present in gross violence offences at the time of the offending, and the same considerations discussed at [4.85] will apply.

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404  Submission 10 (Child Safety Commissioner); Submission 16 (Berry Street).
405  Submission 16 (Berry Street).
406  Submission 16 (Berry Street).
407  Submission 1 (Anonymous).
408  See [4.93] above.
409  Submission 1 (Anonymous).
Circumstances relating to the case

Actions of victims

4.101 A number of stakeholders submitted that – while not condoning any form of violence – the actions of victims in limited circumstances could possibly amount to a special reason for the offender to be exempted from the statutory minimum sentence.

4.102 Stakeholders considered that such circumstances included, for example, where:

- a bullied child lashes out against his or her bully;
- a victim of sexual abuse or a parent of a victim confronts his or her abuser;
- the offence was committed by a victim of family violence against the perpetrator of that family violence; or
- the offence was committed in self-defence but the force used in self-defence was excessive.

4.103 While the actions of the victim do not excuse the offending conduct, they may be seen to diminish the culpability of the offender.

4.104 Victoria Legal Aid described the possible situation where a victim of family violence attacks the perpetrator of family violence and given the power imbalance uses some form of incapacitation. Although acknowledging that such conduct is serious, Victoria Legal Aid submitted that the community would expect such an offender to be dealt with differently from an offender whose offending did not occur in this context.

4.105 Provocation was expressly mentioned as an exceptional circumstance by some stakeholders; however, these examples would likely be more worthy of consideration for exemption if the injury threshold were ‘serious’ rather than ‘severe’ as proposed by the Council. Because of the level of harm required for the gross violence offences, the behaviour of a victim is not as significant a consideration as it might otherwise be.

4.106 Again, as with all potentially mitigating circumstances, the fact that the circumstance does not amount to a ‘special reason’ does not prohibit the court from taking that circumstance into consideration when determining the appropriate sentence, when that sentence is above the statutory minimum.

Minor involvement in the offending

4.107 The Victoria Bar Council and the Criminal Bar Association of Victoria (endorsed by Liberty Victoria) proposed an exception where:

- an offender who in some way encouraged another to commit an assault which resulted in serious injury being caused but played a very minor role in doing so and did not themselves engage in any violence.

4.108 Where a person counsels or aids and abets offending he or she would be charged as a principal offender under section 323 of the Crimes Act 1958 (Vic); however, the Council has recommend that an offender whose complicity is not as a principal offender in the first degree (as discussed at [2.138]–[2.141]) should still be convicted of a gross violence offence, but the statutory minimum should not apply.

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410 Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 22 (Victoria Legal Aid); Submission 25 (Liberty Victoria).
411 Submission 22 (Victoria Legal Aid).
412 Submission 14 (Centre for Multicultural Youth); Submission 22 (Victoria Legal Aid).
Public Policy exemptions

Guilty plea

4.109 Although a guilty plea may represent remorse on the part of the offender (and so be categorised as a circumstance personal to the offender), in *R v Gray* the court stated that a reduction of a sentence following a plea of guilty might more properly be considered a circumstance relating to the public interest:

The plea may operate … to save a [witness] the ordeal of giving evidence … The plea may serve … to save the State a lengthy and expensive trial. Yet in neither of such cases might the accused feel genuine remorse … Weighing the strength of a possible defence against the likely penalty upon conviction he [or she] may elect deliberately to adopt a course which involves a measure of public utility in the belief that his [or her] own ultimate interest is best served by doing so. The judge may (not shall) take such circumstance into account in the accused’s favour.

4.110 This common law principle has been incorporated into legislation, such that (regardless of issues of remorse or the willingness of an offender to facilitate the course of justice) when considering sentence, a court in Victoria must have regard to:

whether the offender pleaded guilty to the offence, and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so.

4.111 In addition to circumstances where the offender provides assistance to authorities (see [4.62]–[4.69]), Victoria Legal Aid suggested that a sentencing judge should be entitled to reduce a sentence below the statutory minimum to recognise a plea of guilty. The Crime Victims Support Association similarly proposed that there should be a discount (for example, of one year) for those offenders who ‘initially plead guilty and save court time and expense’.

4.112 Victoria Legal Aid submitted that excluding a guilty plea from the ‘special reasons’ under which a court can impose a sentence less than the statutory minimum would have the effect of ‘removing any meaningful recognition of … a guilty plea’ such that:

this will reduce the number of guilty pleas entered because an accused person will have ‘nothing to lose’ by taking a case to trial.

4.113 Including a plea of guilty as a special reason for exemption from the statutory minimum sentence assumes that without being able to sentence below the minimum sentence there is limited scope for a court to impose a reduction in sentence to acknowledge that plea. However, the proposed gross violence offences (incorporating a severe injury threshold) are of such high culpability, that they are likely to result in sentences that fall well above the minimum sentence.

4.114 In those circumstances, the court has a broad sentencing range between the minimum sentence and the proposed statutory maxima for the severe injury offences (20 years for intentionally causing severe injury and 15 years for recklessly causing severe injury) to impose a sentence that provides for a reduction for a plea of guilty along with other mitigating factors.

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414 Ibid 232 (McInerney and Crockett JJ).
416 Submission 22 (Victoria Legal Aid).
417 Submission 6 (Crime Victims Support Association).
418 Submission 22 (Victoria Legal Aid).
Combinations of factors

4.115 Although the existence of one factor may be considered insufficient to justify an exemption from the statutory minimum sentence, it may be the case that a combination of factors results in significantly diminished culpability for the offender or strong evidence that the offender would not cope with a custodial sentence.

Stakeholders’ views

4.116 The Law Institute of Victoria provided a case example that included circumstances that, when examined individually, might not be considered sufficient to justify an exemption from the statutory minimum, but may be sufficient when seen as a combination of factors, for example, the offender:

• is an elderly offender with dementia;
• has no prior offending;
• pleaded guilty at an early stage; and
• would find prison particularly difficult.\textsuperscript{419}

4.117 The Law Institute of Victoria submitted that such factors should be taken into account ‘either singly, or in combination’.\textsuperscript{420}

4.118 As discussed above, the Children’s Court Barristers Association provided an example where there has been a lengthy delay between the offence and the charge, in which time the child has disassociated from co-offenders, stayed out of trouble, returned to school and returned to his family.\textsuperscript{421}

4.119 A number of stakeholders expressly submitted that ‘the Court may take into account a combination of factors in deciding whether special circumstances apply’\textsuperscript{422} or that it is ‘unfathomable to assume that Parliamentarians could not have intended mental illness, drug or alcohol influence or a combination of these factors’\textsuperscript{423} to allow an exemption from the statutory minimum sentence.

The Council’s view

4.120 The Council considers that a court should be permitted to conclude that different mitigating factors, taken in combination, amount to ‘special reasons’. However, the existence of multiple factors is required to be measured against the high level of harm and culpability represented by the gross violence offences, and the court must find that it is in the interests of justice that an offender with a combination of factors that amount to ‘special reasons’ be exempt from the statutory minimum.

\textsuperscript{419} Submission 11 (Law Institute of Victoria).
\textsuperscript{420} Submission 11 (Law Institute of Victoria).
\textsuperscript{421} Submission 9 (Children’s Court Barristers Association).
\textsuperscript{422} Submission 1 (Anonymous).
\textsuperscript{423} Submission 23 (Jesuit Social Services).
**Recommendation 3**

The exceptional circumstances should be called ‘special reasons’.

The special reasons should be framed in a non-exhaustive list.

That list should include:

- intellectual disability or cognitive impairment (including acquired brain injury);
- mental illness;
- particular psychosocial immaturity and/or particular vulnerability in custody; and
- assistance by the accused to police or an undertaking by the accused to assist the Crown.

The legislation should provide that the court may impose a sentence (including a non-custodial sentence) other than the statutory minimum non-parole period, where the court considers that a lesser sentence is appropriate because of both the existence of special reasons and that it is in the interests of justice.

Where a youthful offender (18 to 20 years of age) is convicted of intentionally causing severe injury or recklessly causing severe injury and satisfies the eligibility criteria for youth detention under the dual track system, that offender should be subject to the same statutory minimum period of detention imposed on a 16 or 17 year old offender convicted of intentionally causing severe injury or recklessly causing severe injury.

The legislation should provide scope that a combination of reasons can be found to constitute special reasons.
Chapter 5
Current sentencing practices: adults

5.1 The Council has recently published a report on current sentencing practices for the causing serious injury offences. That report comprehensively examines data collected from sentencing remarks on cases containing at least one of the two causing serious injury offences sentenced in the higher courts in 2008–09. The report identifies the nature of the offending, characteristics of the victims, some of the effects of the offences on the victims and the characteristics of offenders who commit serious injury offences.

5.2 This chapter presents some of the analysis from that report, and some further analysis of non-parole periods for serious injury offences, for the purpose of providing a background to the likely impact of gross violence offences, which is examined in Chapter 7.

5.3 In this chapter, the following abbreviations have been used:

- ADU – adjourned undertaking;
- CBO – community-based order;
- CCTO – combined custody and treatment order;
- FIN – fine;
- ICO – intensive correction order;
- ICSI – intentionally causing serious injury;
- IMP – immediate imprisonment;
- NPP – non-parole period;
- PSS – partially suspended sentence;
- RCSI – recklessly causing serious injury;
- TES – total Effective Sentence;
- WSS – wholly suspended sentence; and
- YJC – youth justice centre order.

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Intentionally causing serious injury

Sentencing outcomes

5.4 Sentencing practices for intentionally causing serious injury in the higher courts in 2008–09 were skewed towards the most severe sanction, being imprisonment. Figure 2 shows a breakdown of the sentences imposed for all charges (121) of intentionally causing serious injury sentenced in that year. Nearly three-quarters (72.7%) of those charges received imprisonment. The least severe sentence imposed for a charge was a community-based order (2.5%). Other sanctions imposed were wholly suspended sentences (9.1%), youth justice centre orders (8.2%), partially suspended sentences (5.0%) and intensive correction orders (1.6%).

Figure 2: Percentage of ICSI charges by sentence type and length, higher courts, 2008–09 (n = 121)
Non-parole periods

5.5 As the terms of reference express the minimum sentence for adults in terms of a non-parole period, the Council examined the distribution of non-parole periods for the period 2008–09. A single non-parole period is set for a case. Figure 3 shows the spread of non-parole periods by total effective sentence for those cases of intentionally causing serious injury that received imprisonment in the higher courts. This includes all cases, not just those with gross violence factors. An outlier with a 17-year total effective imprisonment term and a 14-year non-parole period was excluded.

5.6 Of the 109 cases of intentionally causing serious injury in 2008–09, 78 cases (71.6%) received an immediate term of imprisonment. Of those, 16 (20.5%) received a non-parole period at or above the proposed statutory minimum of four years, while 62 (79.5%) received a non-parole period below the proposed statutory minimum.

5.7 For this offence, there are clusters around the five-year total effective imprisonment length, with approximately a three year non-parole period. There is a broadly consistent ratio between the total effective sentence and the non-parole period, with the non-parole period generally being two-thirds of the total effective sentence. The non-parole period tends to increase as a proportion of the total effective sentence as that sentence increases.

Figure 3: Non-parole period for cases of ICSI by total imprisonment length, higher courts, 2008–09 (excluding outliers)

Note: One outlier is not shown in this graph. The case had a total effective imprisonment term of 17 years and a non-parole period of 14 years. Two cases with non-numeric total effective imprisonment sentences are also not shown.
Statutory minimum sentences for gross violence offences

Recklessly causing serious injury

Sentencing outcomes

Higher courts

5.8 Figure 4 shows the distribution of sentence types imposed in the higher courts on charges of recklessly causing serious injury. Compared with intentionally causing serious injury, sentences for charges of recklessly causing serious injury were more evenly split between imprisonment (42.4%) and non-custodial sentences. Just over one-third of charges (34.2%) received a wholly suspended sentence and one in 20 (6.3%) received a community-based order.

Magistrates’ Court

5.9 Figure 5 (page 101) shows the distribution of sentencing outcomes for charges of recklessly causing serious injury sentenced in the Magistrates’ Court compared with the higher courts. In the Magistrates’ Court, compared with the higher courts, a much smaller proportion of recklessly causing serious injury charges received imprisonment (17.4%), while the lowest sentence imposed was an adjourned undertaking (2.9%). Wholly suspended sentences were the most common sanction (21.5%), followed by community-based orders (20.4%).

5.10 Because the Magistrates’ Court does not record sentencing remarks, the Council could not estimate the proportion of charges involving gross violence factors by examining sentencing remarks.

Non-parole periods

5.11 Figure 6 (page 101) shows the spread of non-parole periods by total effective sentence for those cases of recklessly causing serious injury that received imprisonment in the higher courts. This includes all recklessly causing serious injury cases, not just those cases with gross violence factors. Of the 56 cases that received a sentence of immediate imprisonment, 5 (8.9%) received a non-parole period at or above the proposed statutory minimum of four years, while 51 (91.1%) received a non-parole period below four years.

Figure 4: Percentage of RCSI charges by sentence type and length, higher courts, 2008–09 (n = 158)
On the basis of all cases sentenced for that offence (including those cases that did not receive a sentence of imprisonment) only 3.6% received a non-parole period at or above the proposed four-year minimum. There were clusters around the two to three year length for the head sentence with approximately a one-year non-parole period. Of all the recklessly causing serious injury cases, 2.1% received no non-parole period. Those offenders who did not receive a non-parole period are not reflected on the graph as this would be ‘zero’.

The absence of a non-parole period means that the total effective sentence, rather than the non-parole period, reflects the earliest that the offender could ordinarily be released.

**Figure 5:** Percentage of RCSI charges by sentence type, Magistrates’ Court, 2008–09 (n = 455)

**Figure 6:** Non-parole period for cases of RCSI by total imprisonment length, higher courts, 2008–09 (excluding outliers)
Analysis of non-parole periods and gross violence factors

5.14 In order to provide some basis for the estimation of the number of cases that may fall within the new offences of gross violence (and the consequential effect on the current sentencing practices for non-parole periods), the Council identified those cases involving a gross violence factor, or a proxy for that factor.

5.15 Critically, this analysis does not include the severe injury threshold recommended by the Council. As a result, all of the cases that contain a gross violence factor are those that also contain ‘serious’ injury, and so may not reflect the same high level of harm as represented by the new gross violence offences.

5.16 The figures presented below represent an analysis for the offence of intentionally causing serious injury only. The Council also analysed recklessly causing serious injury, but as the distribution of sentences was very similar the graphs have not been replicated for that offence.

Co-offenders

5.17 Figure 7 (page 103) presents the non-parole period and the total effective sentence for those cases of intentionally causing serious injury that received imprisonment where there were two or more people involved in the offence in addition to the offender, compared with one other person or no people involved in the offence in addition to the offender.

5.18 Although the factor is described as ‘co-offenders’, this term described people involved in the offending in addition to the offender, but not necessarily charged with any offence. As discussed at [2.138]–[2.141], the Council has recommended that the gross violence element of ‘gang of three or more persons’ be limited to co-offenders who are principal offenders in the first degree.425 As a result, the number of cases represented by these data would include, but be the outer limit of, the number of cases that may fall within that element of gross violence.

5.19 One outlier not displayed in the graph did not involve two or more co-offenders. In that case, the offender received a 17-year total effective imprisonment term and a 14-year non-parole period.426

5.20 Of those cases involving three or more persons for which at least one offender received a sentence of imprisonment, 6.0% (one case) received a non-parole period above the proposed four-year minimum. Those cases involving multiple persons were not clustered at the upper end of the scale, and again this factor in isolation does not seem to determine the sentencing outcome.

5.21 Where a person was charged along with co-offenders, but was not the instigator or had a limited role in the offence, his or her level of involvement may have influenced the sentencing outcome to a greater degree than the aggravating fact that he or she had co-offenders.

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425 But excluding those offenders who are principal offenders in the first degree by virtue under common law principles of ‘extended common purpose’ or ‘joint criminal enterprise’: see [2.125]–[2.129].

426 The outlier was a case containing charges of rape in addition to ICSI.
**Figure 7:** Non-parole periods for cases of ICSI with 2+ co-offenders, by total imprisonment length, higher courts, 2008–09 (excluding outliers)

Note: One outlier is not shown in this graph. The case had a total effective imprisonment term of 17 years and a non-parole period of 14 years. This case did not involve two or more co-offenders. Two cases with non-numeric total effective imprisonment sentences are also not shown.
Statutory minimum sentences for gross violence offences

Weapon

5.22 Figure 8 presents the use of a weapon, or the absence of a weapon, as a factor for those intentionally causing serious injury cases that received imprisonment, comparing the non-parole period with the total effective sentence. Weapons were present in the majority of cases that received imprisonment (75.6%, or 59 cases). The Council data code for all implements, so the weapon could be anything from a tree branch to a knife or firearm. Of those cases involving a weapon that received imprisonment, 20.3% (12 cases) received a non-parole period at or above the proposed four-year minimum.

5.23 There are a few data points where weapon and no weapon overlap, but this does not change the distribution of the sentences. The Council also examined the presence of a weapon in cases involving recklessly causing serious injury. For that offence, the presence of a weapon was less common (61.5% of all cases) however, the distribution of sentences was very similar.

Figure 8: Non-parole periods for cases of ICSI with a weapon, by total imprisonment length, higher courts, 2008–09 (excluding outliers)

Note: One outlier is not shown in this graph. The case had a total effective imprisonment term of 17 years and a non-parole period of 14 years. This case involved a weapon. Two cases with non-numeric total effective imprisonment sentences are also not shown.
Incapacitation

5.24 Figure 9 presents loss of consciousness by the victim as a factor, or the absence of this factor, for those intentionally causing serious injury cases that received imprisonment, comparing the non-parole period with the total effective sentence.

5.25 Only one case, or 5.9% of all cases receiving imprisonment that had this factor, received a sentence with a non-parole period above the proposed minimum of four years. While the non-parole periods for this factor were slightly higher than for the other two examined by the Council, this factor was not obviously determinative of sentencing severity.

5.26 As discussed at [2.185]–[2.187] ‘loss of consciousness’, while a rough proxy for ‘incapacitation’, would not include those cases where the victim was unable to defend him- or herself. Similarly, there may be cases in which severe injury is inflicted without the victim ever losing consciousness.

Figure 9: Non-parole periods for cases of ICSI with loss of consciousness, by total imprisonment length, higher courts, 2008–09 (excluding outliers)

Note: One outlier is not shown in this graph. The case had a total effective imprisonment term of 17 years and a non-parole period of 14 years. This case did not involve the loss of consciousness of the victim. Two cases with non-numeric total effective imprisonment sentences are also not shown.
Statutory minimum sentences for gross violence offences
Chapter 6
Current sentencing practices: children

Range of sentencing outcomes in the Children’s Court

Current sentencing levels and numbers in custody

6.1 The Council examined sentences imposed in the Children’s Court for offenders aged 16 or 17 from 2006 to 2009. Over that period, 427 offenders aged 16 or 17 (at the time of the offence) were sentenced in the Children’s Court in a total of 401 cases involving either intentionally causing serious injury or recklessly causing serious injury (or both). This amounts to an average of approximately 100 intentionally causing serious injury or recklessly causing serious injury cases sentenced in the Children’s Court per year.

6.2 Over the same 2006–09 period only three offenders aged 16 or 17 (at the time of the offence) were sentenced in the County or Supreme Court for cases involving at least one intentionally causing serious injury offence. No cases involving recklessly causing serious injury charges against a child aged 16 or 17 were sentenced in those courts during that period.

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427 The four-year period from January 2006 to December 2009 has been selected for analysis as 17 year old offenders were not sentenced by the Children’s Court before July 2005 (prior to that date, the definition of child was restricted to those aged under 17).

428 Given the Council’s recommendation that the two-year minimum applies to cases not charges, the scenarios developed to determine potential sentencing levels and numbers in custody use cases rather than offences sentenced. The number of ICSI and RCSI offences sentenced over the period was 109 and 354 respectively (for this count, where more than one offence is committed, it is counted more than once).

429 There were 92 cases involving ICSI offences and 321 cases involving RCSI offences. The 401 cases sentenced to either ICSI or RCSI is not the sum of the 92 ICSI cases and the 321 RCSI cases, because 12 offenders were sentenced to both ICSI and RCSI offences in the same case.
6.3 Of the 401 offenders sentenced in the Children’s Court for intentionally causing serious injury or recklessly causing serious injury cases, 79 received custodial sentences over the four-year period from 2006 to 2009. Offenders sentenced to detention for intentionally causing serious injury or recklessly causing serious injury cases therefore amounted to 15.0% of the total population of 16 or 17-year-old offenders (532 offenders) sentenced to detention over the period.

6.4 Lengths of sentences ranged from two months to 24 months for intentionally causing serious injury or recklessly causing serious injury cases. The most frequent sentence length of youth detention was 12 months (21 people) and the average was 10.2 months. However, the actual length of time served in detention is uncertain given the availability of parole for offenders deemed eligible by the Youth Parole Board.430

6.5 There are no data indicating characteristics of the cases that received a sentence of imprisonment, and therefore it is not possible to measure the number of cases that would have amounted to gross violence. Judge Grant of the Children’s Court has indicated that youth detention orders are used as a sanction of last resort and are generally reserved only for those offenders who have committed very serious offences or for chronic, high-risk offenders who have continued to offend despite numerous previous interventions.431

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430 Submission 21 (Youthlaw). Once sentenced to a period of detention by the Children’s Court, the child falls under the jurisdiction of the Youth Parole Board, which will consider eligibility for parole. See further discussion of parole at [3.28]–[3.32].

6.6 Between 2006 and 2009, there were 322 cases involving intentionally causing serious injury or recklessly causing serious injury offences that did not receive a custodial sentence (80.3% of all intentionally causing serious injury or recklessly causing serious injury cases). Of the non-custodial sentences, probation was the most frequent sentencing order imposed (103 of 322 cases, or 32.0%), followed by a youth supervision order (90 of 322 cases, or 28.0%), a good behaviour bond (64 of 322 cases, or 19.9%), a youth attendance order (35 of 322 cases, or 10.9%) and a fine (26 of 322 cases, or 8.1%). Accountable undertakings were the least imposed sentencing order (4 of 322 cases, or 1.2%).

6.7 Given the small number of children sentenced for intentionally causing serious injury and recklessly causing serious injury, the current sentencing levels and numbers in custody are likely to be subject to significant fluctuations from year to year.
Chapter 7
Likely effect on sentencing levels

Offenders aged 18 and over

7.1 The terms of reference asked the Council to advise on the likely effects of recommendations and options put forward by the Council on two specific aspects of the criminal justice system:
   • sentencing levels for the relevant offences; and
   • the numbers of persons serving custodial and non-custodial sentences.

7.2 In response to this request, the Council has produced a set of estimates based on two possible scenarios.

7.3 The purpose of the estimates is to illustrate the magnitude of increases to sentences from current sentencing levels and increases to the numbers in custody that are likely to occur under both scenarios, based on certain assumptions.

7.4 The estimates do not represent forecasts of the actual numbers of prisoners in future years. The actual numbers of persons serving sentences for these offences in future years will be affected by a wide range of factors that may include population growth and other demographic changes as well as possible changes in the prevalence, reporting, investigation and prosecution of the offences. The estimates do not seek to incorporate these factors as they are highly uncertain and they are not necessary for the purpose of this advice. The estimates also do not take into account any changes in pleading practices or the granting of bail. Further, the estimates do not incorporate a prediction of the effects of cases found by a court to have ‘special reasons’ to exempt the offender from the imposition of the statutory minimum sentence. Such a prediction relies on estimates of both the number of these cases and the sentences they would receive. While it is reasonable to assume that some cases would fall into the ‘special reasons’ category and therefore receive a sentence less than the four-year statutory minimum, the Council deemed any estimates of the number of cases and the likely sentences to be overly speculative.
Statutory minimum sentences for gross violence offences

Scenarios

7.5 The options proposed by the Council for applying the four-year statutory minimum non-parole period varied along the axis of scope of cases.

7.6 Scope of cases refers to the characteristics of cases to which the statutory minimum is likely to apply. This depends on how ‘gross violence’ is defined. For the purposes of the scenarios, the Council has adopted two definitions:

1. **Broad definition.** This definition is based on the criteria proposed in the terms of reference. It involves the presence of at least one of the following factors: the offender plans an attack in advance; the offender is part of a group of three or more offenders; the offender plans in advance to use a weapon and then uses the weapon to engage in an offence; and the offender continues to violently attack the victim after the victim is incapacitated.

2. **Recommended definition.** This definition is based on the Council’s recommended approach and uses the same ‘gross violence’ criteria as the broad definition, but is restricted to cases where the victim receives a ‘severe’ injury as a result of the offence.

7.7 Earlier in this report, the Council recommended that gross violence offences be framed so as to require ‘severe’ injury; however, scenarios based on the broad definition are also provided to illustrate the likely difference if the Council’s recommendation is not adopted.

7.8 The Council used these two scenarios to produce estimates in sentencing outcomes and prisoner numbers.

Sentence adjustment

7.9 There are a number of approaches to how sentences for gross violence cases would be adjusted. In regard to how the sentence may be adjusted, the Office of Public Prosecutions Victoria submitted that:

The OPP does not agree that a legislatively mandated minimum sentence should necessitate the artificial inflation of head sentences to maintain ratios, or other accused’s sentences to differentiate them. It would be inappropriate and unfair to inflate a sentence for these purposes beyond the intention of the sentencing judge.432

7.10 The approach applied here was to attach a four-year non-parole period to all cases deemed to be gross violence cases that, under the existing legislation, received a sentence below the proposed four-year statutory minimum (including non-imprisonment sentences).433

7.11 For gross violence cases that received at or above the statutory minimum, no adjustment was made. For example, a gross violence case with a non-parole period of three years would have the non-parole period increased to four years, as would a case with a non-parole period of six months. A gross violence case with a non-parole period of five years would not change.

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432 Submission 26 (Office of Public Prosecutions Victoria).
433 It cannot be assumed that the type of cases that received less than the minimum non-parole period (in the absence of a statutory minimum) would be sentenced by a court by the addition of four years – proportionally increasing sentences across the range of sentencing outcomes – rather than an adjustment up to the four-year minimum non-parole period.
Methodology

Data

7.12 Sentencing outcome data from 2004–05 to 2009–10 for the Magistrates’ Court and from 1999–00 to 2000–10 for the higher courts were available to the Council. Data relating to gross violence and injury factors, however, were only available for the higher courts and only for the period 2008–09. The focus of the analysis therefore was restricted to 2008–09 data.

7.13 The Council collected gross violence and injury factors from sentencing remarks. These have a number of limitations in terms of data collection and analysis. First, not all sentencing remarks are available to the Council. Remarks were unavailable to the Council for 8.7% (12) recklessly causing serious injury cases and 8.3% (9) intentionally causing serious injury cases sentenced in the higher courts. This level of missing data was considered acceptable for producing estimates.

7.14 Second, the information provided in sentencing remarks varies between cases and between judges (see [2.62]–[2.63]). One judge may choose to mention a particular factor that another judge may see as unimportant. Third, where judges do provide information on a particular factor, they may use different language to describe the same thing. Due to these latter two limitations, it was important to focus on factors to which judges referred consistently and in a clear and unambiguous fashion.

Variables relating to the broad definition of gross violence

7.15 Only certain elements of the broadly defined gross violence factors were available in sentencing remarks. The Council collected data on whether the offender used a weapon, whether the offender had two or more co-offenders and whether the victim lost consciousness during, or shortly after, the offence. Data relating to planning of the offence could not be collected due to the ambiguity in language used in sentencing remarks.

7.16 Given the limitations with the available data, the Council chose to define ‘gross violence’ for the purposes of measurement as having one or more of the following factors: weapon use, two or more co-offenders and loss of consciousness by the victim.

Severe injury variables

7.17 In order to satisfy the recommended definition of gross violence, the Council collected information on the injuries sustained by the victim as well as the treatment received by the victim for his or her injuries. In order to distinguish ‘severe’ injury from ‘not severe’ injury, the Council measured ‘severe injury’ as head, chest or lung injuries that required hospitalisation.
Magistrates’ Court data

7.18 In order to identify gross violence cases, the Council used an estimate produced by the Magistrates’ Court of the percentage of recklessly causing serious injury cases sentenced in that court that involved gross violence according to the broad definition (50%). In order to select 50% of recklessly causing serious injury cases, the Council chose cases with the most severe sentences to represent the broad definition of gross violence.

7.19 As a proxy for the recommended definition of gross violence, the Council used cases sentenced in the Magistrates’ Court to a non-parole period of over 12 months.

7.20 It should be noted that due to the jurisdictional limit for cases sentenced in the Magistrates’ Court, ‘gross violence’ cases previously sentenced in the Magistrates’ Court will be heard and determined in the higher courts, where the four-year non-parole period can be imposed.

Estimates

7.21 The Council used 2008–09 sentencing data to produce estimates of changes to sentencing levels for recklessly causing serious injury and intentionally causing serious injury and estimates of additional prisoners.

Estimates for sentencing

7.22 To estimate the change in sentencing practices as a result of the proposed reforms, the Council compared key sentence outcome information from the 2008–09 recklessly causing serious injury and intentionally causing serious injury data with and without the proposed legislative changes.

Estimates for prisoner numbers

7.23 The effect of sentence outcomes on the prison population is determined both by the number of prisoners entering prison and by the length of stay. Therefore, a significant increase in the length of imprisonment terms (as opposed to a small increase) may take years to flow through to the prison population. In order to examine the long-term effects on prisoner numbers, the Council extrapolated the 2008–09 sentencing data, repeating these over a 10-year period.

7.24 To estimate prisoner numbers flowing from the proposed options, for each case the Council estimated prison entry and exit dates using the date of sentence and the length of the minimum imprisonment term imposed. The estimated entry and exit dates allowed the Council to examine the number of offenders serving prison sentences on a given day according to various scenarios. Estimates for a given day were produced by subtracting the cumulative number of prisoners released up to that day from the cumulative number of prisoners received up to that day.

7.25 The estimated number of additional prisoners was calculated by obtaining the difference between the number of prisoners on a given day – assuming there is no change in sentencing (‘control’ scenario) – and the number of prisoners on that day under a given scenario (‘test’ scenarios).

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434 Victoria Legal Aid provided advice that, on a rough estimation, approximately 20% of RCSI cases currently dealt with summarily would contain gross violence factors: email from Victoria Legal Aid to the Sentencing Advisory Council, 29 July 2011. The Magistrates’ Court conducted a two-week survey in order to gather information about summary jurisdiction granted for RCSI matters. Surveys of summaries of facts involved in RCSI cases in the summary stream confirmed that almost 50% may constitute ‘gross violence’. Submission 20 (The Magistrates’ Court). In order to provide the outer limit of the potential effect, the Council chose to conduct an analysis using the higher estimation.
Effect on sentencing levels

Key assumptions

7.26 There are a number of key assumptions made in these estimates. Some assumptions relate to definitions of sentence outcomes:

- the minimum imprisonment term is either the non-parole period or the total effective imprisonment term for cases that have no non-parole period;
- the minimum imprisonment terms for the following sentences in ‘gross violence’ cases are zero: partially suspended sentences, combined custody and treatment orders, wholly suspended sentences and community-based orders; and
- the minimum imprisonment term for ‘gross violence’ cases that receive a youth justice centre order are not affected.

7.27 Other assumptions relate to the relationship between sentencing outcomes and subsequent time spent in jail:

- offenders who receive a sentence requiring their immediate custody enter prison on the date of sentence; and
- prisoners are released from prison on the first possible release date relating to the case.

7.28 As indicated earlier, the final set of assumptions relate to the broad sentencing environment:

- the type, number and sentencing for causing serious injury cases in 2008–09 repeat over the projection period;
- no other changes occur to sentencing legislation that would affect sentencing of these offences; and
- charging practices and plea behaviour do not change.

Estimates from scenarios

Scenario 1: Broad definition of gross violence

7.29 In the higher courts, the sentences of 146 offenders sentenced for a causing serious injury offence in 2008–09 would increase (see Table 1, page 116). This represents 58.6% of offenders sentenced for a causing serious injury offence in the higher courts.

7.30 The percentage of offenders who receive imprisonment would increase from 55.0% to 88.6%. The mean imprisonment term for recklessly causing serious injury would increase from 2.0 to 3.7 years (the projected mean is below 4.0 years because it includes non-gross violence cases as well as gross violence cases), and the mean imprisonment term for intentionally causing serious injury would increase, from 3.5 to 4.5 years.

7.31 In the Magistrates’ Court, the sentences for 227 of the 454 offenders sentenced in a given year for recklessly causing serious injury would increase and the mean minimum imprisonment term would increase from 0.8 to 3.8 years (see Table 2, page 118).

7.32 The resulting increase to the prison population flowing from changed sentencing in both the Magistrates’ Court and the higher courts would occur over a four-year period and be in the order of 1,300 additional prisoners (see Figure 12, page 119).
Statutory minimum sentences for gross violence offences

Scenario 2: Recommended definition of gross violence and sentences increase to four years

7.33 In the higher courts, the sentences of 34 offenders sentenced for a causing serious injury offence in 2008–09 would increase (see Table 1). This represents 13.7% of offenders sentenced for a causing serious injury offence.

7.34 The percentage of all causing serious injury offenders who receive imprisonment would increase to 61.8%. The mean imprisonment term for recklessly causing serious injury would increase from 2.0 years to 2.5 years, and the mean imprisonment term for intentionally causing serious injury would increase from 3.5 years to 3.7 years (the projected mean is below 4.0 years because it includes non-gross violence cases as well as gross violence cases).

Table 1: Sentencing practices over one year for causing serious injury offences according to control and test scenarios, higher courts

<table>
<thead>
<tr>
<th>Cases</th>
<th>Control scenario</th>
<th>Scenario 1 - broad</th>
<th>Scenario 2 - recommended</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ICSI</td>
<td>RCSI</td>
<td>Total</td>
</tr>
<tr>
<td>All cases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Imprisonment sentence (number)</td>
<td>78</td>
<td>59</td>
<td>137</td>
</tr>
<tr>
<td>Non-custodial sentence (number)</td>
<td>31</td>
<td>81</td>
<td>112</td>
</tr>
<tr>
<td>Mean minimum imprisonment term (years)</td>
<td>3.5</td>
<td>1.8</td>
<td>2.7</td>
</tr>
<tr>
<td>Gross violence cases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Imprisonment sentence (number)</td>
<td>66</td>
<td>39</td>
<td>105</td>
</tr>
<tr>
<td>Non-custodial sentence (number)</td>
<td>24</td>
<td>60</td>
<td>84</td>
</tr>
<tr>
<td>Mean minimum imprisonment term (years)</td>
<td>3.4</td>
<td>1.8</td>
<td>2.8</td>
</tr>
<tr>
<td>Gross violence plus severe injury cases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Imprisonment sentence (number)</td>
<td>17</td>
<td>10</td>
<td>27</td>
</tr>
<tr>
<td>Non-custodial sentence (number)</td>
<td>4</td>
<td>13</td>
<td>17</td>
</tr>
<tr>
<td>Mean minimum imprisonment term (years)</td>
<td>2.8</td>
<td>1.8</td>
<td>2.4</td>
</tr>
</tbody>
</table>
7.35 In the Magistrates’ Court, the sentences for 30 of the 454 offenders sentenced in a given year for recklessly causing serious injury would increase and the mean minimum imprisonment term would increase from 0.8 years to 1.5 years (Table 2, page 118).

7.36 The resulting increase to the prison population flowing from changed sentencing in both the Magistrates’ Court and the higher courts would occur over a four-year period and be in the order of 180 additional prisoners (see Figure 12, page 119).

7.37 Figure 10 shows the change over time in the number of prisoners resulting from two higher courts test scenarios.

**Figure 10:** Estimated number of additional prisoners and 10% error bars over time from sentences imposed in the higher courts under two sentencing scenarios
Table 2 shows the sentencing practices in the Magistrates’ Court for recklessly causing serious injury cases under a ‘no change’ scenario and under two test scenarios.

Figure 11 (page 119) shows the change over time in the number of prisoners resulting from two Magistrates’ Court test scenarios.

Figure 12 (page 119) shows the number of additional prisoners over time for two scenarios in the two levels of adult courts combined.

Table 2: Sentencing practices over one year for recklessly causing serious injury offences according to control and test scenarios, Magistrates’ Court

<table>
<thead>
<tr>
<th>Cases</th>
<th>Control scenario</th>
<th>Scenario 1 – broad</th>
<th>Scenario 2 – recommended</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All cases</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Imprisonment sentence (number)</td>
<td>99</td>
<td>227</td>
<td>99</td>
</tr>
<tr>
<td>Non-custodial sentence (number)</td>
<td>355</td>
<td>227</td>
<td>355</td>
</tr>
<tr>
<td>Mean minimum imprisonment term (years)</td>
<td>0.8</td>
<td>4.0</td>
<td>1.6</td>
</tr>
<tr>
<td><strong>Gross violence cases (top 50%)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Imprisonment sentence (number)</td>
<td>99</td>
<td>227</td>
<td>n.a</td>
</tr>
<tr>
<td>Non-custodial sentence (number)</td>
<td>128</td>
<td>0</td>
<td>n.a</td>
</tr>
<tr>
<td>Mean minimum imprisonment term (years)</td>
<td>0.8</td>
<td>4.0</td>
<td>n.a</td>
</tr>
<tr>
<td><strong>Gross violence plus severe injury cases (NPP over 12 months)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Imprisonment sentence (number)</td>
<td>30</td>
<td>n.a</td>
<td>30</td>
</tr>
<tr>
<td>Non-custodial sentence (number)</td>
<td>0</td>
<td>n.a</td>
<td>0</td>
</tr>
<tr>
<td>Mean minimum imprisonment term (years)</td>
<td>1.7</td>
<td>n.a</td>
<td>4.0</td>
</tr>
</tbody>
</table>
Figure 11: Estimated number of additional prisoners and 10% error bars over time from sentences imposed in the Magistrates’ Court under two scenarios

Figure 12: Estimated number of additional prisoners and 10% error bars over time from sentences imposed in adult courts under two sentencing scenarios
16 and 17 year old offenders

Potential sentencing levels and numbers in custody

7.41 The terms of reference require consideration of the ‘likely effects of recommendations and options put forward by the Council on sentencing levels for the relevant offences and on the numbers of persons serving custodial and non-custodial sentences’.

7.42 For the purposes of estimating those effects, the Council has tested two scenarios, based upon the following definitions:

1. **Broad definition.** This definition is based on the criteria proposed in the terms of reference. It involves the presence of at least one of the following factors: the offender plans an attack in advance; the offender is part of a group of three or more offenders; the offender plans in advance to use a weapon and then uses the weapon to engage in an offence; and the offender continues to violently attack the victim after the victim is incapacitated.

2. **Recommended definition.** This definition is based on the Council’s recommended approach and uses the same ‘gross violence’ criteria as the broad definition, but is restricted to cases where the victim receives a ‘severe’ injury as a result of the offence.

7.43 As discussed at [6.1]–[6.7], given the small number of children sentenced for intentionally causing serious injury or recklessly causing serious injury each year (approximately 100), the potential sentencing levels and numbers in custody are likely to fluctuate significantly from year to year.

7.44 The possible percentage of cases involving both gross violence factors and severe injury is based on the impressions of Victoria Legal Aid practitioners, as no formal data are available. The Children’s Court and Victoria Police prosecutors were also asked to provide estimates as to the likely impact on sentencing levels. The Children’s Court advised that careful monitoring would be required to give a more accurate estimate, but did not dispute the figures provided by Victoria Legal Aid.435 Victoria Police prosecutors were not in a position to provide estimates.

7.45 It should also be noted that the compounding effect (see [7.32] and [7.36]) with adult court sentencing levels is unlikely to be the same in the Children’s Court.

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435 Meeting with Children’s Court Magistrates (28 June 2011).
Estimates from scenarios

Broad definition

7.46 On the broad definition, stakeholders have suggested that there will be a significant net-widening effect, pulling a high number of young people into detention facilities, including first-time offenders with mitigating characteristics.436

7.47 According to Victoria Legal Aid (which funds representation for accused children in approximately 98% of cases),437 at least 80% of serious injury cases involving 16 or 17 year old offenders would involve at least one gross violence factor.438 This would result in approximately 80 cases per year of either intentionally causing serious injury or recklessly causing serious injury, being sentenced in the Children’s Court to the proposed two-year minimum.

7.48 Given that less than 20 offenders currently receive detention per year for either intentionally causing serious injury or recklessly causing serious injury, on a broad definition of gross violence there will be a substantial increase in the number of children receiving detention. Assuming that 80% of offenders from 2006 to 2009 met the broad definition of gross violence, this would result in an increase from 19.75 offenders per year sentenced to youth detention to 80.2 offenders per year sentenced to youth detention, or a quadrupling of offenders sentenced to detention.

7.49 In addition, unlike the current numbers of children sentenced to detention for serious injury offences who receive lower sentences and may have access to parole, those receiving the statutory minimum sentence will be retained in detention for at least the minimum two-year period (see [8.85]–[8.91]).439

Recommended definition

7.50 Victoria Legal Aid has suggested that a small proportion of cases (about 2% of all recklessly causing serious injury and 5% of all intentionally causing serious injury) with 16 or 17 year old offenders involve severe injury. With a yearly average of 23 intentionally causing serious injury cases and 80 recklessly causing serious injury cases sentenced over the past four years, this amounts to 1.15 intentionally causing serious injury cases and 1.6 recklessly causing serious injury cases per year sentenced in the Children’s Court.

7.51 Victoria Legal Aid has suggested that fractionally fewer than 2% of recklessly causing serious injury cases and 5% of intentionally causing serious injury cases would involve both severe injury and a gross violence factor.440 Critically, these estimates do not account for the definition of offending in company as recommended by the Council (see [2.138]–[2.141]).

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436 Submission 21 (Youthlaw). This issue was also discussed in Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 8 (Victorian Council of Social Service); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 22 (Victoria Legal Aid); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania). The Uniting Church in Australia Synod of Victoria and Tasmania acknowledged the difficulty in determining the extent to which incarceration will be affected, but referred to examples of mandatory sentencing in other jurisdictions that have seen a significant rise in the prison population: Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).

437 Meeting with Victoria Legal Aid (6 May 2011). About 98% of children are represented by Victoria Legal Aid, 51% of these in-house.

438 This percentage is derived from the impressions of Victoria Legal Aid duty lawyers and not from formal collection methods, and was based on the gross violence factors as proposed in the terms of reference.

439 Submission 10 (Child Safety Commissioner); Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw).

440 Email from Victoria Legal Aid to the Sentencing Advisory Council, 11 August 2011.
Statutory minimum sentences for gross violence offences
Chapter 8
Other relevant matters

8.1 The terms of reference require the Council to advise on ‘any other matters it considers relevant’. Those matters that the Council regards as being particularly significant or that have been strongly highlighted by stakeholders are outlined below.

8.2 It is important to note that stakeholders’ comments and submissions were formulated on the terms of reference and many discussed the potential impacts of the gross violence scheme in the absence of the ‘severe’ injury threshold as recommended by the Council.

Impact on pleading practices and court costs

8.3 A common concern expressed in submissions\(^\text{441}\) and in the Council’s meetings with stakeholders\(^\text{442}\) was that the introduction of statutory minimum sentences would have a significant effect on a number of interrelated pleading issues, including:

- the number of guilty pleas;
- the process of plea negotiation; and
- resulting court costs and court delays.

\(^{441}\) Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 6 (Crime Victims Support Association); Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 8 (Victorian Council of Social Service); Submission 9 (Children’s Court Barristers Association); Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 25 (Liberty Victoria).

\(^{442}\) Comments by stakeholders at the Adult Offenders Discussion Forum (31 May 2011); Meetings with County Court Judges (9 May 2011, 7 June 2011).
Impact on the number of pleas

8.4 In 2008–09 in the higher courts, 89.3% of intentionally causing serious injury charges and 90.3% of recklessly causing serious injury charges were resolved by way of a guilty plea. A guilty plea saves both courts and the community the time and expense of conducting a trial, and spares witnesses (including victims) from having to give evidence and being subject to cross-examination, which may be a traumatic experience (particularly for violent offending).

8.5 Although a guilty plea may also demonstrate the offender’s remorse (and so be mitigating in that respect) as discussed at [4.109] it is a common law principle that the public policy benefits of a guilty plea may be considered at sentencing regardless of the presence of remorse, and this has been incorporated into section 5(2)(e) of the Sentencing Act 1991 (Vic).

8.6 The Council’s analysis of sentencing outcomes for intentionally causing serious injury and recklessly causing serious injury in the higher courts for 2008–09 found that offenders who pleaded guilty received an average reduction in sentence of approximately 25%.

8.7 Given the reduction in sentence for a guilty plea, there is clearly an incentive for offenders to plead guilty. Stakeholders submitted that a statutory minimum sentence will reduce that incentive for offenders to plead guilty, given that a court will be unable to reduce a sentence below the minimum when taking into account that guilty plea.

8.8 The Victorian Bar Council and the Criminal Bar Association of Victoria noted that:

In many cases, the applicability of a statutory minimum sentence will remove or substantially diminish the incentive to plead guilty to a serious injury offence. As a result the number of trials listed in the County Court on serious injury charges will increase.

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443 Sentencing Advisory Council (2011), above n 273, 27.
444 Sentencing Advisory Council (2011), above n 273, 39. These data were obtained as a result of the operation of section 6AAA of the Sentencing Act 1991 (Vic), which requires the court to state what sentence an offender would have received but for the plea of guilty.
445 Submission 7 (Victorian Bar Council and the Criminal Bar Association of Victoria); Submission 25 (Liberty Victoria).
8.9 Youthlaw also submitted that a similar result would occur in the Children’s Court jurisdiction:

Under a statutory sentencing regime, there is little incentive for an offender to plead guilty given that the penalty is set and no discount will apply. This will result in more matters being listed for contested hearing, which will consequently extend already lengthy waiting periods to have a matter finalised at Court.446

8.10 It was submitted that, as with the adult jurisdiction, only a small percentage of offences involving child offenders are currently contested.447 It was suggested that, as accused persons would be unlikely to plead guilty to a two-year minimum term, there may be an increase in cases going to contest mention, to contested hearings and ultimately on appeal.448

8.11 The potential impact on the number of pleas will depend on at least two significant considerations:

• whether or not the offender believes that he or she would have received a reduction in sentence below the statutory minimum; and
• whether or not the offender considers the evidentiary burden for the Crown in proving a gross violence offence such that it is worth ‘rolling the dice’449 and pleading not guilty.

8.12 In the context of a severe injury threshold (which means that the level of both harm and culpability present in the proposed severe injury offences is very significant), many cases are likely to receive a sufficiently high sentence, even with a reduction for a guilty plea, for the non-parole period to be above the statutory minimum. Therefore, at least for these cases, there would continue to be an incentive for the offender to plead guilty.

446 Submission 21 (Youthlaw).
447 Submission 5 (B. Herbert).
448 Submission 14 (Centre for Multicultural Youth).
449 Comments by stakeholders at the Adult Offenders Discussion Forum (31 May 2011).
Impact on plea negotiation

8.13 Any impact on the incentive to plead guilty, as discussed above, will also affect the process of plea negotiation. One of the duties of the prosecuting authority (comprising police prosecutors in the Magistrates’ Court and the Director of Public Prosecutions in the higher courts) is to avoid the financial cost and the social cost of conducting unnecessary trials. There is a strong public interest in resolving matters by way of a guilty plea, where possible and appropriate. The Director’s Policy As To The Early Resolution Of Cases states:

The Director of Public Prosecutions recognises the public interest in identifying pleas of guilty at the earliest possible stage in the criminal justice process. Not only does this give certainty of outcome, it also saves valuable community resources, lessens the burden on witnesses, and assists victims of crime. The Office of Public Prosecutions (OPP) must, at every stage of the prosecution process, proactively consider and assess whether a matter can be resolved as early as possible to a plea of guilty to appropriate charges regardless of whether the possibility of resolution is raised by the accused’s legal representatives. This is essential to the efficient and economic use of OPP resources, the interests of victims, witnesses and their families, and the proper and effective conduct of prosecutions.

8.14 This incentive for the early resolution of matters by way of a guilty plea must be balanced against the need to ensure that matters are prosecuted in such a way that the court may impose a sentence that appropriately reflects the criminality of the offending behaviour. The Office of Public Prosecutions’ policy The Prosecutorial Discretion states:

No plea will be accepted by the Crown unless it reasonably reflects the nature of the criminal conduct of the accused and provides an adequate basis upon which the Court can impose an appropriate sentence. In exercising this discretion it has to be borne in mind that in a particular case the public interest may be better served by the certainty of a conviction secured by the acceptance of a lesser plea than by the unpredictability inherent in a contested trial.

8.15 Often, when an offender has been charged with an aggravated form of an offence, the matter may be resolved by the acceptance of a plea to the non-aggravated form, where appropriate, subject to the policy considerations described above. In some cases, the higher evidentiary burden of proving an aggravated form of offending may result in a greater level of unpredictability in securing a conviction. Framing gross violence as separate discrete offences (see [2.25]–[2.27]) will maintain flexibility for the prosecuting authorities to accept a plea to a lesser charge where they consider it appropriate.

8.16 A concern expressed by a number of stakeholders was that the removal of judicial discretion, particularly in relation to children, may simply function to shift the power to determine penalties from the court to the prosecuting authorities. Victoria Legal Aid noted that, in the Children’s Court, the police ‘both investigate and prosecute without the benefit of arms length oversight from the DPP’. While acknowledging these concerns, the Council has recommended that the gross violence offences of intentionally causing severe injury and recklessly causing severe injury should be excluded from the Children’s Court jurisdiction, as discussed in Chapter 3.

450 Including the potential impact on any victim witnesses.
453 Submission 8 (Victorian Council of Social Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).
454 Submission 22 (Victoria Legal Aid).
Impact on court delay and court costs

8.17 Any significant decrease in the number of guilty pleas (and any corresponding increase in contested matters going to trial) is likely to increase court delays, court costs and associated resourcing issues (for example, for Victoria Legal Aid and the Office of Public Prosecutions).

8.18 Judges from the County Court expressed, among a range of concerns, that if the gross violence offences were to be applied as proposed in the terms of reference, a significant number of recklessly causing serious injury cases that contained gross violence factors would necessarily move from the jurisdiction of the Magistrates’ Court and be heard and determined in the County Court jurisdiction.

8.19 The Magistrates’ Court submitted that (among other concerns):

- The likely impacts of the proposal for a four-year minimum mandatory sentence for recklessly causing serious injury (and intentionally causing serious injury) include the following ramifications for the Court:
  - The removal of recklessly causing serious injury charges from the jurisdiction of the Court, and the transferral of these offences into the Court’s committal stream;
  - The Court would be unable to impose a sentence in approximately 50% of all recklessly causing serious injury charges;
  - The committal jurisdiction of the Court would face further increases to already busy workloads;
  - An estimated 225 contested committals per year would blow out committal lists.

8.20 Judges from the County Court also cautioned that, from a resourcing perspective, the transfer of a large number of matters into the court’s jurisdiction as described above, as well as any substantial reduction in the current rate of serious injury cases in the County Court that resolve by way of a guilty plea, would require a significant number of additional judges (and necessary support staff), along with the provision of additional court rooms, if long delays were to be avoided.

8.21 The Springvale Monash Legal Service noted this potential for a movement of cases from the Magistrates’ Court to the County Court and commented:

Such a shift will have negative impacts in time and cost increases if not supported by appropriate increases in higher court resources.

8.22 Similarly, within the Children’s Court jurisdiction, Youthlaw submitted that:

Contesting a matter consumes more resources and is an expensive resolution given the costs involved. This includes:
- Costs for Victoria Police and the Office of Public Prosecution in preparing briefs of evidence;
- Increased costs for defence counsel, which will directly impact on the current resourcing of Victoria Legal Aid as more matters proceed to hearing;
- Costs to support additional court staff and judicial officers.

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455 Meetings with County Court Judges (9 May 2011, 7 June 2011).
456 As a result of the maximum term of imprisonment that can be imposed in the Magistrates’ Court for any single offence being two years (which would exclude the statutory minimum term of four years for adult offenders).
457 Submission 20 (Magistrates’ Court of Victoria).
458 Meetings with County Court Judges (9 May 2011, 7 June 2011).
459 Submission 19 (Springvale Monash Legal Service).
460 Submission 21 (Youthlaw).
8.23 The Council acknowledges the significant concerns of the Magistrates’ Court, the County Court and other stakeholders regarding the resourcing implications of a large number of cases that would otherwise be dealt with summarily as a plea of guilty in the Magistrates’ Court becoming contested trials in the County Court (with the associated need for a committal hearing in the Magistrates’ Court).

8.24 The Council notes, however, that the threshold of severe injury – upon which the Council’s recommendations for the gross violence offences are based – will limit the potential cases to those where there is a high level of harm and culpability, in accordance with policy objectives of the proposed reforms.

8.25 The Council sought advice from stakeholders on whether or not cases involving severe injury are presently determined in the Magistrates’ Court, and Victoria Legal Aid advised:

It is our experience that it is extremely rare that [recklessly causing serious injury] cases are either initiated or determined in the summary stream where the injuries are life threatening or genuinely serious.461

8.26 In those circumstances, it is unlikely that a significant number of cases of recklessly causing serious injury that involve a severe level of injury are presently being heard and determined in the Magistrates’ Court. Those cases that involve, as the intent of the gross violence proposal suggests, a high level of both harm and culpability are unlikely to be appropriate for determination in a summary jurisdiction, in any event.

8.27 Although the Council’s recommendation that the determination of offences of gross violence be excluded from the Children’s Court jurisdiction (see [3.65]–[3.70]) will result in a reduction in the Children’s Court trial workload462 (and an increase in the workload of the County Court in determining those cases), the potential number of cases is likely to be small (see [7.50]–[7.51]).

8.28 Even after accounting for the severe injury threshold, it is conceivable that accused persons will still wish to contest charges of gross violence offences to a greater degree than charges of intentionally causing serious injury or recklessly causing serious injury, given the statutory minimum. The Victorian Aboriginal Legal Service submitted that a likely consequence will be that ‘court costs increase when more defendants contest charges to try to avoid mandatory penalties’.463

8.29 The nature of gross violence offences – which involve greater evidentiary burdens on the Crown than a charge of intentionally causing serious injury or recklessly causing serious injury – means that the average trial for a gross violence offence may last longer than a trial for a serious injury offence. This may mean that fewer sitting days are available for judges to hear and determine other matters, which may have implications for delay in the higher courts.

461 Email from Victoria Legal Aid to the Sentencing Advisory Council, 29 July 2011.
462 As with the death-related excluded offences, the Children’s Court will still retain jurisdiction over committals for gross violence offences.
463 Submission 15 (Victorian Aboriginal Legal Service).
Disproportionate impact of scheme

8.30 It was submitted that certain groups of offenders may be disproportionately affected by a minimum sentencing regime, particularly if a severe injury threshold is not adopted and the factors constituting gross violence are broadly applied.

8.31 The minimum sentencing scheme targets offending behaviour that, on a broad reading of the terms of reference, is more likely to be committed by young people. Intentionally causing serious injury and recklessly causing serious injury cases are committed at a disproportionate rate by those under the age of 25 (the time period in which it is argued a person may not yet have achieved complete brain maturation). Victorian sentencing data show that over the 2008–09 financial year, 433 persons aged 16 to 24 (at the time of sentence) were sentenced in Victoria’s courts for intentionally causing serious injury and/or recklessly causing serious injury. This represents over half of all people sentenced for these offences (52.6%).

8.32 Table 3 shows the number and rate (per 100,000 population) of persons sentenced for intentionally causing serious injury or recklessly causing serious injury, according to their age. When the underlying populations of different age groups are considered, the rate at which persons aged 16 to 24 are sentenced is 61.0 per 100,000 persons. This is six times the rate for people aged 25 years and over (10.7 per 100,000) and more than double the rate for people in the 25 to 34 age group (25.7 per 100,000).

Table 3: Number and rate per 100,000 population by age group of people sentenced in Victorian courts for RCSI or ICSI, 2008–09

<table>
<thead>
<tr>
<th>Age group</th>
<th>Number</th>
<th>Rate (per 100,000 population in age group)</th>
</tr>
</thead>
<tbody>
<tr>
<td>16 to 24</td>
<td>433</td>
<td>61.0</td>
</tr>
<tr>
<td>25 and over</td>
<td></td>
<td></td>
</tr>
<tr>
<td>25 to 34</td>
<td>202</td>
<td>25.7</td>
</tr>
<tr>
<td>35 to 44</td>
<td>129</td>
<td>16.3</td>
</tr>
<tr>
<td>45 to 64</td>
<td>58</td>
<td>4.3</td>
</tr>
<tr>
<td>65 and over</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td>Total 25 and over</td>
<td>390</td>
<td>10.7</td>
</tr>
<tr>
<td>Total/rate all ages</td>
<td>823</td>
<td>18.8</td>
</tr>
</tbody>
</table>

8.33 It was submitted that the gross violence elements – if broadly applied – are also more likely to be satisfied by young people; as stated by Youthlaw, ‘by virtue of their age, young people are more likely to commit offences in groups and in public in comparison with adult offending’. Some stakeholders drew parallels between the likely impact of the Victorian proposal with the impact caused on such groups by the mandatory sentencing schemes operating in Western Australia and the Northern Territory: Submission 19 (Springvale Monash Legal Service); Submission 15 (Victorian Aboriginal Legal Service).

464 Some stakeholders drew parallels between the likely impact of the Victorian proposal with the impact caused on such groups by the mandatory sentencing schemes operating in Western Australia and the Northern Territory: Submission 19 (Springvale Monash Legal Service); Submission 15 (Victorian Aboriginal Legal Service).

465 In its submission, the Uniting Church in Australia Synod of Victoria and Tasmania suggested that violent crime is most often committed by males in their teens to early twenties (Submission 24).

466 These data capture age at date of sentence rather than the date of offending. Therefore, they differ from other Children’s Court data included in this report. As the data capture age at the date of sentence, some 15 year olds at the time of sentencing may be included and some persons aged 24 at the time of offending but 25 at the time of sentencing may be excluded.

467 Submission 21 (Youthlaw). This issue was also raised by the Child Safety Commissioner (Submission 10).
in groups was considered by some stakeholders to be a ‘normal part of adolescent behaviour’. It was submitted that young people, and particularly marginalised young people (such as Indigenous people, refugees, culturally and linguistically diverse people and socio-economically disadvantaged young people), tend to associate in groups in public, given the lack of other space to congregate, limited resources and safety reasons. Given the nature of socialising among young people and their visibility to authorities, young people may satisfy the gang/group criterion for gross violence more readily than other offenders.

8.34 It was submitted that young people may be more likely to carry weapons and may be more likely to engage in impulsive behaviours (given their cognitive immaturity and susceptibility to peer influence) which may mean that they are more likely to satisfy one or more of the gross violence elements, such as the weapon and incapacitation elements (see [2.142]–[2.167], [2.168]–[2.193]).

8.35 According to submissions, a minimum sentencing regime may also have a disproportionate impact on those ‘most disadvantaged’ – such as those with mental illness or drug and alcohol addictions and those who have been subject to violence, trauma, neglect and abuse – who are more likely to be in conflict with the criminal justice system. It was submitted that a minimum sentencing regime may serve only to ‘entrench’ this pre-existing disadvantage.

8.36 A two-year minimum sentence may, for example, have a particularly harsh impact on those with mental health issues, given the lack of appropriate mental health and support services in prisons and detention centres. According to the Mental Health Legal Centre, a minimum sentencing regime will only serve to further ‘warehouse’ the mentally ill in prisons and detention facilities.

8.37 Stakeholders submitted that the effect of a minimum sentencing scheme may also be more greatly felt by those from rural and remote communities who may be relocated a significant distance away from their families and communities. The effect may also be greatly felt by young people who may be ‘more responsive to rehabilitation’ than adult offenders, particularly those without violent prior offences who may otherwise have been diverted from custody.

8.38 As the submissions on these issues relate to the merits of the policy of introducing a statutory minimum scheme, the Council makes no comment on them.

468 Submission 10 (Child Safety Commissioner). It was submitted that congregating within groups may also fit within cultural norms: Submission 23 (Jesuit Social Services). This issue was also discussed by the Centre for Multicultural Youth (Submission 14).

469 Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw).

470 For a variety of reasons including for self-protection or for utilitarian purposes. See [2.154].

471 Submission 21 (Youthlaw).

472 Submission 21 (Youthlaw).


474 Submission 18 (Mental Health Legal Centre).

475 Submission 16 (Berry Street).

476 Submission 18 (Mental Health Legal Centre).

477 Submission 8 (Victorian Council of Social Service); Submission 21 (Youthlaw). This may be particularly problematic for children given that there are fewer detention facilities in regional locations.

478 Submission 19 (Springvale Monash Legal Service).

479 Springvale Monash Legal Service (Submission 19) submitted that young people, particularly those without violent priors, who may have otherwise been diverted from custody, will be incarcerated for a significant period reducing their chances for rehabilitation, and potentially entrenching them in an incarceration-offending cycle.
Impact on Indigenous offenders

Disproportionate impact on Indigenous people

8.39 The introduction of a minimum sentencing regime may have a disproportionate impact on Indigenous people, particularly if gross violence offences are not subject to a severe injury threshold.

8.40 The Victorian Aboriginal Legal Service drew parallels between the proposed scheme and mandatory sentencing schemes in the Northern Territory and Western Australia. According to the Victorian Aboriginal Legal Service, although such schemes may not be directly discriminatory (they do not distinguish between Indigenous and other offenders), they are indirectly discriminatory as Indigenous people may be disproportionately affected given their contact with the criminal justice system and the type of offences targeted.

8.41 There is no doubt that Indigenous people are significantly over-represented in police custody, prisons and juvenile detention centres. In its submission to the Council, the Victorian Aboriginal Legal Service referred to a recent report of the Standing Committee on Aboriginal and Torres Strait Islander Affairs. The report indicated that the rate of Aboriginal and Torres Strait Islander imprisonment has worsened since the recommendations of the Royal Commission into Aboriginal Deaths in Custody (the ‘Royal Commission’) 20 years ago and that Aboriginal and Torres Strait Islander children are now 28 times more likely than other juveniles to be incarcerated.

8.42 The Royal Commission reported that underlying Indigenous conflict with the criminal law (including the commission of serious injury offences) are factors of social, economic and cultural disadvantage, including unemployment, lack of education, poor health, alcohol dependency and separation of children from parents, and cultural factors such as perceptions relating to the appropriate use of public space (with public, group-orientated behaviour resulting in increased visibility to authorities).

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480 Submission 8 (Victorian Council of Social Service); Submission 12 (Youth Affairs Council of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 19 (Springvale Monash Legal Service); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).

481 Submission 15 (Victorian Aboriginal Legal Service).

482 Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, Final Report (1991), vol 1, [1.3.3].

483 The Royal Commission into Aboriginal Deaths in Custody found that the disproportion is largely a result of the social, economic and cultural disadvantages faced by Indigenous people in Australian society. Factors such as unemployment, lack of education, poor health, alcohol dependency, separation of children from parents and cultural factors such as perceptions relating to the appropriate use of public space (among other factors) have been found to contribute to Indigenous conflict with the criminal law. Commonwealth of Australia (1991), above n 482 [1.7.1], [1.2.17], ch 2; vol 2, pt C.


485 Commonwealth of Australia (1991), above n 482 [1.7.1], [1.2.17], ch 2; vol 2, pt C.
8.43 The Victorian Aboriginal Legal Service submitted that a minimum sentencing scheme is inconsistent, and indeed in ‘stark contrast’, with the findings and recommendations of the Royal Commission, such as recommendation 92 – that governments legislate to enforce the principle that imprisonment be utilised as a sanction of last resort. It was submitted that the minimum sentencing scheme may also undermine advances that have been made in the rehabilitation of Koori offenders (see, for example, the Koori Court initiatives, below) and may conflict with Commonwealth policy, including the findings of the Standing Committee on Aboriginal and Torres Strait Islander Affairs, that governments need to ‘focus on early intervention and the wellbeing of Indigenous children rather than punitive responses’.

8.44 One effect of the statutory minimum regime may be that it discourages reporting of gross violence offences, which is contrary to the public interest. In consultation with the Council, Judge Smallwood, who presides over the Koori County Court, said that much Indigenous offending occurs within extended families, between an offender and victim who are often well known to one another in the context of an ongoing dispute, and often involves extreme intoxication. Given the close connection between offender and victim, victims are often reluctant to report incidents to authorities. The knowledge that the reporting of a serious injury may result in an extended family member receiving a two- or four-year minimum sentence may exacerbate the current disincentive to report crime, particularly if the offences of gross violence do not require a severe injury threshold. It may be, however, that the disincentive to report would diminish if a severe injury threshold were in operation.

8.45 The practical consequences of the minimum detention period may also more profoundly impact young Indigenous people, given the number of Indigenous people living in rural, regional or remote areas – a significant distance from youth detention centres. Indigenous offenders required to relocate are likely to experience a loss of connection with community and family, despite these being matters the court is required to take into account in sentencing under section 362 of the Children, Youth and Families Act 2005 (Vic).

8.46 The high proportion of Indigenous youth with mental health issues and cognitive impairment (it is estimated that 25% of Indigenous people within the parole system are registered as intellectually disabled) means that the scope of the definition of ‘special reasons’ (discussed in Chapter 4) is of particular significance.

486 Submission 15 (Victorian Aboriginal Legal Service).
487 Submission 15 (Victorian Aboriginal Legal Service).
488 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011), above n 484, x. This was referred to by the Victorian Aboriginal Legal Service in its submission (Submission 15).
489 Meeting with His Honour Judge Smallwood (24 June 2011).
490 Children, Youth and Families Act 2005 (Vic) ss 362(a)–(b); Submission 21 (Youthlaw).
491 Submission 8 (Victorian Council of Social Service), referring to Department of Human Services (2010), above n 267, xvi.
Possible impact on Koori Courts

8.47 Koori Court Divisions of the County, Magistrates’ and Children’s Courts have been established to provide a more inclusive and culturally relevant sentencing process for Indigenous offenders, by involving (among other measures) Aboriginal Elders and other members of the Indigenous community in the court hearing.

8.48 Koori Courts are one of a number of initiatives that aim to address the over-representation of Aboriginal and Torres Strait Islander people in custody, by confronting issues underlying offending behaviour. For a Koori Court to have jurisdiction over a matter, the accused must consent to jurisdiction and must plead guilty or intend to plead guilty. What transpires is a ‘sentencing conversation’ conducted with minimum technicality and formality around an oval table, with the magistrate (or judge) sitting at the same level as other participants. All participants (including Elders and Respected People, the accused, family members of the accused, the Koori support worker, the prosecutor and the defence lawyer) are given the opportunity to contribute to proceedings. Indigenous Elders and Respected People retain a particularly significant role in the proceedings (although the magistrate or judge retains full responsibility for sentencing, as in mainstream courts). Seated side by side with the magistrate at the oval table, Elders and Respected People talk directly to the accused, offering advice and encouragement and asking questions.

8.49 The Koori Court process is regarded as highly effective in assisting a judicial officer to understand matters relevant to the determination of sentence (such as the offender’s remorse, prospects of rehabilitation and reasons for offending) and enabling the offender to explain and ‘take ownership’ over his or her actions and to address issues underlying his or her offending behaviour. The introduction of a minimum sentencing regime may, however, substantially impact the operation of the Koori Court Division of the County Court – particularly if a severe injury threshold is not

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493 See for example, Children and Young Persons (Koori Court) Act 2004 (Vic) s 1; Victoria, Children and Young Persons (Koori Court) Bill, Parliamentary Debates Legislative Assembly, 3 November 2004, 1196–1199 (Sherryl Garbutt, Minister for Community Services).

494 Submission 15 (Victorian Aboriginal Legal Service).

495 The accused must also be an ‘Aborigine’, the offence must be of a particular type and the accused must consent to the matter being heard by the Koori Court: Children, Youth and Families Act 2005 (Vic) s 519(1); Magistrates’ Court Act 1989 (Vic) s 4F(1); County Court Act 1958 (Vic) s 4E. In the Koori Court Division of the County Court, the court must also consider that it is appropriate in all the circumstances that the proceeding be dealt with by it: County Court Act 1958 (Vic) s 4E(e).

496 The term ‘sentencing conversation’ was used by Mark Harris in his evaluation of the Magistrates' Koori Court: Department of Justice, Victoria, ‘A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program, October 2002–October 2004 (2006). The term, which was originally drawn from a comment made by Dr Kate Auty, the inaugural Magistrate of the Shepparton Magistrates’ Koori Court, has subsequently been used to refer to the method of communication in Koori Court proceedings. See further Sentencing Advisory Council (2010), above n 492, 16.

497 Children, Youth and Families Act 2005 (Vic) ss 517(3); Magistrates’ Court Act 1989 (Vic) s 4D(4); County Court Act 1958 (Vic) s 4A(5).

498 For an example of the seating arrangements of the Koori Court Division in the Magistrates’ Court, see Sentencing Advisory Council (2010), above n 492, 16.

499 See further Sentencing Advisory Council (2010), above n 492, 19.

adopted. The Koori Court Division of the Children’s Court is also likely to be significantly affected, as its workload will be reduced whether or not the Children’s Court retains jurisdiction over gross violence offences. For the same jurisdictional reasons as discussed at [2.215], the Koori Court Division of the Magistrates’ Court will be unable to hear gross violence offences.

8.50 Serious injury cases make up a large proportion of the caseload of the Koori Court Division of the County Court, and may also significantly contribute to the caseload of the Koori Court Division of the Children’s Court. Judge Smallwood observed that the Koori Court Division of the County Court is very much a ‘court of violence’. The Council does not have data available indicating the precise number of intentionally causing serious injury or recklessly causing serious injury cases heard in the Koori Court Division of the County Court. However, Judge Smallwood estimated that approximately 75–80% of cases are crimes against the person, with the majority of those involving a charge of intentionally causing serious injury or recklessly causing serious injury. If a severe injury threshold were not adopted, many of these intentionally causing serious injury and recklessly causing serious injury cases would no longer be heard in the Koori Court Division of the County Court. This is because an offender must consent to the jurisdiction of the Koori Court Division of the County Court and plead guilty, and it is unlikely that an accused person charged with gross violence will plead guilty to an offence that attracts a minimum sentence of four years in the County Court or two years in the Children’s Court. Where a minimum sentence applies, there is also very little incentive for an accused person to consent to a process that is likely to be more personal, confronting and intrusive than mainstream processes.

8.51 Under the minimum sentencing regime (if a severe injury threshold is not required), it is likely that many cases would proceed to trial in the mainstream County Court, significantly reducing the caseload of Koori Court Divisions. In those cases involving a large number of co-offenders, this increase in contested matters may become a ‘logistical nightmare’ for the court, the parties and the community. Judge Lawson of the County Court provided an example of a large riot/affray involving a number of Indigenous offenders. By pleading guilty, the offenders saved the Koori Court Division of the County Court the time and expense of proving the matters at trial, and by consenting to the Koori Court process, the proceedings became part of a broader mediation process working to heal a long-standing rift in the community.

8.52 The Council notes these concerns; however, as discussed above, the gross violence offences involving a severe injury threshold will target only those highly culpable offenders who have inflicted severe harm (in accordance with the policy objectives). Therefore the impact on the Koori Court Division of the County Court is likely to be significantly reduced.

501 If the Children’s Court retains jurisdiction over gross violence offences, offenders charged with gross violence are unlikely to consent to the procedure. If the offences are excluded from jurisdiction, the workload of the Division would also be reduced, and these offences will be heard in higher courts (for the reasons provided above, children are also unlikely to be sentenced in the Koori Court Division of the County Court).

502 Although the Council has no data to this effect.

503 Meeting with His Honour Judge Smallwood (24 June 2011).

504 Meeting with His Honour Judge Smallwood (24 June 2011).

505 See [8.48] above.

506 Sentencing Advisory Council (2010), above n 492, 19.

507 Email from Her Honour Judge Lawson to the Sentencing Advisory Council, 8 June 2011.

508 It is, however, uncertain how many serious injury cases in the Koori Court Division of the County Court would also contain severe injury.
Human rights obligations

8.53 A number of stakeholders submitted that statutory minimum sentencing contravenes Australia’s human rights obligations\(^{509}\) and is incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).\(^{510}\)

International human rights obligations

8.54 Among the international conventions said to be contravened by the imposition of a minimum sentencing regime is the *Convention of the Rights of the Child* (CROC),\(^ {511}\) which Australia ratified in 1991 (with one reservation).\(^ {512}\)

8.55 The CROC sets out a number of civil, cultural, economic, political and social rights pertaining to persons under 18 years of age\(^{513}\) and the manner in which those rights are to be protected.\(^{514}\)

8.56 The CROC requires that, in all actions concerning children, the best interests of the child be a primary consideration in decision-making,\(^{515}\) sentencing be proportionate\(^{516}\) and subject to appeal\(^{517}\) with rehabilitation a principle of particular emphasis\(^ {518}\) and detention be used as a sanction of last resort and for the minimum amount of time required.\(^{519}\)

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\(^{509}\) Submission 11 (Law Institute Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).

\(^{510}\) Submission 8 (Victorian Council of Social Service); Submission 12 (Youth Affairs Council of Victoria); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw).


\(^{512}\) Submission 11 (Law Institute Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).

\(^{513}\) Children are defined in Article 1 as those under 18 years of age, unless under relevant law, age of majority is attained earlier: *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1.


8.57 Stakeholders suggested that the imposition of minimum sentences on children (and therefore the removal of judicial discretion) contravenes these rights. Submissions commented that statutory minimum custodial sentences may be disproportionate, in that such sentences do not take into account the circumstances of the offence or the offender and because offences at the lower end of the spectrum of seriousness potentially attract the same sentence as more serious offences. It was submitted that detention is not used as a sanction of last resort, the principle of rehabilitation is not promoted and minimum sentences may not be appealed on the grounds of being manifestly excessive (even if the regime ‘captures offenders who the community does not think should serve long terms of imprisonment’). It was also submitted that the loss of discretion as to sentence length is also contrary to the need for sentences to be for the shortest possible time to achieve the purpose for which the sentence is imposed.

8.58 Other international conventions said to be violated by a minimum sentencing regime include the Convention on the Elimination of Racial Discrimination and the International Covenant on Civil and Political Rights. The Victorian Aboriginal Legal Service suggested that comments made by the Committee on Elimination of Racial Discrimination about the Northern Territory mandatory sentencing regime are applicable to the proposed Victorian reforms. The Committee has commented that the Northern Territory regime:

appears to target offences that are committed disproportionately by Indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration.

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521 Submission 11 (Law Institute of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid).

522 Lower-end offences may therefore be punished ‘disproportionately more severely’: Submission 21 (Youthlaw).

523 Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth); Submission 21 (Youthlaw). According to the Law Institute of Victoria (Submission 11), if a juvenile is detained after a first conviction, the principle that detention be a sanction of last resort is contravened, unless such detention is necessary for public safety. This was also endorsed by Victoria Legal Aid (Submission 22).

524 Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth).

525 Submission 11 (Law Institute Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 22 (Victoria Legal Aid). The Crimes Victims Support Association submitted that appeals are more relevant to a finding of guilt than to suitable punishment in relation to those found guilty (Submission 6).

526 Submission 22 (Victoria Legal Aid).

527 Submission 15 (Victorian Aboriginal Legal Service).

528 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’). The ICCPR and ICESCR principles said to be infringed by a statutory minimum includes proportionality, that imprisonment or detention sentences should be a sanction of last resort and of shortest possible time and that sentences should be reviewable: Submission 15 (Victorian Aboriginal Legal Service).

8.59 The Council notes that the rights under each of these international instruments are not automatically enforceable in Australia. To operate as a direct source of domestic rights and obligations, treaty provisions must be incorporated by parliament into legislation. Therefore, the submissions on these issues have been taken to relate to the merits of the proposed statutory minimum sentences rather than the capacity of the Victorian Parliament to enact the statutory minimum sentences.

8.60 The Council notes that rights enunciated in international instruments may have ancillary relevance. For example, Australian treaty obligations may assist in statutory interpretation where legislation is ambiguous.\(^{530}\) Australian courts have also taken into account international human rights conventions, and specifically, the CROC, in exercising sentencing discretions.\(^{531}\) Further, Australia is obliged to act in ‘good faith’ to ensure the rights contained within those instruments are performed.\(^{532}\)

**Charter of Human Rights and Responsibilities Act 2006 (Vic)**

8.61 Stakeholders contended that the statutory minimum contravenes the *Charter of Human Rights and Responsibilities Act 2006 (Vic).*\(^{533}\)

8.62 The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* imposes duties on each of the three arms of government to have regard to, and, where possible, act consistently with, the rights set out in the Charter. The parliament and executive are required to consider human rights implications prior to introducing new legislation,\(^{534}\) Public authorities (including the Sentencing Advisory Council) must have regard to, and, where possible, act in accordance with human rights. A duty is also imposed on courts to interpret laws consistently with human rights.\(^{535}\)

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\(^{530}\) See for example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Acts Interpretation Act 1901* (Cth) s 15AB.


\(^{532}\) Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26: ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’. See also *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 4: ‘[s]tates Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention’.

\(^{533}\) Submission 8 (Victorian Council of Social Service); Submission 12 (Youth Affairs Council of Victoria); Submission 17 (Federation of Community Legal Centres Victoria); Submission 21 (Youthlaw).

\(^{534}\) *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 28: a statement of compatibility must be issued for every Bill by a member of parliament who proposes to introduce a Bill; *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 30: the Scrutiny of Acts and Regulations Committee must consider any Bill introduced into parliament and must report to parliament as to whether the Bill is incompatible with human rights.

\(^{535}\) *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 38(1); 32(1); See further, Human Rights Law Centre (2001–). above n 527, ch 5, 65–82.
8.63 Stakeholders have submitted that the two-year statutory minimum sentence for 16 and 17 year old offenders compromises several rights in the Charter of Human Rights and Responsibilities Act 2006 (Vic), including a child’s right to a procedure that takes account of his or her age (the two-year minimum is imposed regardless of the youthfulness of the offender) and the desirability of promoting the child’s rehabilitation (the two-year minimum precludes rehabilitation as a sentencing principle).

8.64 The Council notes that, while the Charter of Human Rights and Responsibilities Act 2006 (Vic) applies to the three branches of government in different ways, it is not a source of an individual right to a remedy.

8.65 The Charter of Human Rights and Responsibilities Act 2006 (Vic) provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

8.66 It goes beyond the scope of this project to advise on the extent to which the proposed statutory minimum scheme would constitute ‘reasonable limits’ under this provision. The Council notes that, even if the scheme were to go beyond ‘reasonable limits’, subject to certain procedural requirements, parliament may expressly declare that an Act, or a provision in an Act, has effect despite being incompatible with a right in the Charter of Human Rights and Responsibilities Act 2006 (Vic).
Loss of access to group conferencing and other rehabilitative and restorative measures

8.67 Statutory minimum sentencing will preclude child offenders from accessing a number of rehabilitative, restorative and re-integrative measures currently available, such as group conferencing.

8.68 Group conferencing is a pre-sentence diversionary/restorative justice-based mechanism used in the Children’s Court that brings together in a facilitated meeting the offender; his or her family/support and legal representative, the police informant and the victim (or a victim representative). The process, which is undertaken during deferral, aims to examine issues that may have contributed to the young person’s offending behaviour; to arrive at an outcome that is satisfactory to all participants (including the victim) and divert the offender from the intensive supervisory sanctions that the court may otherwise impose.541 A child is eligible for group conferencing if the Children’s Court is considering imposing a probation order or youth supervision order;542 the court considers the child suitable to participate and the child consents. Successful completion of a group conference entitles a child to a reduction of sentence.543

8.69 Stakeholders have referred to the success of group conferencing in reducing recidivism,544 encouraging young people to take responsibility for their actions and in giving those impacted by the criminal behaviour a chance to be heard and to be involved in ‘developing a plan to make amends’.545 Group conferencing provides an important avenue for victims and their families to have a voice, to take some ownership over proceedings, to resolve unanswered questions (for example why they may have been targeted) and to receive an apology directly from the accused.546 Evaluations of group conferencing confirm the satisfaction of victims with the process.547

541 KPMG for Department of Human Services (2010), above n 53.
542 Children, Youth and Families Act 2005 (Vic) s 415(1).
543 Children, Youth and Families Act 2005 (Vic) s 362(3). The court must not, however, impose a more severe sentence than it would have otherwise if the child fails to participate in the group conference: Children, Youth and Families Act 2005 (Vic) s 362(4).
544 The KPMG Review of Group Conferencing found that those who participated in a group conference were much less likely to have reoffended within 12–24 months, with more than 80% of group conferencing participants not reoffending within two years of participating: KPMG for Department of Human Services (2010), above n 53.
545 Submission 23 (Jesuit Social Services); Submission 22 (Victoria Legal Aid). The KPMG Review of Group Conferencing found that those who participated in a group conference were much less likely to have reoffended within 12–24 months. Of those participating, only 19.2% had reoffended after 24 months of participating; KPMG for Department of Human Services (2010), above n 53, 39, 61. Victoria Legal Aid provided a case example of the value of group conferencing in requiring offenders to confront their behaviour and in developing an outcome plan agreed to by victims and offenders: Submission 22 (Victoria Legal Aid).
546 All of the victims, family members and the vast majority of young offenders surveyed agreed that they were satisfied with their involvement with the group conference process: Submission 23 (Jesuit Social Services).
547 KPMG for Department of Human Services (2010), above n 53, 14.
Magistrate Bowles provided an example of the effect of a group conference on the family of a victim:548

A Group Conference was conducted in a matter in which the accused pleaded guilty to recklessly causing serious injury … the incident and the injuries have had a profound impact on the victim. He was too angry to attend the Conference but his mother attended. She indicated that the Group Conference convenor was the first and only person who had spoken to her about the criminal proceedings since the incident had occurred. She agreed to participate in the Conference because she wanted her son and her family to have a voice.

Just prior to the Conference she found it almost too overwhelming to attend. However, she did attend and graphically and emotionally explained the most unbearable consequences of the incident for her son and her family. The effect was immense upon the accused. He was made aware of the pain and the impact of his actions on the victim and his family. Somewhat incredulously but very generously the victim’s mother stated at the end of the Conference that she was pleased the accused had commenced to do some positive things in his life.

The Group Conference provided an opportunity for the accused’s family to have a voice and to be involved in the process. It was the only stage during the criminal proceedings that the accused’s family considered that they have been acknowledged. It was a positive experience for the victim’s family; a very different experience to that undergone by victims giving evidence in contested proceedings. It provides a greater voice for victims than the provision of a Victim Impact Statement.

A minimum custodial sentence will also preclude the offender from accessing other diversionary options and programs available in the Children’s Court that seek to address causes of offending549 and divert offenders from further contact with the criminal justice system. Such programs include the ‘ROPES’ program,550 Right Step, the Koori Intensive Bail Support Program and the Koori Youth Justice Program.551

Although deferral processes are frequently used in the Children’s Court to enable the child to take steps to address offending behaviour prior to sentencing, where a minimum sentence applies, there will be little incentive for the child to undertake such programs and education (including anger management and drug and alcohol counselling) during deferral.552 The minimum sentence will apply regardless of any efforts taken to rehabilitate prior to sentencing. As stated by one stakeholder:

One wonders what incentive a 16 or 17 year old boy or girl would have to address any triggers to their offending or indeed any underlying issues that have contributed to their poor decision making whilst awaiting a contested hearing—knowing all the time on the advice of their lawyer—that the best outcome they can hope for is being locked up for two years! It is quite likely in some cases that the dire prospects and lack of hope will not only lead to the young person choosing not to comply with appropriate interventions but could be a catalyst for further offending.553

Many of the therapeutic interventions that otherwise might be made available to a child through community-based orders (during which the child is supervised, directed and supported by youth justice workers in the community) will also be unavailable for those children subject to the minimum sentence.

548 Email from Magistrate Bowles to the Sentencing Advisory Council, 7 August 2011.
549 Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 23 (Jesuit Social Services).
550 Submission 14 (Centre for Multicultural Youth). ‘ROPES’ is a Victoria Police cautioning program.
551 Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw).
552 For example, the ‘GRIPP’ program for young men who have committed act of violence.
553 Submission 1 (Anonymous).
The Council acknowledges stakeholders' concerns regarding the unavailability of a variety of sentencing orders where a statutory minimum sentence applies. The Council considers that such concerns may be lessened where the gross violence offences (which attract a minimum sentence) reflect a very high level of both harm and culpability. In those circumstances, sentencing orders other than immediate imprisonment or detention are not likely to sufficiently denounce or punish the offending behaviour and so are unlikely to be imposed, even in the absence of the statutory minimum sentence.

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**Case example**

The offender, aged 16, was charged with recklessly causing serious injury (in circumstances that would amount to gross violence). Sentencing was deferred to enable the offender to engage in a detoxification program and link-in to culturally appropriate education, training and employment programs with the supervision of Youth Justice (the offender was a daily user of marijuana, was not enrolled in school or any educational program and was not employed).

During deferral, the offender successfully completed the detoxification program, enrolled in TAFE and was assessed as having prospects of ongoing paid employment. The offender’s progress was taken into account in sentencing. The magistrate recorded a conviction and placed the offender on a youth supervision order, which requires ongoing supervision from Youth Justice, continued engagement with the training program and TAFE and drug and alcohol counselling.

Under a minimum sentencing regime, the offender’s sentencing would not be deferred to enable the offender to address the issues underlying his or her offending behaviour, or to reconnect with culture, gain skills for meaningful employment and re-engage with community and family.

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This case example was drafted from an example provided by the Victorian Aboriginal Legal Service in its submission (Submission 15).
Statutory minimum sentences for gross violence offences

Impact on victims

8.75 Given the threshold of severe injury, and the circumstances of gross violence offending, victims of a gross violence offence are likely to have suffered significant trauma and stress.

8.76 It is sometimes assumed that the experience of giving evidence at trial will always be traumatic for a victim and, in effect, revictimise a victim as he or she is required to recall the experience of a violent assault, and is subjected to cross-examination, which questions a victim’s recollections or credit. While this may be true for a number of victims, the Council also notes the submission of the Crimes Victim Support Association, which commented that a minimum sentencing regime may have a therapeutic effect on victims.\(^{555}\)

8.77 One stakeholder submitted that gross violence trials would have a negative impact on victims, as a result of the greater likelihood of contested hearings and lengthy delays,\(^{556}\) for example, further exacerbating the trauma and psychological harm experienced by victims. According to the Centre for Multicultural Youth, victims may be required to give evidence and be cross-examined more often than is currently the case and ‘possibly years after the commission of the offence’,\(^{557}\) potentially adding to the significant emotional stress already experienced.

8.78 The Crime Victims Support Association submitted that the suggestion that increased court attendances will negatively impact victims was insensitive and submitted that often victims, in making sure offenders pay for their crimes, are ‘prepared for the hardship of stepping forward for our day or days in court’.\(^{558}\)

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\(^{555}\) Submission 6 (Crime Victims Support Association).

\(^{556}\) Submission 9 (Children’s Court Barristers Association).

\(^{557}\) Submission 14 (Centre for Multicultural Youth); this issue was also discussed by Youthlaw (Submission 21).

\(^{558}\) Submission 6 (Crime Victims Support Association).
Recidivism and deterrence

8.79 A number of stakeholders were concerned that one of the potential impacts of a statutory minimum sentence regime was an increased rate of recidivism, particularly for child offenders aged 16 or 17. Some submissions contended that a two-year minimum imposed on 16 and 17 year olds may in fact increase the risk of reoffending among children, rather than specifically deter them.559

8.80 It was submitted that, deterrence ‘assumes rational decision making, where a person is expected to weigh up the costs and benefits of a particular course of action’;560 however, neurological research suggests that the regions of the brain that are associated with impulse control, judgment and forward thinking do not fully mature until a person is well into his or her twenties.561 The Victorian Council of Social Service stated that, as children may not yet be ‘functionally mature’,562 they may more likely act impulsively and without considering the consequences of their actions, or the significant penalty that may attach to such actions.563 Other stakeholders submitted that particularly vulnerable youth, such as those with a mental illness or cognitive impairment, may be even less capable of rational behaviour.564

8.81 Whitelion submitted that, rather than deterring children, a minimum period in detention may increase the risk factors ‘for their continued involvement in offending behaviour; substance use and perpetuating cycles of social exclusion’.565 Victoria Legal Aid suggested that a child subject to a two-year minimum sentence may become disconnected from family and community supports and education/training pathways,566 despite, as Youthlaw noted, recognition in the Children, Youth and Families Act 2005 (Vic) of the importance of these factors in sentencing children.567 Stakeholders suggested that a child may also experience ‘stigmatisation and labelling’,568 impairing his or her ability to reintegrate and obtain stable living conditions and long-term job stability.569 It was proposed that

559 Submission 2 (G. Defteros); Submission 8 (Victorian Council of Social Service); Submission 10 (Child Safety Commissioner); Submission 11 (Law Institute of Victoria); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).
560 Submission 21 (Youthlaw).
561 Submission 12 (Youth Affairs Council of Victoria); Submission 14 (Centre for Multicultural Youth). This issue was also discussed by Youthlaw (Submission 21) and the Victorian Council of Social Service (Submission 8), which quoted the Prime Minister’s Science Advisory Committee, Improving the Transition: Reducing Social and Psychological Morbidity during Adolescence, A Report from the Prime Minister’s Chief Science Advisor (2011).
563 Submission 8 (Victorian Council of Social Service); Submission 12 (Youth Affairs Council of Victoria); Submission 21 (Youthlaw).
564 The Mental Health Legal Centre criticised specific deterrence as an objective for persons with mental illness: Submission 18.
565 Submission 13 (Whitelion).
566 Submission 22 (Victoria Legal Aid).
567 Submission 21 (Youthlaw).
568 Submission 21 (Youthlaw).
569 Submission 8 (Victorian Council of Social Service); Submission 12 (Youth Affairs Council of Victoria); Submission 13 (Whitelion); Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw).
detection may also expose a child offender to a criminal learning environment and negative peer influences.\textsuperscript{570} It was submitted that, rather than deterring crime:

\begin{quote}
[p]rison inculcates people into criminal networks and pulls apart social and community supports increasing the risk that a person will offend following release.\textsuperscript{571}
\end{quote}

8.82 Submissions included comments that a minimum term in custody may also interrupt the normal offending trajectory\textsuperscript{572} (offending usually peaks in late adolescence, with few young people continuing to offend into adulthood).\textsuperscript{573} One stakeholder noted that “[r]eversion from deviant to mainstream identities is the norm with progressing age; many young people subject to a minimum term may otherwise ‘grow out’ of criminal behaviour as they mature.\textsuperscript{574}

8.83 Stakeholders contended that non-custodial options and initiatives (such as group conferencing \textsuperscript{8.68}–\textsuperscript{8.70}) are far more effective than custodial sentences in reducing reoffending and therefore protecting the community.\textsuperscript{575} This is because these options are considered to treat the underlying issues that contribute to violent offending, not just the symptoms.\textsuperscript{576} It was commented that non-custodial options are particularly effective for children, who are more likely to achieve better rehabilitative outcomes than adults.\textsuperscript{577}

8.84 As the submissions on these issues relate to the merits of the policy of introducing a statutory minimum scheme, the Council makes no comment on them.

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\textsuperscript{570} Submission 21 (Youthlaw).
\textsuperscript{571} Submission 22 (Victoria Legal Aid).
\textsuperscript{572} Submission 11 (Law Institute of Victoria); Submission 22 (Victoria Legal Aid); Submission 22 (Victoria Legal Aid). This issue was also discussed by the Uniting Church in Australia Synod of Victoria and Tasmania (Submission 24).
\textsuperscript{573} Submission 21 (Youthlaw).
\textsuperscript{574} Submission 21 (Youthlaw). This issue was also discussed by the Victorian Council of Social Service (Submission 8), the Child Safety Commissioner (Submission 10); the Law Institute of Victoria (Submission 11) and Victoria Legal Aid (Submission 22).
\textsuperscript{575} Submission 8 (Victorian Council of Social Service); Submission 11 (Law Institute of Victoria); Submission 12 (Youth Affairs Council of Victoria); Submission 15 (Victorian Aboriginal Legal Service); Submission 21 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 24 (Uniting Church in Australia Synod of Victoria and Tasmania).
\textsuperscript{576} Submission 15 (Victorian Aboriginal Legal Service). This issue was also discussed by the Victorian Council of Social Service (Submission 8).
\textsuperscript{577} Submission 12 (Youth Affairs Council of Victoria); Submission 11 (Law Institute of Victoria).
Custodial and future costs

8.85 On the basis of the factors referred to in the terms of reference (and without factoring in a severe injury threshold), stakeholders submitted that statutory minimum sentences will significantly inflate detention numbers. Children who currently receive lower sentences and who currently may be eligible for parole will remain in detention for at least two years. A charge of gross violence may also affect the likelihood of bail (the prospect of a long term of imprisonment may, for example, increase the risk that the accused will fail to appear in response to bail) and may result in more offenders being detained in remand facilities while awaiting trial.

8.86 Particular concerns were expressed about a significant increase in numbers in juvenile detention as it was submitted that those facilities are already at capacity. Stakeholders expressed concern that increases in numbers will add more pressure to currently inadequate detention facilities, and referred to the 2010 Ombudsman Victoria investigation that found that conditions in the Melbourne youth justice precinct were ‘appalling’. It was argued that this may compromise the safety and welfare of children and staff in the centres and the capacity to deliver the education programs currently operating.

8.87 It was noted that (in the absence of a severe injury threshold) an increase in juvenile detention numbers would also require significant investment in the building of new detention centre facilities, or modifications of existing facilities, to increase capacity.

8.88 In addition to the immediate costs of minimum sentences, it was submitted that long-term costs may result, for example, from:

- a young person giving up school or losing employment, the likelihood of exacerbation of mental health issues; the exposure to criminal behaviour … and the costs to the family in terms of travelling or loss of employment due to supporting a young person in custody particularly if they are placed in a detention centre far from home.

8.89 Jesuit Social Services submitted that there may also be increased stigmatisation resulting from the criminal process, further ‘diminishing the possibility of a normal existence’ on re-entry to society.

8.90 It was submitted that these factors may exacerbate pre-existing disadvantage and further impede the young person’s prospects of rehabilitation, and consequently society may therefore be required to bear the costs not only of jailing but also of subsequent lives of crime.

8.91 As the submissions on these issues relate to the merits of the policy of introducing a statutory minimum scheme, the Council makes no comment on them.

578 Submission 1 (Anonymous); Submission 5 (B. Herbert); Submission 8 (Victorian Council of Social Service); Submission 13 (Whitelion); Submission 14 (Centre for Multicultural Youth); Submission 22 (Victoria Legal Aid).
579 Submission 10 (Child Safety Commissioner); Submission 14 (Centre for Multicultural Youth).
580 B. Herbert (Submission 5) commented that the remand centre is also around capacity. This was also discussed by the Centre for Multicultural Youth (Submission 14) and Victoria Legal Aid (Submission 22).
581 Submission 15 (Victorian Aboriginal Legal Service); Submission 22 (Victoria Legal Aid); Submission 14 (Centre for Multicultural Youth), referring to the finding of the Victorian Ombudsman that some facilities were ‘dirty, unhygienic and ill-maintained’: Ombudsman Victoria, Whistleblowers Protection Act 2001: Investigation into Conditions at the Melbourne Youth Justice Precinct (2010).
582 Submission 5 (B. Herbert).
583 Submission 5 (B. Herbert); Submission 13 (Whitelion); Submission 15 (Victorian Aboriginal Legal Service); Submission 16 (Berry Street).
584 Submission 21 (Youthlaw).
585 Submission 23 (Jesuit Social Services).
586 Submission 21 (Youthlaw); Submission 23 (Jesuit Social Services); Submission 16 (Berry Street).
Monitoring and evaluation

8.92 As discussed at [7.4], the estimations provided by the Council on the effect of severe injury offences on sentencing practices and the number of offenders in custody are subject to a large number of potential influences. Factors such as population growth and other demographic changes, as well as possible changes in the prevalence, reporting, investigation and prosecution of the offences, may all affect numbers in custody over time.

8.93 Further, the changes are not expected to be immediate, and are more likely to build over a substantial period of time, taking a minimum of five years to stabilise (see [7.32], [7.36]), depending on how the offences are defined.587

8.94 Aside from these factors, it is uncertain how the proposed introduction of baseline sentences will affect the sentencing of severe injury offences, and how baseline sentences set for the offences (if they are to be included within the baseline scheme) will interact with the operation of the statutory minimum sentences.

8.95 Given these varied and uncertain influences, and given the significant concerns expressed by stakeholders about the introduction of statutory minimum sentences, the Council considers that future monitoring and evaluation are warranted on the operation of the statutory minimum sentences and their effect on sentencing practices for severe injury offences.

587 As the severe injury offences will not operate retrospectively, statutory minimum sentences can only be imposed when a court sentences an offender for offences committed after the commencement of the legislation that introduces those offences.
## Appendix

### Consultation – meetings and submissions

#### Meetings/forums

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<th>Number</th>
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<td>1</td>
<td>14 April 2011</td>
<td>Meeting with Judge Grant, President of the Children’s Court</td>
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<td>4</td>
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<td>Meeting with Youth Justice, Department of Human Services</td>
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<td>9</td>
<td>31 May 2011</td>
<td>Adult Offenders Discussion Forum</td>
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<td>Child Offenders Discussion Forum</td>
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<td>11</td>
<td>7 June 2011</td>
<td>Meeting with County Court Judges</td>
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<td>12</td>
<td>17 June 2011</td>
<td>Meeting with Professor Peter Cameron, Academic Director of Emergency and Trauma Centre, Alfred Hospital</td>
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<td>13</td>
<td>21 June 2011</td>
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<td>15</td>
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<td>16</td>
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<td>17</td>
<td>5 August 2011</td>
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### Submissions

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<td>26</td>
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Statutory minimum sentences for gross violence offences


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Barwon Spinners Pty Ltd and Ors v Podolak (2005) 14 VR 622

Bowen v The Queen [2011] VSCA 67 (11 March 2011)

Bugmy v The Queen (1990) 169 CLR 525

Cheung v The Queen (2001) 209 CLR 1

CL (A minor) v Lee [2010] VSC 517 (16 November 2010)

CNK v The Queen [2011] VSCA 228 (10 August 2011)

D (A Child) v White [1988] VR 87

Director of Public Prosecutions v Avici (2008) 21 VR 310

Director of Public Prosecutions v Gerrard [2011] VSCA 200 (30 June 2011)

Director of Public Prosecutions v Hills (No 1) [2011] VSC 88 (18 March 2011)

Director of Public Prosecutions v Hood [2011] VCC (17 March 2011)

Director of Public Prosecutions v Karazisis; Director of Public Prosecutions v Bogtstra; Director of Public Prosecutions v Kontoklotsis [2010] VSCA 350 (17 December 2010)

Director of Public Prosecutions v Lawrence (2004) 10 VR 125

Director of Public Prosecutions v Soko [2010] VSC 223 (11 February 2010)

Director of Public Prosecutions v SJK; Director of Public Prosecutions v GAS [2002] VSCA 131 (26 August 2002)

Director of Public Prosecutions v Terrick; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457

Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241
DL (A Minor by His Litigation Guardian) v A Magistrate of the Children’s Court Duncan Reynolds and Ors (Unreported, Supreme Court of Victoria, Practice Court, Vincent J, 9 August 1994)

H v Rowe and Ors [2008] VSC 369 (19 September 2008)

Johns v The Queen (1979–1980) 143 CLR 108

Kingswell v The Queen (1985) 159 CLR 264

McAuliffe v The Queen (1995) 183 CLR 108

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273


Osland v The Queen (1998) 197 CLR 316

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R v ALH (2003) 6 VR 276


R v Bell (1999) 30 MVR 115


R v Clarke and Johnstone [1986] VR 643


R v Gray [1977] VR 225

R v Ioannou (2007) 17 VR 563

R v Ivan Leonard Storey [1998] 1 VR 359

R v KMW; R v RJB [2002] VSC 93 (15 March 2002)

R v Kumar (2002) 5 VR 193


R v Lowery and King (No 2) [1972] VR 560

R v M (1977) SASR 598

R v M and Ors [2008] VChC 4 (12 February 2008)

R v Mills [1998] 4 VR 235

R v Nuri [1990] VR 641

R v P and Ors [2007] VChC 3 (5 November 2007)

R v Schonewille [1998] 2 VR 625

R v Su, Katsuna, Katsuna, Katsuna, Asami and Honda [1997] 1 VR 1


R v Tsiaras [1996] 1 VR 398

R v Verdiins; R v Buckley; R v Vo (2007) 16 VR 269

R v VZ (1998) 7 VR 693

R v Welsh and Flynn (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, King and Tadgell J), 16 October 1987

R v Wilson and Jenkins [1984] AC 242

Ryan v The Queen (1967) 121 CLR 205

Smith v The Queen (1994) 181 CLR 338


Westaway v The Queen (1991) 52 A Crim R 336
Legislation and Bills

**Victoria**

*Accident Compensation Act 1985* (Vic)
*Bail Act 1977* (Vic)
*Charter of Human Rights and Responsibilities Act 2006* (Vic)
*Children and Young Persons (Koori Court) Act 2004* (Vic)
*Children, Youth and Families Act 2005* (Vic)
*Corrections Act 1986* (Vic)
*County Court Act 1958* (Vic)
*Crimes (Amendment) Act 1985* (Vic)
*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
*Crimes Act 1958* (Vic)
*Criminal Procedure Act 2009* (Vic)
*Disability Act 2006* (Vic)
*Drugs, Poisons and Controlled Substances Act 1981* (Vic)
*Magistrates’ Court Act 1989* (Vic)
*Mental Health Act 1986* (Vic)
*Sentencing Act 1991* (Vic)
*Sentencing and Other Acts (Amendment) Act 1997* (Vic)
*Summary Offences Act 1966* (Vic)

**Commonwealth**

*Acts Interpretation Act 1901* (Cth)
*Migration Act 1958* (Cth)

**International**


