



Sentencing Advisory Council  
3/333 Queen Street,  
Melbourne 3000 VIC

10<sup>th</sup> October 2022

Dear Sentencing Advisory Council,

### **Re: Adjourned Undertakings Consultation**

Jesuit Social Services welcomes the opportunity to respond to the Sentencing Advisory Council's Consultation into Adjourned Undertakings. In particular, we thank the Council for engaging with us directly to provide context and seek our feedback.

Jesuit Social Services is a social change organisation working to build a just society where all people can live to their full potential. For 45 years, we have accompanied people involved in, or at risk of becoming involved in, the criminal justice system. In Victoria, we work with people to prevent and divert involvement in the justice system and support those exiting prison.<sup>1</sup> We also provide practical help with accessing housing, education, learning pathways and employment.<sup>2</sup>

Jesuit Social Services believes that the primary goal of any effective and humane criminal justice system is to ensure policy, legislation and budgetary decisions are all centred on prevention and early intervention. In that sense, we note that adjourned undertakings can be an important part of sentencing to prevent further contact with the criminal justice system. As highlighted by the Sentencing Advisory Council, adjourned undertakings connect people with programs and allow the conditions placed on the order to be tailored to each person.<sup>3</sup> However, in our experience, an adjourned undertaking is not often available to the vast majority of the people Jesuit Social Services works with due to the nature of their offending and criminal history. Adjourned undertakings are lowest on the sentencing hierarchy outside of diversion, and therefore are largely used in cases involving first-time and less serious offenders. This is

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<sup>1</sup> For details of Jesuit Social Services' justice and crime prevention programs, please see [here](#).

<sup>2</sup> For details of Jesuit Social Services' education, training and employment programs please see [here](#).

<sup>3</sup> Sentencing Advisory Council. (2022). Reforming Adjourned Undertakings in Victoria: Consultation Paper. State of Victoria. ([Weblink](#))

evident in figures showing that 64 per cent of offenders placed on an adjourned undertaking between 2019 and 2020 had not been sentenced for any other offending.<sup>4</sup>

In responding to the consultation, this letter provides general feedback on the subject of adjourned undertakings and related matters rather than providing specific responses to the consultation questions. First, we discuss the characteristics of the participants we work with and why they are often not eligible for adjourned undertakings. Second, we share our vision for a justice system premised on prevention and early intervention and highlight the importance of diversion, access to bail and bail supports, and suspended sentences for facilitating pathways away from the criminal justice system. Finally, we make recommendations for reform to the use of adjourned undertakings, particularly considerations of the conditions and supports attached to them. We also note the opportunity to use adjourned undertakings as a positive reinforcement of a person's commitment to rehabilitation.

### **Who we work with and why they are missed**

At Jesuit Social Services, we work alongside some of the most marginalised individuals, families and communities, often experiencing multiple and complex challenges. Our participants who have had contact with the justice system are particularly vulnerable, having faced multiple disadvantages in their lives, as well as circumstances beyond their control. Through our research conducted over the past 20 years, *Dropping off the Edge* (DOTE), we know that entrenched geographical disadvantage is a significant factor that influences whether a person will come into contact with the justice system. [DOTE 2021 research](#) revealed those living in the three per cent most disadvantaged communities in Victoria were nearly three times more likely to have high levels of prison admissions than people living in the remaining 97 per cent of communities.<sup>5</sup> This highlights the localised nature of crime and entrenched disadvantage as an underlying cause of offending.

The multiple layers of complex disadvantage faced by our participants can manifest in a combination of experiences ranging from homelessness, family violence, history of trauma, mental ill-health and alcohol and substance misuse. We also work with members of the Aboriginal and Torres Strait Islander community as well as people from culturally and linguistically diverse (CALD) and newly arrived communities, who experience further intersectional disadvantage. In our experience, complexity of needs and circumstances often mean that participants have history of justice involvement at the higher end of the sentencing hierarchy, leading to a Community Corrections Order or imprisonment. Adjourned undertakings on the other hand, are commonly used for people who have limited previous involvement in the criminal justice system and have committed a low-level offence. In these contexts, an adjourned undertaking would be a useful tool in diverting people away from the criminal justice system.

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<sup>4</sup> Ibid.

<sup>5</sup> Tanton, R., Dare, L., Miranti, R., Vidyattama, Y., Yule, A. and McCabe, M. (2021), *Dropping Off the Edge 2021: Persistent and multilayered disadvantage in Australia*, Jesuit Social Services: Melbourne

## **Prevention and early intervention: facilitating pathways away from the criminal justice system**

At Jesuit Social Services, we have a vision for a humane and effective justice system that meets the needs of, and is responsive to everyone. This includes people who have contact with, or are a risk of coming into contact with, the justice system, as well as staff, victims of crime, families and the broader community. We believe that prevention, early intervention and diversion are critical in facilitating pathways away from being entrenched in, and cycling through the criminal justice system. We see incarceration used as a last resort and, when it is used, rehabilitation should be the priority. Listening to the voices of people and their families, working restoratively and addressing mental health and other health and wellbeing needs are all central to an effective and humane justice system.

### ***Diversion***

Given that the participants we work with are often not eligible for adjourned undertakings, we call for strengthened diversion away from the criminal justice system. Pre-court and court-ordered diversion are crucial measures to prevent ongoing contact with the justice system. This was a key finding of the *Inquiry into Victoria's Justice System* which highlighted the importance of diversion in connecting people with the supports needed to address factors contributing to their offending.<sup>6</sup> It also recommended an expansion of existing court-based diversion programs to meet increasing demand.<sup>7</sup> Jesuit Social Services echoes these calls, advocating for an expansion of the adult diversion program and greater use of pre-court and court-ordered diversion to allow people to address the drivers behind their offending while still holding them accountable. This should include the implementation of restorative justice practices across the Victorian adult justice system. An example could be piloting group conferencing for adults at both the pre-sentence and pre-release stage, as well as through deferred sentences. Research and our experience delivering Youth Justice Group Conferencing in Victoria, demonstrates that restorative practices are effective in reducing re-offending.<sup>8</sup> Additionally, Jesuit Social Services emphasises the importance of restorative practices in enabling engagement with and support for victims of crime. Evidence has shown that by participating in a conference, victims were able to resolve unanswered questions, including reasons behind the offending.<sup>9</sup> Particular attention should also be paid to linking people with therapeutic programs as well as other critical supports such as stable employment and supported housing options.

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<sup>6</sup> Parliament of Victoria. (2022). *Inquiry into Victoria's criminal justice system*. Legal and Social Issues Committee. FINDING 18, page xxxix. ([Weblink](#))

<sup>7</sup> Parliament of Victoria. (2022). *Inquiry into Victoria's criminal justice system*. Legal and Social Issues Committee. ([Weblink](#))

<sup>8</sup> Bonett, R.J.W., Lloyd, C.D., & Ogloff, J.R.P. (2022). *Group Conferencing Effects on Youth Recidivism and Elements of Effective Conferences*. Centre for Forensic Behavioural Science, Swinburne University of Technology, Melbourne Australia; Jesuit Social Services (2019). #JusticeSolutions New Zealand Tour. Available from: ([Weblink](#)); and Larsen, J. (2014). *Restorative justice in the Australian criminal justice system*. AIC Reports: Research and Public.

<sup>9</sup> KPMG (2010). *Review of the Youth Justice Group Conferencing Program: Final Report*. Melbourne: Department of Human Services, p. 39. ([Weblink](#))

## ***Bail***

Greater access to bail and bail supports are also essential for diversion away from the criminal justice system. Recent changes to bail legislation have led to a growing number of people in custody who are yet to be convicted of a crime. Following the Coghlan Bail Review in 2017, the Andrews Government enacted the *Bail Amendment (Stage One) Act 2017* and the *Bail Amendment (Stage Two) Act 2018* which resulted in unprecedented numbers of people on remand. Reform is necessary to repeal the introduced changes which have made it more difficult to access bail. In addition to these legislative changes, we call for the expansion and sustained funding of bail support services such as the Assessment and Referral Court and the Court Integrated Services Program.

## ***Suspended sentences***

Another key tool for diverting people away from the criminal justice system are suspended sentences. From 2011 to 2014, suspended sentences were phased out as an option for addressing offending in Victoria. Without suspended sentences, there are fewer sentencing options available on the sentencing hierarchy, leaving only a Community Corrections Order or imprisonment for the vast majority of people we work with. Given each sentence on the sentencing hierarchy serves a particular purpose, the removal of any equates to the removal of that particular purpose for which it was imposed. In the case of the wholly suspended sentence, it is no longer available for the purpose of deterrence and denunciation in situations of serious offending with low risk of reoffending. When an individual on a Community Corrections Order either breaches the order or commits a new offence, there are limited options available to judges and magistrates. If the offending continues then the next step in the sentencing hierarchy is imprisonment, as no other alternatives are available in between. We therefore recommend the reintroduction of suspended sentences into the *Sentencing Act 1991* to empower Victorian courts to fully or partially suspend a state sentence of imprisonment, for a specified period.

Additionally, Jesuit Social Services supports Victoria Legal Aid's recommendation for a new 'therapeutic order' to fill the gap between fines and community correction orders.<sup>10</sup> This order would include a treatment component which can better respond to the needs of those with complex mental health, substance misuse or disabilities and ensure that these groups are not further entrenched in the justice system.

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<sup>10</sup> Victoria Legal Aid. (2022). Submission to the Sentencing Advisory Council: Reforming Adjourned Undertakings in Victoria – October 2022.

## **An opportunity to reform the use of adjourned undertakings**

### ***Name and definitions of ‘good behaviour’***

The Sentencing Advisory Council highlights that the term ‘adjourned undertakings’ can be confusing and difficult to understand for people attending court. Jesuit Social Services supports an alternate term for this order that is more accessible such as a ‘good behaviour agreement’.

In terms of the definition of ‘good behaviour’, the consultation paper reiterates that there is no definition of this term, either in legislation nor case law, which can contribute to a subjective interpretation of what constitutes a breach of this condition.<sup>11</sup> Reforms could include further clarification on the definition, and greater consideration applied to the circumstances of an individual, when a good behaviour condition is breached. Namely, the complex disadvantage faced by our participants such as homelessness, family violence, history of trauma, mental ill-health and alcohol and substance misuse and the implications of this should be factored into the definition of ‘good behaviour’.

### ***Conditions and support attached to an adjourned undertaking***

Jesuit Social Services is particularly concerned about the use of monetary penalties as a condition of, or as a consequence for breaching conditions of an adjourned undertaking. The imposition of a monetary penalty can add to the burden of people already experiencing financial pressure and disproportionately impact those of lower socioeconomic groups. For this reason, we advocate for a move away from monetary penalties and enforced payment conditions.

Jesuit Social Services echoes the Sentencing Advisory Council’s call for greater access to support for people who are given an adjourned undertaking. A key measure preventing an individual’s further involvement in the justice system is to ensure they are adequately supported after their first instance of offending. Intervening as early as possible and providing the supports needed, is critical in facilitating pathways away from being entrenched in, and cycling through the criminal justice system. More broadly, Jesuit Social Services calls for adequate and sustained resourcing of wrap-around support services for individuals at every interaction with the criminal justice system, rather than solely targeted at the most serious offenders

Jesuit Social Services would also like to see an expansion of the adult diversion program and other programs such as the Assessment and Referral Court and the Court Integrated Services Program. We believe this is an effective way of diverting people from the criminal justice system, especially for participants we work with who often do not have access to an adjourned undertaking due to their criminal history.

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<sup>11</sup> Sentencing Advisory Council. (2022). Reforming Adjourned Undertakings in Victoria: Consultation Paper. State of Victoria. ([Weblink](#))

A possible reform to the use of adjourned undertakings, coupled with expanding the Assessment and Referral Court and the Court Integrated Services Program, could involve the court deferring or adjourning a sentence and referring to rehabilitative and supportive programs. When returning to court for sentencing, the court could impose an adjourned undertaking without a condition. This is also the case for imposing conditions on people who receive an adjourned undertaking. For example, if the court would like a person to participate in a drug treatment program, feedback from our frontline staff suggests a more effective process could be to defer that person's sentence and either dismiss it on return to court after they have completed the program or give them an adjourned undertaking with no conditions.

At Jesuit Social Services, we believe in an effective and humane criminal justice system where prevention and diversion are central. The criminalisation of breaches to adjourned undertakings does little to support someone's rehabilitation and serves to only further their entrenchment in the criminal justice system. We instead call for the decriminalisation of breaches coupled with greater access to community-based supports.

#### ***Positive reinforcement of an individual's commitment to rehabilitation***

Jesuit Social Services believes there is an opportunity to reform the use of adjourned undertakings so they are more accessible to our participants in cases where they have shown a reduction in offending behaviours. In these cases, if the individual commits a low-level offence, the adjourned undertaking could be used as a form of diversion, and a positive reinforcement to prevent them from further justice involvement. This could be particularly beneficial for our participants who have prior justice system involvement and a criminal history record, however show a significant reduction in the rate and severity of offending, caught up in low level offending. For example, if a person who has a significant offending history and has shown dedication to rehabilitation through participating in programs commits a low-level shop theft, an adjourned undertaking could be used instead of a more severe sentencing option such as a Community Corrections Order. This acts as an acknowledgement of the progress they have made prior to the low-level offending.

Similarly, a potential reform to the use of adjourned undertakings could be for the court to provide this sentencing option to a young person when they transition from the youth to adult system. For example, if someone with a youth criminal record commits their first offence as an adult, an adjourned undertaking could be used as a way of cautioning them with the intent of diverting them from further justice involvement. This option could be used rather than solely taking their prior criminal history in consideration and potentially charging them with a more severe sentence.

#### ***Spent convictions and adjourned undertakings***

Jesuit Social Services sees many people who struggle to obtain education or employment due to their criminal records. This also impacts their ability to access housing, which is foundational for physical and mental health, and personal agency. In turn, we witness many people cycle in and out of the criminal



justice system as a result of their inability to access housing, education and employment. We therefore call for the *Spent Convictions Act 2021* to be amended so that findings of guilt become spent at the date of *sentencing* for people receiving adjourned undertakings without conviction, rather than at the end of their adjourned undertaking. Given the maximum length of an adjourned undertaking can be anywhere up to five years, this reform can help ensure that a criminal record does not inhibit someone from getting back on their feet.

Jesuit Social Services endorses the submission of Victoria Legal Aid.

Jesuit Social Services allows the Sentencing Advisory Council to publish, refer to, and/or quote directly from our submission and name the source of the submission in relevant publications.

We appreciate the Sentencing Council taking these matters into consideration, and would welcome the opportunity to discuss these ideas with you further.

Yours sincerely,

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