



## **Reforming Sentence Deferrals in Victoria**

December 2022

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## Jesuit Social Services: Who we are and what we do

Jesuit Social Services has been working for 45 years delivering support and advocating for improved policies, legislation and resources to achieve strong, cohesive and vibrant communities where every individual can play their role and flourish.

We are a social change organisation working with some of the most marginalised individuals, families and communities, often experiencing multiple and complex challenges. Jesuit Social Services works where the need is greatest and where we have the capacity, experience and skills to make the most difference. Our services span Victoria, New South Wales and the Northern Territory.

Our services and advocacy focuses on these areas:

- **Place-based approaches and ecological justice** – advocacy and research around the systemic change needed to achieve a ‘just transition’ towards a sustainable future, and supporting community members to lead more sustainable lives through place-based approaches to social and ecological problems.
- **Justice and crime prevention** – people involved with the justice system.
- **Education, training and employment** – people with barriers to education and sustainable employment.
- **Mental health and wellbeing** – people with multiple and complex needs including mental illness, trauma, homelessness and bereavement.
- **Gender Justice** – leadership on the reduction of violence and other harmful behaviours prevalent among boys and men, and new approaches to improve their wellbeing and keep families and communities safe.
- **Settlement and community building** – recently arrived immigrants and refugees, and disadvantaged communities.

Research, advocacy and policy are coordinated across all program and major interest areas of Jesuit Social Services. Our advocacy is grounded in the knowledge, expertise and experiences of program staff and participants, and academic research and evidence. We seek to influence policies, practices, legislation and budget investment to positively influence people’s lives and improve approaches to address long-term social challenges.

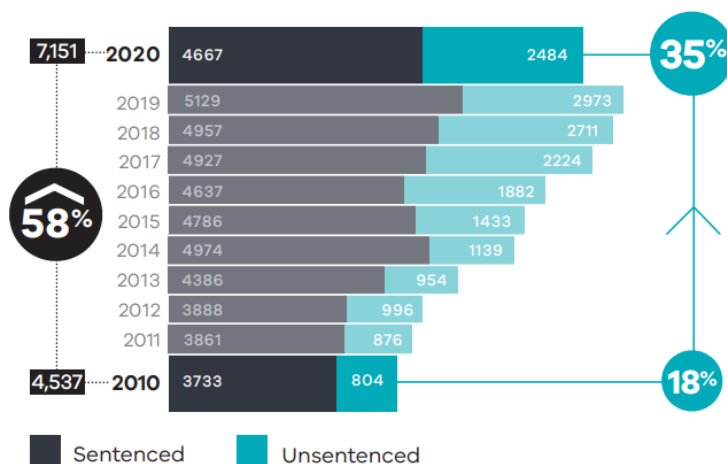
We do this by working collaboratively with governments, businesses, the community sector, and communities themselves to build coalitions and alliances around key issues, and building strong relationships with key decision-makers and the community.

*We acknowledge the Traditional Custodians of all the lands on which Jesuit Social Services operates and pay respect to their Elders past and present. We express our gratitude for First Nations people’s love and care of people, community, land and all life.*

## Introduction

Jesuit Social Services welcomes the opportunity to contribute to the Sentencing Advisory Council's consultation on reforming sentence deferrals in Victoria. Victoria's prison population has risen dramatically over the past ten years with a key driving factor being the implementation of regressive bail, parole and sentencing legislation, often as a response to public and media pressure in heightened moments, such as the Bourke Street tragedy in 2017.<sup>1</sup>

**Victorian prison population 2010-2020.<sup>2</sup>**



Source: Corrections Victoria (2021). *Annual Offender Statistical Profile*

This approach is unsustainable and is ineffective in reducing recidivism. Currently, 44 per cent of Victorian adults who exit the prison system return to have contact with the criminal justice system within two years.<sup>3</sup>

Jesuit Social Services' vision is for a justice system that is based on the principles of prevention, early intervention and restorative justice. It sees incarceration used only as a last resort and, where it is used, rehabilitation is the priority. This is consistent with the *Sentencing Act 1991* (Vic). We believe that, when appropriate, deferring a person's sentence so that they can demonstrate their willingness to engage in rehabilitation and restorative processes, while being held to account, can play an important role in reaching this vision.

In our submission, Jesuit Social Services outlines 17 recommendations in relation to deferred sentencing and the following key areas:

1. **Recognising entrenched disadvantage and contact with the justice system**
2. **Prioritising marginalised and overrepresented groups**
3. **Strengthening access to support and restorative processes during a deferral period**
4. **Considerations for sentencing following a deferral period**
5. **Enhancing court processes.**

<sup>1</sup> Corrections Victoria (2020). *Annual Offender Statistical Profile 2010 to 2020*. ([Weblink](#))

<sup>2</sup> With COVID-19 posing a considerable risk to people in detention, 2020 saw a decline in the rate and number of people imprisoned in Victoria for the first time in a decade.

<sup>3</sup> <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/released-prisoners-returning-to-prison>

In essence, we highlight that effective use of deferred sentencing can act as a circuit breaker for people in contact with the justice system. This relies on increased awareness of deferred sentencing, access to appropriate therapeutic supports and restorative responses during the deferral period, and flexible deferral plans. More broadly, we call for alternative sentencing options to be reinstated, and for court processes that are trauma-informed and culturally safe.

## 1. Recognising disadvantage and contact with the justice system

A significant factor that influences whether a person will come into contact with the justice system is where they live. Entrenched geographical disadvantage has been explored in our series of research reports conducted over the past 20 years titled *Dropping off the Edge* (DOTE). Our [DOTE 2021 research](#) found that those living in the three per cent most disadvantaged areas in Victoria (13 communities) 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>4</sup> People living in these communities were also:

- More than three times more likely to be living in public housing (3.1 times).
- Nearly three times more likely to have families with jobless parents (2.9 times).
- Nearly three times more likely to experience child maltreatment (2.7 times).
- More than twice as likely (2.5 times) to experience overcrowding and 2.4 times more likely to be exposed to family violence.

DOTE 2021 also demonstrated the entrenched nature of disadvantage in Victoria, with every location in the top 10 most disadvantaged locations in Victoria also ranked in the top 40 most disadvantaged locations in 2015.

In light of the complex and overlapping challenges faced by people who come into contact with the justice system, Jesuit Social Services would like to see greater use of deferred sentences to allow people who have been convicted of a crime to address the interrelated drivers behind their offending while still holding them accountable for their actions.

Where appropriate, **individuals must be made aware through legal representation of deferred sentencing options and supported to make informed decisions about the use of a deferral period, including what their obligations may be on a deferral plan.** Not only would this have substantial benefits for those who have offended by providing coordinated supports and reducing stigma, but it would also strongly benefit the broader community.

### We recommend that the Victorian Government:

- Legislate for sentence deferrals are used more widely to address the range of factors that can lead people to justice system involvement in Victoria by increasing judicial officers' knowledge and legal practitioners' awareness of deferrals as a pre-sentence option.

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<sup>4</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.

## 2. Prioritising sentence deferrals for marginalised and overrepresented groups

### 2.1 Aboriginal and Torres Strait Islander people

Jesuit Social Services believes that the overrepresentation of Aboriginal and Torres Strait Islander people<sup>5</sup> in the adult and youth justice systems in Victoria and nationally is a disgrace. Aboriginal people have been the subject of adverse government interventions since colonisation and continue to experience the ongoing impacts of dispossession, structural racism, intergenerational trauma and disadvantage.<sup>6</sup> Whilst this has been widely accepted in the literature and acknowledged as the root cause of overrepresentation in Victorian frameworks (such as *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement 4* and *Youth Justice Strategic Plan 2020–30*), disproportionate over-incarceration and structural racism remain a daily reality for Aboriginal communities.

We acknowledge the important work of the Victorian Government and First People's Assembly of Victoria in establishing the Truth and Justice Commission. However, more efforts are urgently needed. As at March 2022, Aboriginal adults were 11.3 times (per 100,000) more likely to be imprisoned than adults in the general population.<sup>7</sup> Jesuit Social Services is particularly concerned that Aboriginal women are the fastest growing prison population in Victoria. The number of Aboriginal women entering prison in Victoria more than tripled between 2012 and 2019.<sup>8</sup>

Jesuit Social Services advocates that deferred sentences can be used as one possible strategy to address the overrepresentation of Aboriginal and Torres Strait Islander people incarcerated. Deferred sentences must be accompanied by initiatives that are designed, controlled, and delivered by the Aboriginal community result to ensure the best outcomes for Aboriginal people involved with the justice system, with positive flow on effects for the wider Aboriginal community. We outline one such initiative currently being piloted by the Victorian Aboriginal Legal Service (VALS) in further detail below.

### 2.2 Young adults

The increasing number of young adults in Victoria's adult prisons is of great concern. The mental and physical health of these young people when they emerge from incarceration has often deteriorated significantly, while the barriers to reintegrating with the community are high. Too many young people are reoffending and returning to prison. More than half [53 per cent] of young adults under 25 return to prison within two years, which is more than eight per cent higher than the general population.<sup>9</sup>

There is significant research into brain development that indicates brain function and cognitive development continues to mature well past the age of 20, depending on the individual's gender, genes and environment.<sup>10</sup> The parts of the brain that are still developing include the prefrontal cortex that

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<sup>5</sup> Note: Hereafter we use the term 'Aboriginal' to describe the many Aboriginal and Torres Strait Islander people, clans and Traditional Owner groups of this land.

<sup>6</sup> Commission for Children and Young People (2021). Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system. ([Weblink](#))

<sup>7</sup> Australian Bureau of Statistics (Australian Government) (2022). Corrective Services March 2022. ([Weblink](#))

<sup>8</sup> Australian Bureau of Statistics (Australian Government) (2021). Corrective Services March 2021. ([Weblink](#))

<sup>9</sup> Victorian Ombudsman. (2015). Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria. ([Weblink](#))

<sup>10</sup> Johnson, S., Blum., R., & Giedd, J. (2009). Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health policy. *Journal of Adolescent Health*, 45(3): 216-221. ([Weblink](#)); Lebel, C. & Beaulieu, C. (2011). Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood. *Journal of Neuroscience*, 31(30): 10937-10947. ([Weblink](#))

helps to control impulsivity, judgement, planning for the future, foresight of consequences, and other characteristics that form moral culpability. Research indicates that the development and maturation of the prefrontal cortex occurs primarily during adolescence and is roughly accomplished at the age of 25 years.<sup>11</sup> Young adults therefore need to be treated differently to older groups at all points of their contact with the criminal justice system, including in diversion options which support young adults to take responsibility and make amends for their actions in the community, through to the way we sentence young adults and the custodial environments we incarcerate them in.

We believe sentence deferral is a key strategy to divert young adults away from future contact with the adult justice system and provides a crucial opportunity to engage young adults with important supports to address factors related to their offending. As we outline in further detail below, we also recommend restoration of the dual track system to prevent the most vulnerable young people from entering the adult system at an early age.

### **2.3 Women**

We are deeply concerned about the soaring rate of women in Victorian prisons. From 2010 to 2019, the number of women in Victorian prisons increased by 44 per cent.<sup>12</sup> The unique profile and vulnerability of women in prisons is internationally recognised: women in prison have disproportionately experienced physical or sexual abuse and family violence prior to imprisonment, inordinately experience mental health problems and disability, alcohol and other drug misuse problems, and often have caring responsibilities for children and families.<sup>13</sup>

Women have unique pathways into offending and tailored responses are required at each point of the justice system, 'from admission, to release and beyond'.<sup>14</sup>

Jesuit Social Services advocates for the use of deferral periods as one possible diversion strategy to address the increasing number of women in the criminal justice system. Consideration must be given to the following vulnerable cohorts:

- Women who have been victims of family violence or sexual or physical violence that can play a part in the onset of offending behaviour (noting also that offending may occur in the context of coercive relationships).
- Aboriginal women who are less likely to access mainstream rehabilitation programs, and are more likely to breach community-based orders and return to prison.
- Women who have children and young dependants account for 70 per cent of sentenced women in prison in Victoria.<sup>15</sup> The impact this has on these mothers, their children and families can be

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<sup>11</sup> Arain, M., Hague, M., Johal, L., Mathur, P., Nel, W., Rais, A., Sandhu, R., & Sharma, S. (2013). Maturation of the adolescent brain. *Neuropsychiatric Disease and Treatment*, 9: 449-461 ([Weblink](#))

<sup>12</sup> Corrections Victoria. (2021). Monthly prisoner and Offender Statistics. ([Weblink](#))

<sup>13</sup> United Nations Office on Drugs And Crime. (2008). Handbook for Prison Managers and Policymakers on Women and Imprisonment. Criminal Justice Handbook Series. New York: United Nations. Retrieved from ([Weblink](#))

<sup>14</sup> Dr Lorana Bartels and Antonette Gaffney. Australian Institute of Criminology. (2011). Good Practice in Women's Prisons: A literature review. ([Weblink](#))

<sup>15</sup> Walker, S., Sutherland, P. & Millsted, M. (2019). Characteristics and offending of women in prison in Victoria 2012-2018. Crime Statistics Agency, Melbourne.

devastating, with children of incarcerated parents at a higher risk of entering out-of-home care.<sup>16</sup>

- People with disability are overrepresented at all stages of the criminal justice system,<sup>17</sup> and women with a disability in particular who do not received adequate specialised care while in contact with the justice system.<sup>18</sup>

## **2.4 People with an acquired brain injury and/or intellectual disability**

Far too many Victorians with acquired brain injuries (ABI) are caught up in the criminal justice system. It is estimated that nearly half of all adult men in prison and more than one third of adult women in prison in Victoria have an ABI, compared with approximately two per cent of the general population.<sup>19</sup> The overrepresentation of people with ABI in prisons reflects a broader failure of the criminal justice system to recognise and respond to these unique experiences at earlier stages of the criminal justice process. In fact, ABI is not well recognised within the justice system, and the basic supports accepted as essential for people with other kinds of disability are lacking – leaving people with ABI unsupported.

It is critical that the Victorian Government implement strategies such as deferred sentencing to divert people with an ABI and/or intellectual disability from the prison system at every opportunity and respond with more appropriate community-based services and programs.

### **We recommend that the Victorian Government:**

- Use deferred sentencing as a mechanism to divert vulnerable and overrepresented people from the justice system, including Aboriginal and Torres Strait Islander people, young adults, women, and people with an ABI or intellectual disability.

## **3. Strengthening support and restorative justice during deferral periods**

### **3.1 Clear communication of deferral plans and expected sentencing**

We believe judicial officers should be required to tell an individual what sentence they can expect should they complete their deferral plan successfully. Court and contact with the criminal justice process is highly stressful. Often, the added layer of not knowing what may happen at court heightens the significant stress and burden of contact with the justice system that for many people is compounded by trauma, adverse life experiences and unstable living circumstances.

The experience of not knowing can parallel and mirror past experiences of trauma, particularly in the context of a lack of agency over personal circumstances or their future. By clearly communicating what a person can expect as a sentencing outcome following successful completion of a deferral plan, this

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<sup>16</sup> Sentencing Advisory Council. (2020). Crossover Kids: Vulnerable Children in the Youth Justice System, Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria.

<sup>17</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. (2020). Overview of responses to the Criminal Justice System Issues paper. ([Weblink](#))

<sup>18</sup> Victorian Ombudsman. (October 2018). Investigation into the imprisonment of a woman found unfit to stand trial. ([Weblink](#))

<sup>19</sup> Jesuit Social Services and RMIT University Centre for Innovative Justice (2017). Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury. ([Weblink](#))



allows individuals to plan their future, and also may encourage motivation to address deferral plan conditions.

Further, all individuals receiving deferral plans must receive a written or visual copy of their plan that meets their communication needs. The plan must be explained to them utilising relevant communication tools and resources with a support person present.

### **3.2 Promoting wider use of restorative responses during deferral periods**

Jesuit Social Services advocates that embedding restorative processes in sentence deferral plans has the potential to reduce a person's contact with the justice system while holding them accountable for their actions. Restorative justice views crime as more than breaking the law – it recognises that crime also causes harm to individuals, relationships and the wider community. In contrast to retributive responses to offending within the criminal justice system, restorative responses focus on addressing harms, as well as the wrongdoing.

In Victoria, Jesuit Social Services has delivered the Youth Justice Group Conferencing program for almost 20 years, enabling dialogue between children who have offended, their victims and others harmed in the wider community. The program is grounded in the foundational principles of restorative justice (for further details, please see the Appendix).

A recent evaluation found group conferencing was associated with substantive reductions in the likelihood of ongoing recidivism (between 24 and 40 per cent reduced likelihood).<sup>20</sup> The research also considered offending trajectories of young people who participated in the program, and found that they were much less likely to continue offending, even after the first recidivism event.<sup>21</sup>

We have long advocated for restorative justice approaches to be adopted in Victoria's adult criminal justice system. We continue to observe the significant need for these approaches across our adult programs and from key sector partners. The legislative mechanism to enable referrals to a restorative justice process is already made available to the Courts through Section 83A in the *Sentencing Act 1991* (Vic).<sup>22</sup> However, referrals into a restorative justice process under this section of the Act are rare. As noted in the Council's consultation paper, no survey participants nominated restorative justice as the most common reason for seeking a deferred sentence.<sup>23</sup> This is likely due to the absence of a formal restorative justice program operating in Victoria's adult jurisdiction.

Jesuit Social Services calls for the Victorian Government to establish an Adult Justice Group Conferencing program modelled on this approach. We believe that Adult Justice Group Conferencing and incentivising engagement through sentence deferral plans could have substantial benefits for those who have offended, their victims and the wider community.

### **3.3 Access to tailored, wrap-around supports**

The timely provision of tailored support is essential during a deferral period and may be the difference between successful or unsuccessful completion of conditions of a deferral plan. Jesuit Social Services delivers the ReConnect program across Melbourne's north and western regions, as part of the

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> *Sentencing Act 1991* (Vic)

<sup>23</sup> Sentencing Advisory Council of Victoria, (October 2022), Reforming Sentence Deferrals in Victoria Consultation Paper ([weblink](#))

Corrections Victoria Reintegration Pathway. ReConnect supports high risk and high profile adult men and women, including Aboriginal men and women, to transition from prison to the community by providing tailored, flexible support across critical domains. The program provides better outcomes for the families of people exiting prison, as well as the communities that people who have been in prison are returning to.

In our experience of delivering ReConnect, we know that intensive support is required to ensure people in contact with the justice system have their needs met holistically through a trauma informed, person-centred approach.<sup>24</sup> It is critical to ensure that these supports are culturally safe, gender-responsive and developmentally appropriate. We have observed a considerable gap in service delivery for young adults aged 18 to 25 in contact with the justice system. We therefore call for a specialised young adults case management and outreach service for 18-25 year olds appearing before the adult courts with a focus on addressing needs holistically that may be related to their court matters.

### ***Support for people with multiple and complex needs***

The Court Integrated Services Program (CISP), operating out of the County Court and Magistrates' Court of Victoria (also known as Bail Support in the Magistrates' Court), offers a coordinated approach to the assessment, treatment and support of accused persons.<sup>25</sup> CISP provides case management and referral pathways to services that assist: people with substance misuse issues, people experiencing homelessness, people with disability, and people with mental health challenges.

A three-year review of the CISP program at the Magistrates' Court of Victoria found that the program reduced re-offending, improved the health of clients, provided significant cost savings, facilitated referrals to a broad range of supports and improved the Magistrates' Court's access to accurate and timely client assessments.<sup>26</sup>

We recommend further investment in case management available through the Court Integrated Support Program (CISP) to ensure people appearing before the courts who may have multiple and complex needs are provided with pathways to support. Further, in noting the maximum 12 month period that a sentence can be postponed, we call for people on deferred sentences to be prioritised for support through programs such as CISP.

### ***Judicial monitoring***

Jesuit Social Services believes that the courts must be resourced to provide effective and regular support for people on deferred sentences both in person and via distance. A presiding judicial officer could be kept abreast of barriers that may impact an individual's ability to complete their deferral plan through the use of judicial monitoring. Monthly judicial monitoring reviews could allow for appropriate changes to be considered to a deferral plan where required.

## **3.4 Data collection**

Jesuit Social Services recognises the importance that data collection, analysis and evaluation have on measuring the effectiveness of interventions for people in contact with the justice system. As noted in the Council's consultation paper, given the challenges associated with data collection on deferred sentencing in Victoria, we advocate for resourcing and strategy development to be considered in

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<sup>24</sup> As example, see Appendix B Jesuit Social Services Practice Framework

<sup>25</sup> County Court of Victoria. (2022). Court Integrated Services Program. ([Weblink](#))

<sup>26</sup> Department of Justice. (2018) CISP tackling the causes of crime. ([Weblink](#)).

developing adequate data collection methods to inform future data collection and research into the effectiveness of sentence deferrals in Victoria. This is particularly important in the context of recommendations that we make in our submission and evaluating outcomes of innovation in the use of sentence deferrals.

**We recommend that the Victorian Government:**

- Ensure that the conditions of a person's deferral plan, as well as their expected sentence should they comply with those conditions, be clearly communicated to individuals at the commencement of a deferral period.
- Embed the use of restorative processes in deferral plans by funding an Adult Justice Group Conferencing pilot program.
- Enhance access to tailored, flexible support across a range of critical domains for people on sentence deferrals. Such support must be culturally safe, gender-responsive and developmentally appropriate.
- Fund a specialised young adults case management and outreach service for 18-25 year olds appearing before the adult Courts with a focus on addressing needs holistically that may be related to their Court matters.
- Further invest in case management available through the Court Integrated Support Program (CISP) to ensure people with multiple and complex needs have pathways to appropriate supports.
- Strengthen data collection and research in relation to the use of deferred sentencing to further enhance the use of this pre-sentence option.

## **4. Considerations for sentencing following a deferral period**

### **4.1 Addressing the overrepresentation of Aboriginal and Torres Strait Islander people**

The Victorian Aboriginal Legal Service (VALS) is currently piloting Community Justice Reports over a five year period under the [Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4](https://www.vals.org.au/wp-content/uploads/2021/03/Victorian-Aboriginal-Justice-Agreement-Phase-4.pdf).<sup>27</sup> Modelled on Canada's *Gladue Reports*, these pre-sentence reports detail an Aboriginal person's circumstances, community, culture and strengths whilst highlighting community-based support options available to them.<sup>28</sup> The purpose is to improve sentencing processes and outcomes for Aboriginal and Torres Strait Islander defendants in court and ultimately reduce their over-incarceration in the criminal justice system.<sup>29</sup>

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<sup>27</sup> [Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4](https://www.vals.org.au/wp-content/uploads/2021/03/Victorian-Aboriginal-Justice-Agreement-Phase-4.pdf)<https://www.vals.org.au/wp-content/uploads/2021/03/Victorian-Aboriginal-Justice-Agreement-Phase-4.pdf>

<sup>28</sup> For details of eligibility, please see here: <https://www.vals.org.au/aboriginal-community-justice-reports/>

<sup>29</sup> Victorian Aboriginal Legal Service, (November 2022), Community Justice Reports webpage ([weblink](#))

*“I just raise that as one example, amongst the many, of the continuing impacts of dispossession, segregation, subjugation, assimilation policies, systemic racism and discrimination that Aboriginal communities have suffered and that have led to disadvantage and further trauma. Alongside that history, of course, sits the amazing resilience, leadership and strength shown by many of your community and family and that your Elders have set as examples and urge you to look towards for inspiration in the future”.<sup>30</sup> - Sentencing remarks, Judge John, 2022*

We believe Community Justice Reports referrals made as part of a deferral plan will allow the court to make a more culturally informed, grounded and holistic sentencing decision, increase the court’s ability to fully ‘see’ the person appearing before them, and strengthen their ability to take into account the ongoing impacts of colonisation, trauma and dispossession on the person they are sentencing, their family and their community. Further, Community Justice Reports can empower courts to understand culture as an inherently protective factor, grounded in strength and resilience.<sup>31</sup>

We call on the Victorian Government to support Aboriginal-led initiatives to improve sentencing outcomes for Aboriginal and Torres Strait Islander people, including by resourcing the continuation of VALS’ Community Justice Reports pilot program.

#### **4.2 Understanding engagement with the conditions of a deferred sentence**

Rehabilitation must be the primary purpose of all sentencing, Jesuit Social Services believes that sentencing should take into account the conditions successfully completed as part of the deferral plan, such as engagement in a Group Conference. However, barriers to achieving successful completion of deferral plan conditions must be considered holistically in the context of each person’s living circumstances and needs. In our experience, barriers could include limited access to services, lengthy waitlists, and experiences of homelessness, mental health concerns and serious health issues. ‘Individual circumstances must be considered in all sentencing.

#### **4.3 Repealing regressive bail laws**

In some instances, deferral requirements are imposed over bail conditions. This means that the *Bail Act 1977* (Vic) can expose people charged with an indictable offence to a reverse onus bail position if they are alleged to have committed another indictable offence during the deferral period. Jesuit Social Services is deeply concerned about the unprecedented growth in the use of remand and the extent to which it falls disproportionately on people experiencing vulnerability. Changes to bail legislation introduced in recent years have led to a growing number of people in our prisons who are unsentenced and yet to be convicted of a crime.

In 2011-12, 23 per cent of adults in prison were unsentenced (876 of 3,861 people) compared with 58 per cent (2,973 of 5,129 people) in 2019-20. Since 2010, the number of women on remand has increased by a staggering 152 per cent.<sup>32</sup> In July 2021, there were more women in prison who were unsentenced (54 per cent) compared with women who had received sentences in Victorian prisons.<sup>33</sup> We call on the Victorian Government to repeal regressive legislation in relation to bail.

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<sup>30</sup> Ibid.

<sup>31</sup> DPP V Rotumah (September 2022) ([weblink](#))

<sup>32</sup> Corrections Victoria (2021). Profile of women in prison. ([Weblink](#))

<sup>33</sup> Corrections Victoria (2021). Monthly time series prisoner and offender data. ([Weblink](#))

#### 4.4 Reinstating and strengthening alternatives to imprisonment

Jesuit Social Services notes that from 2012 – 2020, 20 per cent of people with a recorded sentence deferral were imprisoned at the completion of their deferral period.<sup>34</sup> In order to significantly reduce the number of people in prison, promote rehabilitation and reserve prison as a last resort, alternative options must be considered, including raising the age of criminal responsibility and sentencing orders such as home detention and suspended sentences. These create a graduated sentencing hierarchy, reserving prison for the most serious, violent offences, and ensures legislation is evidence informed by prevention of reoffending.

##### ***Raise the age of criminal responsibility***

Jesuit Social Services strongly believe that prison should only ever be used as a last resort, and that community-based responses including restorative approaches are available to help children take responsibility for their actions and steer them towards positive pathways. In light of this, Jesuit Social Services has consistently advocated to all States and Territories to raise the age of criminal responsibility to divert children and young people from the criminal justice system.

##### ***Suspended sentences***

From 2011 to 2014, suspended sentences were phased out as an option for future offending in Victoria, putting added pressure on prison capacity.<sup>35</sup> Without wholly suspended sentences, there are fewer sentencing options available, with only very low-end orders such as fines or adjourned undertakings, then Community Correction Orders (CCOs), and then imprisonment. Given that each sentence serves its own particular purpose, the removal of one of those sentences equates to the rescinding of the 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 CCO 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 that the Victorian Government reintroduce 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.

##### ***Home detention***

Home detention was abolished on 16 January 2012 when the *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011 (Vic)* came into effect. From that date, it was no longer available as a sentence or as a post-sentence order. To reduce incarceration, alternatives like home detention limit the number of people in prison when it is safe and viable for them to be elsewhere. A home detention order requires an individual who is sentenced to imprisonment to instead remain at home or another approved residence throughout the period of that order and not to leave at any time except for specific reasons that are agreed to or directed by the home detention officer.

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<sup>34</sup> Sentencing Advisory Council. (2022). Reforming Sentence Deferrals in Victoria: Consultation Paper.

<sup>35</sup> They were abolished: in 2011 in the higher courts for serious and significant offences committed on or after 1 May 2011 (Sentencing Amendment Act 2010 (Vic)); in 2013 in the higher courts for all offences committed on or after 1 September 2013 (Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013 (Vic)); and In 2014 in the Magistrates' Court for all offences committed on or after 1 September 2014 (Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013 (Vic)).

Conditions may be attached to any home detention order, in conjunction with targeted and intensive support mechanisms that assist in rehabilitation. Home detention requires careful assessment and screening for appropriate candidates and is a strong option for some cohorts, such as people with drug-related charges and non-violent offending histories. Home detention must be met with increased funding for Community Corrections and NGO's to support working with people in the community. Further, it must be implemented in a way that does not net-widen, drawing more people into the justice system.

### ***Presumption against short sentences***

For many people in prison, short-term sentences do not promote rehabilitation. State-wide alternatives to custody are needed for people with short prison sentences (for example, 18 months or less) in addition to legislating for a presumption against short-term prison sentences. Recently, Scotland has acted against sentences of 12 months or less by imposing a presumption against them.<sup>36</sup> Victoria currently does not have a law either banning or limiting prison sentences of any length.

A presumption against short prison sentences combined with robust, viable and state-wide alternatives to custody would prevent people from becoming entrenched in the criminal justice system and reduce the number of people in Victorian prisons altogether. It is essential that any alternatives to custody include wrap-around supports for people to address the underlying circumstances influencing their offending.

### ***Restore dual track***

Jesuit Social Services believes the Victorian Government should reverse legislative erosions to the dual track system, one of the foundations of Victoria's youth justice system. Dual track allows a court to sentence eligible young offenders to detention in a youth justice centre, rather than an adult prison. The Victorian Government's *Children and Justice Legislation (Youth Justice Reform) Act 2017* contains functions that significantly erode this system, providing for the presumption that young people aged 18 to 20 convicted of particular offences will be sentenced to adult prison unless exceptional circumstances apply. Further erosions are contained in recent legislation relating to assaults on emergency services personnel<sup>37</sup> whereby impairment due to alcohol or drugs, and psychosocial immaturity are no longer considered as special reasons exceptions, and the court must give significantly less weight to the life circumstances of the offender. We believe these erosions are counter-productive and will have negative long-term effects on community safety. We call on the Victorian Government to restore the dual track system to its previous form (pre-*Youth Justice Reform Bill* amendments).

To add to this, research indicates that brain function and cognitive development continue to mature well past the age of 20, depending on the individual's gender, genes and environment.<sup>38</sup> The parts of the brain still developing include the prefrontal cortex that helps control impulsivity, judgement, planning for the future, foresight of consequences, and other characteristics that form moral culpability. Development and maturation of the prefrontal cortex occurs primarily during adolescence and is roughly

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<sup>36</sup> Howard League Scotland. (2019). Presumption Against Short Sentences (PASS) ([Weblink](#))

<sup>37</sup> *Justice Legislation Miscellaneous Amendment Bill 2018*; New Laws To Crack Down On Emergency Worker Attacks (2018). Retrieved from <https://www.premier.vic.gov.au/new-laws-to-crack-down-on-emergency-worker-attacks/>

<sup>38</sup> Johnson, S., Blum., R., & Giedd, J. (2009). Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health policy. *Journal of Adolescent Health, 45*(3): 216-221. ([Weblink](#)); Lebel, C. & Beaulieu, C. (2011). Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood. *Journal of Neuroscience, 31*(30): 10937-10947. ([Weblink](#))

accomplished at the age of 25 years, which is very important to complex behavioural performance.<sup>39</sup> As such, we ask that the incoming government extend dual track to the age of 25.

**We recommend that the Victorian Government:**

- Support Aboriginal-led initiatives to improve sentencing outcomes for Aboriginal and Torres Strait Islander people, including by resourcing the continuation of VAL's Community Justice Reports pilot program.
- Raise the age of criminal responsibility from 10yrs to 14yrs.
- Repeal changes introduced under the Bail Amendment (Stage One) Act 2017 and the Bail Amendment (Stage Two) Act 2018
- Provide alternatives to custody, including by reintroducing suspended sentences, home detention and electronic monitoring.
- Consider legislating for a presumption against short-term prison sentences (12 months or less) to reduce prison overcrowding and the growing costs of incarceration.

## 5. Enhancing court processes

### 5.1 A trauma informed and culturally responsive court system

Courts as they currently operate are not trauma informed settings and we continue to observe an absence of trauma informed approaches in court proceedings. Often courts are places where people feel an inherent sense of uncertainty, stress and worry about their future. The layout of the courtroom itself is intimidating and are not conducive to trauma informed conversations about rehabilitation, restoration, or insight. These factors coupled with the sheer pace of court proceedings, wait times at court and the complex language used in proceedings often sees vulnerable people further marginalised from access to true justice. Language used by judicial officers in proceedings and sentencing is often disempowering, complex and difficult to understand.

On our Justice Solutions tours, we witnessed how a clear vision centred on restorative justice and cultural safety cascades through to court processes, and the mindset and skillset of judges. Key to the strengths of the restorative justice approach adopted by courts and judges in New Zealand has been the importance of Māori voice and alignment with Māori concepts of "land, ancestors, community, morality and justice". Roughly 10 per cent of New Zealand's judges are Māori and, in 2019, the first Māori judge was elected to the Supreme Court.<sup>40</sup> At the same time, it must be acknowledged that Māori face considerable ongoing social and economic disadvantage across multiple domains,<sup>41</sup> and experience more contact with the justice system than their non-Māori counterparts, evidenced by both

<sup>39</sup> Arain, M., Hague, M., Johal, L., Mathur, P., Nel, W., Rais, A., Sandhu, R., & Sharma, S. (2013). Maturation of the adolescent brain. *Neuropsychiatric Disease and Treatment*, 9: 449-461 ([Weblink](#))

<sup>40</sup> McLachlan, L. (2019, May 7). First Māori Supreme Court judge wants a focus on his culture. *Scoop*, ([Weblink](#))

<sup>41</sup> New Zealand Ministry of Health. (2018, August 2). Socioeconomic indicators. ([Weblink](#))



imprisonment and victims of crime rates.<sup>42</sup> The use of Māori language and the inclusion of Māori culture in justice processes is an important component of promoting cultural safety and addressing the overrepresentation of Māori people in New Zealand's criminal justice system. We know that connection to culture, language and community are critical for promoting cultural safety within the justice system and Aboriginal people have long advocated for this.

In addition to a focus on culture and language, judges at the courts we visited on our Justice Solutions tour placed considerable emphasis on restoring relationships with family, community and self. Jesuit Social Services staff sat in on a case being heard in a Pasifika Court in Auckland. Elders from diverse Pacific Island communities are active participants in the Court. In the case we heard, the Judge highlighted the impact of the offending behaviour on the victim, yet the hearing remained conversational. There was a noticeably lighter tone, which, rather than detracting from the seriousness of the proceedings, helped the young person engage in the discussion.

**Figure 2: Pasifika Court in Auckland**



Source: Jesuit Social Services (2019). Justice Solutions Tour New Zealand. ([Weblink](#))

Reflecting on what he witnessed at the hearing, Daniel Clements, General Manager of Justice Programs at Jesuit Social Services, wrote:

***“As the case concluded in the Pasifika Court, the Judge spoke clearly to the young person about what he was taking into account in her considerations about him: the risk to community balanced with the positive steps he was taking to change his life, not least of which was working full time and providing additional financial support for the family. But central to Judge Malosi’s summation were the key points of identity and family. ‘Lift up your eyes and see what is possible,’ she urged him.”***

Koori Courts in Victoria were developed to reflect cultural issues and operate in a more informal way, including having a yarn and avoiding legal language. While early evaluation found that for indigenous people accused the process was more engaging, inclusive and less intimidating than the mainstream courts<sup>43</sup>, evaluations of Koori courts in Australia more broadly have been criticised for taking a limited scope.<sup>44</sup> Some have argued that focusing on blunt measures of recidivism fails to take into account the multitude of other goals that sit at the heart of Koori sentencing courts, and that Aboriginal and Torres Strait Islander voice and knowledge are often sidelined in evaluation methodology.<sup>45</sup> For this reason, it

<sup>42</sup> Office of the Prime Minister’s Chief Science Advisor. (2018). Using evidence to build a better justice system: The challenge of rising prison costs, pp. 18-19. ([Weblink](#))

<sup>43</sup> Clear Horizon Consulting (2011). County Koori Court, County Court of Victoria and Department of Justice, Final Evaluation. ([Weblink](#))

<sup>44</sup> Marchetti, M. (2017). Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations. Current Issues in Criminal Justice, 28(3), 257–276. ([Weblink](#))

<sup>45</sup> Ibid.



would be inappropriate to directly compare the effectiveness of the two models in terms of traditional measures such as reoffending.

What we can learn from both Koori Courts and from Rangatahi and Pasifika Courts is that culturally informed and person-centred approaches are restorative and benefit individuals, families and communities. We saw in New Zealand the immense value of embedded cultural practice for the Māori and non-Māori community alike in placing people at the centre and restoring relationships and connection with culture and community.

## **5.2 Communication as a basic human right**

It is essential that people appearing before the courts have a strong understanding of the court process, outcomes and requirements associated with their supervised order or deferral plan conditions. This is particularly significant for people appearing before the courts who may have an Acquired Brain Injury, a neurodisability, a developmental language disorder (DLD) and those who have English as a second language. However, ultimately the court and criminal justice process is often overwhelming for anyone who comes into contact with it.

Oral language difficulties have been found in between 38-52 per cent of young people in detention in Australia<sup>46</sup> and in 60 per cent of young people appearing before the courts in the United Kingdom.<sup>47</sup> Recent research in the United Kingdom has shown young people with a DLD are twice as likely to re-offend compared to their peers without a DLD.<sup>48</sup> This may suggest future implications and costs for the adult criminal justice system.

The complex language used in court proceedings further marginalises individuals who may require communication support and aides. As an often already stressful experience, the formality and language used in court adds an additional layer of what can become trauma associated with contact with the youth justice system. This is particularly the case for people with disabilities, young people, Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities and women who are often also survivors of violence.

**We believe communication aides are a missing link in Victoria's Court system and criminal justice process overall. Effective models for both in person communication aides alongside visual resources exist in other Australian jurisdictions and internationally.**

*Blurred Borders* was a Commonwealth Funded Project coordinated and led by Aboriginal legal services in the Northern Territory and Western Australia. Blurred Borders is a set of best practice visual communication tools used by both lawyers and social workers in socio-legal collaborations in these jurisdictions that was co-designed with Aboriginal people and communities. The focus of the project was to enhance culturally proficient communication between front line legal practitioners and Aboriginal

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<sup>46</sup> Snow, Pamela, (2019), Speech-Language Pathology and the YouthOffender: Epidemiological Overview and Roadmap for Future Speech-Language Pathology Research and Scope of Practice, Language, Speech and Hearing Services in Schools Volume 50 Issue 2

<sup>47</sup> Bryan, Karen, Garvani, Gillian, Gregory, Juliette and Kilner, Karen (2015). Language difficulties and criminal justice: the need for earlier identification. International journal of language and communication disorders, 50 (6), 763-775.

<sup>48</sup> Winstanley Maxine, Webb Roger, Conti-Ramsden Gina (2020), Developmental language disorders and risk of recidivism among young offenders, The Journal of Child Psychology and Psychiatry

and Torres Strait Islander people appearing before the courts living in some of the most remote parts of Australia, many of whom may have had English as a second language.<sup>49</sup>

The development of these resources saw this use expanded and *Blurred Borders* adopted for use in a variety of both legal and social settings to explain important things complex Court procedure, Order obligations and bail conditions. Adopting a model of two-way communication, or two-way learning, the Blurred Borders evaluation suggests that the resource can be used in many other jurisdictions and areas where vulnerable people may be disadvantaged often due systemic failure to meet their communication needs. The evaluation found that *Blurred Borders* legal communication tools are improving outcomes for Aboriginal and Torres Strait Islander people and other disadvantaged groups and is having systemic benefits across the systems the resource is used in.<sup>50</sup>

In New Zealand, non-Government organisation *Talking Trouble* provide court appointed Communication Assistants in court proceedings both in youth and adult court jurisdictions. Communication Assistants are trained speech language therapists (SLTs) and initially they conduct a court ordered assessment of someone's communication needs with a focus on speech, language and communication skills. The Communication Assistant then provides a detailed report to the court with recommendations on how the person may manage court-based communication for the presiding Judge to consider.<sup>51</sup> Based on the recommendations made in the report, the court may appointment the Communication Assistant to sit with an accused person with communication needs through all stages of the Court process, explaining proceedings in a way that meets their communication needs.<sup>52</sup>

A similar model also operates in the United Kingdom through the Intermediary Special Measure in England and Wales where an independent Registered Intermediary is appointment to support communication of vulnerable persons appearing before the courts. The Registered Intermediary is an independent professional communication specialist with a background in either speech pathology, occupational therapy, social work or psychology who works impartially in their responsibility to the court. Evaluations of this model have yielded positive outcomes since its initial pilot inception in 2004.<sup>53</sup>

**We recommend that the Victorian Government:**

- Commit to a system wide review and evaluation of Victorian court processes with the view to redesigning the court system to be trauma-informed.
- Provide increased funding and resources to further strengthen Koori courts as well as expand their operation in regional areas.
- Fund the development of Victorian centric communication aides and resources to ensure all people appearing before the courts have their communication needs met.

<sup>49</sup> Western Australia Legal Aid, (2019), *Blurred Borders Legal Communication Tools: Process and Evaluation Review* ([weblink](#))

<sup>50</sup> Ibid.

<sup>51</sup> Talking Trouble New Zealand, (2022), *Website Description* ([weblink](#))

<sup>52</sup> Ibid.

<sup>53</sup> Ilana Hepner, Mary N. Woodward & Jeanette Stewart (2014): *Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries With Individuals With Intellectual Disability, Psychiatry, Psychology and Law*, DOI: 10.1080/13218719.2014.960032

## Appendix

### A: Group conferencing

Grounded in the principles of restorative justice, Group Conferencing is a structured process, facilitated by an independent Convenor, which brings together the people affected by conflict (in the context of offending: the person who has been found guilty of the offence, the person impacted by harm(s), their respective support people, and other relevant professionals or community members) to: understand what has happened and who has been affected, and; make a plan to repair the harm, prevent further harm and promote the wellbeing of all involved. Group Conferencing can be used as a response at different points in the justice process, including as:

- diversion where the process functions as an *alternative* to court
- sentencing support where the process functions as an *adjunct* to court, with the proceedings and agreement reached during the conference taken into account in the sentencing process (as is the case with the Victorian Government funded pre-sentence Youth Justice Group Conferencing program), and/or
- post-sentencing healing, whereby the people affected by the offence meet to make sense of the experience together in a way that enables them to move forward with their lives.<sup>54</sup>

Operating alongside the court process, an Adult Justice Group Conferencing program could improve outcomes for people engaged in offending, person impacted by harms of crime and the wider community:

- For **the person who committed the offence** participating in a Conference is an opportunity to develop insight into the true impact of their offending behaviour, take practical steps to repair the harm they have caused and avoid offending in the future. The accountability, insight and empathy required of the individual provides an incentive to change their behaviour. Importantly, the conferencing process is an opportunity to identify a network of support that will help them make progress towards their outcome plan. It also provides an accountability mechanism for people and agencies to help the person who committed the offence work towards their goals.
- For **person impacted by harms of crime**, a Conference is an opportunity to actively participate in the justice process. It is a safe and structured space for their voice to be heard and have a say in how the person who committed the offence can make up for what they have done. The process provides those who have been impacted by harms with the opportunity to address the hurt and fear they have felt as a result of the crime.
- For the **community**, the Conference dialogue and relationships created through the conferencing process provide an opportunity to heal divisions, and – in the long term – build a more harmonious community.

Jesuit Social Services would be happy to provide further details of each stage of the Conference process at the Sentencing Advisory Council's request.

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<sup>54</sup> Moore, DB. and Vernon, A. *Restorative Group Conferencing Convenor's Manual*, Victorian Association for Restorative Justice (VARJ)

**Decolonising restorative justice**

We acknowledge the peacemaking practices embedded in Aboriginal law and culture, the existing skill and expertise in intercultural approaches to justice across this Country, including in Victoria, and the significant and ongoing work that is needed to decolonise restorative justice as a discipline across Australia. The development of restorative justice programs for adults in the Victoria must engage this significant cultural expertise, in a process committed to two-way learning and ultimately the decolonising of our justice system.