Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

20 September 2021
The Secretariat
Legislative Council Legal and Social Issues Committee
By email: justiceinquiry@parliament.vic.gov.au

Dear Committee Members,

Re: INQUIRY INTO VICTORIA'S CRIMINAL JUSTICE SYSTEM

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1. Thank you for the opportunity to provide a submission to this important inquiry.

2. This is a public submission and is not confidential.

ABOUT LIBERTY VICTORIA

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for over eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

4. The members and office holders of Liberty Victoria include people from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and defence. More information about our organisation and activities can be found at: libertyvictoria.org.au.

5. We thank the volunteers who have helped research and draft these submissions. Some of the following submission adopts previous submissions made by Liberty Victoria. Where that occurs, we have provided hyperlinks to those submissions.

TERMS OF REFERENCE

6. On 3 June 2020, the Legislative Council agreed to the following motion:

> *That this House requires the Legal and Social Issues Committee to inquire into, consider and report, by no later than 28 February 2022, on various issues associated with the operation of Victoria's justice system, including, but not limited to —*
>
> *(1) an analysis of factors influencing Victoria's growing remand and prison populations;*
>
> *(2) strategies to reduce rates of criminal recidivism;*
>
> *(3) an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime; and*
>
> *(4) the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skill-set necessary for judges and magistrates overseeing specialist courts.*

7. This submission will focus on issues (1) and (2) before the Committee.

8. This Inquiry represents a critical opportunity for Victoria to make long-lasting, meaningful changes to the administration of criminal justice in this State with a view to prevent crime and improve community safety. We all have a shared interest in responding to the challenges faced by the criminal justice system in a way that reduces recidivism and accordingly, protects the public.

INTRODUCTION

9. Liberty Victoria is dedicated to the protection, strengthening and promotion of civil liberties and human rights, including those protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') and recognised under international law. These encompass a range of rights fundamental to living in a free and democratic society.

10. Complainants[1] and victims of crime are entitled to be part of a society that respects and protects their human rights. As we have previously submitted, Liberty Victoria strongly supports the view that complainants and victims of crime should be treated with courtesy, respect and dignity throughout the criminal justice process.[2] We support the governing principles set out in the *Victims' Charter Act 2006* (Vic) in relation to the treatment of persons adversely affected by crime. We have supported measures, such as intermediaries, to ensure that persons with cognitive impairments and children are afforded equal participation in the criminal trial process.[3]

11. Accused persons, and those who plead or are found guilty of criminal offences, are also entitled to have their human rights respected and protected. That includes bedrock principles such as the presumption of innocence, the right to a fair hearing or trial, the criminal standard of proof, and proportionate sentences.

12. One of the great challenges of the criminal justice system is determining how to balance competing rights in a manner that will improve community safety.

13. The focus of this submission is on the ways in which the criminal justice system impacts accused persons and people who offend. By improving their chances of rehabilitation, and by reducing risks of reoffending, each of our proposed reforms directly benefit the wider community.

14. As Chief Justice French stated in *Hogan v Hinch*,[4] '[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest'.[5]

15. To the same end, Justice Maxwell, the President of the Court of Appeal has observed:

> *In what continues to be a highly punitive debate about sentencing, it seems to me that this Court needs to promote public understanding of the fact that, quite apart from the interest of the individual whom it is sought to rehabilitate, there is a vital community interest in maximising the prospects of rehabilitation of an individual who has been convicted of a serious crime. The prospect of an offender being rehabilitated represents the best hope for the community that the person will never again engage in violent behaviour.*[6]

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1 On occasion Liberty Victoria uses the term 'complainant' in this submission. That means no disrespect to people who are victim-survivors. However, it is important to recognise that when a criminal allegation is made against a person, it is for the finder of fact (be it a jury or judicial officer) to determine whether the evidence of a complainant is accepted and whether an alleged offender is guilty of an offence. It is important not to subvert the proper role of the fact-finder in this regard. This is consistent with the language employed by the Court of Appeal, even in conviction appeals after a person has been convicted of an offence.

2 Liberty Victoria, Submission to the Victorian Law Reform Commission, Improving the Response of the Justice System to Sexual Offences, 25 January 2021, [9] <https://libertyvictoria.org.au/content/improving-response-justice-system-sexual-offences>.

3 Ibid [10].

4 [2011] HCA 4; (2011) 243 CLR 506.

5 Ibid 537 [32].

6 *DPP v Malikovski* [2010] VSCA 130, [51].

16. In relation to youthful offenders, in *Azzopardi v The Queen*[7] Justice Redlich has stated:

> *[C]ourts "recognise the potential for young offenders to be redeemed and rehabilitated". This potential exists because young offenders are typically still in a stage of mental and emotional development and may be more open to influences designed to positively change their behaviour than adults who have established patterns of anti-social behaviour. No doubt because of this potential, it has been stated that the rehabilitation of young offenders, "is one of the great objectives of the criminal law".*[8]

17. Over the past two decades there have been many systematic changes to the criminal justice system in Victoria with the enactment, amongst other things, of the *Charter*, the *Evidence Act 2008* (Vic), the *Criminal Procedure Act 2009* (Vic), and the *Jury Directions Act 2015* (Vic). Over this period there have been fourteen pieces of amending legislation that have introduced and then expanded presumptive and mandatory sentencing under the *Sentencing Act 1991* (Vic).[9] Further, there have also been significant reforms to parole and bail laws after the Callinan and Coghlan reviews.

18. Over this period Victoria's prison population has expanded dramatically. The Sentencing Advisory Council ('SAC') has published the following graph showing the increase in Victoria's prison population from 1871-2020:[10]

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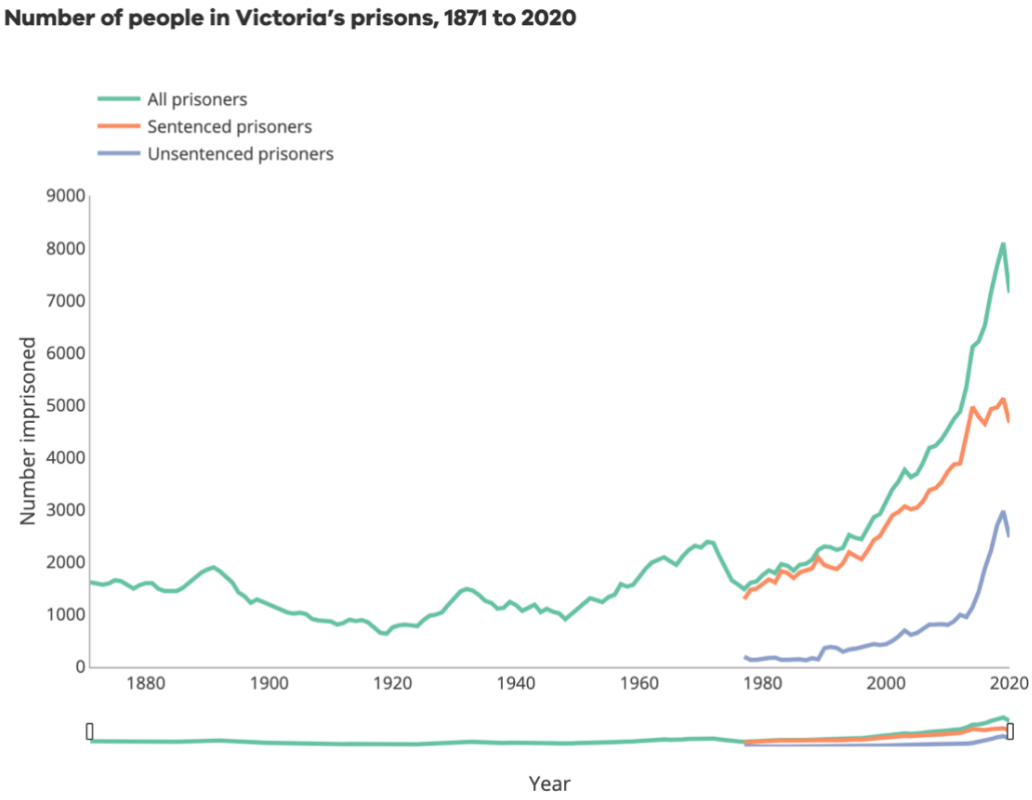
7 (2011) 35 VR 43.

8 Ibid 54 [35] (citations omitted). Coghlan AJA agreeing at 70 [92], Macaulay AJA agreeing at 70 [93].

9 *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic); *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic); *Sentencing Amendment (Emergency Workers) Act 2014* (Vic); *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic); *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic); *Crimes Legislation Amendment Act 2016* (Vic); *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic); *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic); *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic); *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic); *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic); *Justice Legislation Miscellaneous Amendment Act 2018* (Vic); *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic); and *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic).

10 Victoria's Prison Population', *Sentencing Advisory Council* ('SAC') (Web Page) <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-prison-population>. See the table 'Number of People in Victoria's Prisons, 1871 to 2020'. As at 30 June 2020, Victoria's prison population was 7,149 (following a 11.8% decrease from 2019-2020 due to the likely impact of the COVID-19 pandemic). As at 31 July 2021 there were 7,194 prisoners in Victorian prisons: 'Monthly Prisoner and Offender Statistics 2020–21', *Corrections Victoria* (Web Page) <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics>.



19. Each prisoner costs the public over $130,000 per annum.[11] Victoria's prison budget is now over $1.8 billion a year.[12] The Government has committed to expanding Victoria's prison capacity.[13]

20. Over one third of prisoners are unsentenced, and accordingly entitled to the presumption of innocence.[14]

21. Of course, the vast majority of prisoners serving sentences of imprisonment will eventually be released. Former Chief Magistrate the Hon Ian Gray and former Supreme Court Judge the Hon Kevin Bell AM QC have observed that, despite Victoria's imprisonment rate having reached its highest levels since 1895, 'jailing is not working as a deterrent: four out of 10 prisoners in Victoria return to prison within two years of their release, with many entrenched in a relentless cycle of unemployment, homelessness and offending'.[15]

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11 Ian Gray and Kevin Bell, 'Why "Tough on Crime" Attitude Doesn't Make Communities Safer' *Herald Sun* (Web Page, 23 November 2020) <https://www.heraldsun.com.au/news/opinion/why-tough-on-crime-attitude-doesnt-make-communities-safer/news-story/c899d9398a40979174cc417b49c8c3fa>.

12 Corrections Victoria, 'Corrections Budget for 2019-20 released' (Web page) <https://www.corrections.vic.gov.au/corrections-budget-for-2019-20-released>.

13 Ibid.

14 Victoria's Prison Population', *Sentencing Advisory Council* ('SAC') (Web Page) <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-prison-population>.

15 Gray and Bell (n 10). See Corrections Victoria, 'Corrections Statistics: Quick Reference' (Web Page) citing Council of Australian Governments, Report on Government Services 2020 <http://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>.

22. In her article 'Why Mandatory Sentencing Fails', Ms Tania Wolff, the current President of the Law Institute of Victoria ('LIV'), states:

> *The Victorian Ombudsman's report into prisons in 2015 provided the following sobering statistics about our prison population:*
>
> *(i) 75 per cent of male prisoners and 83 per cent of female prisoners report illicit drug use before going to prison*
>
> *(ii) 40 per cent of prisoners have a mental health condition*
>
> *(iii) 42 per cent of male prisoners and 33 per cent of female prisoners had a cognitive disability*
>
> *(iv) 35 per cent of prisoners were homeless before their arrest*
>
> *(v) More than 50 per cent of prisoners were unemployed*
>
> *(vi) More than 85 per cent of prisoners had not finished high school.*
>
> *The notion that the unwell, addicted and impaired will stop committing crimes without rehabilitation and therapeutic programs to deal with the underlying causes of offending is fanciful. It is well known that the motivation to satisfy a drug addiction outweighs the threat of punishment and its long-term consequences.*
>
> *In a growing number of jurisdictions internationally, including Texas, governments are directing resources away from prisons and towards rehabilitation programs for offenders and justice reinvestment initiatives.*[16]

23. We urge the Committee to move away from the 'tough on crime' rhetoric which often underpins reactionary and deleterious changes to the criminal justice system and prevents proactive, evidence-based reform. While there may be a short-term political gain from taking such an approach, we are all worse off in the long-term. The 'tough on crime' rhetoric has gripped successive governments over the last couple of decades. However, the legal and policy changes that this rhetoric have brought about have not seen a decrease in imprisonment numbers, but a significant increase. There also seems to be no causation between the 'tough on crime' rhetoric and any reduction in offending.

24. We acknowledge that the Government has committed to important reforms over recent years, such as introducing a spent convictions regime[17] and the abolition of the offence of public drunkenness. However, much more could be done to provide meaningful, long-lasting reform to Victoria's criminal justice system.

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16 Tania Wolff, 'Why Mandatory Sentencing Fails', *Law Institute Journal* (Web Page, 1 February 2018) <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/Jan-Feb-2018/Why-mandatory-sentencing-fails>.

17 *Spent Convictions Act 2021* (Vic).

25. Instead of adopting a 'tough on crime' rhetoric, we need to be smart on crime. This includes considering and addressing the underlying criminogenic factors that lead to offending and re-offending.

26. In this submission we have attempted to address several matters relevant to the Inquiry that give rise to particular concern. Our submission and recommendations reflect our experience and expertise.

27. It should also be stated at the outset that this year marks the 20th anniversary of the Royal Commission into Aboriginal Deaths in Custody. Key recommendations of that Royal Commission remain unimplemented. As recent tragic events demonstrate all too clearly, those recommendations are just as relevant today. First Nations Australians remain greatly overrepresented in Victoria's prisons.

28. Liberty Victoria has had the benefit of receiving an advance copy of the submissions made by the Victorian Aboriginal Legal Service ('VALS') to this inquiry. VALS has the experience and expertise to provide specific advice and recommendations in respect of the issues that affect First Nations Victorians. We urge the inquiry to have close regard to the submission and recommendations made by VALS.

SUMMARY OF RECOMMENDATIONS

29. We recommend that the Inquiry:

    (a) Acknowledge that the factors which make it more likely that a person will become involved in the criminal justice system are wide-ranging and cannot be addressed solely by investment or reform within the criminal justice system;

    (b) Recognise that the criminal justice system impacts First Nations people, people with culturally and linguistically diverse cultural backgrounds, women and LGBTQI+ people in different and unique ways;

    (c) Recognise the importance of preventing people from becoming entrenched within the criminal justice system. Reform in this regard should include:

        (i) Acknowledging the harm caused by repressive laws governing whether accused persons are granted bail, and reforming these laws so they are fairer;

        (ii) Improving the availability of affordable housing and service availability in the community;

(iii) Raising the age of criminal responsibility to fourteen years;

(iv) Removing prosecutorial discretion with regard to the availability of the diversion program;

(v) Adopting a health-based, harm minimisation approach to drug use that promotes human rights and equality. This requires the decriminalisation of personal drug use and possession; and

(vi) Acknowledging the prevalence of mental illness and intellectual disability in those persons who commit criminal offences, and in particular those who are then incarcerated;

(d) Recognise the important role played by experienced judicial officers and the substantial benefits of a criminal justice system in which their discretion is protected. Reform should include:

(i) Broadening the sentencing options that are available to courts;

(ii) Repealing laws that provide for prescriptive and mandatory sentencing which unfairly circumscribe judicial discretion; and

(iii) Repealing recently enacted laws that would abolish *de novo* appeals from the Magistrates' Court to the County Court of Victoria;

(e) Acknowledge the importance of being able to access bail support and supervision programs (such as CISP) and propose the expansion of bail support and supervision programs so that more accused can access such programs;

(f) Acknowledge the harmful and criminogenic impact of imprisonment and that steps ought to be taken to minimise these harms. This includes:

(i) Making prison disciplinary processes fairer and more transparent;

(ii) Taking steps to prevent mistreatment in prisons, including banning the use of harmful, unnecessary and degrading practices like routine strip searching and solitary confinement;

(iii) Implementing regular and independent oversight of Victoria's prisons;

(iv) Improving access to rehabilitative courses and educational programs for those in prison in order to attempt to break the cycle of recidivism, including by providing controlled internet access; and

(v) Providing a comprehensive and unified system of supports for released offenders to enable their reintegration in the community;

(g) Recommend that government-funded representation to be made available for people facing visa cancellation and refusal on character grounds, and that all people in criminal custody receiving visa cancellation or refusal notices be given access to urgent government-funded legal advice and support.

I. ADDRESSING THE CAUSES OF CRIME

30. In addition to the statistics above regarding the prevalence of drug addiction, mental illness and intellectual disability in the prison population,[18] we note:

(a) Only 4 per cent of Victorian prisoners have completed secondary school. 50 per cent of Victorian prisoners were unemployed prior to being imprisoned;[19]

(b) 53 per cent of children in detention or being supervised by Youth Justice are victims of abuse, trauma, or neglect. 42 per cent of children in youth detention or being supervised by Youth Justice have been exposed to family violence;[20] and

(c) 66 per cent of children detained in youth detention centres have a history of alcohol or drug misuse.[21] 52 per cent of adult offenders attribute their offending to use of alcohol or drugs.[22]

31. Liberty Victoria has previously expressed concern about the conditions that children in detention face, and the increasing number of children being detained on remand.[23]

32. Liberty Victoria endorses the comments of Justice Bell in *Woods v Director of Public Prosecutions*:[24]

> *…detention of young people on remand can have deleterious consequences for them and the community which are out of all proportion to the purpose of ensuring appearance at trial and protecting the community. It separates them from their families and the community, disrupts their education and employment, causes them to associate with other young offenders at a vulnerable time in*

18 At [22].
19 Corrections Victoria, August 2020, Annual Prisoner Statistical Profile 2006-07 to 2018-19, Table 1.13 & 1.14.
20 Department of Justice and Community Safety (Vic) 2020, Youth Justice Strategic Plan 2020–2030, 9.
21 Youth Parole Board, "Annual Report 2015-2016" August 2016, 14.
22 Payne J & Gaffney A, "How much crime is drug or alcohol related? Self-reported attributions of police detainees. Trends & issues in crime and criminal justice no. 439", 2012, Australian Institute of Criminology.
23 Liberty Victoria, Inquiry into Youth Justice Centres in Victoria (Web Page, 10 March 2017) <https://libertyvictoria.org.au/content/inquiry-youth-justice-centres-victoria>.
24 [2014] VSC 1; (2014) 238 A Crim R 84.

their lives, … deprives them of access to therapeutic programs and increases the risk of them being given a sentence of incarceration…[25]

33. To avoid children getting caught up in the criminal justice system, early intervention and justice reinvestment programs ought to be prioritised. Alternatives to holding children on remand should be expanded. It is clear that detention and imprisonment is criminogenic, and it is vital to break the cycle of recidivism through early intervention and by providing supports in relation to drug and alcohol addiction and mental illness.

Housing and Community Services

34. There is a clear need to properly resource community services that address the causes of crime, including those directed towards mental health, housing, alcohol and drug rehabilitation, and child protection. These systems markedly reduce the number of people that become involved in the criminal justice system:

(a) Individuals with mental health conditions and those who have experienced trauma are overrepresented in the prison population. Improvements in the mental health system are needed so that individuals in need can better access help. As the Royal Commission into Victoria's Mental Health System, and the recent Inquiry into Homelessness in Victoria point out, mental illness can be further compounded by housing instability;[26]

(b) Better services to address housing and prevent people experiencing homelessness will reduce the likelihood of contact with the criminal justice system. The causes of homelessness are varied and include financial instability, poor mental health, employment difficulties, and alcohol and drug misuse. Those from disadvantaged or marginalised groups are at greater risk of homelessness;

(c) The link between substance abuse and contact with the criminal justice system is well established. The Victorian Ombudsman has previously called for urgent improvement in timely access to rehabilitative services (and also emphasised the importance of stable housing) for released prisoners;[27] and

(d) That many children in institutional care become involved in the criminal justice system is a tragic indictment on the state of the child protection system. In October 2020, the Victorian Ombudsman published a report

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25 Ibid 109-10 [95].

26 See Royal Commission into Victoria's Mental Health System – Final Report – summary and recommendations (2021), 13.

27 Victorian Ombudsman, 'Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system' (7 September 2017), 1.

regarding an investigation into five young people in State care.[28] Each had reported being sexually and physically abused while in residential care. The report states that each of these children were traumatised by their experience of residential care, and it recognises that their experiences are not new or isolated. Out of home care for children in Victoria is unsafe and places them at risk of harm. One of the sad consequences of failures in this system is the increased likelihood of criminal justice system involvement for these children and young people.

II. RAISING THE AGE

35. The minimum age of criminal responsibility in Victoria is 10 years.[29] For children under the age of 14 the principle of *doli incapax* applies.[30]

36. We take this opportunity to continue to advocate for the urgent need to raise the age of criminal responsibility to 14 years.

37. In 2019, in General Comment No 24 on 'Children's Rights in Juvenile Justice', the United Nations Committee on the Rights of The Child ('UNCRC') recommended that all State parties increase the minimum age of criminal responsibility to at least 14 years.[31] The UNCRC stated:

> *Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.*[32]

38. Recently, the United Nations Human Rights Council Universal Periodic Review ('UPR') highlighted the need for Australia to raise the minimum age of criminal responsibility.[33]

39. As observed by the UNCRC, there is a strong evidentiary basis to support this reform. We refer to the Raise the Age campaign statement to the Council of Attorneys-General ('CAG') dated 19 May 2021,[34] of which Liberty Victoria is a signatory, and the resources referred to there.

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28 Victorian Ombudsman, 'Investigation into complaints about assaults of five children living in Child Protection residential care units' (29 October 2020), 1.

29 *Children, Youth and Families Act 2005* (Vic) s 344.

30 *RP v The Queen* (2016) 259 CLR 641 ('*RP*'). This is a common law rule by which it is presumed that children under the age of 14 lack the capacity to be criminally responsible for their acts.

31 United Nations Committee on the Rights of the Child, General Comment No 24, 'Children's Rights In Juvenile Justice', [33].

32 Ibid [2].

33 Human Rights Council, Forty-seventh session, 21 June–9 July 2021, Agenda item 6, Universal periodic review, Report of the Working Group on the Universal Periodic Review, Australia <https://undocs.org/A/HRC/47/8>.

34 See Raise The Age, CAG Statement <raisetheage.org.au/cag-statement> and Raise The Age, 'Public statement to accompany the release of submissions to the Council of Attorneys-General on raising the age'

40. Victoria now has the opportunity to follow the initiative of the Australian Capital Territory on this crucial issue.

41. Children under 14 are developmentally immature. Early contact with the criminal justice system and punitive responses to childhood offending are criminogenic; they contribute to higher rates of incarceration and recidivism.

42. Such a low age of criminal responsibility disproportionately affects some of the most vulnerable children in the community. Children who enter the criminal justice system far too often are those that have experienced neglect, abuse, and trauma.[35] First Nations children are significantly over-represented in the system, and especially in detention.

43. Contact with the criminal justice system does little to address the complex needs of these children, and often exacerbates them.

III. DIVERSION

44. Diversion is an important sentencing option available to the courts in dealing with relatively minor criminal charges in a way that minimises the negative impacts on an accused's prospects of rehabilitation. It is usually only available for first-time offenders.

45. The grant of diversion currently requires prosecutorial consent.[36] We are concerned that:

    (a) There is no legislative guidance for the factors that prosecutors consider in deciding whether to consent to diversion. The result is an informal process of decision making, with any internal guidance being ad hoc and opaque;

    (b) There is no way to appeal against a diversion decision and it is arguable that judicial review is not available;[37]

    (c) There is an inconsistent approach to the grant of diversion across the State; and

    (d) These inconsistencies are disproportionately borne by marginalised communities.

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35 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision: 1 July 2014 to 30 June 2018* (Report, 2019); Law Council of Australia, 'Children and Young People' (Justice Project: Final Report, August 2018), 8.

36 *Criminal Procedure Act 2009* (Vic) s 59.

37 *Likiardopoulos v The Queen* [2012] HCA 37; (2012) 247 CLR 265.

46. We adopt and refer the Committee to our Rights Advocacy Project report, 'Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria.'[38]

47. Diversion should not depend on prosecutorial consent.

48. This view has been supported by:

    (a) The Criminal Bar Association of Victoria ('CBA');[39]

    (b) The LIV;[40]

    (c) VALS;[41]

    (d) The Magistrates Court Executive Committee, which stated that 'diversion should be available at the instance of a magistrate and not initiated by notice of a member of Victoria Police';[42] and

    (e) The Criminal Court Users Committee which has held a 'longstanding view that the Chief Magistrate recommend to the Attorney General that the granting of the diversion program should be a matter for the discretion of the magistrate and not be subject to veto by the prosecution'.[43]

IV. DRUG DECRIMINALISATION

49. We take this opportunity to reiterate our position in relation to drug-decriminalisation, as outlined in our response to the Enquiry into Drug Law Reform in 2017;[44] and our response to the Inquiry into the Use of Cannabis in Victoria in 2020.[45]

50. As we have stated in our previous submissions, four key principles should underpin any policy or law reform:

    (a) ***Health-based prevention***: It is a core tenet of medicine that prevention is better than cure, and drug addiction is a medical problem that requires

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38 Liberty Victoria Rights Advocacy Project, 'Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria' (2018) <libertyvic.rightsadvocacy.org.au/wp-content/uploads/2018/05/Justice-Diverted-Report-FINAL.pdf>.

39 Criminal Bar Association of Victoria, Submission to the Magistrates' Court of Victoria, Review of the Criminal Justice Diversion Program, 5 June 2015.

40 Law Institute of Victoria, Submission to the Magistrates' Court of Victoria, Review of the Criminal Justice Diversion Program, 26 May 2015.

41 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, Review of the Diversion Program in the Magistrates' Court, 2015.

42 Magistrates' Court of Victoria, 'Annual Report 2015-16' (30 September 2016) 12.

43 Ibid, 13.

44 Liberty Victoria, 'Submission to the Enquiry into Drug Law Reform' (21 March 2017) <libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-DrugLawReform20170321-web.pdf>.

45 Liberty Victoria, 'Submission to the Enquiry into the Use of Cannabis in Victoria' (31 August 2020) <libertyvictoria.org.au/sites/default/files/Inquiry%20Into%20the%20Use%20of%20Cannabis%20in%20Victoria%20-%20Liberty_Victoria_0.pdf>.

health-based solutions. We believe in a focus on prevention and early-intervention;

(b) ***Harm minimisation and risk mitigation***: It is inevitable that people will continue to use drugs. A key role for drug reform must therefore be to implement policies that reduce the risk involved in drug use and minimise the harmful impacts of drug use at individual and community levels;

(c) ***Human rights***: Under the *Charter* and international human rights law, individuals are entitled to certain rights and freedoms. Respect for these rights benefits both individuals and communities, and makes for better public policy; and

(d) ***Equality***: Related to human rights, reforms must be equal in substance and in effect. Drug laws should not have a disproportionate impact on minority groups and/or groups with lower socio-economic status.

51. We support the decriminalisation of personal drug use and possession. A multitude of social and community benefits are achieved by this approach, including a reduced burden on police, legal and support services, and an already stretched court system. Such an approach would also increase the likelihood that people would access health services for support, and divert people away from the criminal justice system.

52. As we said in our 2017 submission to the Inquiry into Drug Law Reform:[46]

> *In any debate about drug reforms, there is a lot of confusion around what decriminalisation is and how it differs from legalisation. To clarify, in this submission we use the term* decriminalisation *to refer to policies that divert offenders away from the criminal justice system. This differs from* legalisation *in one key way: use and possession is still unlawful; it just doesn't carry the same criminal penalties. …*
>
> *The benefits of decriminalisation have been well documented. They include:*
>
> *(1) Benefits to those impacted, including improved health, employment and rehabilitation prospects;*
>
> *(2) A reduced burden on an already stretched criminal justice system and associated positive economic implications; and*
>
> *(3) The associated social and community benefits that flow from the above.*

53. In relation to cannabis laws, we support Victoria adopting the approach of the Australian Capital Territory in *legalising* the possession of small amounts of cannabis, and the cultivation for personal use of a small number of plants. Importantly, such an approach would represent a significant blow to the black market and organised crime groups that profit from the criminalisation of cannabis.

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[46] Liberty Victoria, 'Submission to the Enquiry into Drug Law Reform' (21 March 2017) at [7]–[10].

54. While we accept that drug use can result in addiction and deleterious consequences, this should be dealt with a health and human rights-based approach, which gives primacy to prevention over punishment.

55. Victoria currently permits the issuing of drug cautions by police (resulting in no criminal charges) for instances of cannabis possession, and as noted above allows the prosecution to agree that an accused person is eligible for diversion (after criminal charges are laid). However, this approach relies on police discretion and is not properly adapted for repeat offenders affected by drug addiction. We therefore recommend decriminalisation (and for small quantities of cannabis, legalisation) in order to divert offenders away from the criminal justice system. Such an approach should be supported by rehabilitation and education programs.

56. One way in which drug and alcohol abuse as a criminogenic factor has been addressed in Victoria is through drug courts. In 2021, a new subdivision of the County Court was introduced so that the County Court could also run a drug court.

57. The Magistrates' Court drug courts have been evaluated[47] and that evaluation has shown that there was a significantly lower rate of reoffending for those who participated in Drug Court and a significant reduction in the average seriousness of offences for Drug Court participants who do reoffend.[48] When compared to imprisonment, Drug Court was also considered a more cost-effective sentencing alternative.[49]

58. It is positive that there has been an expansion of Drug Court to the County Court and there is a planned expansion to the Shepparton and Ballarat Magistrates' Court. However, access to the Drug Court is limited and participants who have been charged with some offences (e.g sexual offences or offences that involve the infliction of bodily harm, unless the harm is minor in nature) are excluded. This means that many people who would benefit from Drug Court cannot access it.

59. Liberty Victoria recommends that Drug Court be expanded to all Magistrates' Courts around Victoria and that the eligibility requirements be broadened, so that even those accused of serious offences can access the rehabilitative benefits of Drug Courts.

V. BAIL REFORM

60. The laws relating to obtaining bail should be reformed urgently so that more people have access to bail. The current bail system frequently puts children, First Nations

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47 Magistrates' Court of Victoria, Evaluation of the Drug Court of Victoria, Final Report (18 December 2014) available at < https://www.mcv.vic.gov.au/sites/default/files/2018-10/Evaluation%20of%20the%20Drug%20Court%20of%20Victoria.pdf>.

48 Ibid at page 4.

49 Ibid at page 6–7.

people, women, and people with poor mental health in a position where, even for minor offences, they are placed in the same category as those accused of much more serious offences when their bail decisions are made.

61. The legislative amendments that followed the Coghlan Review have created a system far stricter than even that which was recommended by the expert advice to the Government. It results in a system where, for example, a person who is charged with a shop-steal offence (as an indictable offence), and is then alleged to commit another shop-steal offence while on bail is placed in a category where they must 'show compelling reasons' why they should be granted bail.[50] If they are bailed and commit another shop-steal, they would then need to show 'exceptional circumstances' in order to be granted bail.

62. Successive bail reforms have disproportionately impacted minority and marginalised groups. This includes First Nations people. By 2019, just under half of First Nations prisoners were on remand. We are deeply concerned that the fair and proper administration of justice is adversely affected as a result. Further, the continued tightening of bail laws is contrary to the findings and recommendations made by the Royal Commission into Aboriginal Deaths in Custody.

63. Ways in which bail laws should be amended to be fairer and to slow the unacceptable growth of the remand population are set out in the Liberty Victoria Rights Advocacy Project's forthcoming report *Bailing Out a Broken Bail System*.[51] They include:

    (a) Implementing a single 'unacceptable risk' test for bail;

    (b) Repeal of laws that impose a reverse onus test when the applicant is accused of having committed offences whilst on bail;

    (c) Repeal of the offences of committing on offence whilst on bail, failing to answer bail, and breaching bail conditions;

    (d) Introduction of a 'no real prospect test', the effect of which would be to limit the Court's power to remand an accused where the accused has no real prospect of being sentenced to a term of imprisonment; and

    (e) Strengthening s 3A of the *Bail Act 1977* (Vic) to provide better protection against the disproportionate denial of bail faced by First Nations bail applicants.

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50 See *Bail Act 1977* (Vic) s 4AA and Schedule 2.

51 Liberty Victoria, Rights Advocacy Project, *Bailing Out A Broken Bail System*, 2021, pp 23-26.

64. Liberty Victoria supports the approach suggested by the Victoria Law Reform Commission ('VLRC') in 2007 which was endorsed by the Court of Appeal in *Robinson v The Queen* ('*Robinson*') [52] In 2007, the Victorian Law Reform Commission ('VLRC') stated:[53]

> *We recommend the removal of reverse onus tests so all bail decisions are made on the basis of unacceptable risk. We do not believe this will alter the outcome of bail decisions because decision makers have told us unacceptable risk is always the ultimate test. Reverse onuses apply to a small number of offences, many of which do not commonly come before the court. They include: murder and treason; arson causing death; serious drug offences; a violent breach of a family violence or stalking order by a person with a history of violence; aggravated burglary; and indictable offences where a weapon is used.*
>
> *The commission believes decision makers will continue to treat seriously bail applications for offences that currently attract a reverse onus. There is no suggestion that applications for offences not currently included in the reverse onus categories are treated lightly*
>
> *... A common criticism of the current Act is that the inclusion of offences in the reverse onus categories is ad hoc. Most serious violence offences are not included, such as attempted murder, rape or serious assault. The same arguments are canvassed in bail applications that do not involve a reverse onus, and the ultimate issue for the decision maker is whether the accused person poses an unacceptable risk. This simplified approach should apply to all offences.*

65. The Court in *Robinson* said '[t]his reform would greatly simplify Victorian bail law, without weakening it in any way. The Commission's reasoning is compelling'.[54]

66. To refuse bail where alleged offenders are not found to be an unacceptable risk of reoffending represents an unjustifiable limitation to the presumption of innocence. It places massive pressure on accused persons to plead guilty in circumstances where they may have a defence at law to the charges.

67. We are concerned that bail laws are increasingly being used as a means of preventative detention in some circumstances where prisoners, even if found to have committed the charged offences, would not receive lengthy sentences of imprisonment. The problem is even more acute in the present circumstances given the delays caused by the COVID-19 pandemic.

68. Another way in which bail ought to be reformed is that there need to be more bail support and supervision programs such as the Court Integrated Services Program ('CISP'). CISP is a fundamental tool in supporting more vulnerable people in being granted bail. CISP help to arrange emergency housing, doctor's appointments, alcohol and drug counselling and they link individuals in with other services. They also regularly

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52 (2015) 47 VR 226; [2015] VSCA 161

53 Victorian Law Reform Commission, Review of the Bail Act: Final Report (2007), 7. See also 54

54 *Robinson v The Queen* (2015) 47 VR 226; [2015] VSCA 161, 239 [47] (Maxwel P and Redlich JA).

meet with the person granted bail and report on their progress to the Court. The CISP program has now been introduced in the County Court, which is a positive step.

69. However, the CISP program is not available for all accused and some offences (for example sexual offences) are expressly excluded. This means that there are people who spend a significant time on remand because they do not have the knowledge, means or resources to put together a strong bail plan because they are left without assistance.

70. There is also an issue where accused who start off on CISP in the Magistrates' Court for indictable matters are then committed to the County Court, but they cannot continue on CISP whilst on bail in the County Court and are exited from the program.

71. Liberty Victoria supports the expansion of CISP to make it available to more people, irrespective of the offence that they are charged with. This will ensure that there are more people who disadvantaged that will be able to put together a strong bail plan. Further, this will mean that there is more supervision and support for individuals on bail.

72. Liberty Victoria also recommends that there is more of a connection between the Magistrates' Court and County Court CISP program, so that people are not exited from CISP solely for the reason that their matter has been committed to a higher Court. Liberty Victoria supports the availability of CISP to continue while accused are in the higher courts.

VI. JUDICIAL DISCRETION AND MANDATORY SENTENCING

73. We are deeply concerned about the gradual erosion of judicial discretion in sentencing and the move towards presumptive and mandatory models of sentencing.[55] Over the last decade there have been at least fourteen pieces of legislation introducing and then ratcheting up presumptive and mandatory sentencing in Victoria.

74. Many bills that restrict judicial discretion have passed into law despite there having been no evidence to support the proposition that a significant number of sentencing outcomes are out of step with community expectations. The evidence demonstrates that, when people are properly informed about the facts of a particular case, there is little or no discrepancy between informed public expectation and actual sentencing

[55] 'Presumptive sentencing' refers to criminal offences where there is a statutory presumption of a particular type and/or minimum length of sentence, subject to exceptions. This includes presumptive sentences of imprisonment with minimum non-parole periods subject to 'special reasons' exceptions. 'Mandatory sentencing' refers to criminal offences where a particular type of sentence and/or minimum length of sentence must be imposed and there are no exceptions. See Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* 195, 203 nn 55–6.

outcomes.[56] Further, the evidence supports the proposition that, when fully informed, members of the public support judicial discretion in sentencing.[57]

75. We refer to and adopt our submission to the Sentencing Advisory Council's Sentencing Guidance Reference.[58]

76. The foundational problem caused by mandatory sentencing was well described by Mildren J in *Trenerry v Bradley*:[59]

> *Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.*[60]

77. We also share the Law Council of Australia's concerns that mandatory sentencing laws:[61]

(a) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

(b) Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR); and the right to a fair trial and the provision that

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56 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience; an Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769; Karen Gelb, 'More Myths and Misconceptions', *SAC* (Research Paper, 2008); Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study', Trends & Issues in Crime and Criminal Justice, *Australian Institute of Criminology* (Research Paper, February 2011). See also SAC, *Sentencing Guidance in Victoria* (Report, June 2016) 319–20 [10.44]–[10.45]; 'Is Sentencing in Victoria Lenient? Key Findings of The Victorian Jury Sentencing Study' *SAC* (Web Page, 23 August 2018) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Is_Sentencing_in_Victoria_Lenient.pdf>:

> Overall, 62% of jurors would have imposed a sentence that was more lenient than the judge, while 2% would have imposed a sentence of equal severity. The difference was not minor: overall, jurors imposing a prison sentence were more lenient than the judge by an average of 12 months. Jurors (16%) were also more likely than judges (8%) to suggest a non-custodial sentence.
> After being provided with the judge's sentencing remarks and a booklet of information on sentencing law and practice, the overwhelming majority (87%) of jurors thought the judge's sentence was either 'very appropriate' or 'fairly appropriate'. Only 3% of jurors thought the judge's sentence was 'very inappropriate'.

See also *R v WCB* (2010) 29 VR 483, 490–2 [20]–[29] (Warren CJ and Redlich JA).

57 Kate Warner et al, 'Mandatory Sentencing? Use [with] discretion' (2018) 43(3) *Alternative Law Journal* 289:

> [W]hen the public are provided with illustrative cases or are reminded that under mandatory sentencing all offenders guilty of a particular offence will be given the same sentence regardless of the circumstances of the offence or their individual circumstances, the public are largely in favour of sentences being determined on a case-by-case basis. In addition, research has revealed strong public attachment to judicial discretion, even if people feel that sentencing 'in general' is too lenient. (Citations omitted).

58 Liberty Victoria, Submission to the Sentencing Advisory Council's Sentencing Guidance Reference, (Web Page, 8 February 2016) <https://libertyvictoria.org.au/content/sentencing-guidance-reference>.

59 (1997) 6 NTLR 175

60 Ibid 187.

61 Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (May 2014).

prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;

(c) Increase costs to the community through higher incarceration rates;

(d) Disproportionately affect vulnerable groups within the community, including First Nations people and persons with a mental illness or intellectual disability.

(e) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

(f) Fail to deter crime;

(g) Increase the likelihood of recidivism because prisoners are placed in a learning environment for crime inhibiting rehabilitation prospects;

(h) Wrongly undermine the community's confidence in the judiciary and the criminal justice system as a whole; and

(i) Displace discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and so fails to eliminate inconsistency in sentencing.

78. The abolition of sentencing options has compounded the impact of increasingly restricted judicial discretion. In recent years the Victorian Government has removed the ability of courts to impose suspended sentences[62] and home detention orders.[63]

79. Judicial officers now have four main sentencing dispositions available to them: adjourned undertakings for the offender to be of good behaviour, fines, Community Correction Orders ('CCO'), and gaol.

80. CCOs are often not appropriate for offenders as the conditions that attach to these orders can adversely impact a person's ability to maintain employment and care-giving responsibilities. Offenders who are at risk of experiencing homelessness, have mental health issues, or come from culturally and linguistically diverse backgrounds often face greater difficulties maintaining compliance with these orders. Sadly, courts have no option in circumstances where an offence calls for a sentence greater than a fine, but does not warrant imprisonment. Historically, suspended sentences could be used in such circumstances to great effect.

62 Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013 (Vic).
63 Sentencing Amendment (Community Correction Reform) Act 2011 (Vic).

81. The CCO regime has been reformed so that a CCO now cannot be combined with a sentence of imprisonment of more than 12 months (not including pre-sentence detention).[64] For some offences a CCO is not available as a sentencing option at all, and for other offences only in very restricted circumstances.[65] These reforms have been a serious mistake.

82. In Victoria's first guideline judgment, *Boulton v The Queen*,[66] the Court of Appeal observed:

> *[I]mprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage…*
>
> *The CCO option offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide...*[67]

83. As we have previously said, judicial officers need more, not fewer, sentencing options. With a greater set of options, judges and magistrates are better equipped to do justice in an individual case.[68]

84. Further, it is clear that, when faced with a presumptive or mandatory term of imprisonment (whether with regard to the head sentence or the non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, presumptive and mandatory sentencing reforms are bound to see an increase in contested hearings, committals and trials which places further pressure on a court system that is already strained and suffering from serious delays only exacerbated by the COVID-19 pandemic. This has obviously deleterious consequences for complainants, victims, witnesses, and investigators.

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64 *Sentencing Act 1991* (Vic) s 44(1).
65 See *Sentencing Act 1991* (Vic) (Vic) ss 5(2G) and 5(2H).
66 [2014] VSCA 342; (2014) 46 VR 308.
67 Ibid 334 [108], 335 [114] [127]-[128] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) (citations omitted).
68 Liberty Victoria, 'Submission on the Sentencing (Community Correction Order) and Other Acts Amendment Bill (Web Page, 31 October 2016) <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-comment-CCO-bill-20161031web.pdf>.

85. Further, we note that there have been significant judicial warnings about the effects of prescriptive and mandatory sentencing. In *Esmaili v The Queen* ('*Esmaili*'),[69] Justice Croucher stated '[o]ther jurisdictions have tried similar approaches to sentencing and failed. It is a great pity that we are making the same mistakes'.[70] In *Esmaili,* the Court of Appeal warned of the deleterious effects of presumptive and mandatory sentences, noting that the provisions would lead to the compression of sentences and shorter periods of supervision on parole.[71] This must be seen in conjunction with reforms to Victoria's parole system after the Callinan Review, with the consequence that a significant number of prisoners are released with no, or very limited, periods of supervision on parole. That is not in the community's interests.

86. We continue to oppose bills that restrict judicial discretion in sentencing and call for evidence-based reforms instead of those based on short-term populist appeal.

VII. SEXUAL OFFENCES AND POST SENTENCE ORDERS

87. At the start of this year Liberty Victoria made a comprehensive submission to the VLRC in relation to its inquiry into Improving the Response of the Justice System to Sexual Offences.[72] We adopt those submissions.

88. In relation to suitable sexual offences (and with the consent of the victim and the accused), we have supported the introduction of a restorative justice model, observing:

> *Often the criminal justice system is ill-equipped, even with the best endeavours of legislators, judicial officers and legal practitioners, to provide just outcomes that are fair to complainants and accused persons. Sexual offences cases are often fraught, regularly considering events having occurred a long time ago, in circumstances where there is often limited if any corroborative evidence, and where there is often a clear conflict in the evidence of the complainant and the accused person in circumstances where the fact-finder needs to be satisfied beyond reasonable doubt of the elements of the offence. In part, that is why other avenues such as restorative justice may provide the best outcome for both complainants and accused persons in some cases.[73] …*
>
> *Restorative justice aims to improve victims' experiences of justice by considering their wellbeing and addressing specific needs, to improve victim access to justice by offering an alternative avenue for addressing harm, to support offenders in nonoffending by increasing their insight into the impact of the harm caused, and to create healthy societies by strengthening social bonds. It provides an opportunity for people who have been sexually harmed to explain the impact in their own words, without the constraints of the rules of evidence. Where restorative justice is 'done well', it can go beyond what traditional responses can achieve… Liberty Victoria has long supported the adoption of a restorative justice model for sexual offences to address and complement the*

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69 [2020] VSCA 63.
70 Ibid [100].
71 Ibid [63] (Priest and Kyrou JJA).
72 Liberty Victoria, Victorian Law Reform Commission Inquiryinto Improving the Response of the Justice System to Sexual Offences (Web Page, 25 January 2021) <https://libertyvictoria.org.au/content/improving-response-justice-system-sexual-offences>.
73 Ibid [18].

> *necessary limitations of the adversarial criminal justice system, and to ensure better outcomes for all participants.*[74]

89. In that submission we also note the serious problems affecting the sex offender registration regime under the *Sex Offenders Registration Act 2004* (Vic) including: (a) the expanding number of registrants; (b) the absence of judicial discretion as to whether a person should be placed on the register; and (c) the complexity of reporting obligations.[75]

90. We also note the serious problems with post-sentence detention or supervision under the *Serious Offenders Act 2018* (Vic), which has been expanded to include serious violence offences.[76] There are significant limitations with the risk assessment methodology underpinning the making of such orders.[77] Further:

> *It must be remembered that these forms of detention and supervision orders take effect only after a person has completed a sentence of imprisonment imposed by an independent judicial officer, and where that sentence of imprisonment was found to be proportionate having regard to all sentencing considerations, including the risk of reoffending and the need for community protection. …*
>
> *It appears that these detention and supervision orders are in part intended to fulfil the function once intended by supervision on parole, including access to rehabilitative programs, but only after a proportionate sentence has expired.*
>
> *Imprisonment has a criminogenic effect, and that needs to be counteracted in the early stages of incarceration, not after a sentence of imprisonment has expired. It would be [a] much better use of public resources if greater funding was allocated to prisoners to undertake rehabilitative programs when they are serving their sentences, as opposed to the creation of an additional layer of post-sentence supervision.*[78]

91. Further, mandatory sentencing provisions for breaches of 'restrictive conditions' under the *SOA* (including for relatively minor offences such as possession of cannabis or 'good order' offences), further entrenches problems as people are moved between stable housing, residential facilities and gaol, disrupting rehabilitation.

VIII. DE NOVO APPEALS

92. Liberty Victoria is strongly opposed to the abolition of de novo appeals in criminal matters from the Magistrates' Court to the County Court of Victoria.[79]

93. The abolition of de novo appeals was due to commence on 3 July 2021. On 23 March 2021, *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) received Royal Assent. Amongst other things, Part 19 of that Act amended

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74 Ibid [89].
75 Ibid [54]-[76].
76 Ibid [77]-[86].
77 Ibid [82].
78 Ibid [78].
79 Liberty Victoria, Comment on the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill, (Web Page, 18 August 2018) <https://libertyvictoria.org.au/content/justice-legislation-amendment-unlawful-association-and-criminal-appeals-bill>.

the *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) ('the 2019 Act') to push back the abolition of *de novo* appeals until 1 January 2023 ('the reforms').

94. The reforms should be reversed.

95. We refer to and adopt the article by Michael Stanton and Paul Smallwood, 'Pause for thought? The case for reversing the abolition of De Novo criminal appeals'.[80]

96. The last significant investigation into the *de novo* appeals system in Victoria was undertaken by the Law Reform Committee of the Parliament of Victoria in October 2006.[81] The findings of that investigation were published in a 270-page report entitled 'De Novo Appeals to the County Court' which recommended that the *de novo* appeal system be retained.

97. The Report also found that the abolition of the *de novo* appeal system would 'almost certainly reduce the efficiency of, and increase costs for, the Magistrates' Court' and would make hearings in the Magistrates' Court longer and more complex.[82] Further the Report warned:

> *While the implications of hearing appeals 'afresh' may involve an additional workload for the County Court, the Committee was not convinced that the potential efficiency gains would be realised in the whole justice system. Nor was the Committee convinced that alternative forms of appeal provide the same level of protection against errors made in rulings of the lower court. In addition, the Committee was concerned about issues of access to a fair appeals system.*[83]

98. Magistrates sometimes deal with more than 80 matters in a day. In 2018-9 alone, 151,765 cases were initiated and 67,973 were finalised in the Magistrates' Court.[84] There were 660,262 criminal listings.[85] This vast caseload places great pressure on all involved. Magistrates must make swift decisions that can have lasting consequences for an accused (such as imposing a conviction or a gaol sentence), and the majority of decisions are given *ex tempore*. While a day may be made available for a plea hearing in the County Court, a hearing in the Magistrates' Court may take as little as a few minutes. A large number of summary matters involve unrepresented accused, or legal representation by relatively junior lawyers. Due to changes to legal aid eligibility guidelines in 2015, more work has to be undertaken by duty lawyers, who regularly have to meet multiple accused persons, give advice to unrepresented accused, take

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80 (2021) 169 Victorian Bar News 46-48, <https://www.vicbar.com.au/sites/default/files/VBN169_Web.pdf>.
81 Parliament of Victoria, Law Reform Committee, De Novo Appeals to the County Court (2006),
82 Ibid, 5.
83 Ibid, xi.
84 Magistrates' Court of Victoria, Annual Report 2018-9 (Report, 14 November 2019) 33 <https://www.mcv.vic.gov.au/sites/default/files/2019-11/Annual_Report_18-19.pdf>. Given the impact of COVID-19 in 2019-20, this article refers to the 2018-9 statistics.
85 Ibid.

instructions, and prepare and present multiple pleas on any given day. The *de novo* appeal provides a vital safety net.

99. Abolishing *de novo* appeals removes a powerful reason for accused persons to resolve matters summarily. That would be unfortunate given the utilitarian benefits that summary resolutions bring, including to the community and to victims. It also imposes a very different model of advocacy upon those who practise in the Magistrates' Court, and a burden on Magistrates that is simply not practicable given the pressures on that Court.

100. The abolishing of *de novo* appeals will increase the workload of practitioners in the Magistrates' Court, many of whom are funded by Victoria Legal Aid. Hearings, including plea hearings, will require practitioners to gather additional evidence about an accused, including psychiatric and psychological reports, before a plea hearing can be held. This will increase delays, as there are a limited number of expert witnesses available that can complete reports (and that do reports on legal aid rates). These delays will overwhelm an already overworked system and underfunded practitioners. It will also operate more unfairly on accused who are on remand, who will likely spend more time on remand before their plea hearings can be finalised, because extra time will be needed for reports.

101. As the then Attorney-General remarked when introducing the reforms, the Magistrates' Court handles over 90 per cent of all cases that come before Victorian criminal courts each year, and only a small percentage are appealed.[86] In contrast to the figures from the Magistrates' Court, in 2018-9 there were only 2,498 criminal appeals commenced in the County Court, with 2,273 finalised (with 96% disposed of within 6 months).[87] Such appeals have formed a relatively small proportion of the business of the County Court.

102. The arguments in favour of the abolition of *de novo* appeals are misguided. To the extent it is claimed that *de novo* appeals undermine public confidence in Magistrates[88] or their abolition would result in better decision-making, there is no evidence that is so. Imposing an obligation on Magistrates to give full reasons with one eye on a potential appeal, when the practical constraints of the Court make it almost impossible to do so,

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86 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (The Hon Jill Hennessy, Attorney-General, Minister for Workplace Safety).

87 County Court of Victoria, Annual Report 2018-9 (Report, 2019) 7 <https://www.countycourt.vic.gov.au/files/documents/2019-10/ccv-annual-report-2018-19.pdf>.

88 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (The Hon Jill Hennessy, Attorney-General, Minister for Workplace Safety).

is simply unfair. Magistrates already face vast pressure operating at the coalface of the criminal justice system.

103. To the extent it is claimed that *de novo* appeals can traumatise complainants by them having to give evidence a second time,[89] in almost all circumstances that only applies to conviction appeals, which are a small part of the County Court's appeal workload. It is already the case that pre-recorded evidence is admissible in many cases.[90] Any inappropriate cross-examination would be stopped (and is routinely stopped) by judges hearing the appeal.[91] There are significant protections in relation to how witnesses may give their evidence.[92] It is certainly, at its highest, not an argument for the abolition of *de novo* sentence appeals.

104. It also wrong to suggest that *de novo* appeals, when conducted properly, are inefficient. Such appeals, in the vast majority of matters, are more efficient than having to obtain material, prepare and present legal submissions, and then have a judge review and resolve issues in dispute in an appellate jurisdiction bound in part by the way the matter proceeded before the Magistrates' Court.

105. In 2006, the Law Reform Committee concluded:

> Victoria's system of *de novo* appeal is both comparatively efficient — when seen in the wider context of its place within the criminal justice system — and comparatively fair. In the Committee's view, Victoria's system of *de novo* appeal achieves a remarkable synthesis of justice and value for money.[93]

106. Liberty Victoria agrees with those observations.

IX. PRISON AND BEYOND

Rehabilitation in Prison

107. Imprisonment can have a devastating impact on a person's life. As the Victorian Ombudsman Deborah Glass said in 2018: 'prison is not a therapeutic environment'.[94]

108. Those who are remanded or sentenced not only lose their liberty, but also face the loss of their jobs, family, reputation and sometimes their life.

109. We repeat our submission to the Victorian Ombudsman's 2014 Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria:

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89 Ibid.
90 *Criminal Procedure Act 2009* (Vic) pt 8.2 div 5.
91 *Evidence Act 2008* (Vic) s 41.
92 *Criminal Procedure Act 2009* (Vic) s 360.
93 Parliament of Victoria, Law Reform Committee, De Novo Appeals to the County Court (2006), xvii.
94 Victorian Ombudsman, 'Investigation into the imprisonment of a woman found unfit to stand trial' (16 October 2018), 16.

> *It is vital that resourcing for rehabilitation and reintegration services increases proportionately to the prison population. If an offender could potentially benefit from transition services, offence-specific rehabilitation programs or educational opportunities, any failure to provide those services is an indictment on the system. Additionally, regard must be had to the particular characteristics of vulnerable prisoners, notably women and Aboriginal and Torres Strait Islander prisoners.*[95]

110. Many prisoners face mistreatment, including being subject to harmful, unnecessary and degrading practices like routine strip searching and solitary confinement. These practices must cease.

111. In *Minogue v Thompson*[96] Justice Richards found that some of the routine strip-searching and drug testing of the plaintiff constituted breaches of his human rights under the *Charter*.[97]

Solitary Confinement

112. Liberty Victoria has previously expressed its concerns about the use of solitary confinement in prisons.[98] This is all the more relevant given the impacts of the COVID-19 pandemic.

113. Security regimes in prisons, such as solitary confinement, have a significant adverse effect on the rehabilitation and reintegration of prisoners. Where prisoners are placed in solitary confinement, or 'lockdown', they are unable to participate in rehabilitation programs. This means that the rehabilitative element of their incarceration is delayed or deferred and further, may adversely impact prospects for such prisoners being granted supervision on parole.

114. Research into heightened security conditions and prolonged isolation shows that:

> *Inmates in isolation, whether for the purpose of protective custody or punishment, suffer from numerous psychological and physical symptoms, such as perceptual changes, affective disturbances (notably depression), difficulties in thinking, concentration and memory problems, and problems with impulse control…*[99]

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95 Liberty Victoria, Submission to the Victorian Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria (Web Page, 31 December 2014) <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-YLLR_Submission_Ombudsman_PrisonConsultation20141231.pdf> [99].

96 [2021] VSC 56

97 Ibid [146].

98 Liberty Victoria, Submission to the Victorian Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria (Web Page, 31 December 2014) <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-YLLR_Submission_Ombudsman_PrisonConsultation20141231.pdf>.

99 Jesenia Pizarro and Vanja M K Stenius, 'Supermax Prisons: Their Rise, Current Practices and Effect on Inmates' (2004) 84 The Prison Journal 248, 256. See also Sharon Shalev, 'Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis' (2011) 11 Journal of Forensic Psychology Practice 151.

115. The use of solitary confinement should be abolished in all but the most exceptional cases. It should never be used for children.

Responsible Decarceration During the COVID-19 Pandemic

116. Liberty Victoria has also advocated for the responsible decarceration of Victorian Prisons during the COVID-19 pandemic given the vulnerability of Victorian prisoners in a closed environment with a high proportion of pre-existing serious health conditions.[100] We have called for responsible decarceration for:

(1) Elderly or immunosuppressed prisoners;

(2) Prisoners serving sentence for non-violent offending;

(3) Female prisoners eligible for release especially prisoners who are pregnant;

(4) Young people who have access to accommodation and supports in the community;

(5) Aboriginal and Torres Strait Islander people;

(6) Prisoners who are soon to be or are eligible for parole; and

(7) People on remand who are unlikely to serve more than 6 months in custody.

117. The recent outbreaks of COVID-19 in Victoria's prisons only supports this approach. Prisoners in Victorian prisons during COVID-19 have very limited access to visits from family and friends, education and rehabilitative courses. If proper access to rehabilitation cannot be achieved in Victorian prisons, then a different approach is required for prisoners who do not pose an immediate significant risk to the safety of the community.

Controlled Access to the Internet

118. Liberty Victoria also strongly supports controlled, restricted access to the internet for Victorian prisoners.[101]

119. Victorian prisoners are not permitted to access the internet during their incarceration. This imposes a dual limitation on those wanting to undertake distance education while in prison. First, information on what programs are available, and their content, is far

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100 Liberty Victoria (Web Page, 29 March 2020) <https://libertyvictoria.org.au/content/liberty-victoria-supports-calls-humane-decarceration-during-covid-19-pandemic-you-cannot>.

101 Liberty Victoria, Submission to the Victorian Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria (Web Page, 31 December 2014) <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-YLLR_Submission_Ombudsman_PrisonConsultation20141231.pdf>.

more difficult to access offline. Secondly, meaningful participation in such education opportunities is made more difficult, if not altogether impossible.[102]

120. Liberty Victoria notes that the Corrections Guidelines provide that prisoners' education shall enable them to develop appropriate skills for use in employment upon release. In a rapidly changing world, online learning is a mechanism which allows students to 'develop important skills which better equip them for the modern workplace' than offline vocational training. It is not an understatement to observe that, in the modern digital world, online skills are increasingly necessary to meaningfully participate in society.

121. Liberty Victoria is concerned that preventing prisoners from developing this important aspect of literacy will have ramifications for their further education and employment prospects post-release. Although there are understandable security concerns, Liberty Victoria submits that this could be addressed by monitoring and controlling internet usage of prisoners. The ACT human rights-compliant Maconochie Centre is a successful example of best practice in this area. This approach involves blocking all access to the internet but then 'white-listing' certain suitable websites to allow prisoner access.

Preventing Corruption in Prisons and Ensuring Adequate Oversight of Prisons

122. Societies that give emphasis to rehabilitation while taking crime seriously have lower crime rates. Societies that degrade and humiliate criminals tend to have higher crime rates.[103]

123. In recent years, Victoria's anti-corruption watchdog – the Independent Broad-based Anti-Corruption Commission ('IBAC') – in its special report on corrections uncovered serious and systemic wrongdoing in Victoria's private and public prisons.[104]

124. The Victorian Ombudsman found that disciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency.[105] These disciplinary hearings can have serious consequences for prisoners, including removal of access to phones, restrictions on out of cell time and withdrawal of contact with family.

> *In one case, a prisoner said he was told he would not be taken off the methadone program if he pleaded guilty – a decision he came to regret after*

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102 Lisa Harrison, 'Prisoners and Their Access to the Internet in Pursuit of Education' (2014) 39 Alternative Law Journal 159–61.

103 Braithwaite J, 'Shame and criminal justice' *Canadian Journal of Criminology* (July 2000) 42, 3.

104 Independent Broad-based Anti-corruption commission, 'Special report on corrections' (June 2021).

105 Victorian Ombudsman, 'Investigation into good practice when conducting prison disciplinary hearings' (6 July 2021).

the hearing officer denied making such a deal and he was removed from the program.[106]

125. Steps should be taken to ensure that disciplinary processes in prison are fair, independent, with clear written reasons provided and that prisoners have access to mechanisms for review of these decisions.

126. Preventing corruption and increasing oversight and transparency within Victorian prisons is essential to achieving rehabilitation of offenders, reducing recidivism and the criminogenic effect of incarceration, and keeping *all* Victorians safe.

127. We urge the Inquiry to consider the Ombudsman's inquiry into the disciplinary hearings and IBAC's report into corrections, as well as the recommendations made by both of those reports.

Support on Release

128. Almost every imprisoned person will be released. Every year thousands leave the prison system and re-enter the community. They face a lack of institutional support, stigmatisation and barriers to employment, untreated mental health issues, and challenges in finding affordable housing.

129. Those who find stable housing after release from prison are less likely to reoffend.[107]

130. We refer to and adopt the Young Liberty for Law Reform Fact Sheet, 'What Happens After Prison?'.[108]

131. Prison is not therapeutic. Incarceration exacerbates trauma and the issues that lead people to offend. Victoria spends billions of dollars on the prison system, more should be done to address the factors that lead people to crime, and to improve the measures that can help people reintegrate into the community after their release. We hope this submission has drawn attention to the myriad ways in which this can happen.

X. CHARACTER REFUSAL AND CANCELLATION

132. Liberty Victoria recognises that the many of the issues of character refusal and visa cancellations are the province of the Commonwealth. However, if the Victorian criminal justice system is made fairer and addresses the underlying criminogenic facts in order to reduce re-offending, then this will also have a significant impact on people who are at risk of having their visa cancelled. Further, giving individuals the opportunity to

106 Ibid 25, 6.
107 Willis M, 'Supported housing for prisoners returning to the community: A review of the literature' (2018) Australian Institute of Criminology Research Report 07.
108 Young Liberty for Law Reform Fact Sheet, 'What Happens After Prison?' (Web Page) <https://libertyvictoria.org.au/sites/default/files/YLLR-after-prison-fact-sheet.pdf>.

participate in rehabilitation programs, irrespective of their visa status, will mean that a person can demonstrate that rehabilitation to the relevant Minister when the Minister is considering exercising their discretion.

133. It is in that context that Liberty Victoria sets out the issues and concerns in respect of character refusals and visa cancellations. Liberty Victoria includes recommendations which the Victorian Parliament or Government can implement to address some of these issues.

134. Any person who is not an Australian citizen, regardless of the tenure of their residence in Australia, can have their temporary or permanent visa cancelled or refused on character grounds under s 501 of the *Migration Act 1958* (Cth) ('*Migration Act*').

135. Visa cancellation and refusal on character grounds directly affects sentencing, remand, and prison populations (including by reason of its effects on bail and parole), and recidivism. Accordingly, while these issue concerns Commonwealth legislation, it has a direct impact in Victoria. Although it has wide-ranging effects for many people, it is little understood within the justice system, affecting the integrity of outcomes, and exacerbating existing problems within the justice system.

The Character Test

136. There are considerable misunderstandings in the community regarding the operation of s 501 of the *Migration Act*. This section will provide an overview of the operation of the law.

137. The current law envisages numerous circumstances where a person will fail the character test. That failure can be objective, or a matter of discretion.

138. It is not necessary for a person to have been sentenced to over twelve months' imprisonment for them to face visa cancellation. However, if they do receive such a sentence, their visa will be mandatorily cancelled.[109] Rather, *any* failure of the character test can lead to visa refusal or cancellation: there is no minimum standard whatsoever, and even the existence of charges against a person can suffice.

139. If a person's visa is cancelled (or refused and they do not hold a separate protection visa), they no longer have lawful status in Australia and must be held in immigration detention and removed from Australia under, respectively, ss 189 and 198 of the *Migration Act*.

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109 s 501(3A).

140. There are also the human consequences: permanent separation of families, permanent separation of children from their parents, disruption of communities, detention in remote locations, mental anguish, and removal to a country a person has no connection with other than birth. These outcomes may breach Australia's international obligations, including under the Refugees Convention, the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child.

141. Many people facing visa cancellation or refusal experience severe disadvantage. This is often a result of incarceration (where they may not have access to communication), mental illness or disability, socioeconomic disadvantage, lack of social and familial supports as a result of prolonged immigration detention, and poor English language proficiency.

142. Many people whose visas are cancelled came to Australia as children; many do not realise they are not citizens until they receive correspondence from the Department of Home Affairs. As was observed by Chief Justice Allsop, cancellation is 'potentially life-destroying'.[110]

143. At present, a person will *necessarily* fail the character test (non-exhaustively) if:

(a) They have, over any interval, been sentenced to a total of twelve months' imprisonment or more,[111] including where sentences were suspended or concurrent,[112] regardless of whether they have spent any time in prison, and regardless of whether the sentence was to periodic detention, a residential program or criminal custody.[113]

(b) They have:

(i) been acquitted of an offence on the grounds of unsoundness of mind, or

(ii) a court considered them not fit to plead,

(iii) and, as a result, they have been detained in a facility or institution.[114]

(c) They committed an offence relating to immigration detention, including escape from immigration detention.[115]

110 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [45].
111 ss 501(6)(a) and 501(7)(b).
112 s 501(7A).
113 s 501(9).
114 ss 501(6)(a) and 501(7)(f).
115 ss 501(6)(aa) and (ab).

(d) A court, Australian or foreign, has convicted or found them guilty of one or more sexually based offence involving a child.[116]

(e) They have been charged with or indicted for crimes of serious international concern.[117]

(f) ASIO have assessed them as, directly or indirectly, a risk to security.[118]

(g) There is an INTERPOL notice relating to the person, from which it is reasonable to infer the person would be a risk to the community.[119]

144. A person also fails the character test if a decision-maker, using *discretion*, assesses that:

(a) Having regard to any past and present criminal or general conduct, they are not of good character.[120]

(b) There is a risk that, in Australia, they would:

(i) Engage in criminal conduct;

(ii) Harass, molest, intimidate, or stalk another person;

(iii) Vilify a segment of the community;

(iv) Incite discord;

(v) Represent a danger to the community or a segment of the community in any way.[121]

(c) The Minister has a reasonable suspicion that:

(i) they are or have been associated with a group, organisation, or person who the Minister reasonably suspects has been or is involved in criminal conduct,[122] or

(ii) they have been or are involved in serious international offending, including people smuggling, regardless of whether there has been a conviction.[123]

116 s 501(6)(e).
117 s 501(6)(f).
118 s 501(6)(g).
119 s 501(6)(h).
120 s 501(6)(c).
121 s 501(6)(d).
122 s 501(6)(b).
123 s 501(6)(ba).

145. Generally, cancellation or refusal processes are constrained by Ministerial Direction no. 90, made pursuant to s 499 of the Act. It sets out mandatory considerations for decision-makers. Whilst it does not bind the Minister acting personally, the Minister's personal decisions follow the structure of the Direction as a general rule.

146. If a person's visa is cancelled mandatorily, they can seek revocation but must do so within a strictly non-extendable period of 28 days.[124] If they fail to meet this deadline the cancellation decision stands, and no merits review is available of that decision. To challenge the decision, the appropriate jurisdiction is the High Court of Australia.

147. If a person's visa is liable for cancellation on a discretion, they will generally be given the opportunity for comment prior to cancellation, usually 28 days, but in specific cases 7 days.[125]

148. If the Minister makes a personal decision regarding cancellation, the affected person will not have access to merits review. The only avenue of appeal is on the basis of jurisdictional error in the Federal Court of Australia,[126] which can be costly, and which is technically complex and difficult to access. That application must be filed in the Court within 35 days.[127]

149. If a delegate of the Minister makes a decision regarding cancellation, it is generally reviewable by the Administrative Appeals Tribunal.[128] Where a person is eligible to apply to the Administrative Appeals Tribunal for merits review of a character related decision, that review application must be made within a strictly non-extendable short period. This must generally be done within 9 days of notification.[129] Over 60% of people appearing before the Tribunal do so unrepresented;[130] in contrast, the Minister is represented by either the Australian Government Solicitor's office (often a senior executive lawyer) or by senior employees of a panel firm, and often with counsel briefed.

150. A decision of the Administrative Appeals Tribunal can be appealed within 35 days on the basis of jurisdictional error to the Federal Court of Australia,[131] facing the same challenges as set out above.

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124 s 501CA, reg 2.52 of the *Migration Regulations 1994* (Cth).
125 reg 2.52.
126 s 476A.
127 s 477A.
128 s 500(1),
129 s 500(6B).
130 See Parliamentary Inquiry Written Question on Notice No. 6, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 2 March 2021.
131 s 477A.

151. The Minister also has a suite of personal powers allowing him or her to effectively overturn decisions made by other decision-makers, including the Tribunal and delegates.[132]

152. Many people affected by cancellation or refusal do not or are unable to seek review of the decision, including because of the complexity of doing so. Between 2013 and 2020, the Tribunal has determined 998 cases, but there have been over 4,784 mandatory cancellations (not including discretionary cancellations or refusals) since 2013.[133] That is an astounding and troubling gap.

153. Not only is the process often inaccessible, but it also generally involves prolonged administrative detention. The Commonwealth Ombudsman has observed that 'requests for revocation are generally processed by the date the revocation applicant entered immigration detention and not the date a client requested revocation', [134] and often cancellations are not put into effect until toward the end of a custodial sentence, meaning that affected non-citizens are likely to spend substantial time in immigration detention after their release from criminal custody.

154. Material released by the Department of Home Affairs under the *Freedom of Information Act 1982* (Cth) indicates that, as at 1 August 2021, the average processing time for a s 501 visa cancellation revocation request was 317 days.[135]

155. There is also the very real prospect of removal from Australia. Over 2,500 people have been removed from Australia following a s 501 cancellation since 2012, including to countries such as South Sudan, Eritrea, and Afghanistan.[136]

156. A person is only protected from removal if there is a current finding by the Australian government that they are owed protection.[137] If they do not apply for a protection visa, are barred from doing so, or are unable to substantiate their claims, including because of a lack of representation, and they may be subjected to persecution on return, they are nonetheless able to be removed.

157. If a person is not able to be removed due to a protection finding, they face indefinite detention.[138] A number of people in Australia's immigration detention system have been detained for close to a decade.

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132 See, for example, ss 501A and 501BA.
133 FA19/12/01125.
134 Commonwealth Ombudsman, 'Report – The Administration of s 501 of the Migration Act 1958', December 2016, at 4.30.
135 FA 20/11/01048.
136 FA19/12/01189.
137 s 197C.
138 s 197C.

158. There is little to no government-funded representation available for people facing visa cancellation. Liberty Victoria does not consider any person should be without legal representation for such processes. Considering in particular that persons facing criminal proceedings have representation available, persons facing such catastrophic consequences as those set out above ought to have support.

159. In order to address these issues, Liberty Victoria recommends that the Victorian Government lobby the Federal Government for government-funded representation to be made available for people facing visa cancellation and refusal on character grounds at the primary stage and at the Administrative Appeals Tribunal.

160. Liberty Victoria also recommends that all people in criminal custody receiving visa cancellation or refusal notices be given access to urgent government-funded legal advice and support.

Sentencing

161. Anecdotally, a significant number of people are sentenced without their non-citizen status being known or taken into account. This reflects the significant lack of understanding of the law in the legal community and in the broader community. It means that the courts often do not have the opportunity to sentence in a way that takes into account all relevant considerations.

162. The prospect of deportation is relevant to sentencing. It is likely to increase the burden of imprisonment (including by restricting access to parole and rehabilitative programs) and the fact that the accused will lose the opportunity to settle in Australia is a significant punishing consequence in itself.[139] Indeed, for refugees, the prospect of indefinite administrative detention is a significant punishing consequence.

163. Even where a person's visa status is known and taken into consideration, error or inaccuracy may occur. As one example, if a person receives a four-month sentence on each of three charges, ordered to be served concurrently, they will nonetheless face mandatory visa cancellation, which is often not appreciated by decision-makers. If a person has a prior twelve-month sentence in their criminal history and they receive a 12-day sentence, they will nonetheless face mandatory visa cancellation. Similarly, the actual consequences of visa cancellation for a particular person may not be appreciated during sentencing: that is, the statistical likelihood of their deportation or indefinite detention (ascertainable having regard to statistics from the Department and

[139] *Guden v the Queen* [2010] VSCA 196; (2010) 28 VR 288; *Matamata v The Queen* [2021] VSCA 253.

from legal circumstances), and the weight on them of protracted immigration detention including because of mental health.

164. In this context, Liberty Victoria recommends that an onus be imposed on prosecutors requiring that, if a person is not a citizen, that status be made known to the court.

165. Liberty Victoria recommends comprehensive training be made available for practitioners and judicial officers regarding sentencing of non-citizens.

Bail, parole, and rehabilitative programs

166. If a person successfully applies for bail after a visa cancellation, they will be taken to immigration detention. That detention does not count towards pre-sentence detention.

167. If a person successfully applies for bail, their visa may subsequently be cancelled and they may then be detained in immigration detention, notwithstanding the findings that led to the granting of bail.

168. People in criminal custody whose visas have been cancelled are often denied access to rehabilitative programs and opportunities, including moving to less secure facilities. In our experience, the failure to undertake such rehabilitative programs can often be relied upon by a Minister and their delegates as a reason to deny the person a visa to live in the community.[140] Additional information about access to pre-release and rehabilitative programs for non-citizens ought to be sought as part of this Inquiry.

169. Parole is rarely granted to people whose visas have been cancelled. Additional information about these arrangements, including policies, ought to be sought as part of this Inquiry. Non-citizens should not lack access to parole (or at least, to a parole determination) on account of their visa status, including because it affects the assessment of the nature and seriousness of their offending in any merits review of their visa cancellation.

170. This is particularly troubling in the youth justice jurisdiction.

171. In some cases where parole is granted, the Minister deems the criminal custody facility to be a place of immigration detention,[141] with the effect being that the person whose visa was cancelled remains in criminal custody despite being paroled.

172. This thwarts the rationale of a particular sentence and of sentencing principles more broadly, as well as contributing to prison population.

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140 Ministerial Direction No. 90, made pursuant to s 499.

141 s 5, definition of immigration detention at (b)(v).

173. Each of these factors plainly affects a person's opportunity to rehabilitate, as well as their opportunity to demonstrate that their visa should not be cancelled including because of rehabilitation. In our submission, it is both opaque and deeply counterproductive to the rehabilitative ends of the justice system.

174. In order to address this, Liberty Victoria recommends comprehensive training be made available for practitioners and judicial officers regarding the differential treatment of people without visas in the justice system in respect of bail, parole, and access to programs.

CONCLUSION

175. Thank you for the opportunity to make this submission to the Inquiry into Victoria's Criminal Justice System. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Julia Kretzenbacher or Policy Committee Member Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.

Yours faithfully,

Julia Kretzenbacher
President, Liberty Victoria
president@libertyvictoria.org.au
Ph: 03 9670 6422
www: https://libertyvictoria.org.au
Facebook: libertyvictoria
Twitter: @LibertyVic