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Submission On 'Swift and Certain' Sentencing Of Family Violence Offenders In Victoria

Introduction

1. Thank you for the opportunity to provide a submission in response to the issues and questions raised in the Sentencing Advisory Council's 'Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper'.
2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.
3. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for the prosecution and the defence. More information on our organisation and activities can be found at: <https://libertyvictoria.org.au/>.

The need to prevent and reduce family violence

4. We are mindful of the profound, pervasive, often catastrophic impacts of family violence in Victoria, and the need to develop holistic and sustained strategies to prevent and reduce family violence. Our organisation's core concern is maintaining a society in which people's rights, freedoms and dignity are valued and protected. Inasmuch as family violence is, for those individuals and families affected by it, a threat to those rights—including rights to life, property, freedom of movement and association, safety and freedom from fear, access to justice and participation in public life—it constitutes an affront to our core values.
5. For that reason, Liberty Victoria welcomes the release of the Sentencing Advisory Council's 'Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper' (Discussion Paper). It is an informed and careful discussion of whether and how swift, certain and fair (SCF) approaches might be adopted in Victoria.
6. The following submission seeks to address selected questions posed by the Discussion Paper, and offer some broader comments on the implementation of SCF approaches in Victoria
7. In summary, our view is that there is presently insufficient evidence to support the adoption in Victoria of a strict SCF program, in the nature of Hawaii's HOPE Program and its counterparts elsewhere in the United States.
8. As the Discussion Paper notes, there are doubts about the efficacy of such programs and, where they have been shown to be efficacious, the reasons for their efficacy in particular settings and for particular offenders. That aside, there are features of the Victorian legal landscape—the emphasis on rehabilitation as a sentencing consideration, particularly for young offenders; the imposition of imprisonment only as a last resort, and only by judicial officers; and the procedural rights of accused persons—which distinguish Victoria from other jurisdictional settings. These features are of paramount importance, and any effort to improve the sentencing of family violence offenders must seek to incorporate them.
9. Notwithstanding the above, we recognise that swiftness, certainty and fairness in sentencing are laudable objectives, particularly in this context, where delay and inconsistency too often place those subject to family violence at grave risk. We note

that these general principles are not analogous with a SCF approach, and therefore favour the pursuit of those objectives chiefly through the improvement of Victoria's existing legal framework, including wider and more considered use of judicial monitoring; a rigorous and tailored approach to monitoring individuals subject to Community Correction Orders (CCOs); and improved access to the Magistrates' Court of Victoria, as set out in the recommendations of the Royal Commission into Family Violence.

Questions 1 and 2: the evidence base for SCF approaches

10. Questions 1 and 2 in the Discussion Paper seek comment as to the sufficiency of the evidence base for SCF approaches, and whether such approaches align with the evidence of best practice for the sentencing and management of family violence offenders.
11. The Discussion Paper provides a very valuable overview of current research on the efficacy of SCF approaches. Liberty Victoria's response to Questions 1 and 2 is informed by that overview, and by our broader experience and knowledge of the efficacy of deterrence-based strategies, and of incarceration as a means to deter offending.
12. As the Discussion Paper demonstrates, research on SCF approaches presents a picture which is mixed at best. We note in particular the results of, and responses to, the HOPE Demonstration Field Experiment (DFE) (at [2.37]-[2.49] of the Discussion Paper); and criticisms of HOPE and HOPE-like programs (at [2.50]-[2.58]). The preliminary findings of the HOPE DFE illustrate that HOPE's efficacy in Hawaii was not able to be replicated in the four DFE trial sites. Indeed, at one site HOPE probationers were *more* likely than those on ordinary probation to be convicted of a new offence; and overall, HOPE probationers and those on ordinary probation performed equally well in terms of new arrests and convictions: [2.39].
13. Those findings are consistent with research cited by the Discussion Paper (at [3.174]-[3.176]) and conducted by the New South Wales Bureau of Crime Statistics and Research (BOCSAR) on the outcome of imposing short periods of imprisonment on first-time family violence offenders. As the discussion paper notes at [3.175], the findings 'suggest that increasing the proportion of family violence offenders who

serve short prison sentences (less than 12 months) is unlikely to have an impact on the likelihood of reoffending’; and (at [3.176]) that ‘custody (in the absence of treatment) may not reduce the likelihood of reoffending’.

14. There is, of course, some research, also noted by the Discussion Paper, which supports the efficacy of the HOPE Program in Hawaii, and similar programs in other states. Nonetheless, the balance of the evidence appears to show that the reasons why these programs succeed (where they do succeed) are unclear, and that it is exceptionally difficult to replicate their success even in relatively similar jurisdictions, let alone Victoria.
15. The BOCSAR research further indicates the limitations of an imprisonment-based response to offending. To that extent, it coheres with a large body of research, in Australia and elsewhere, indicating that imprisonment typically has limited, and sometimes adverse, effects on rates of recidivism.
16. For the above reasons, we are of the view that the evidence base is inconclusive and insufficient to support the adoption of SCF approaches in the nature of HOPE in Victoria.

Questions 10 and 11: the impact of SCF approaches on procedural fairness, and on particular groups of offenders

17. Leaving aside empirical concerns set out above, Liberty Victoria has concerns about the impact of SCF approaches on Victoria’s current framework of procedural fairness safeguards, and about how SCF approaches might affect offenders and groups of offenders with particular needs and vulnerabilities. Questions 10 and 11 in the Discussion Paper address these matters.
18. On the first point, the Discussion Paper notes that HOPE and HOPE-like programs may rely on prosecutions being brought to contest within a matter of days, on the imposition of imprisonment prior to conviction, and on the capacity of authorities other than courts to impose periods of imprisonment. The Discussion Paper at [4.84]-[4.86] draws attention to the provisions of the *Criminal Procedure Act 2009* (Vic), which among other things, seeks to ensure that accused persons are provided with notice of the charges laid against them and details of the prosecution’s case: [4.85]. At [4.91] the Discussion Paper notes that ‘[i]t would be highly unusual in Victoria for

a body other than a court to be given the power to order somebody into custody for two or more days'; and refers to the comment of Professor Kate Warner, arising from her research, that '[m]aking detention an automatic sanction rather than a means of ensuring a court appearance for a suspected offender or breach of an order sits uneasily with Australia's common law traditions'.

19. On the second point, the Discussion Paper at [4.64]-[4.78] notes the potential impact of an SCF approach on particular groups of offenders, including low-risk offenders, people with cognitive disabilities, women, people with primary carer responsibilities and Aboriginal and Torres Strait Islander peoples.
20. In our submission, these matters ought to be paramount in any consideration of whether and how to adopt an SCF approach in Victoria. In recent years, changes to Victoria's sentencing laws – including the removal of suspended sentences of imprisonment, the introduction of mandatory and prescriptive sentencing, and the recent decision to restrict the application of CCOs – have meant decreasing flexibility for sentencing courts. At the same time, the increasing burden on the criminal courts, and increased pressure to deal with offenders expeditiously, have already jeopardised the procedural fairness safeguards set out in the *Criminal Procedure Act* and elsewhere. There is also a worrying trend towards giving authorities other than courts, in particular police, increased and largely unsupervised powers.
21. These developments have had a disproportionate effect on several of the categories of offenders identified by the Discussion Paper. To the extent that SCF approaches come at a further cost for marginalised and vulnerable individuals, or for the long-held procedural protections that exist in Victoria's criminal justice system, they should be rejected.

The pursuit of SCF principles through existing frameworks

Question 5: Reforms to judicial monitoring

22. The Discussion Paper seeks feedback on whether judicial monitoring hearings should be triggered by non-compliance, and whether the court's powers at these hearings should be expanded.
23. Victorian Courts currently have the power to make judicial monitoring a condition of a CCO, which requires the offender to appear before the sentencing judicial officer to

report on their progress under the order. Current statistics indicate that in the year 2015-16 only 14% of cases where a CCO was imposed for family violence offending had a judicial monitoring condition attached to the CCO. In line with the comments made by Victorian Magistrate Pauline Spencer at [4.32] - [4.33], Liberty Victoria does not oppose increased and more consistent use of judicial monitoring to ensure there is a 'web of accountability' surrounding family violence offenders.

24. There is significant scope for Corrections Victoria to improve oversight and enforcement of CCOs through the use of advanced case managers and increased information sharing between agencies. Liberty Victoria supports improvements to the existing framework, such as the initiatives set out at [4.18] of the Discussion Paper which include:
 - a. Ensuring offenders are enrolled in Men's Behaviour Change Programs within an agreed timeframe;
 - b. Victoria Police informing Corrections Victoria of any new allegations of family violence offending, enabling Corrections to consider additional interventions that may be required to manage risks; and
 - c. Subsequent matters returning before the same judicial officer who imposed the original CCO.
25. These initiatives, employed as part of a holistic approach encompassing wider reforms introduced by the Royal commission, would substantially address the concerns that gave rise to calls for SCF approaches.
26. The Discussion Paper seeks feedback on whether the power to impose sanctions for non-compliance or amend conditions on a CCO should be given to the courts in judicial monitoring hearings. Liberty Victoria strongly maintains that it is for the executive to bring charges against offenders. It is not the judicial function to commence breach proceedings. The separation of powers is a cornerstone of our legal system, and would be undermined by changes which transferred prosecutorial powers from the executive to the judiciary.
27. Should such changes be implemented, appropriate safeguards to ensure procedural fairness would be required. If the court's powers are extended to commencing breach proceedings of their own motion, the offender must be afforded an opportunity to seek legal advice and representation. Legal representation must be afforded where a

sanction imposed for non-compliance may involve the deprivation of the offender's liberty. Currently, Victoria Legal Aid does not fund practitioners to attend judicial monitoring hearings.

Question 9: Alcohol exclusion orders

28. Liberty Victoria acknowledges the significant role that alcohol can play in all types of offending behaviour, and the relationship that exists between alcohol and the commission of family violence. However, we oppose the idea that courts should have expanded powers to prohibit family violence offenders from consuming alcohol entirely, and further, that compliance monitoring should utilise Secure Continuous Remote Alcohol Monitoring (SCRAM) technology.
29. The use of SCRAM technology, which sends information from the wearable device about an offender's alcohol consumption to a remote computer that can be monitored by police or corrections officials, is potentially inconsistent with an individual's right to privacy and s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
30. Aside from any affronts to individual privacy, this approach is dangerous to the health of offenders who are heavy alcohol users. Alcohol addiction is safely and most effectively treated under the supervision of specialist health professionals. The inclusion of such an order takes a punitive approach to what is fundamentally a health issue that calls for a therapeutic response. Further, we are concerned that such an approach will deter people from seeking treatment.

Question 12: Sanctions

31. Liberty Victoria opposes mandatory sentencing, and in particular the mandatory imposition of custodial penalties. In this context, there is insufficient evidence as to the efficacy of imposing short periods of imprisonment (see, eg, [12] above). That aside, mandatory sentencing straitens judicial discretion, compelling judges to disregard relevant considerations and impose disproportionate sentences in particular cases.
32. Fixed sanctions that mandate short terms of imprisonment also raise questions about

how and where offenders should be held. Due to Victoria's prison facilities requiring offenders to undergo a 2-3 day reception process upon their arrival at prison, short periods of custody are likely to be served in the police cells [at 4.116]. Police cells have already been operating beyond capacity for some years, and there is almost no capacity for police cells or remand centres to house offenders subject to short periods of custody. Police cells are inappropriate places to hold sentenced prisoners and police should not be expected to act as custodial officers.

33. Judicial discretion and flexibility in sentencing is required to ensure that justice is done in a particular case. If a SCF response is to be introduced in Victoria - in managing the compliance of offenders subject to a CCO, for example - the courts should maintain a primary role in reviewing contraventions and imposing sanctions. It is not appropriate to divest this power in the hands of non-judicial corrections officers.

34. If corrections officers are tasked with enforcing a strict SCF response to offenders on CCOs, this also raises issues of inconsistency with Corrections Victoria's case management approach to offender management and non-compliance. The current approach aims to achieve compliance through 'proactive modelling of good behaviour' which is diametrically opposed to a SCF approach which requires strict, consistent responses to each and every non-compliance event [at 3.142].

Conclusion

Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.



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