



WITNESS STATEMENT OF EMERITUS PROFESSOR ARIE FREIBERG AM

I, Emeritus Professor Arie Freiberg AM, Chair, Sentencing Advisory Council, of Level 3, 333 Queen Street, Melbourne, Victoria 3000, say as follows:

Background and experience

- 1 A copy of my CV is attached at AF-1.
- 2 I have been Chair of the Victorian Sentencing Advisory Council (**Council**) since 2004. In that position I chair monthly meetings of the Council and generally advise the CEO and Council staff on projects and publications.
- 3 I am giving evidence in my personal capacity however, in my capacity as Chair of the Sentencing Advisory Council I have drawn on the work of the staff of the Council who have been involved in the preparation of these responses. The Board of the Council has not been consulted.

Role of the Sentencing Advisory Council

- 4 The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues. Its functions are specified in section 108C of the *Sentencing Act 1991* (Vic), and include:
 - (a) stating in writing to the Court of Appeal its views in relation to any guideline judgment;
 - (b) providing statistical information on sentencing;
 - (c) conducting research on sentencing matters;
 - (d) gauging public opinion on sentencing matters;
 - (e) consulting on sentencing matters; and
 - (f) advising the Attorney-General on sentencing matters.
- 5 Due to the paucity of available data, the Council is not in a position to provide a response to many of the Royal Commission's questions. The Council has relatively little data on the prevalence of mental illness in offenders sentenced in Victoria. There are two reasons for this:

Please note that the information presented in this witness statement responds to matters requested by the Royal Commission.

- (a) the data the Council receives from the courts does not include that information; and
- (b) the Council has not yet undertaken a project qualitatively analysing all higher court sentencing remarks for whether sentenced offenders had a mental illness.

6 The leading Victorian case on the effect of mental disorder is *R v Verdins & Ors* [2007] VSCA 102. *Verdins* has been cited in Australian courts nearly 1,700 times.¹ In this case, the Victorian Court of Appeal held that there are at least six ways that mental impairment can be relevant to sentencing, including:

- (a) reducing an offender's moral culpability for the offending;
- (b) affecting the decision about what type of sentence to impose (and relevant conditions);
- (c) moderating or eliminating the weight to be afforded to general deterrence;
- (d) moderating or eliminating the weight to be afforded to specific deterrence;
- (e) causing a given sentence to weigh more heavily on an offender; and
- (f) justifying the imposition of a lesser punishment if there is a serious risk that prison would have a significant adverse effect on the offender's mental health.

The Sentencing Advisory Council's consideration of mental illness and the impacts of the justice system on people living with mental illness

- 7 The Council is mindful of the disproportionate number of people with mental illness who come into contact with the criminal justice system, especially in prison, but as well in community corrections. Where possible, the Council has in its various research reports identified the prevalence of mental illness in offenders sentenced for certain offences.
- 8 Data published by the Adult Parole Board of Victoria, the Youth Parole Board, the Victorian Ombudsman and various other organisations reveal that many people in custody, on parole or community correction orders are suffering from substance abuse, mental disorder, acquired brain injury, foetal alcohol disorder or some form of intellectual disability.
- 9 However, because the Council is, by its statute, only permitted to inquire into sentencing matters it is therefore limited by its terms of reference as to what issues it can explore.

¹ On the differing views of the application of the Verdins principles in a case where the defendant pleaded guilty to both infanticide, murder and attempted murder, see *The Queen v Guode* [2020] HCA 8.

- 10 The Council conducted a number of studies on public opinion and sentencing which included some information about community attitudes towards mentally ill offenders.² One study by Karen Gelb looked at community attitudes toward alternatives to imprisonment and found that 91% of respondents agreed that mentally ill offenders should not be sent to prison and should instead be treated in a mental health facility.
- 11 A study of jurors' views of sentencing conducted in Victoria³ found that judges generally treat mental disorder as a mitigating factor and use the *Verdins* principles to explain the basis for mitigation.⁴ By contrast, when jurors were given a copy of their judge's sentencing remarks, jurors were far less likely to agree with the judge that a mental disorder was a mitigating factor, with only 19% of jurors agreeing that it was a mitigating factor compared with 83% of judges.⁵ This was for a number of reasons, including the fact that the jurors seemed to adopt a narrower view of what amounted to a mental disorder, and were reluctant to find a link between a mental condition and an offence.⁶

Future Role of the Sentencing Advisory Council

- 12 The Royal Commission may want to consider recommending in its final report that the Sentencing Advisory Council be given terms of reference to report on the role of mental illness in sentencing in Victoria, along with adequate resources to support that project. Such a project would likely address many of the issues that the Royal Commission is interested in.
- 13 In particular, the Council does not have sufficient data, nor has it conducted targeted research, on the causes of or ways to address the disproportionate representation of people living with mental illness who come into contact with the criminal justice system. This would be a resource-intensive exercise that may be achieved through the Council being given terms of reference (and associated resources) to analyse the prevalence of certain mental illnesses in offenders sentenced in the higher courts.
- 14 That said, I reiterate that the Council is nevertheless cognisant when performing its functions of the over-representation of people with mental illness in all facets of the criminal justice system,⁷ especially in prison. It is for this reason that the Council, where

² Gelb, *Alternatives to Imprisonment: Community Views in Victoria* (Victorian Sentencing Advisory Council, 2011) 4.

³ Warner, K., Spiranovic, C., Freiberg A., Davis, J. and Bartels, L. 'Aggravating or Mitigating? Comparing Judges' and Jurors' Views on Four Ambiguous Sentencing Factors' (2018) 28 *Journal of Judicial Administration* 55, 62.

⁴ Warner et al, *Aggravating or Mitigating? Comparing Judges' and Jurors' Views on Four Ambiguous Sentencing Factors* (2018) 28 JJA 55, 62.

⁵ Ibid, 63.

⁶ Ibid.

⁷ See, eg, Sentencing Advisory Council, *A Sentencing Guidelines Council for Victoria: Report* (2018) 27–28 (recommending that a sentencing guidelines council include someone with demonstrated experience in the issues facing offenders with impaired mental functioning).

relevant, acknowledges the distinct vulnerability of people with mental illness when they have contact with the criminal justice system,⁸ a factor which is regularly taken into account as a mitigating factor during sentencing.

Mental illness and offending

Nature of offences committed by offenders in the criminal justice system who are living with a mental illness

- 15 In general, the Council does not have sufficient data, nor has it conducted the necessary targeted research, that would allow it to comment on the nature of all offences (including violent offences) committed by people living with a mental illness.
- 16 The Council has, however, in the context of reports about specific types of offences, qualitatively coded sentencing remarks for the prevalence of mental illness in those sentencing remarks. The collective results of those analyses are below (**Table 1**). Those findings suggest that—in relation to firearms offences, driving offences, drug offences, serious injury offences and aggravated burglary offences—offenders committing drug cultivation and trafficking offences were the most likely to have a mental illness, and almost all offenders were noticeably more likely to have a substance abuse issue than a mental health issue.
- 17 **Table 1:** Prevalence of mental illness, cognitive impairment, alcohol abuse or substance abuse in offenders in higher court cases sentenced for particular offences (various reference periods).

⁸ Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1* (2019); Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders* (2019); Sentencing Advisory Council, *Restitution and Compensation Orders: Report* (2018) 87 (noting the difficulties they may face in paying restitution and compensation orders); Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (2017) 9 (noting that sentencing reforms often disproportionately affect those with mental impairments); Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria* (2014) (noting the potential inappropriateness of monetary sanctions to offending behaviours occurring in the context of mental illness).

Offence	Number of offenders	Mental illness, cognitive impairment, acquired brain injury or other diagnosed medical condition		Substance abuse	
Firearm offences ⁹	438	32%		81%	
		Mental illness	Cognitive impairment	Alcohol abuse	Substance abuse
Culpable driving causing death ¹⁰	105	16%	8%	29%	27%
Dangerous driving causing death ¹¹	124	6%	6%	1%	2%
Negligently causing serious injury (driving) ¹²	78	18%	6%	26%	25%
Dangerous driving causing serious injury ¹³	51	4%	6%	24%	22%
Cultivating commercial quantity of drugs ¹⁴	403	35%	4%	37%	
Trafficking commercial quantity of drugs ¹⁵	138	40%	4%	74%	
Trafficking large commercial quantity of drugs ¹⁶	72	54%	1%	75%	
Intentionally cause serious injury ¹⁷	100	22%	6%	72%	
Recklessly cause serious injury ¹⁸	128	21%	7%	51%	
Aggravated burglary ¹⁹	321	32%	12%	68%	

- 18 In relation to the relationship between mental health and offending, in her PhD thesis, *Envisioning Next Generation Mental Health Courts for Australia*, (2016) Elizabeth Richardson, writes as follows:²⁰

The over-representation problem has been well documented in the past thirty years at all stages of the criminal justice process, including in police cells,

⁹ Sentencing Advisory Council, *Firearms Offences: Current Sentencing Practices* (2019) 45.

¹⁰ Sentencing Advisory Council, *Major Driving Offences: Current Sentencing Practices* (2015) 30.

¹¹ *Ibid*, 41.

¹² *Ibid*, 53.

¹³ *Ibid*, 63.

¹⁴ Sentencing Advisory Council, *Major Drug Offences: Current Sentencing Practices* (2015) 19.

¹⁵ *Ibid*, 29.

¹⁶ *Ibid*, 37.

¹⁷ Sentencing Advisory Council, *Causing Serious Injury – Recklessly and Intentionally: Current Sentencing Practices* (2011) 25.

¹⁸ *Ibid*, 25.

¹⁹ Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011) 23.

²⁰ (footnotes omitted).

magistrates' courts and community corrections. High rates of prisoners with mental illness have been found in studies of prisons in the United States, the United Kingdom, Europe, Canada, New Zealand and Australian Institute of Health and Welfare report series *The Health of Australia's Prisoners* reported that 49 per cent of prison entrants self-reported in 2015 that they had ever been told by a health professional that they had a mental disorder including drug or alcohol abuse, compared with 38 per cent in 2012.

Women prisoners and Indigenous prisoners have been found to have a higher prevalence of mental illnesses than other prisoners. Co-occurring substance disorders are also higher in prison populations than in the community, as are the rates of prisoners with intellectual disabilities and other neurocognitive impairments. Many offenders have 'multiple and complex needs' including mental illness and/or cognitive impairments.

There is evidence that offenders with mental illness are more likely to be arrested and spend longer in prison than offenders who do not have mental illness. Arrest often occurs in the context of a mental health crisis or offending behaviour, although most encounters with police do not involve people who meet civil commitment or criminal arrest criteria. In addition to mental health apprehension or criminal arrest, 'police officers can choose to ignore the situation, handle the matter themselves, or refer the matter to a community mental health service'. Police have a wide discretion in the way that they respond to offending behaviour or behaviour that could be classified as an offence (such as disturbing the peace, or loitering, for example) and the majority of incidents are dealt with informally.

... Most people with mental illness do not commit crimes or pose a risk to society, nor does mental illness generally cause crime. However, research indicates that there is an association between psychosis and violence, albeit that the causal connection does not appear to be well understood. It is estimated that approximately 10 per cent of people who have a severe mental illness are at risk of committing a violent crime, but only 5-10 per cent of offenders charged with homicide have schizophrenia and 5-15 per cent have committed minor forms of assault. The risk of committing a violent crime is said to be exacerbated by substance or alcohol abuse. For the small minority of people with mental illness who do commit crime or acts of violence, mental illness should be regarded as but one factor among many that may lead to offending. Despite all these findings, public perceptions that mental illness is related to offending behaviour, and that people with mental illness are dangerous, remain influential ideas in the media and inform public policy for offenders with mental illness.

- 19 In the book *Plea Negotiations in Victoria: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan) by Asher Flynn and Arie Freiberg, we noted at page 199:

Perhaps not unsurprisingly, given that the empirical data in this study were based on VLA [Victoria Legal Aid] case files, a key finding was the extent of mental impairment among the offending sample, with evidence of mental impairment, including intellectual disability, in 60 per cent ($n = 29$) of cases in which the defendant's background was recorded ... The prevalence of mental impairment among those coming before the courts was not limited to the findings drawn from the de-identified case file data, but was also a significant issue identified by the interview participants. As Judge11F maintained, "a large, significant number of offenders have deprived upbringings, mental health problems, intellectual impairment, substance abuse problems which play a significant role in their offending behaviour". Judge10F similarly claimed, "I'm yet to see someone who doesn't get a diagnosis in a psych report, basically, that comes before this court". Defence05M described mental health as "the highest problem area", a comment supported by Defence09F, who suggested that "anywhere between 80 to 90 per cent of my clients have substantial mental health issues". A number of participants quoted different statistics to highlight the number of defendants with a mental illness. Judge01M maintained, "if we're right, if 22 to 25 per cent of people [in the general population] have got serious mental conditions ... it's got to be a much higher figure amongst those who commit offences". Defence17F likewise stated, "a forensic nurse when I was first starting out told me that 99 per cent of offenders within the Magistrates' Court have got a personality disorder and I think that's probably true".

The impact of age on the types of offences committed

- 20 As a rough estimate in relation to offences committed by offenders of different ages, the Council has conducted multiple projects identifying the types of offences people commit when they reoffend. **Table 2** below shows the results of two separate studies, one focusing on children specifically, the other on all offenders, including adults and young people as well as children.²¹ Given that children make up a small portion of those in group 2, this makes for a useful comparison between the types of offences that children reoffend with compared with those that adults and young people reoffend with. While not an ideal measure, this does suggest that children are more likely to reoffend than adults and young people with nearly every type of offence. Note that these figures do not add up to 100% because they represent the proportion of recidivists in each group who were sentenced for each offence type.
- 21 **Table 2:** Proportion of offenders sentenced for a particular offence type at index sentence (group 1=children and young people sentenced in the Children's Court in 2008–09 who

²¹ Sentencing Advisory Council, *Reoffending Following Sentence in Victoria: A Statistical Overview* (2015) 9; Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016) 22.

reoffended; group 2=all offenders sentenced in all Victorian criminal courts in 2004–05, regardless of whether they reoffended).

Offence type	Group 1 (children and young people)	Group 2 (all offenders)
Road safety offences	36%	42%
Offences against the person	34%	13%
Theft/deception	33%	15%
Other offences	27%	9%
Property damage offences	24%	3%
Breach of bail	19%	N/A
Drug offences	16%	6%
Justice procedures	13%	4%
Breach IVO	7%	N/A
Transit offences	5%	N/A
Robbery and burglary offences	N/A	5%
Weapons offences	N/A	3%
Sexual offences	1%	<1%

22 Similarly, the Crime Statistics Agency has found that there are discrepancies in the types of alleged offender incidents based on the alleged offender's age.²² In particular, in the year ending September 2019 children aged 10-17 years old were more likely to be recorded as having committed an offence against the person than their 18-24 and 25+ counterparts. Children aged 10-17 years old were also more likely to be recorded as having committed an alleged property and deception offence than their 18-24 and 25+ counterparts. In contrast, they were less likely to be recorded as having committed a drug offence, public order offence or justice procedure offence (see **Table 3** below). Note that this does add up to 100% because it represents all alleged offences recorded for each age group.

23 **Table 3:** Alleged offender incidents by offence type (source: Crime Statistics Agency).

Offence type	10-17 years old	18-24 years old	25 years +
Crimes against the person	34%	25%	28%
Property and deception offences	51%	38%	37%
Drug offences	4%	12%	9%
Public order offences	7%	12%	11%
Justice procedures offences	4%	12%	16%
Other offences	<1%	<1%	<1%

²² Crime Statistics Agency, 'Alleged Offender Incidents' (2019)
<<https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/alleged-offender-incidents>>.

Trends and changes over the last decade and their impact on people living with mental illness

- 24 The sentencing landscape of 2020 has changed significantly over the last decade. Although I discuss a few changes below, I note that it is no simple question to identify which specific changes have most affected young people and adults living with a mental illness.

Decline in the use of diversion in Victoria

One notable trend is what seems to be an overall decline in the use of diversion in Victoria in recent years. The Council is generally supportive of diversion. This is largely due to a decline in the use of police-ordered diversion;²³ however, there has been a significant increase in the use of court-ordered diversion (see Table 4).²⁴

- 25 **Table 4:** Court-ordered diversions in Victoria, 2011–12 to 2017–18.

	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18
Children's Court	-	-	-	22	702	1,143	1,314
Magistrates' Court	4,388	4,928	5,180	5,416	5,194	5,353	5,753

- 26 As a disposition, diversion allows alleged offenders to acknowledge their responsibility for the prohibited behaviour without also being tainted by a finding of guilt and the various consequences of such a finding including stigma, self-perception, employability, etc. To that end, the Council is supportive of greater use of both police-ordered and court-ordered diversion in appropriate circumstances.

Increased recognition of the importance of trauma informed sentencing

- 27 In relation to changes over time more generally, particularly in relation to the effect on trauma on sentencing, there is evidence that trauma informed sentencing and corrections is now an important and emerging area of research. The following abstract of a recent, and as yet, unpublished study by Dr Victoria Jackson of Forensicare and others entitled

²³ For instance, the Council recently found that police were nearly half as likely to use police-ordered diversion for minor drug offences in 2016–17 (18% of cases) than they were eight years earlier in 2009–10 (32% of cases): Sentencing Advisory Council, *Trends in Minor Drug Offences Sentenced in the Magistrates' Court of Victoria* (2018) 6. This is congruent with other research which recently found that over a ten-year period the use of police-ordered diversion in Victoria had halved from 26% of all criminal cases to 13%: David Cowan et al, 'Reducing repeat offending through less prosecution in Victoria, Australia: Opportunities for increased diversion of offenders' (2019) *Cambridge Journal of Evidence-Based Policing* (advance online publication).

²⁴ See Sentencing Advisory Council, 'Sentencing Outcomes in the Children's Court' <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/sentencing-outcomes-childrens-court>>; Sentencing Advisory Council, 'Sentencing Outcomes in the Magistrates' Court' <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/sentencing-outcomes-magistrates-court>>.

Trauma-informed Sentencing of Serious Violent Offenders: An Exploration of Judicial Dispositions with a Gendered Perspective is as follows:

“Experience of psychological trauma is correlated with violent offending, with exposure reported for most offenders entering the criminal justice system. The practice of trauma-informed sentencing recognizes this complex and consistent relationship, and endeavours to respond in a way that avoids re-traumatisation and reduces harm to offenders and victims. Trauma-informed approaches to offenders improve safety in custodial settings, **enhance prospects of correctional rehabilitation and recovery from mental illness**, and promote the health and welfare of staff working with offenders. This quantitative pilot study examined the identification and impact of trauma, as recorded in sentencing decisions, for homicide perpetrators in Victoria, with particular attention to trauma-informed sentencing and whether gender makes a difference. Traumatic experiences were described in a high proportion of cases, but only explicitly recognized in a minority. Trauma-informed sentencing recommendations were rare. Collaboration between clinical and legal professionals to inform and enhance trauma-informed procedure is recommended (emphasis added).”

28 On the other hand, there are indications that the Parliament is taking a more restrictive view of the role of impaired mental function in the context of assaults on emergency workers, a matter of great community concern. The Government recently introduced the *Sentencing Amendment (Emergency Worker Harm) Bill 2020*. This followed a number of court decisions²⁵ in which the court considered the special reasons provisions in the *Sentencing Act 1991* (Vic) ss 2G, 2GA, 2GB, 2GV and found that special reasons relating to mental impairment existed, resulting in a sentence less than the statutory mandatory sentence being imposed.

29 The Bill makes it more difficult to satisfy the special reasons not to impose a statutory minimum sentence. In her second reading speech, the Attorney-General, Ms Jill Hennessy, stated that:

“The first special reason recognises that a statutory minimum sentence may not be appropriate where an offender’s impaired mental functioning is causally linked to their offending, such that it substantially reduces their moral culpability for their actions. For instance, it may not be appropriate to impose a statutory minimum sentence on an offender who has dementia, or suffers schizophrenia and is experiencing a psychotic episode, and injures an emergency worker while in this impaired state.

²⁵ See in particular *DPP v Haberfield* [2019] VCC 2018.

Currently this special reason will not apply where an offender's impaired mental functioning is solely due to self-induced intoxication (e.g. from drugs and/or alcohol).

There are concerns that the requirements for satisfying this special reason may currently be too easily met by offenders, because they might be able to satisfy it due to the mere existence of another factor (however minor), in addition to drug and/or alcohol consumption, that contributes to impaired mental functioning. These offenders might therefore be able to avoid the requirement to impose a statutory minimum sentence because their impaired mental functioning impairment was not caused solely by self-induced intoxication, thereby giving them access to a safeguard intended to protect vulnerable persons.

The Bill narrows the test to exclude impaired mental functioning that is caused "substantially" (rather than just "solely") by self-induced intoxication. While it can be hard to unpick the cause of offending where there is a mix of intoxication and underlying mental illness, the new test will allow a more common sense weighing up of contributing factors. The special reason will not be able to be relied on where there are multiple causes of mental impairment, but the main cause is self-intoxication."

- 30 The *Sentencing Act 1991 (Vic)* provides that where special reasons exist in relation to certain offences, the Court may make a mandatory treatment and monitoring order, a residential treatment order or a Court Secure Treatment order (see paragraph 35(a)) in appropriate cases, which may assist in an offender's treatment and recovery. Narrowing the scope of the special reasons may result in an offender being denied necessary treatment. The proposed amendments indicate a less sympathetic approach than that adopted by the courts to the role that mental impairment plays in the commission of offences.

Therapeutic justice

Improving and facilitating therapeutic justice approaches in Victorian courts

- 31 There are many organisations better placed to comment on therapeutic justice, such as the Judicial College of Victoria or the Centre for Innovative Justice.
- 32 However, from a personal perspective, I have been strong advocate for non-adversarial justice approaches which include drug courts, mental health courts: in Victoria – the Assessment and Referral Court, the Neighbourhood Justice Centre, Koori Courts and Family Violence Courts.²⁶

²⁶ See generally King, M., Freiberg, A., Batagol, B. and Hyams, R. *Non-adversarial Justice*, 2nd ed, 2017)

- 33 One of the theories underlying the concept of non-adversarial justice is that of therapeutic jurisprudence which is an interdisciplinary study of the law's effect on physical and psychological wellbeing. It has been especially influential in mental health law, in problem-solving courts and court diversion programs, and in associated legal practice. It holds that there is a dimension of the law that has not been consistently explored until recently: its impact upon the emotional and psychological wellbeing of those it affects. It has a number of areas of inquiry: (1) the role of the law in producing psychological dysfunction, (2) therapeutic aspects of legal rules, (3) therapeutic aspects of legal procedures, and (4) therapeutic aspects of judicial and legal roles. It has had a significant effect on drug courts, family violence courts, mental health courts and other solution-focused or problem-oriented courts. Although these courts can be regarded as relatively niche operations, their approach is to look at crime as a social problem or a health problem instead of an individual problem. Non-adversarial justice requires a multi-disciplinary approach to crime at every stage of the criminal justice process: bail, arrest, prosecution, trial, sentencing and corrections. Due to their small-scale operation, problem-oriented courts may not reduce the overall crime rate, but they represent an important change in the way the criminal justice system deals with deeply embedded and wide-spread social problems.
- 34 At the moment there is only one Assessment and Treatment list in Victoria, which is not sufficient to deal with the problems posed by extent and prevalence of mental disorder. In her thesis, Elizabeth Richardson has provided a model for creating the next generation of mental health courts for Australia which the Commission should refer to in developing any recommendations relating to such courts.²⁷

Sentencing and related dispositions for people with mental illness

Prevalence of dispositions available to courts to facilitate treatment for mental illness

- 35 The Council has identified the prevalence of most current dispositions available for courts in dealing with alleged offenders experiencing a mental illness. Those dispositions include:
- (a) **Court Secure Treatment Orders** (formerly Hospital Security Orders), which permit 'a person to be compulsorily taken to, and detained and treated, at a designated mental health service';²⁸

²⁷ See Elizabeth Richardson (2016) *Envisioning Next Generation Mental Health Courts for Australia*.

²⁸ *Sentencing Act 1991* (Vic) ss 94A–94C. A CSTO may be imposed if: but for the person having a mental illness, the court would have imposed a term of imprisonment; the person has been examined by a psychiatrist and the court is satisfied that the person has a mental illness that requires treatment in order to prevent serious deterioration in that person's physical or mental health or to prevent serious harm to that person or another person. The duration of a CSTO cannot exceed the period of imprisonment the

- (b) **Custodial Supervision Orders**, which permits a person to be detained in ‘an appropriate place’ (an approved mental health service or residential service) or alternatively, if ‘there is no practicable alternative in the circumstances’, to prison;²⁹
- (c) **Non-Custodial Supervision Orders**, which permits a person to be released subject to certain conditions;³⁰ and
- (d) **Not Guilty by Reason of Mental Impairment**, which is a defence to alleged criminal conduct if the person, at the time of engaging in the alleged conduct, was suffering from a mental impairment that had the effect that they did not know the nature and quality of their conduct, or did not know that their conduct was wrong.³¹
- (e) **Justice plan condition**, which is a condition attached to a community correction order or an adjourned undertaking requiring a person with an intellectual disability to participate in particularised services designed to reduce their likelihood of committing further offences.³²
- (f) **Mandatory treatment and monitoring orders**, which are specific types of CCOs for offenders who commit particular offences against emergency workers and who have a mental illness (to date, only one MTMO has been imposed).³³

36 The Council is not currently in a position to advise on the appropriateness or otherwise of the various dispositions available for offenders with mental illness in Victoria.

Alternative sentencing approaches for young adult offenders

37 In 2017 the Council published a report discussing possible alternatives for the sentencing of young adult offenders (aged 18-24) in Victoria.³⁴ The options discussed included:

- (a) introducing sentencing principles to the *Sentencing Act 1991* (Vic) that specifically address young adult offenders;

person would have otherwise received had they not received a CSTO. These replaced Hospital Security Orders in 2014: *Mental Health Act 2014* (Vic) ss 429–435.

²⁹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26. These orders are indefinite in duration but may be reviewed periodically: ss 27–28.

³⁰ *Ibid.*

³¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.

³² *Sentencing Act 1991* (Vic) s 80.

³³ *Sentencing Act 1991* (Vic) ss 5(2GA), 3(ca)–(cc), (ic)–(id); *Director of Public Prosecutions v Haberfield* [2019] VCC 2082.

³⁴ Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders* (2019).

- (b) introducing changes to community-based sentencing options (such as targeted programs being made available);
 - (c) expanding dual track to offenders aged 21 to 25;
 - (d) introducing or extending units or facilities currently housing young offenders aged under 21 to allow young offenders under 25 to be housed there rather than in adult correctional facilities; and/or
 - (e) introducing a specialist young adult court or specialist list to address their unique needs.
- 38 Some or all of those options may benefit all young offenders, not just those with mental illness.
- 39 In April 2020, the Council published a report on possible policy reforms to acknowledge the correlation between childhood trauma (and consequent mental illness) and criminal offending.³⁵ In that report the Council noted that a considerable proportion of offences against the person were committed by children in the context of their own complex and traumatic background.³⁶ It also noted that an association between child protection involvement and particular offence types suggested an association between trauma and some offending, particularly for children who experienced residential care.³⁷
- 40 The report suggested that it was important that youth justice sentencing legislation recognise the relevance of trauma and child protection involvement to sentencing children. In particular, one relevant sentencing factor may include a child's experience of trauma, including the effect of that trauma on the child's development and capacity to avoid problematic behaviour.³⁸
- 41 It is also worth noting that the Council has previously conducted research on community attitudes to the sentencing of people with mental illness (among other things). The Council found very strong support in the general community for offenders with mental illness to be sentenced to alternatives to prison; in particular, four in five people (82%) supported alternative sentencing options for offenders living with a mental illness.³⁹

³⁵ Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2*, <https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-in-the-youth-justice-system-report-2>

³⁶ *Ibid*, xx.

³⁷ *Ibid*.

³⁸ *Ibid*, xvii.

³⁹ Sentencing Advisory Council, *Alternatives to Imprisonment: Community Views in Victoria* (2011).

Innovation and reform

- 42 The Council is not in a position to provide much comment on what reforms would most effectively improve the outcomes for young people and adults living with mental illness in the justice system. The Council does, however, note the frequently long waiting lists for offenders with mental illnesses to serve their sentence in an appropriate mental health facility such as Thomas Embling and Dame Phyllis Frost.
- 43 The work of the Mental Health Legal Centre needs to be noted. Although I have no knowledge of its funding, I would guess that it is severely underfunded and unable to meet the needs of its existing and potential clients.
- 44 One area of potential reform is in the operation of the infringements system, which can disproportionately impact Victorians living with mental illness. In 2014, the Council published its report on the imposition and enforcement of fines (including infringement notices) in Victoria. That report contains numerous references to the distinct vulnerability of people living with mental illness receiving monetary sanctions.⁴⁰ Other organisations such as Fines Victoria would be better placed than the Sentencing Advisory Council to discuss the extent to which recommendations in that report have been implemented, and the extent to which mental illness is considered a special circumstance during internal reviews of infringements.
- 45 Another reform that is sometimes discussed is the codification of *Verdins* in legislation. Given the influence of *Verdins* case on sentence decision-making and its subsequent interpretation and elaboration, there is no need for *Verdins* to be codified in the *Sentencing Act 1991* or any other legislative provision.
- 46 Regardless, to help facilitate future innovation and reform, there is a need for greater information not only about the prevalence of mental illness in offenders sentenced in all Victorian courts, but also more specifically about which specific mental illness they experienced and what offences they committed. In the higher courts, this could be facilitated through either the recording of such information by courts during sentencing, or by an external agency such as the Sentencing Advisory Council reviewing sentencing remarks and qualitatively coding for that information. In the Magistrates' Court, which does not routinely publish sentencing remarks, such data would likely only be captured if the sentencing court recorded it.

Attached to this statement and marked 'AF-1 is a copy of my CV.

⁴⁰ Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria* (2014).

sign here ►

A handwritten signature in black ink, consisting of several vertical, slightly wavy lines of varying heights, with a small loop at the bottom left.

print name Arie Freiberg

date 27 April 2020



**Royal Commission into
Victoria's Mental Health System**



ATTACHMENT AF-1

This is the attachment marked 'AF-1' referred to in the witness statement of Arie Freiberg dated 27 April 2020.

Arie Freiberg is an Emeritus Professor at Monash University. He was Dean of the Faculty Law at Monash University between 2004 and 2012. Before this, he was Dean of the Faculty of Arts at the University of Melbourne in 2003. He was appointed to the Foundation Chair of Criminology at the University of Melbourne in January 1991 where he served as Head of the Department of Criminology between January 1992 and June 2002. In 2013 he was appointed an Emeritus Professor of the University.

He graduated from the University of Melbourne with an Honours degree in Law and a Diploma in Criminology in 1972 and holds a Master of Laws degree from Monash University. He was awarded the degree of Doctor of Laws by the University of Melbourne in 2001 and is a fellow of the Academy of Social Sciences in Australia, the Australian Academy of Law and holds an Adjunct Faculty appointment in the Australia and New Zealand School of Government. He is also an Adjunct Professor in the Zelman Cowen Centre, Victoria University and an Honorary Senior Fellow in the Melbourne Law School.

Between 1996 and 1998, he was President of the Australian and New Zealand Society.

In 2009 he was made a Member of the Order of Australia for his service to law, particularly in the fields of criminology and reform related to sentencing, legal education and academic leadership.

His particular areas of expertise are sentencing, non-adversarial justice and regulation. He has been a Visiting Scholar at Harvard Law School (2014) and Tel Aviv University (2008) and has served as a consultant to the Federal, Victorian, South Australian and Western Australian governments on sentencing matters as well as the Australian and South African Law Reform Commissions. In 2015 he consulted to the Royal Commission on Child Sexual Abuse in Institutional Contexts on sentencing issues and in 2016 he was a consultant to the Queensland Department of Justice and Attorney-General on drug courts.

He has also consulted for a number of state government agencies and departments on regulatory reform.

In July 2004, he was appointed Chair of the Victorian Sentencing Advisory Council. In February 2013 he was appointed Chair of the Tasmanian Sentencing Advisory Council. He is a member of the Council of the Judicial College of Victoria. Between 2017 and June 2018 was a member of the Interim Advisory Board of the Victorian Environment Protection Authority.

He has around 180 publications in areas such as sentencing, confiscation of proceeds of crime, tax compliance, corporate crime, juries, juvenile justice, sanctions, victimology, superannuation fraud, trust in criminal justice, commercial confidentiality in corrections, dangerous offenders, the role of emotion in criminal justice and public policy, drug courts, problem-oriented courts, non-adversarial justice, environment protection and regulatory theory.