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RESPONSE TO THE STATUTORY MINIMUM SENTENCES FOR GROSS VIOLENCE PROJECT REVIEW CONDUCTED BY THE SENTENCING ADVISORY COUNCIL

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INTRODUCTION

The Justice and International Mission Unit of the Uniting Church in Australia, Synod of Victoria and Tasmania, is pleased to have this opportunity to make a response to the consultation by the Sentencing Advisory Council in relation to a review into Statutory Minimum Sentences for Gross Violence in Victoria. The Uniting Church in Australia supports a restorative and rehabilitative justice system, with incarceration used as a last resort. *The focus of this response will be the issue of applying two-year minimum detention sentences to juvenile offenders aged 16 or 17.*

The Uniting Church in Australia believes young people are often disadvantaged in the justice system; it opposes mandatory sentencing and desires that all Australians have access to fair and discretionary sentencing¹. At trial, the courts consider the full range of circumstances, such as the context of the offence as well as the impact the offence has had upon victims. At all times, an evaluation of a young person's needs and capacities should be prioritised over formulaic strategies that do not allow for discretion in sentencing. The Synod of Victoria and Tasmania advocates for increased funding levels to those parts of the juvenile justice system that facilitate community-based rehabilitation of young offenders and 'early intervention' through investing more extensively in support services within the primary and secondary phases of state education².

The effectiveness of introducing higher penalties and greater levels of incarceration for young people committing violent crime as a way of decreasing crime and recidivism is doubtful. Notwithstanding Uniting Church opposition to such measures; if Government is intent on introducing such change more research is required before taking action. What is clear is that reducing the level of incarceration and reinvesting in rehabilitative activity is highly effective.

It is not possible to separate the discussion of sentencing from a range of related considerations such as the primary importance of family support for young people; as well as, inequality and the lack of economic opportunity in certain communities. Strong families, schools and communities (in that order) are very important to safeguard the wellbeing of young people. Young males with little family support living in communities without economic opportunity are particularly at risk of committing violent crime. Additionally, bullying and a

culture of violence within particular areas and schools are most probably important contributing factors to violent crime. It also appears that the presence of law enforcement and the knowledge of risk of arrest are much more effective deterrents to criminal behaviour by young people when compared to introducing harsher sentencing laws.

Facilitating rehabilitation, even for those young people who have been found guilty of violent crime, should be an overarching consideration. Overall, rehabilitation of juvenile offenders can reduce the amount of future suffering (and cost) associated with crime in the community. Reducing excessive resourcing of custodial facilities can allow for greater reinvestment in services and programs that are preventative in nature resulting in a safer community. Early intervention to assist struggling families and focusing on greater assistance to schools in areas where there are high rates of juvenile offending rather than increasing custodial penalties for juvenile offenders should be prioritised.

REVIEW OF SENTENCING FOR JUVENILES COMMITTING SERIOUS INJURY OFFENCES INVOLVING GROSS VIOLENCE

The Victorian Attorney-General, the Hon. Robert Clarke, requested the Sentencing Advisory Council provide advice on sentencing for serious injury offences involving gross violence. The Victorian Government has committed itself to introduce a statutory minimum sentence for the offences of intentionally or recklessly causing serious injury when committed with gross violence; including that, in particular, a two-year minimum detention sentence will apply to juvenile offenders aged 16 or 17. The request for advice relates to the introduction of a statutory minimum penalty for the offences of intentionally causing serious injury and recklessly causing serious injury when either offence is committed with gross violence. The minimum sentence is to apply where the offence involves gross violence, such as where the offender: plans in advance to engage in an attack intending to cause serious injury; engages in a violent attack as part of a gang of three or more persons; plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury; or, continues to violently attack the victim after the victim is incapacitated. This proposed minimum sentence may not apply in tightly defined exceptional circumstances, such that the circumstances of the case are so unusual that the court is entitled to assume that the Victorian Parliament could not have intended those circumstances to be covered. This proposed 'summative' sentencing regime strongly resembles a 'mandatory sentencing' framework (see later discussion).

According to Sentencing Advisory Council data (2000-09) around a third of juveniles who intentionally caused serious injury to another person were sentenced to detention and of those around 11% were sentenced for a period exceeding 2 years³. It is unclear how many of these committed 'gross violence' as defined in this review. However, it would be safe to say that the review proposals, if enacted, would markedly increase the amount of juveniles detained in the Victorian system.

Detention a last resort for juveniles and the cost

In places like the United Kingdom, imprisonment rates have been climbing steadily for decades despite falling crime rates leading to a crisis of prison overcrowding; and, in the USA only about 12% of the growth in prison populations is due to an increase in crime⁴. In Victoria, increased imprisonment "has been attributed to changes in sentencing practice and a generally more punitive approach reflecting strong community pressure for law and order"⁵. Thankfully, in Australia all jurisdictions legislatively provide that detention be a 'last resort' for juveniles⁶; and Victoria is no exception to this rule. Consistent with this, there is a growing belief that the emphasis in juvenile justice ought to move from simple punishment, towards making young offenders accountable for their actions, while at the same time involving families in making decisions about their children and in addressing the needs and rights of victims⁷.

There is no doubt that effective policy in the area of juvenile justice result in less human suffering for all those involved in the cycle of violent crime. Also, there are high financial costs to the Victorian community where policy does not succeed in lowering crime rates and recidivism. Mandatory sentencing generally increases incarceration and cost:

Despite the difficulty in assessing the extent to which mandatory sentencing affects levels of incarceration, most jurisdictions in which mandatory sentencing has been introduced have seen a rise in both the number and the proportion of offenders sentenced to terms of imprisonment and a correlative general rise in the prison population. Jurisdictions that have mandatory sanctions tend to have much larger prison populations than those without such regimes⁸.

According to the Victorian Government, to hold a young person in detention costs approximately \$528 per day whereas community-based supervision options are much less costly, at around \$52 per day⁹. If juvenile offenders go on to become adult offenders, government expenditure significantly increases. In Victoria, almost half of young offenders will be imprisoned as adults¹⁰. Last year, budget papers from the previous Victorian Government made projections of an extra \$126 million over four years being spent on an additional 244 prison places (around \$113,000 per bed)¹¹. The 2011-12 Budget reveals that the Victorian Government will spend an extra \$66 million to begin to provide 500 additional prison beds to address probable increases in prisoner population as a result of harsher sentencing and bail laws; also, an extra \$2 million in funding will go towards developing a business case for the development of a new male prison¹². According to media reports the typical 25-year term of a Public Private Partnership project for such a male prison would be in excess of \$2 billion¹³. Increasing resources for incarceration will, arguably over time, reduce available state resources for prevention and therapeutic approaches that can reduce reoffending, harm and cost.

Discretion in sentencing

The Victorian Government wishes to introduce presumptive minimum sentences for juvenile offenders who have caused serious injury offences involving gross violence ('a presumptive sentencing system is one in which parliament prescribes both a sanction type and a minimum level of severity for a given offence which the court *must* impose *unless* there is a demonstrable reason—which may be broadly or narrowly defined—justifying a departure from this'¹⁴). It is proposed that the statutory minimum penalties will not apply only in tightly defined exceptional circumstances that parliament could not foresee; therefore, arguably the proposal closely resembles a mandatory sentencing regime for juvenile offenders¹⁵. If the exceptions were more broadly defined to allow for greater judicial discretion then the proposal would be less likely open to a range of moral and other criticisms levelled at mandatory models of sentencing as being particularly disadvantageous to 'the poor and marginalised'¹⁶, including Indigenous Australians (and particularly Australian Indigenous women)¹⁷. Other than anecdotal arguments in the media and elsewhere, there is little evidence that there has been misuse of judicial discretion in Victoria in the area of juvenile justice. However, some writers like Mirko Bagaric have sharply argued for mandatory regimes modelled on the more nuanced models of Minnesota (and Oregon)¹⁸.

There is no doubt that many in the community believe sentencing is too lenient¹⁹. However, it is generally accepted in the community, including amongst victims of crime groups, that young offenders should, in many cases, be given 'a second chance' rather than being incarcerated where they mix with other offenders²⁰. A recent detailed Australian study showed that, when provided with more information about four actual cases, the public would

have given lower sentences in three out of the four cases²¹. Also, a recent Tasmanian study showed that a substantial majority of jurors with firsthand experience of judges consider that sentences are appropriate and that judges are 'in touch' with public opinion (the opinions of these jurors who have actually experienced the system are very different to those who form their perceptions second-hand via the mass media)²². Indeed there are local and global studies that have suggested that community involvement and understanding of the legal system promote greater public confidence in the system²³.

- **Recommendation:** Victorian judges should continue to possess a high level of discretion when sentencing juvenile offenders (the Victorian Government should undertake community education in this area).

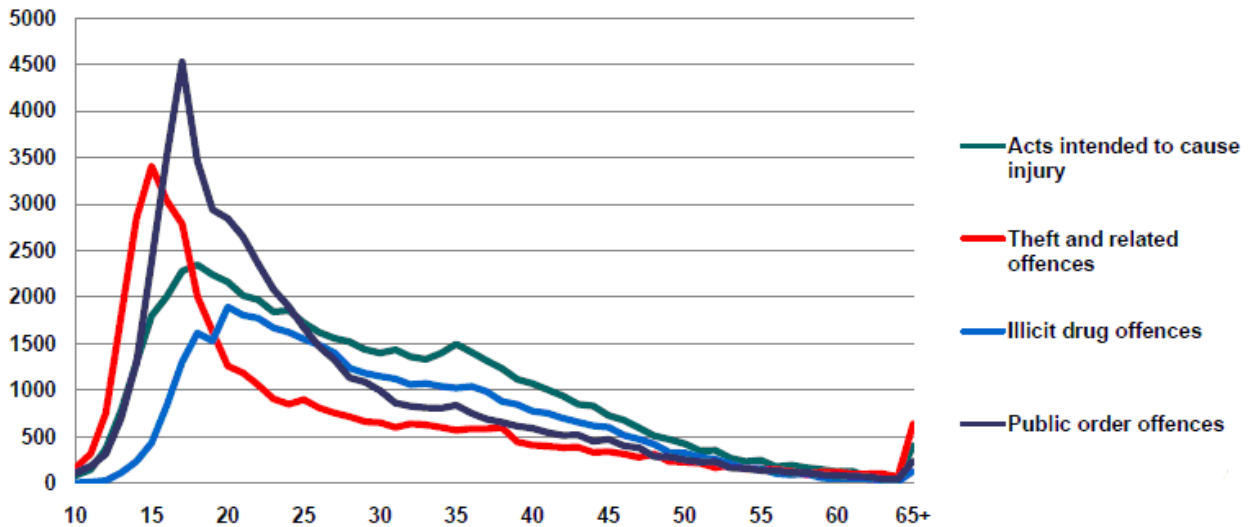
Violence, recidivism and deterrence – factors to take into consideration

No reviews of controlled outcome criminal justice or corrections research have found that reoffending is largely or consistently effected by 'type or severity of the criminal penalty or disposition'²⁴. An exception may be for the period of incapacitation; but most offenders return to the community²⁵, and there are diminishing returns from ever increasing rates of imprisonment²⁶. In any case there is significant doubt that mandatory sentences better deter than those that are discretionary²⁷. Incapacitation can prevent offending by some recidivists but it has not been established that mandatory sentencing increases the effectiveness of incapacitation or, more importantly, that it is the best way of determining who to incapacitate²⁸.

Violent crime exists in some societies and communities more than others. Research by epidemiologists Richard Wilkinson and Katie Pickett in a highly influential book on income inequality championed by the UK Prime Minister, the Rt. Hon. David Cameron, has found that 'among the richest countries, it's the more unequal ones that do worse according to almost every quality of life indicator'²⁹ (including violent crime levels). It should be remembered that in wealthy somewhat unequal societies like Australia violent crime is most often committed by males in their teens to early twenties who, for often financially-driven reasons, suffer a loss of pride; they may also have an absent biological father (causing displays of exaggerated 'masculinity') and may have suffered abuse or bullying at an early stage³⁰. There is increasing evidence in relation to a link between bullying and juvenile crime³¹. In 2010 Mission Australia found that 23.4% of young people surveyed were concerned about bullying and emotional abuse³². Some research has found frequent bullying of a quarter of students in years 4-9³³. Bullies are more likely to drop out of school and to engage in delinquent and criminal behaviour; early intervention restorative justice practices are recommended to tackle this problem³⁴.

In Figure 1 the green line tracks acts intended to cause injury by juvenile offenders; such acts peak just before the age of twenty (see next page).

FIGURE 1: AGE CRIME CURVE (JUVENILE OFFENDERS)³⁵



Ageing (as well as employment and marriage), ‘contributes to the termination of criminal activity’³⁶. According to the Sentencing Advisory Council research shows that imprisonment is often criminogenic in nature and can consequently increase the rate of recidivism³⁷. Evidence shows that therapeutic approaches to sentencing, such as community and treatment-based orders, can substantially reduce reoffending rates compared with prison (in Victoria, people released from prison are twice as likely to return to corrective services within two years of ending their sentence as those with a sentence involving community correction)³⁸ (see later recommendation on research in this area). In the area of juvenile justice it is well known that where young people experience early interaction with the justice system they are more likely to be further drawn into the system³⁹, down the track. It is generally desirable then to minimise the amount of juvenile incarceration so the risk of later adult offending is minimised.

Victorian legislation does not list the object of general deterrence (sentencing as a deterrent for potential offenders) for juveniles, but does allow for specific deterrence for an individual offender to dissuade against reoffending⁴⁰. Research has found fear of apprehension, rather than severity of sentence, provides a deterrent⁴¹. Additionally, it appears that custodial orders are no more likely to stop reoffending for juveniles in comparison to non-custodial penalties⁴².

Taking this research into account it would make sense for the Victorian Government to invest in education for juveniles at risk of offending to make them aware of criminal sanctions for criminal behaviour as well as in law enforcement, rather than legislating for presumptive minimum sentencing⁴³ that will most likely increase the rate or incarceration of juvenile offenders (and probably increase their rate of reoffending in later life).

At the very least, the Government could analyse the different effect of providing custodial and non-custodial sentenced for similarly violent juvenile offenders (who share similar characteristics) in relation to impact on recidivism in later life before reforming law in this area. Interestingly, while it is true that the number of concurrent offences is predictive of

reconviction for both juvenile and adult offenders; it has been found the type of principal offence only matters for adult offenders and not juveniles⁴⁴.

- **Recommendation:** The Victorian Government should conduct research to better ascertain the relative merits of custodial and non custodial sentences for juveniles who have been convicted of violent crime offences in relation to recidivism in later life.

Investing in child and adolescent development in disadvantaged communities is crucial

It is becoming increasingly apparent that adolescent connectedness to family and school is especially crucial for adolescent well being (even more important than connection to peers or community)⁴⁵. Strong families, schools and communities are very important to safeguard the wellbeing of young people. It is important that the state has enough funds available to make important investments in these areas.

Criminal behaviour has its roots in early childhood experience; a key transitional point⁴⁶. There is a strong case for effective intervention at such important junctures⁴⁷ in childhood and adolescent development. It should also be noted that a key driver for problems for juveniles is financial stress on families; it disrupts the parenting process and makes juveniles more susceptible to neighbourhood problems if existent, leading to higher rates of criminal involvement⁴⁸. There is also a link between the concentration of poverty within certain communities and incarceration (and other negative social indicators). Respected Australian researcher Emeritus Professor Tony Vinson highlights:

... the especially damaging consequences of limited education, deficient labour market credentials, indifferent health and disabilities, low individual and family income, and engagement in crime. Localities with markedly high rankings on these and other forms of disadvantage are areas where confirmed child maltreatment is also likely to be high. Whatever other measures are necessary to combat the geographic concentration of the problems ... it is difficult to deny *the centrality of limited education, employment and the capacity for economic independence in the making and sustaining of localised disadvantage in Australia*⁴⁹.

Vinson has found that those communities typified by higher levels of involvement in local groups and events, neighbourliness and trust 'dampen down' harm associated with low levels of education and high unemployment⁵⁰. However, as discussed in this paper, the family unit is the first buffer for juveniles who live in disadvantaged areas.

Community-based sentencing can assist an offender to maintain family links⁵¹ and this is especially important to juvenile offenders. Ineffective parental supervision and neglect⁵² correlates with higher rates of crime⁵³; assisting skill development in this area for parents would most likely be beneficial. So, government should consider investing in provision of effective family support and other services in areas with high levels of juvenile offending and overall disadvantage.

- **Recommendation:** The Victorian Government should review resource allocation to family support service provision in areas with high levels of juvenile offending.

Justice reinvestment

According to a comprehensive recent NSW report⁵⁴, 'there is a substantial body of evidence which suggests that prevention and early intervention are the most cost-effective ways to reduce juvenile offending'. The justice reinvestment approach diverts 'funds that would otherwise be spent on building additional juvenile justice centres to services and programs that address the underlying causes of crime in local communities'⁵⁵. Justice reinvestment strategies result in 'tangible benefits such as reduced crime, reduced re-offending and cost savings for Government, and provides long-term benefits to the community'⁵⁶. A local example of such investment is when the Neighbourhood Justice Centre in Victoria supported a restorative justice group conference program (for young adults between 18 and 25 years of age). A 2010 evaluation of the NJC as a whole found offenders were 14% less likely to re-offend than those processed in other courts⁵⁷. The new Victorian Government is to be congratulated for providing \$17.5 million aimed at crime by young people through prevention and rehabilitation programs⁵⁸. This includes expanding the Youth Justice Group Conferencing program as an alternative to the Children's Court. Also, an extra \$1.1 million has been allocated for a bail supervision program to keep young people out of custodial care⁵⁹.

Systemic approaches (and new ways to deliver services) are best developed from bringing people together with opposing points of view because 'the problem isn't owned by a single entity' and high level of creativity is required⁶⁰. A successful Justice Reinvestment strategy involves a broad range of stakeholders in the jurisdiction, which may include prosecutors; public defenders; judges; corrections and law enforcement officials; service providers and community leaders; victims and their advocates; people who have been incarcerated; and health, housing, human service, education, and workforce professionals⁶¹. Dialogue can focus on not only problems but also young people and families who, despite significant disadvantage, are doing well. Successful behaviours and practice can be found amongst people in an existing community (who have a similar resource base to those experiencing difficulty)⁶²; solutions are grounded in an existing culture and because of this these solutions generally require less resources.

The Victorian Government could consider fostering a dialogue between key stakeholders about juvenile justice in a particular locality within particular disadvantaged Victorian areas such as Broadmeadows, Heathcote, Korong Vale, Maryborough, Nyah West and Rosebud West⁶³. As a starting point, examples of specific actions for stakeholders to consider could be those recommended by Emeritus Professor Tony Vinson such as to aiming to raise educational attainment by improving early education programs, preschool attendance, and improve primary schools and provide financial incentives to attract experienced and successful teachers to the most disadvantaged schools; as well as supporting projects which combine personal support, attention to educational deficits and skills development for disengaged young people⁶⁴.

Justice Reinvestment has been very successful in the United States. In Washington this approach has saved approximately \$2 billion and reduced crime rates⁶⁵. Kansas has experienced a 7.5% reduction in their prison population, and the re-offending rate for people

on parole has dropped by 35% since adopting Justice Reinvestment⁶⁶. Oregon is also a success story (see Appendix for analysis).

- **Recommendation:** The Victorian Government should initiate a justice reinvestment strategy to reduce juvenile reoffending in highly disadvantaged Victorian communities.

RECCOMENDATIONS

1. **Recommendation:** Victorian judges should continue to possess a high level of discretion when sentencing juvenile offenders (the Victorian Government should undertake community education in this area).
2. **Recommendation:** The Victorian Government should conduct research to better ascertain the relative merits of custodial and non custodial sentences for juveniles who have been convicted of violent crime offences in relation to recidivism in later life.
3. **Recommendation:** The Victorian Government should review resource allocation to family support service provision in areas with high levels of juvenile offending.
4. **Recommendation:** The Victorian Government should initiate a justice reinvestment strategy to reduce juvenile reoffending in highly disadvantaged Victorian communities.

APPENDIX

Oregon

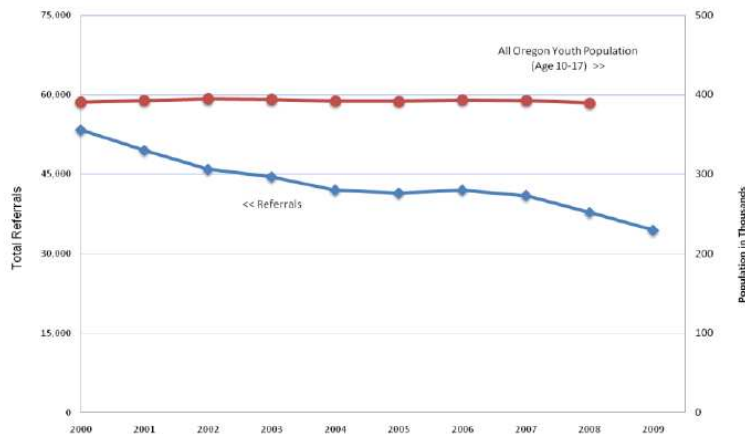
Oregon is known as being very successful in the area of juvenile justice reinvestment and for reducing recidivism across offending groups. According to the National Centre for Juvenile Justice in the USA, Oregon has reduced youth incarceration by 72% which is the biggest ever decrease in juvenile detention⁶⁷. The reduction in prison population has been mainly due to not automatically reincarcerating offenders for parole and probation violations (rather Oregon uses a system of graduated sanctions)⁶⁸.

In Oregon, the recidivism rate for young offenders found guilty of more serious crimes is 29.4%⁶⁹. This figure is based on subsequent felony conviction in an adult court over a tracking period of 36 months, for youth sentenced in the adult system (06/07 cohort) and placed in a youth correctional facility to serve part, or all, of their sentence⁷⁰. It would be interesting to specifically compare like Victoria statistics; however these have been difficult to locate. The scant available evidence suggests that for half of Australian juveniles in detention their current period of detention is not their first, and more than half of juveniles released from detention will be reconvicted within at least six months (within seven years nearly 80% released from detention will be subject to supervision – community or custodial – by a corrective services agency as an adult and almost half will be imprisoned)⁷¹.

Delinquency referrals have been trending downwards in Oregon as can be seen in Figure 2.

Delinquency referrals can be for one of three things: criminal behaviour for a misdemeanour or felony (a felony is a serious crime); a non-criminal violation of a state statute, such as traffic, fish or wildlife violation, or possession of less than an ounce of marijuana; or a status offense, such as runaway or curfew⁷².

FIGURE 2: REFERRAL TRENDS IN OREGON (2000-2009)



In general, Oregon leads the way in the USA in the area of reducing recidivism of offenders (22.8% in 2005). Success has been attributed to a comprehensive justice reinvestment approach to reform and a commitment to change that reaches across all levels of government—from the supervision officer in the field, to the judiciary, through the state corrections department and up the ranks of legislative leadership (and a legislative requirement that any correctional program receiving state money be evidence-based in its design and delivery)⁷³.

While it is true that Oregon does provide for a summative penalty regime for juveniles 16 and over for serious crimes; the approach has been recently strongly criticised by their official Criminal Justice Commission due to concerns about sentencing authority being moved from judges to prosecutors, sentencing inconsistency and that the effect of producing greater deterrence to commit crime could not be clearly determined⁷⁴.

What is clear is that reducing the level of incarceration and reinvesting in rehabilitative activity is highly effective.

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