# Submission responding to proposed amendments mandating imprisonment where injuries are sustained by emergency workers

## June 2018

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This submission responds to the recent indication by the Victorian government of its intention to introduce legislative amendments imposing mandatory terms of imprisonment for any assault against an emergency service worker, which will henceforth be treated as a 'category 1 offence'.[1] Announcements by the Andrews government have been followed by an indication of in-principal bi-partisan support.

We confirm that to our knowledge, there has been no consultation in relation to impacts of the proposed approach with the broader community. This includes community organisations who routinely rely on collaborative relationships with emergency workers to preserve life, ensure safety, facilitate treatment, and intervene in unsafe environments. As community sector organisations, we support community members, their family members, carers, and organisations (health, housing, charitable), many of whom frequently either rely upon and/or are supported by emergency workers. We believe our concerns and experiences should be considered. Many of us are also frontline workers with direct experience of many of the contexts in which these laws may operate.

Calls to emergency services are generally only made when there is an 'emergency' – i.e. where we as family members, community members or community sector workers believe we lack the skills, training, knowledge and resources to manage circumstances presenting in a manner that protects the affected person, meets our duty of care to individuals, and/or is responsible having regard to the safety of the community at large.

We strongly support measures that promote the safety of emergency service workers. We note the category of emergency workers is broad, extending from police members who have specialist training to engage in physical confrontations, and 'operational equipment' (i.e. weapons) that may be used should conflict escalate causing risk of injury, to nurses and paramedics working in emergency departments, who may rely on the presence of security guards and attendance of police to ensure safety in their workplace.

We recognise ambulance workers are exposed to special risks as the contextual circumstances they are likely to face on each job are often largely unknown. Though requiring significant allocation of resources, we strongly support multi-service response approaches to ameliorate risk of injury or harm to workers where appropriate.

We support the expanded collaboration between police and ambulance workers (and other emergency workers) to minimise risk of harm to frontline workers. Such an approach requires

[1] Our concerns and comments are based on details published by the Hon Mr Daniel Andrews Premier in his media release *'Laws to be fixed so jail means jail for emergency worker attacks'* dated 22 May 2018.

allocation of resources, but it is vital that frontline emergency workers are able to do their jobs without undue risk of personal harm.

We support the presence of security guards in emergency departments. If additional resources are required to ensure the safety of patients and staff, those resources should be made available.

We support continued promotions that make clear that assaults of health practitioners, ambulance staff, and other emergency workers will not be tolerated.

Traditionally emergency workers, community sector workers, and court services have worked collaboratively to try to advance and support those objectives. Please consider whether proposed amendments will operate to undermine those collaborations and the shared outcomes we are seeking to further as a community with responsibilities to our most vulnerable.

***Background***

Under current law, assaults against emergency workers - police officers, paramedics, staff in emergency departments and others- attracts a minimal non-parole period of 6 months unless the Court finds a 'special reason' to displace that presumption.[2]

'Mental impairment' as a special reason is defined as a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder, or a neurological impairment such as dementia, and a causal link diminishing culpability must be established.[3] A special reason can also be found if the accused's mental impairment would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment.[4]

Mental impairment as a result of drug or alcohol intoxication is not a special reason.

A special reason exists where the accused was between 18 and 21 years old and had 'a particular psychosocial immaturity that resulted in a substantially diminished ability to regulate his or her behaviour'.[5] Further discretions retained by the courts are highly demarcated, including if there are 'substantial and compelling circumstances', and if the court proposes to make a Court Secure Treatment Order or residential treatment order.[6]

What does this mean? In recognition of their particular workplace challenges, the Parliament has already determined that emergency workers currently attract special positioning in the sentencing

[2] See *Crimes Act 1958* (Vic) s 15 - 18; *Sentencing Act 1991* (Vic) ss 10AA, 10A.
[3] *Sentencing Act 1991* (Vic) s 10A(1), 10A(2)(c)(i).
[4] *Sentencing Act 1991* (Vic) s 10A(2)(c)(ii).
[5] *Sentencing Act 1991* (Vic) s 10A(2)(b).
[6] *Sentencing Act 1991* (Vic) 10A(2) – (5)

framework, as compared with 'ordinary' members of the community who may experience the same forms of assault and injury.

The specific and limited categories displacing a minimum term of imprisonment are clearly designed to protect highly vulnerable persons. There must be a nexus between intellectual or psychosocial disability and the offending conduct, thereby lowering moral culpability; the person's mental impairment must cause prison to be significantly more burdensome or risky than for other offenders; or there must be such substantial and compelling circumstances, having regard to the cumulative impact of the circumstances of the case, that would justify a departure from that minimum sentence.[7]

Sentencing is a complex and heavy burden assigned to the judiciary, reflecting most centrally the community expectation that, subsequent to a finding of guilt, the justice system will provide a transparent mechanism by which the application of parliamentary and common law will be delegated to an independent decision maker for detailed examination (and be subject to appeal in appropriate circumstances). In general terms, a sentence imposed by a Court is required to balance considerations of punishment, deterrence, rehabilitation, denunciation and community protection, having regard to all the circumstances attendant on the particular case. Issues of culpability, vulnerability, harm and proportionality invariably form part of that exercise, as does the community's expectations of where the balance may lie which is influenced by the elected parliament's law making power.

The independence of the judiciary is of central importance to democracy, in particular to ensure that the justice system does not become an overly politicised arena wherein short term political goals are permitted to undermine the rule of law and guiding principles of justice and fairness.

[7] *Sentencing Act 1991* (Vic) s 10A(3)(b).

***Case study***

X has autism spectrum disorder, suffers from periods of severe psychosis, and has just turned 18 years of age. An emergency situation arose in the family home, where other children are also living, wherein X had caused serious injury to herself by throwing herself through a glass window. Her parents called the local hospital, who in turn called 000 to obtain assistance in managing the situation. A male and female ambulance worker, and a male and female police member attended the scene. The presenting crisis was able to be managed through the combined response of services, and in particular, through the specialist training of the ambulance workers, who were able to assist in partnership with and supported by police, in de-escalating the distress and trauma the young person was experiencing, supporting her to be removed temporarily from the home to receive intervention, treatment and medical care for injuries. A clinician from the treating hospital also attended, debriefing with the family and obtaining history to inform treatment.

This incident was compared by the family to a crisis some months previous. X had been experiencing severe psychosis but was assessed to be under the influence of drugs as opposed to being a person experiencing a mental health episode. Over the course of over 24 hours, the family of X attended three hospitals. At the first hospital, X assaulted her father, and was strapped into a bed. When the straps were removed, X became extremely agitated and volatile, wherein staff at the hospital attempted to restrain her. An assault of a staff member occurred at that time for which X was subsequently sentenced. Subsequent to discharge, X immediately called an ambulance for herself, and her family attempted to have her admitted to two further emergency departments. The family of X was extremely distressed as X's condition was deteriorating rapidly. Police members assisted the family by identifying a fourth hospital that would likely be equipped to manage X given the extent of psychosis danger she was presenting to herself and others.

X was subsequently sentenced by the Courts for the assault that had occurred during the course of psychosis. X successfully completed the conditions associated with sentence for assault of an emergency worker and complied with conditions of the family violence intervention order that was instituted by the Court.

If these laws are passed, the family of X will face the decision of whether to expose their child to six months imprisonment in a context where they manifestly cannot predict her conduct, and in particular, whether an injury may be caused to an emergency worker during the course of attendance on X. The condition that affects X is one that she and her family will need to manage for the foreseeable future. They are not alone, but are amongst thousands of other Victorian families navigating similar circumstances.

***Recent County Court decision - DPP v Warren & Anor [2018] VCC 689***

At the outset, we note this submission is constrained by the current lack of specificity surrounding proposed legislative amendments. We note the reasons for sentence in the case which triggered urgent agreement to be reached, without Parliamentary debate or community consultation, between the Premier the Hon Mr Daniel Andrews MP, Ambulance Employees Australia Victoria Secretary Mr Steve McGhie, and The Police Association Secretary Mr Wayne Gatt are publically available.[8] A brief overview of the detail which the Honourable Justice Cotterell gave consideration to may be found in summary below.

According to the press release,[9] which we note followed reporting of the case by only 7 days, the proposed amendments will place injury (whether serious or not/ whether intentionally caused or not) to emergency workers, including police members, in the same category as the following offences – murder, causing serious injury intentionally in circumstances of gross violence, causing serious injury recklessly in circumstances of gross violence, rape, rape by compelling sexual penetration, sexual penetration of a child under the age of 12, persistent sexual abuse of a child under the age of 16, sexual penetration of a child or lineal descendent, if the child or descendent was under the age of 18 at the time of the offence, sexual penetration of a step-child, if the step-child was under the age of 18 at the time of the offence, trafficking in a large commercial quantity of a drug of dependence, cultivating a large commercial quantity of a drug of dependence.

There are clear issues in terms of proportionality in the positioning of lower level offences alongside the most serious category of criminal offending.

***The appropriateness of proposed amendments as a politicised response to the County Court decision***

We note it is a matter of significant gravity that a woman or child's experiences as a victim of a category 1 offences will under the proposed amendments be of 'significantly less weight' in the sentencing exercise by direction of the Victorian Parliament. We strongly recommend the *DPP v Warren & Anor* judgment is read by every decision maker. We note in particular, that sexual abuse of children is statistically unlikely to be the subject of court proceedings or punishment even if reported.[10] Women who experience sexual violence as children, and other sexual victimisation, are

[8] *DPP v Warren & Anor* [2018] VCC 689: Tuesday , May 15, 2018 Contra: Her Honour Judge Cotterell

[9] *'Laws to be fixed so jail means jail for emergency worker attacks'* dated 22 May 2018.

[10] The proportion of incidents of child sexual abuse reported to the police that result in prosecution and conviction is between 8 per cent and 15 per cent: Judy Cashmore, Alan Taylor, Rita Shackel and Patrick Parkinson, 'The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases' Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016, p 34.

already over-represented in the prison system. Between 57% and 90% of women in Australian prisons have histories of child sexual abuse and other forms of victimisation.[11]

We note that a finding of 'impaired mental functioning' was made by Her Honour Judge Cotterell in *DPP v Warren & Anor* [2018] VCC 689 regarding both persons subject to sentence. As stated above, for relevant purposes mental impairment is defined as a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder, or a neurological impairment such as dementia.

The County Court decision is summarised in the below table.

Italics have been used where it is unclear whether consideration may/ may not be given by the judicial officer passing sentence based on the public representations relating to proposed changes to the law.

| **Name** | Ms Warren | Ms Underwood |
|---|---|---|
| **Charge**<br><br>Proposed change:<br><br>Charge 1 in each case will now be treated as Category 1 Offence | Charge 1 - Intentionally cause injury to an emergency worker<br><br>Charge 2 - Cause criminal damage<br><br>Charge 3 - Handle stolen goods | Charge 1 - Intentionally cause injury to an emergency worker |
| **Sentence imposed at first instance (Magistrates' Court)** | Eight months imprisonment, followed by a 12 month community corrections order | Four months imprisonment, with a 12 month community corrections order |
| **Sentence imposed on appeal (County Court)** | Fourteen days imprisonment followed by a three year community corrections order with 150 hours of community work | Two years community corrections order with 50 hours community work |

[11] Mary Stathopolous, 'Addressing women's victimisation histories in custodial settings' (Issues Paper No 13, Australian Centre for the Study of Sexual Assault, December 2012) 4.

| | | |
|---|---|---|
| **Life history/ special reasons/ additional circumstances**<br><br>Proposed change<br><br>The court must give significantly less weight to the life circumstances of the offender (colour code pink)<br><br>Proposed change<br><br>Psychosocial immaturity will be removed as a special reason CU[10]<br><br>Proposed change<br><br>Impairment due to alcohol or drugs can no longer be used as an excuse AW[7]<br><br>Proposed change<br><br>The rights of the Director of Public Prosecutions will be strengthened so she can appeal where the narrowed special reasons exception is found to exist. | [1] no prior offending<br><br>[2] brought up in a dysfunctional family, which included abuse and violence<br><br>[3] ward of the State from the age of 14<br><br>[4] living in the care of the Department, subjected to further significant abuse<br><br>[5] moved from State care to a psychiatric residence<br><br>[6] difficulty in finding housing between 2007 and 2015 and she had five children, one of whom was stillborn.<br><br>[7] *significant cannabis and alcohol use problems*<br><br>[8] had not been taking the medication prescribed in relation to her mental illness<br><br>[9] *finding of impaired mental functioning, causally linked to the commission of the offence, substantially reducing her culpability** | [1] parents separated when two years old, mother returned to England, and accused remained with her father<br><br>[2] at age of 11 was referred to the Gatehouse Centre, Royal Children's Hospital, following disclosure of abuse<br><br>[3] placed in residential protective care at the age of 13 after disclosing further abuse by her father<br><br>[4] gave birth to first child at the age of 15 in 2012<br><br>[5] moved from protective care under the Department of Health and Human Services into transitional housing in 2015<br><br>[6] offences which bring her before the court occurred when she was 18<br><br>[7] second child born in 2017, since this offending, when she was aged 19<br><br>[8] a month before that hearing, the father of her first child was killed<br><br>[9] *suffered from a mental illness within the meaning of the Mental Health Act*<br><br>[10] was over the age of 18 but under the age of 21 at the time of the offence and *on the balance of probabilities that accused has a particular psychosocial immaturity* |

| | | |
|---|---|---|
| **Rehabilitative steps taken** | [10] CISP, during which she had *extensive drug and alcohol treatment*, psychiatric counselling, grief counselling and other courses, including anger management<br>[11] following CISP involvement, she *continued treatment* and was recommended supports<br>[12] *referred herself to North Eastern Recovery*<br>[13] *engagement with the Family Drug Treatment Court Program and she has continued the urine screens twice a week and attending progress hearings in court*<br>[14] *due on 18 May 2018 to commence a day rehabilitation program through the Banyule Community Health Organisation in which she will be heavily supervised* | [11] *as her recovery goes, she has not used ice for over three years, and none of the people working with her have any concerns about her drug or alcohol consumption at this time**<br>[12] undergoing involvement with the Department in relation to domestic violence, and the Department report that as a mother she cannot be faulted |

The reinforcement by government that some forms of victimisation just aren't as important as others, in particular those forms of victimisation that disproportionately affect women and children, through the deliberate placement of victims in a legislative hierarchy absent application of ordinary principles of justice, is in our view deeply offensive and socially harmful.

Finally, we note the Minister for Police the Hon Lisa Neville has indicated that retention of consideration of mental illness as a special reason is open for debate.[12] We note that mental health is linked to approximately 20 percent of ambulance call outs.[13]

All these matters are of significant public concern, and as such, any proposed amendments should be clarified with precision and opened to substantial consultation and debate.

[12] Benjamin Preiss and Melissa Cunningham , 'Premier says ambo attackers will get same treatment as rapists, murderers' *The Age* (online), 21 May 2018.

[13] B Lloyd, CX Gao, C Heilbronn, DI Lubman, Self-harm and mental health-related ambulance attendances in Australia: 2013 data (2015, Turning Point). See also Melissa Davey, 'Mental health linked to one fifth of emergency ambulance callouts' The Guardian (online) 10 September 2015.

***Case Study***

TM was the mother of a 10 month old child and was assaulted by the child's father, MB, on a public street. During the assault TM suffered serious injuries and was left naked and wrapped in a sheet. After arrival, officers attempted to prevent TM from departing the scene with her father at which point TM spat at the officer's direction. It is reported that officers at the scene assumed that TM's behaviour was a result of illicit substance use and not as a result of being the victim of a serious assault. Officers then attempted to arrest TM for the spitting at which point the interactions are reported to have become violent. Additional officers were then called to the scene and TM was taken to the local hospital for assessment. She was taken to hospital for a mental health assessment and medical assistance. In translation between members, the matter was not treated as a domestic violence incident. TM was breath tested at the hospital and it remained the case that attending officers did not suspect it was a domestic violence incident. It seems there was a failure also in the Emergency Department communicating to police that TM had reported she had been assaulted. The Western Australia Corruption and Crime Commission found that little effort was made to find the perpetrator MB and that police 'failed to deal with TM as the victim of an assault'. TM was charged with assault police. During the time between the initial assault upon TM and subsequent hospitalisation, MB took the child. MB had made threats to kill the child and drove with the child over 900km away. These threats were reported on multiple occasions during the period whilst TM was in hospital. The following day MB sexually assaulted and killed the child. The report states that the day following the initial assault police followed proper procedure. However, had proper procedure been implemented on the night in question, and had the charge of assault police not been the focal point for attending officers, rather than to the TM's response to injury and assault by MB, the abduction of the child may have been prevented and his life ultimately saved. TM spent some months in hospital recovering from injuries, which included a broken collarbone, broken ribs and a badly damaged spleen and kidney. She was found guilty of assaulting and obstructing police members. She had kicked one police officer and spat at another. TM received a one year suspended sentence and $900 fine. If she had caused 'bodily harm' to a police member, she would have had to serve a mandatory sentence of six months imprisonment. In sentencing, Western Australian Magistrate Stephen Sharrat stated: "I just can't jail her with what she's gone though. What happened to her made a great deal of difference to the way she reacted to their [the police] presence. Those wounds would have killed her without medical intervention."[14]

[14] Calla Wahlquist, *'Court 'shows mercy' to injured mother of murdered baby who assaulted police'*, *The Guardian* (online), 23 October 2015; Corruption and Crime Commission, *Report on the Response of WA Police to a Particular Incident of Domestic Violence on 19-20 March 2013* (21 April 2016) .

***Specific concerns for community sector workers***

### *A. Safety and employer accountability for the emergency worker sector as a whole*

We note the Auditor General's report into '*Occupational Violence Against Healthcare Workers'*. The findings and recommendations of that report, which assesses 'whether the Department of Health and Human Services (DHHS), WorkSafe, Ambulance Victoria (AV) and health services are adequately protecting healthcare workers from the risks and incidence of occupational violence', do not at any point reference or canvas mandatory sentencing as a measure or recommendation that will support the health and wellbeing of those workers.[15]

We note that registered nurses, welfare and community workers, personal care and nursing assistants, and registered mental health nurses are in the top ten occupations that are most exposed to incidents of occupational violence.[16] We have not been consulted.

Under-reporting is consistently referenced in the report, and we note that the causes of this are discussed at some length. Two reasons singled out are as follows –

> *'Staff have compassion and sympathy for patients whose aggression arises from a clinical condition—staff report feeling that the patient 'couldn't help it';*
>
> *'There is a view that clinical violence is an inevitable part of the job—for example, interviews elicited repeated comments that the frequency of occupational violence incidents meant that if staff reported every incident 'you would be reporting all day.'*[17]

We believe there is every risk that frontline workers will be even less likely to report incidents on occupational violence with the attendant risk of mandatory imprisonment of their clients/ patients.

Occupational violence should be tackled with an evidence informed approach, including auditing of those measures that have been introduced to date for effectiveness. The government should consider extending appropriate measures to other work environments where occupational violence is a significant risk.

### *B. Family violence & barriers to reporting*

Changes that are likely to impact the reporting of family violence incidents should not be taken lightly. Such changes require focussed inquiry across affected community groups and service sectors. We believe the spectre of mandatory imprisonment of a family member will create additional barriers to seeking intervention by emergency workers (i.e. police) in situations of family violence

[15] Victoria, *Occupational Violence Against Healthcare Workers: Victorian Auditor-General's Report*, Parl Paper No 30 (2015).
[16] Ibid.
[17] Ibid 14.

and intimate partner violence. In our experience, assaults on emergency workers including police are already treated seriously by the Courts in this context and that there is little issue with under reporting.[18]

In announcing the Victorian Government's Royal Commission into Family Violence, the Premier declared that family violence is 'the most urgent law and order emergency occurring in our state and the most unspeakable crime unfolding across our nation'.[19] We have already made comment on the hierarchy of victims approach to sentencing, and the manner in which this communicates values and perceptions of harm and vulnerability from a State perspective. We will not repeat these, save to say we do not accept this approach.

We have serious concern that women, children and concerned others will be less likely to call 000 in situations of domestic violence as a result of the proposed reforms. Victims of family violence may not want the perpetrator to be prosecuted.[20] Fear of arrest or prosecution of their partner can deter victims from calling police.[21] We believe the mandatory sentencing as proposed places an undue burden on the reporter in a context of crisis.

Separation of the victim/ reporter from prosecution and sentencing processes can be very important factors to encouraging psychological separation from responsibility for the offending conduct and associated outcomes, serving to support the victim's psychological and physical safety and remove the sense of personal blame. There should be strong analysis of any factors that may increase fear or create barriers for victims experiencing family violence.

Specific barriers to seeking intervention experienced by different communities, whether for cultural, historical, language, class, intergenerational trauma, complex post-traumatic stress, disability psychiatric or other reasons, should be the subject of specific inquiry. The introduction of a mandatory term of imprisonment and the attendant publicity that has accompanied this announcement should be reviewed as significant and deserving of proper consultation in the context of the most widespread community safety issue Victorians currently confront. We reiterate that we have not been consulted.

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[18] Anna Patty, 'Domestic violence mandatory sentencing laws may make victims reluctant to give evidence', Sydney Morning Herald (online), 25 February 2014.

[19] Victoria, Royal Commission into Family Violence, *Summary and recommendations*(2016) 1.

[20] Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40(1) *British Journal of Criminology* 14, 22.

[21] Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40(1) *British Journal of Criminology* 14, 21–3; Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 442–3; Heather Douglas and Tanja Stark, *Stories from survivors: domestic violence and criminal justice interventions* (T C Beirne School of Law, University of Queensland, 2010) 89.

### *C. Homelessness and Community Treatment Orders*

The proposed changes will disproportionately affect people on community treatment orders and people experiencing homelessness as these groups have increased contact with emergency services workers.

Australia, and Victoria, are global forerunners in the reliance on community treatment orders (CTOs) as a form of involuntary treatment of people who have been diagnosed with mental illnesses. Between 2010 and 2011, approximately 5,521 people were subject to a community treatment orders (a rate higher than any other Australian State).[22] More recent data indicates that the Mental Health Tribunal made 5,925 treatment orders in 2016/2017.[23] The primary diagnoses of the patients who had Mental Health Tribunal hearings in 2016/17 were schizophrenia (47%), schizoaffective disorder (21%), bipolar (10%) and dementia (1%).[24]

Without engaging in discussion on the implications of reliance on CTOs in a human rights framework, or analysis of the evidence base to support their use, clearly persons on CTOs whilst living in the community are more likely to have increased engagement with emergency workers. This is particularly so if they are non-compliant with the treatment order they are subject to, or experiencing a period of unwellness requiring hospitalisation or medical attention. By reference to the presence of a CTO, these persons are already recognised as having significant mental impairment that is likely to exacerbate stressors already associated with engagement with emergency workers. Appropriate training and sensitivity to the health condition of the person being attended to must be the logical focal point of minimising the likelihood of injuries to any person involved, including the patient.

The relationship between homelessness and mental illness has been the subject of extensive government commissioned research and findings.[25] According to the ABS Census of 2016, in Victoria 24,817 people were currently experiencing homelessness.[26] Of these, 14,386 identified as male while 10,432 identified as female.[27]

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[22] Edwina Light & Ors, 'Community treatment orders in Australia: rates and patterns of use' (2012) 20(6) *Australasian Psychiatry* 478.

[23] Mental Health Tribunal, *2016-2017 Annual Report* (12 July 2017) 14.

[24] Mental Health Tribunal, *2016-2017 Annual Report* (12 July 2017) 30.

[25] See, e.g., Mental Health Council of Australia, Home Truths: Mental Health, Housing and Homelessness in Australia (28 March 2009).

[26] Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2016*, 'Table 1.3 State and Territory of Usual Residence, Number of homeless persons, by selected characteristics, 2001, 2006, 2011 and 2016', data cube: Excel spreadsheet, cat. no. 2049.0 (14 March 2018).

[27] Ibid.

Australian Institute of Health and Welfare data shows that in 2016/17, specialist homelessness services in Victoria were accessed by 109,901 clients.[28] Just under half, 49,855 people, said that domestic and family violence or sexual abuse were reasons for seeking assistance.[29] 16,294 said mental health problems were a reason.[30]

Many of these issues are intersecting and are not occurring in isolation for homeless community members. We further note that 20% of the homeless population is Aboriginal.[31] It is almost inevitable that a life lived in public space will garner greater scrutiny and intervention from emergency workers, particularly in our current environment where the presence and visibility of homelessness itself is a source of tension and frequent intervention. The option of dealing with a period of unwellness in privacy is simply not available to the homeless population.

### *D. Drug overdose prevention and harm reduction*

It is clear that when a person experiences drug overdose, the best life-saving practice is to call 000. In 2017, there were 1,321 ambulance attendances for heroin overdose incidents alone, and many more for other alcohol and other drug related emergencies.[32] In 2017 there were 172 heroin related drug overdose deaths in Victoria.[33]

Ambulance Employees Australia identify that one safety concern for paramedics when attending an emergency related to heroin overdose is the possibility of triggering an aggressive response from a person who has been administered with Naloxone.[34] Whilst life-saving, the effect of Naloxone is to block the effect of opiates, and can bring on sudden and severe withdrawal symptoms, causing physical distress and shock, which in some cases cause a person administered with Naloxone to become distressed and display aggression.

The impact of mandatory sentencing in this context are obvious and dire: it would mean that a loved one, friend, or bystander could be placed in a position whereby the risk a person being charged with causing injury and therefore a mandatory sentence is weighed up against saving that person's life.

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[28] Australian Institute of Health and Welfare, *Specialist homelessness services 2016-17: Victoria* (2018) 1.
[29] Australian Institute of Health and Welfare, *Specialist homelessness services 2016-17: Supplementary Tables Victoria*, 'Table Vic Clients.13: Clients, by reasons for seeking assistance, 2016–17, adjusted for non-response' (2018)
[30] Ibid.
[31] Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2016*, 'Introduction', cat. no. 2049.0 (14 March 2018). This is likely to be an underestimate: Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2016*, 'Introduction', cat. no. 2049.0 (14 March 2018).
[32] Turning Point, AOD Stats http://amboaodstats.org.au/VicState/
[33] Christian Smyth, 'Do we have an addiction problem?' (Turning Point, 14 February 2018).
[34] Ambulance Employees Australia Victoria, Submission No 20, Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into the Drugs, Poisons and Controlled Substances Amendment (Pilot Medically Supervised Injecting Centre) Bill 2017*

The importance of health and harm reduction in the context of drug dependence and in particular in the context of drug overdose, as policy that sits outside and distinct from the criminalisation of illicit drugs, has been recognised as fundamental to saving lives. We submit that harm reduction agencies and peak bodies must be consulted to ensure messaging and impacts of proposed changes do not impair the work of the health and community sector to stem the death toll from drug overdose in Victoria.

### *E. Mandatory sentencing and the current prison population*

It is trite to state that mandatory sentencing has disproportionate impacts on first time offenders, and on those whose circumstances, including psychiatric health, acquired brain injury, mandated treatment orders, homelessness, intergenerational trauma/ complex post traumatic disorder, exposure to violent and chaotic circumstance, may predispose them to greater contact with emergency workers, and may also predispose them to decreased capacity to manage that interface of contact.[35]

It is important to take responsibility for those issues as a community. Removal of judicial discretion by the legislature places responsibility for these community problems and exacerbation of the punitive way in which we respond directly with community and frontline workers.

Narrowing the 'special reasons' exception to mandatory minimum sentences will worsen the inequality we see in our prison system. Persons with acquired brain injury, persons with psychiatric illness, Aboriginal and Torres Strait Islander people and women are likely to be disproportionately affected by these changes.

As the Australian Law Reform Commission noted in 2017:

> "Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent. Mandatory sentencing may also disproportionately affect particular groups within society, including Aboriginal and Torres Strait Islander peoples…"[36]

We note at the outset that division of categories of markers that increase criminalisation are not intended to mask the incontrovertible fact of intersectionality. For instance, dual diagnosis has long been acknowledged by experts as 'the expectation not the exception', with significant funds

[35] In 2008, the Sentencing Advisory Council noted that "the effect of many mandatory sentencing regimes is often felt more by first-time and/or minor offenders, as well as by offenders of particular vulnerability such as young people, Indigenous people and women": Sentencing Advisory Council (Victoria), *Mandatory Sentencing: Research Report* (7 August 2008) 18. See further Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014); Sentencing Advisory Council (Victoria), *Statutory Minimum Sentences for Gross Violence Offences* (October 2011) 129; Sentencing Advisory Council (Tasmania), *Assaults on Emergency Services Workers* (March 2013) 55.

[36] Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 273 [8.1].

allocated to support service delivery addressing this sociological fact, and long term recognition of the high rates of incarceration of persons affected by dual diagnosis.[37] Socio-economic disadvantage, and intergenerational trauma/ exclusion/ discrimination, are also well understood as factors relevant to criminalisation processes and increased rates of incarceration.

### (i) *Acquired brain injury*

Research published by Corrections Victoria, Department of Justice identifies that 'on the basis of comprehensive neuropsychological assessment, 42 per cent of male prisoners and 33 per cent of female prisoners have been assessed as having an acquired brain injury (an 'ABI').[38] This compares with estimated prevalence in the Australian population of 2 per cent.[39] Whilst the prison population in Victoria has grown significantly since 2011, we see no reason that substantial overrepresentation of individuals with an ABI in the Victorian prison population will have markedly changed.

We extract from the Department's research matters for consideration in the context of proposed amendments:

> …the diffuse pattern of ABI can lead to a variety of disorders of cognition and behaviour that may predispose individuals to offending (Miller, 1999). Clinically significant frontal lobe dysfunction is associated with aggressive dyscontrol (Brower & Price, 2001), impulsivity (Turkstra et al., 2003), impairments in social behaviour (Blair & Cipolotti, 2000; Turkstra et al., 2003) and judgement (Iverson et al., 1993), overreaction to provocative stimuli and decreased conflict resolution skills (Turkstra et al., 2003). … Impaired cognition may diminish appreciation of the legal consequences of one's behaviour (Kelly & Winkler, 2007), and the head-injured individual may seem unresponsive to a judge and/or jury because they have greater difficulty understanding the proceedings than non-head injured individuals. It is possible that this perception of the head injured individual may lead to imprisonment more often than for non-head-injured individuals (Sarapata et al., 1998). Comorbidity is also an issue of relevance to offender populations.
>
> Women are generally less likely to offend than men and, according to Butler, Allnutt, Cain, Owens and Muller (2005) when women do offend they are more likely to be suffering from a mental illness. Given the significant co-occurrence of ABI and mental illness (Butler et al., 2005), this is suggestive of the potential significant presence of ABI among female offenders.

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[37] Senate Select Committee on Mental Health, Parliament of Australia, *A national approach to mental health – from crisis to community* (2006) 365-408.

[38] Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland 'Acquired Brain Injury in the Victorian Prison System' (Corrections Research Paper Series Paper No 04, Department of Justice, Government of Victoria, April 2011) 22.

[39] Ibid 8.

> While risk factors for ABI between men and women in the general population are comparable, battered women syndrome is one risk factor unique to women. Clinicians are frequently unaware of the incidence of head injury sustained by women with a history of domestic violence (Jackson, Philp, Nuttrall & Diller, 2002) and battered women frequently demonstrate "neurological signs that appear to have been caused by repeated head injuries" (Walker, 1991, cited in Jackson et al., 2002). This indicates that clinicians should pay particular attention to a history of domestic violence in assessing ABI among women, particularly among female prison populations where past experiences of domestic violence may be especially high (Johnson, 2004).[40]

National research by the Australian Institute of Criminology published in October 2017 suggests the rates of cognitive impairment among Indigenous Australians in custody to be higher than non-Indigenous Australians.[41] A summary of findings suggested 'an over-representation of cognitively impaired prisoners in the sample and a large minority with concomitant mental illness or disability. Cognitively impaired prisoners were more likely to re-offend, were younger at first offence, and had greater numbers of prior offences.' The authors suggested the findings 'signal the need for culturally themed disability assistance and diversionary options at all levels of the criminal justice system.'[42]

It is unclear in what manner the legislature proposes to consider the relationship between mental impairment, psychosocial immaturity and acquired brain injury, given there is clearly significant crossover in the use of terminology and indicators.

**(ii)** ***Psychiatric illness***

Offenders with mental health conditions already dominate the prison population. The Victorian Ombudsman has published findings that as of 31 March 2015, 40% of Victorian prisoners had been assessed as having a mental health condition, and 54% had been identified as having a history of suicide attempts of self-harm.[43] The findings of the Victorian Ombudsman indicated prisoners are 'two to three times more likely than those in the community to have a mental illness and are ten to 15 times more likely to have a psychotic disorder.'[44]

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[40] Ibid 8-9.

[41] Stephane M Shepherd, James RP Ogloff, Yin Paradies and Jeffrey Pfeifer, 'Aboriginal prisoners with cognitive impairment: Is this the highest risk group?'(Trends & issues in crime and criminal justice No 536, Australian Government, October 2017).

[42] Ibid 1.

[43] Bernadette McSherry and Andrew Carroll, 'Hospitals or prisons? Treating offenders with severe mental health conditions' (Report, Melbourne Social Equity Institute, University of Melbourne, 21 October 2015);
Victoria, *Victorian Ombudsman Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria,* Parl Paper No 94 (2015).

[44] Victoria, *Victorian Ombudsman Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria,* Parl Paper No 94 (2015) 181.

This is a much higher prevalence than in the general population. The Australian Government Australian Institute of Health and Welfare reports, based on Australian Bureau of Statistics figures, 'that 2–3% of Australians (about 720,000 people based on the estimated 2015 population) have a severe mental disorder, as judged by diagnosis, intensity and duration of symptoms, and degree of disability caused. This group is not confined to those with psychotic disorders and it also includes people with severe and disabling forms of depression and anxiety. Another 4–6% of the population (about 1.2 million people) are estimated to have a moderate disorder and a further 9–12% (about 2.5 million people) a mild disorder.'[45]

A population-based linkage study in Australia of adults in their 20s and 30s found that around one-third (32%) of those with a psychiatric illness had been arrested during a 10-year period, and the first arrest often occurred before first contact with mental health services (Morgan et al. 2013).[46] In 2015, among both entrants and dischargees, women (62% and 63% respectively) were more likely than men (40% and 47%) to report a history of mental health issues.[47]

Any action to fast-track this trend and further incarcerate people with serious psychiatric illness should not occur. Involving those who have committed their lives to providing care to people experiencing periods of unwellness is unconscionable. We note 20% of ambulance call-outs relate to psychiatric incidents.[48] It is unclear how many more call-outs relate to persons affected by dual diagnosis who are experiencing a medical crisis connected centrally and inextricably to their mental health condition.

### (iii) *Disproportionate impacts on Aboriginal and Torres Strait Islander peoples*

Over-incarceration of Aboriginal and Torres Strait Islander people is well documented. Recommendation 8.1 of the recent Australian Law Reform Commission Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander People (ATSI) peoples is that:

> *Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.*[49]

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[45] Australian Institute of Health and Welfare, 'Mental Health Services in Australia' (3 May 2018).

[46] Australian Institute of Health and Welfare, 'The health of Australian prisoners 2015', cat. no. PHE 207 (27 November 2015).

[47] Ibid.

[48] B Lloyd, CX Gao, C Heilbronn, DI Lubman, *Self-harm and mental health-related ambulance attendances in Australia: 2013 data* (2015, Turning Point). See also Melissa Davey, 'Mental health linked to one fifth of emergency ambulance callouts' *The Guardian* (online), 10 September 2015.

[49] Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 277.

The United Nations Committee Against Torture has recommended the repeal of Australia's mandatory sentencing laws because of their disproportionate and discriminatory impact on the Indigenous population.[50] The ALRC says there is no evidence that mandatory sentencing acts as a deterrent and reduces crime.[51]

Stakeholders also noted that mandatory or presumptive penalty provisions:

- constrain the exercise of judicial discretion;
- heighten the impact of charging decisions that are within the discretion of police and prosecutors;
- contradict the principles of proportionality and 'imprisonment as a last resort'; [52] and reduce incentives to enter a plea of guilty, resulting in increased workloads for the courts.[53]

**Conclusion**

Subsequent to recent local and national inquires, including the Royal Commission into Family Violence (Victoria) and the Royal Commission into Institutional Responses to Child Sexual Abuse (national), Members of Parliament will be aware of the systematic failures and complex harms that those affected by abuse in the home and in institutional care are seeking to navigate and recover from.

Directing the judiciary not to give significant weight to those circumstances is a deeply gendered approach that speaks against, not for, longitudinal objectives the Victorian Parliament and the Australian community are deeply committed to. Included amongst those most committed to issues of specific concern – family violence, mental health, protection of children, harms in institutional settings – are workers at the frontline of the community sector, and perhaps most centrally, emergency workers.

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[50] UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008); UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/4-5 (2014) 4.

[51] Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 276 [8.13] citing, e.g., Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65.

[52] Noting that all Australian jurisdictions (with the exception of Tasmania and the NT) have legislated to enforce the principle: *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Penalties and Sentences Act 1992* (Qld) ss 4S, 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) ss 4B, 5(4); *Sentencing Act 1995* (WA) ss 6(4), 86.

[53] Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 275 [8.9]. See, eg, Victorian Aboriginal Legal Service, Submission 39; The Light Bulb Exchange, Submission 44; Caxton Legal Centre, Submission 47; International Commission of Jurists Victoria, Submission 54; Australian Lawyers for Human Rights, Submission 59; Aboriginal Legal Service (NSW/ACT), Submission 63; Human Rights Law Centre, Submission 68; Criminal Lawyers Association of the Northern Territory, Submission 75; National Association of Community Legal Centres, Submission 94.

We strongly assert that, both independently, and in an intersecting fashion, mental health, family violence, and harm caused to children should never be down played or diminished. These are important issues for us to contemplate as a community, and must be considered with respect by the judiciary when tasked with weighing, on a case by case basis, the personal circumstances of the accused and the underlying principles that inform the sentencing exercise. As discussed above, current sentencing practices prescribe that Victorian Courts take assaults on emergency workers very seriously. This is reflected in sentencing outcomes and in the existing legislation within which judicial discretion is significantly circumscribed.

The proposed amendments will cause substantial harm to the most vulnerable; effectively subverting the desire to enhance community safety by placing those seeking to assist family or community members at further risk. We support the promotion of safety for emergency service workers however evidence informed appropriate measures need to be taken to remedy occupational risk of violence; not measures that undermine justice.

Yours faithfully

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DAREBIN COMMUNITY LEGAL CENTRE INC.

st kilda legal service co-op limited

INNER MELBOURNE COMMUNITY LEGAL

pclc Peninsula Community Legal Centre

L|A|C|W LAW & ADVOCACY CENTRE FOR WOMEN

MOONEE VALLEY LEGAL SERVICE

Criminal Bar Association

Villamanta Disability Rights Legal Service Inc.

Federation of Community Legal Centres VICTORIA

eastern community legal centre

women's legal service victoria

acm Aboriginal Catholic Ministry for Victoria

vaada Victorian Alcohol & Drug Association

FLAT OUT

Victorian Aboriginal Legal Service

DEMOCRACY IN COLOUR

MHLC mental health legal centre inc.

YDHF YARRA DRUG & HEALTH FORUM

LIBERTY VICTORIA

Liberty Victoria's RIGHTS ADVOCACY PROJECT

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