

Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Report

The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues.

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the *Sentencing Act 1991*. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices
- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

Council members come from a broad spectrum of professional and community backgrounds. Under the *Sentencing Act 1991*, Council members must be appointed under eight profile areas:

- two people with broad experience in community issues affecting the courts
- one senior academic
- one highly experienced defence lawyer
- one highly experienced prosecution lawyer
- one member of a victim of crime support or advocacy group
- one person involved in the management of a victim of crime support or advocacy group who is a victim of crime or a representative of victims of crime
- one member of the police force of the rank of senior sergeant or below who is actively engaged in criminal law enforcement duties
- the remainder must have experience in the operation of the criminal justice system.

For more information about the Council and sentencing generally visit:

www.sentencingcouncil.vic.gov.au

Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Report

Published by the Sentencing Advisory Council
Melbourne, Victoria, Australia

© Copyright State of Victoria, Sentencing Advisory Council, 2017

This publication is protected by the laws of copyright. No part may be reproduced by any process except in accordance with the provisions of the *Copyright Act 1968* (Cth).

ISBN 978-1-925071-29-0 (print)
978-1-925071-30-6 (online)

Authorised by the Sentencing Advisory Council,
Level 3, 333 Queen Street, Melbourne VIC 3000

Copyedited by Catherine Jeffreys AE

Publications of the Sentencing Advisory Council follow the Melbourne University Law Review Association Inc *Australian Guide to Legal Citation* (3rd ed., 2010).

This report reflects the law as at 1 July 2017.

Printed by TMP Digital Printing Services, 53–57 Munster Terrace, North Melbourne

Contents

Contributors v

Family violence assistance vi

Abbreviations vii

Glossary vii

Executive summary and recommendations ix

Terms of reference ix

Approach taken by the Council ix

Context for the Council's recommendations x

What is a 'swift, certain and fair' approach? x

Is a 'swift, certain and fair' approach desirable for family violence offenders in Victoria? xi

Recommendations for reform xi

1. Introduction to the reference 1

Structure of this report 1

Terms of reference 1

Distinguishing 'swift, certain and fair' approaches from the principles of swiftness, certainty and fairness 2

Heightened scrutiny of the evidence base 3

Focus on sentencing for family violence offenders 3

Human rights considerations 3

Consultation 4

2. Context of the Council's recommendations 5

Overview 5

Family violence specific reforms 5

Corrections Victoria offender management reforms 11

Dandenong Magistrates' Court and Swinburne Centre for Forensic Behavioural Science's judicial supervision study 12

Dandenong pilot of fast tracking charges of contravening a community correction order 12

Northern Territory's COMMIT pilot program 13

3. Desirability of a 'swift, certain and fair' approach to family violence offenders 15

Overview 15

Key elements of a 'swift, certain and fair' approach 16

The evidence base for 'swift, certain and fair' approaches 17

Potential risk to victim survivors 24

Procedural fairness and human rights concerns 25

Effectiveness of, and capacity for, short custodial sanctions 29

Undesirability of mandatory sanctions and a compliance-based approach 32

Disproportionate impact on particular offender groups 34

Conclusion on the desirability of a 'swift, certain and fair' approach to family violence offenders in Victoria 36

4. Promoting accountability of family violence offenders on a community correction order 39

Overview 39

Fast tracking listing process for charges of contravening a community correction order for family violence offenders 40

Judicial monitoring on a community correction order 42

Development of a principled model for the use of judicial monitoring for family violence offenders 58

Resourcing of the Council's recommendations 61

Evaluation of the Council's recommendations 63

Package of recommendations 64

Appendix: consultation 65

Preliminary consultation: meetings/events 65

Consultation: meetings/events 66

Submissions 67

References 68

Bibliography 68

Case law 72

Legislation and Bills 72

Quasi-legislative materials 72

Contributors

Authors

Anusha Kenny, Paul McGorrery and Donald Ritchie

Data analyst

Zsombor Bathy

Research assistant

Sarah Ward

Sentencing Advisory Council

Chair

Arie Freiberg AM

Deputy-Chair

Lisa Ward

Council Directors

Carmel Arthur

Hugh de Kretser

Fiona Dowsley

Helen Fatouros

David Grace QC

John Griffin PSM

Sherril Handley

Brendan Kissane QC

Shane Patton

Barbara Rozenes

Geoff Wilkinson OAM

Chief Executive Officer

Cynthia Marwood

Acknowledgments

The Sentencing Advisory Council would like to thank all of the stakeholders who participated in meetings during consultation for this project, including the County Court of Victoria, the Magistrates' Court of Victoria, Victoria Police, Corrections Victoria, Victoria Legal Aid, the members of the Magistrates' Court of Victoria Family Violence Taskforce, the members of the Victim Survivors' Advisory Council, Dr Angela Hawken, Dr Jonathan Kulick, Judge Steven Alm and Justice Stephen Southwood. The Council also thanks those who provided data, including Victoria Police, the County Court of Victoria, Corrections Victoria, Court Services Victoria and the Office of Public Prosecutions.

Family violence assistance

This report discusses family violence offending.

If you have personal concerns about family violence, you can contact safe steps Family Violence Response Centre for support, information and referral to services on **1800 015 188**, 24 hours a day, seven days a week.

Abbreviations

CCO	community correction order
FVCD court	Family Violence Court Division court
HOPE	Hawaii's Opportunity Probation with Enforcement
HOPE DFE	Honest Opportunity Probation Enforcement Demonstration Field Experiment
MBCP	men's behaviour change program
SCF	swift, certain and fair
SCF approach	'swift, certain and fair' approach
SCF program	'swift, certain and fair' program

Glossary

Accused	A person who is charged with a criminal offence.
Affected family member	A person who is the subject of an application for a family violence intervention order under the <i>Family Violence Protection Act 2008</i> (Vic).
Breach	In this report, a term used to refer to a person's non-compliance with a court-ordered condition. Unless referring to a specific offence, the terms 'breach' and 'contravene' are used interchangeably.
Community correction order	A sentencing order available since 16 January 2012 that may require the offender to comply with a range of conditions including undertaking unpaid community work, undergoing treatment and being supervised by a community corrections officer.
Contravene	In this report, a term used to refer to a person's non-compliance with a court-ordered condition. Unless referring to a specific offence, the terms 'contravene' and 'breach' are used interchangeably.
Family violence offender	A person who has been found guilty of committing a criminal offence in a family violence context.
Higher courts	In this report, the County Court of Victoria and the Supreme Court of Victoria.
Offender	A person who has been found guilty of an offence.
Parole	Supervised and conditional release of an offender from prison before the end of their prison sentence.
Randomised controlled trial	A study design that randomly assigns participants into an experimental group or a control group.

Substance abuse

In this report, substance abuse includes abuse of alcohol and/or illicit drugs.

SCF program

In this report, a term used to collectively refer to programs that utilise a 'swift, certain and fair' approach, such as Hawaii's Opportunity Probation with Enforcement (HOPE) program, South Dakota's 24/7 Sobriety Project and the Washington Intensive Supervision Program. The Council acknowledges that there are differences between the HOPE program and other SCF programs in operation in the United States.

SCF approach

In this report, an approach characterised by such measures as zero-tolerance responses, contravention detection measures, quick responses to condition contraventions and the imposition of fixed sanctions for contravention.

Victim survivor

In this report, a person who has been a victim of a family violence offence. The Council has adopted the term in this report to ensure consistency with other publications of the Department of Justice and Regulation, Victoria.

Executive summary and recommendations

Responding to family violence is a responsibility shared across government, the criminal justice system and the wider community. One part of the broader criminal justice response is the sentencing, and management under sentence, of family violence offenders.

In March 2016, the Royal Commission into Family Violence recommended that the Sentencing Advisory Council ('the Council') examine one aspect of sentencing and managing family violence offenders, namely 'the desirability of and methods for accommodating "swift and certain justice" approaches to family violence offenders in Victoria's sentencing regime' (Recommendation 83).

Subsequently, in September 2016, the Attorney-General requested such advice from the Council in the form of terms of reference, and this report constitutes the Council's response to those terms.

Terms of reference

The terms of reference ask the Council to examine the empirical evidence and provide advice on whether the criminal justice system response known as the 'swift, certain and fair' (SCF) approach is desirable in the sentencing and management under sentence of family violence offenders in Victoria.

The Council has also been asked, in the event that the government introduces some form of 'swift and certain' approach, to provide advice on the following matters:

- which specific approaches are preferred within the Victorian context;
- whether there are particular groups of family violence offenders at which swift and certain approaches should be focused;
- whether modifications to current laws and sentencing practice and procedure are needed to support preferred swift and certain approaches;
- whether additional sentencing options are needed to support preferred swift and certain approaches;
- the broad demand implications of any approach, or approaches, that the Council may consider desirable; and
- any other matter that the Council considers appropriate.

In preparing its advice, the Council has been asked to consult with government and non-government stakeholders working in criminal justice and family violence, as well as with the Victorian community, and to report to the Attorney-General by no later than 29 August 2017.

Approach taken by the Council

In responding to the terms of reference, the Council has:

- distinguished SCF approaches from the principles that inform those approaches;
- focused only on sentencing and sentence management of family violence offenders;
- prioritised the safety of victim survivors;
- given consideration to the human rights implications of an SCF approach; and
- conducted broad stakeholder consultation.

Context for the Council's recommendations

A substantial number of current initiatives and reforms in Victoria are likely to address some of the issues that prompted calls for an SCF approach in sentencing family violence offenders.

These initiatives and reforms include:

- extending the Magistrates' Court's family violence fast tracking listing process;
- conducting a pilot at the Dandenong Magistrates' Court to trial the inclusion of charges of contravening a community correction order (CCO) in the fast tracking listing process;
- expanding Family Violence Court Divisions to more courts;
- improving risk assessment tools for family violence offenders;
- improving information sharing between agencies (including developing a Central Information Point and encouraging increased communication between Corrections Victoria, Victoria Police and the courts);
- researching effective perpetrator interventions;
- researching effective methods of judicial supervision; and
- commencing Corrections Victoria's new community corrections Offender Management Framework.

The Northern Territory also recently commenced the COMMIT program, the first trial of an SCF approach in Australia, and that program is yet to be evaluated.

The Council's recommendations therefore come during a period of not only wide-ranging and significant change but also significant uncertainty, given the number of reforms that are yet to be evaluated.

What is a 'swift, certain and fair' approach?

The terms of reference request that the Council consider 'swift and certain' programs, in other words, the particular criminal justice responses developed in the United States that are variously known as 'swift and certain', 'swift, certain and fair', 'swift and sure' and (acknowledging some distinction) the 'HOPE' approach.

SCF approaches are distinct from the general principles of 'swiftness', 'certainty' and 'fairness', which could be applied to all stages of the criminal justice process. In American and international literature, SCF approaches represent a particular type of criminal justice response to the management of offenders, and in particular, those offenders serving a sentence in the community.

The Council's research has established that SCF approaches have common identifiable elements, and in order to meaningfully discuss 'SCF approaches', a clear and specific articulation of the elements of those approaches is necessary.

As a result of its research, the Council defines an SCF approach to include the following elements:

1. targeting offenders serving their sentence in the community;
2. identifying conditions that should be targeted for zero-tolerance responses;
3. establishing a behavioural contract so that the offender knows what is expected of them and what the response will be to condition contraventions;
4. utilising regular measures to monitor compliance with conditions;
5. responding to contraventions quickly (usually within 72 hours); and
6. responding to contraventions consistently with fixed (and primarily custodial) sanctions.

These elements have been tested and confirmed with leading SCF researchers.

Is a ‘swift, certain and fair’ approach desirable for family violence offenders in Victoria?

The Council has concluded that an SCF approach to sentencing and managing family violence offenders is *not* desirable in Victoria.

This conclusion is based on:

- the mixed evidence for the effectiveness of SCF approaches to offenders with substance-abuse issues;
- the absence of evidence for the effectiveness of SCF approaches to family violence offenders;
- the potential risks to victim survivors and affected family members;
- the procedural fairness and human rights implications;
- the limited effectiveness of, and lack of capacity in Victoria for the imposition of, short custodial sanctions;
- the undesirability of mandatory sanctioning and compliance-based approaches;
- the potential for a disproportionate impact on particular offender groups; and
- overwhelming stakeholder opposition.

While noting that some of the Council’s concerns extend beyond the applicability of an SCF approach to family violence offenders and relate to the application of such a scheme to any cohort of offenders, the Council has confined its threshold recommendation to that asked in the terms of reference.

In light of its research and consultation, the Council makes the following recommendation:

Recommendation 1

There is insufficient evidence that a ‘swift, certain and fair’ approach to sentencing and sentence management of family violence offenders would be effective or appropriate in Victoria, and such an approach should not be implemented.

Recommendations for reform

The Council considers that, in Victoria, the aims of an SCF approach would be better achieved by alternative means, such as increasing the swiftness and certainty of the response to CCO contraventions by family violence offenders through fast tracking charges of contravening a CCO.

Further, in preference to an SCF approach, the Council recommends increasing the monitoring of compliance and the ‘visibility’ of family violence offenders before the court by:

- utilising the existing tool of judicial monitoring and encouraging its increased use; and
- extending the availability of judicial monitoring to circumstances in which Corrections Victoria has concerns around the escalation of risk (in circumstances that do not demonstrate a need to vary the order or initiate contravention proceedings).

These recommendations represent a package of interrelated reforms, and the Council cautions against separate implementation on the basis that many of the reforms are reliant upon one another.

Fast tracking charges of contravening a community correction order for family violence offenders

The Council recommends that the Magistrates' Court's current fast tracking listing process for family violence offences should be extended to include charges of contravening a CCO where that CCO has been imposed for family violence offending.

There is strong support from a broad range of stakeholders for a fast-tracked response to contraventions of CCOs imposed for family violence offences, including from the Magistrates' Court of Victoria, Corrections Victoria, Victoria Police, Victoria Legal Aid, the Law Institute of Victoria and the Victims of Crime Commissioner.

A common statement from stakeholders during consultation was that the extension and resourcing of fast tracking would achieve more prompt responses from the criminal justice system and reinforce a clear message of accountability to offenders.

Recommendation 2

When a family violence offender has been sentenced in the Magistrates' Court of Victoria to a community correction order, any subsequent charge alleging a contravention of that order should be listed in accordance with the Magistrates' Court of Victoria's family violence fast tracking listing process.

Encouraging greater use of judicial monitoring for family violence offenders

The Council considers that judicial monitoring is underutilised for family violence offenders on a CCO.

There was broad support from stakeholders for increasing the use of judicial monitoring for family violence offenders. RMIT University's Centre for Innovative Justice strongly urged the Council to 'make increased judicial monitoring a central platform of its recommendations'. Various stakeholders commented on the potential for judicial monitoring to make offenders feel 'known and visible', such as the Eastern Community Legal Centre and the Victorian CASA Forum (Centres Against Sexual Assault).

A broad range of stakeholders considered that the courts need to have an increased role in maintaining offender accountability, including the Magistrates' Court itself, McAuley Community Services for Women, the Victorian Aboriginal Legal Service, Victoria Legal Aid and the Law Institute of Victoria. The International Commission of Jurists Victoria considered judicial monitoring useful for 'managing' offenders at high risk of recidivism.

The Council has developed a set of recommendations (Recommendations 3, 4 and 5) to encourage greater consideration of the use of judicial monitoring by relevant agencies at different stages of the sentencing process.

First, the Council recommends that Corrections Victoria be required to consider judicial monitoring when authoring a report to a court considering the imposition of a CCO.

Recommendation 3

The *Sentencing Act 1991* (Vic) should be amended to provide that if a court finds a person guilty of an offence involving family violence and orders a pre-sentence report, the author of that report must include consideration of the relevance and appropriateness of a judicial monitoring condition.

Second, the Council recommends that prosecuting authorities have regard to the appropriateness of judicial monitoring for family violence offenders when making submissions, and that specific guidance be developed on this issue.

Recommendation 4

The Director of Public Prosecutions should consider revising the *Policy of the Director of Public Prosecutions for Victoria* to include policy guidance on sentencing submissions regarding judicial monitoring for family violence offenders in appropriate cases.

Victoria Police should consider developing policy guidance for Victoria Police prosecutors on sentencing submissions regarding judicial monitoring for family violence offenders in appropriate cases.

Finally, the Council recommends that judicial officers, as the final arbiter of the appropriateness of a judicial monitoring condition on a CCO, give particular regard to attaching this condition.

Recommendation 5

When sentencing a family violence offender to a community correction order, judicial officers should give particular consideration to attaching a judicial monitoring condition.

Encouraging judicial monitoring of family violence offenders early in the term of the order

A number of stakeholders commented on the ineffectiveness of a court scheduling a judicial monitoring hearing long after a CCO has commenced, given that offenders often struggle with compliance early in their CCO. The existence of such an issue has been confirmed by the Council's findings on the contravention of CCOs showing that a large proportion of offenders contravene their CCO within a short period after commencement.

For offenders sentenced to a CCO alone, the Council recommends that a first judicial monitoring hearing be scheduled within six weeks of the commencement of the order. It was considered that this would be sufficient time for Corrections Victoria to get the offender set up on the order.

For offenders sentenced to imprisonment combined with a CCO, the Council considers that a shorter timeframe than six weeks is necessary to respond to the risk of escalation for offenders being released back into the community on a CCO after serving a term of imprisonment.

The Council recommends that a first judicial monitoring hearing be scheduled within two weeks of release. This is based on the expectation that Corrections Victoria will engage with the offender some weeks prior to their release. Further, it is based on the identified high risk of offenders contravening their CCO by further offending after being released from custody, and where the offender is a family violence offender, potentially committing further family violence offences.

Recommendation 6

When a court attaches a judicial monitoring condition to a community correction order imposed on a family violence offender, the court should schedule the first judicial monitoring hearing no later than:

- six weeks after the sentencing hearing if there is no period of imprisonment to be served; or
- two weeks after the offender's release date if there is a period of imprisonment to be served after the sentencing hearing.

Corrections Victoria directed judicial monitoring hearings

Currently, a Corrections Victoria case manager has no mechanism, short of contravention or an application for variation of the CCO, to bring a person back before the court quickly in order to use the authority of the court to help monitor the offender's progress and hold the offender accountable.

A particular issue with family violence offenders is that there may be a change in circumstances or behaviour that represents an escalation of risk but does not constitute a contravention of the order.

For example, the risk of family violence may be seen to escalate where an offender has:

- impending family law proceedings;
- an emerging pattern of non-attendance at appointments (falling short of non-attendance that would trigger the initiation of contravention proceedings); or
- concerning information about them coming from a men's behaviour change program (MBCP) that undertakes ongoing communication with victim survivors or affected family members.

Legislative change allowing a court to attach a condition that Corrections Victoria may direct an offender to attend court for judicial monitoring would give an additional tool to Corrections Victoria case managers and the courts. The monitoring hearing could provide an opportunity to reinforce the offender's accountability and the authority of the court, prior to an escalation of behaviour that may constitute family violence or may result in a contravention.

There was broad stakeholder support for this reform. However, the Council notes that, importantly, not every judicial monitoring condition would empower Corrections Victoria to direct an offender to attend a judicial monitoring hearing. It would instead be an additional optional power for sentencing courts to attach to a judicial monitoring condition, without removing any of the existing functions of the condition.

Further, the Council considers that Corrections Victoria and the courts should develop a protocol around the circumstances in which Corrections Victoria would issue a direction for the offender to attend a judicial monitoring hearing, to ensure that such a direction is used appropriately.

Recommendation 7

The *Sentencing Act 1991* (Vic) should be amended to allow a court, when making a community correction order, to attach a condition that an offender be required to attend a judicial monitoring hearing:

- as directed by the court, at a specified time or times; and/or
- as directed by Corrections Victoria, at any time for the duration of the order.

Corrections Victoria, in consultation with the courts, should develop and implement a protocol identifying the appropriate circumstances in which an offender would be directed by Corrections Victoria to attend a judicial monitoring hearing.

Improved quality of information at a judicial monitoring hearing

During consultation, it was emphasised that the success of a judicial monitoring hearing largely depends on the quality of information that is available to the court at the hearing. It was noted that, currently, the quality and completeness of information vary considerably.

In the circumstances, the Council recommends that Corrections Victoria ensure that it can provide to the court at a judicial monitoring hearing all relevant and available information concerning

family violence offenders. In particular, Corrections Victoria should enquire about any pending or completed family violence or family law related matters involving the offender.

Where possible, Corrections Victoria should independently verify the information rather than solely rely on self-reporting by the offender.

Recommendation 8

When providing information to a court for a judicial monitoring hearing involving a family violence offender, Corrections Victoria should, where appropriate, include all relevant and available information in relation to:

- any known interactions between the offender and any victim survivors or affected family members;
- any pending or completed applications for a family violence intervention order, family violence safety notice or personal safety intervention order involving the offender; and
- the status of any pending criminal proceedings or relevant civil matters, including family law proceedings, involving the offender.

The principled use of judicial monitoring for family violence offenders

While the Council has recommended the increased use of judicial monitoring for family violence offenders in appropriate cases (Recommendation 5), it has not presumed to prescribe what those appropriate cases look like. Also, aside from the need to schedule the first judicial monitoring hearing early in the life of the order (Recommendation 6), the Council makes no recommendations as to the appropriate frequency of judicial monitoring hearings on a CCO.

Instead, the Council recommends that the Judicial College of Victoria, as the body best placed to develop and deliver judicial education and training, develop an evidence-based model for the judicial monitoring of family violence offenders, and deliver education and training on that model.

The Council notes that the Judicial College will need to consult with expert stakeholders, and that the evidence-based model is likely to be informed by the findings of the Dandenong Magistrates' Court and Swinburne Centre for Forensic Behavioural Science's judicial supervision study.

Recommendation 9

The Judicial College of Victoria, in consultation with the courts and expert stakeholders, should develop an evidence-based model for judicial monitoring of family violence offenders. The model should address such topics as:

- the unique nature of family violence;
- the identification of dynamic risk factors;
- the circumstances in which judicial monitoring might be appropriate for a family violence offender sentenced to a community correction order; and
- the most effective ways to engage with family violence offenders at a judicial monitoring hearing.

The Judicial College of Victoria should deliver judicial education and training on applying the evidence-based model for judicial monitoring of family violence offenders.

The Judicial College of Victoria should receive additional resources to provide this education and training.

Resourcing increased use of judicial monitoring for family violence offenders

The Council heard from a number of stakeholders that the court system in Victoria is operating at capacity. A recent report commissioned by Victoria Legal Aid suggests that this is particularly true in the summary jurisdiction. While some courts, and some judicial officers, may have the capacity to conduct further judicial monitoring hearings, many venues may struggle with additional demand. Also, a range of legislative amendments has led to increased pressures on judicial officers and court listings.

In order to support the increased use of judicial monitoring, there will need to be increased resources provided to courts, to meet the demand for expedited listings and the increased numbers of judicial monitoring hearings. The investment will also need to apply to both the summary and the indictable streams of the courts as well as the agencies and organisations whose work will be affected.

Recommendation 10

The Victorian Government should provide additional resources to agencies and organisations affected by:

- a. an increase in the number of judicial monitoring hearings; and
- b. the listing of charges of contravening a community correction order in the Magistrates' Court fast tracking listing process.

Such agencies and organisations include, but are not limited to:

- the courts;
- Corrections Victoria;
- Victoria Police (including front-line police and Victoria Police prosecutors);
- Victoria Legal Aid;
- the Victorian Aboriginal Legal Service; and
- the Office of Public Prosecutions.

Evaluating court-based family violence interventions

There is some research in favour of the use of judicial monitoring for family violence offenders; however, further research is needed to examine the effectiveness of the use of judicial monitoring for family violence offenders in the Victorian context.

The Council recommends that the Victorian Government should develop a framework for evaluating the recommended reforms, in order to build the evidence base for effective court-based interventions with family violence offenders.

Recommendation 11

The Victorian Government should develop a framework to evaluate the effectiveness of court-based family violence interventions, including:

- the use of judicial monitoring for family violence offenders;
- Corrections Victoria directed judicial monitoring hearings;
- the Magistrates' Court fast tracking listing process for prosecution of family violence offending; and
- listing charges of contravening a community correction order imposed for family violence offending in the Magistrates' Court fast tracking listing process.

1. Introduction to the reference

Structure of this report

- I.1 This report is divided into four chapters. In addition to this introductory chapter:
- Chapter 2 discusses the context for the Council's recommendations, including an examination of many programs and reforms that either predate or are a result of the Royal Commission into Family Violence. Some of these reforms are likely to have a substantial influence on the sentencing of family violence offenders and may indirectly further the same aims as a 'swift, certain and fair' (SCF) approach;
 - Chapter 3 summarises the evidence relating to the effectiveness of SCF approaches, and answers the threshold question of whether an SCF approach – constituted by the elements identified by the Council – is desirable for family violence offenders in Victoria; and
 - Chapter 4 presents the Council's recommendations in relation to sentencing reforms in Victoria that are intended to achieve the aims of an SCF approach but are more appropriate in the Victorian context.
- I.2 This report refers extensively to material presented in the Council's *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper*, published in February 2017 ('SCF discussion paper').

Terms of reference

- I.3 On 9 September 2016, the Council received a request for advice from the Attorney-General, the Hon Martin Pakula, MP, to advise him on the desirability of 'swift and certain' approaches to sentencing family violence offenders in Victoria, having regard to the available empirical evidence. The request for advice followed a recommendation from the Royal Commission into Family Violence.
- I.4 The report of the Royal Commission into Family Violence was tabled in parliament on 30 March 2016. The report contains 227 recommendations, and the government has committed to adopting all of them. Recommendation 83 is that:
- The Sentencing Advisory Council report on the desirability of and methods for accommodating 'swift and certain justice' approaches to family violence offenders within Victoria's sentencing regime [within 12 months].¹
- I.5 For the purposes of this reference, a family violence offender is defined as a person who has been found guilty of committing a criminal offence in a family violence context. Family violence is taken to have the same definition as that given in section 5 of the *Family Violence Protection Act 2008* (Vic).

1. State of Victoria, Royal Commission into Family Violence, *Volume III: Report and Recommendations* (2016) 232 (Recommendation 83). For further background on this recommendation, see Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (2017) 3–5.

- 1.6 The Council has also been asked, in the event that the government introduces some form of 'swift and certain' approach, to advise on the following matters:
- which specific approaches are preferred within the Victorian context;
 - whether there are particular groups of family violence offenders at which swift and certain approaches should be focused;
 - whether modifications to current laws and sentencing practice and procedure are needed to support preferred swift and certain approaches;
 - whether additional sentencing options are needed to support preferred swift and certain approaches;
 - the broad demand implications of any approach, or approaches, that the Council may consider desirable; and
 - any other matter that the Council considers appropriate.
- 1.7 The Council has been asked to consult with government and non-government stakeholders working in criminal justice and family violence, as well as with the Victorian community, in preparing its advice.
- 1.8 The Council is required to report to the Attorney-General by no later than 29 August 2017.

Distinguishing 'swift, certain and fair' approaches from the principles of swiftness, certainty and fairness

- 1.9 One of the challenges faced by the Council during consultation on this project was the need to distinguish SCF approaches – models for the management of offenders serving a sentence – from the broader principles of swiftness, certainty and fairness, which are aims for all stages of the criminal justice system.
- 1.10 A criminal justice program or reform intended to improve swiftness, certainty or fairness does not automatically constitute an 'SCF approach', as it has come to be known in the literature. Similarly, naming a program 'swift, certain and fair' does not necessarily make it so. For example, what is considered 'fair' within one legal context may not be considered 'fair' according to the legal and procedural rights and traditions of another.
- 1.11 The terms of reference request that the Council consider the available empirical evidence on 'swift and certain' programs, in other words, the criminal justice responses that are variously known as 'swift and certain', 'swift, certain and fair', 'swift and sure' and (acknowledging some distinction) the 'HOPE' approach.²
- 1.12 The Council's research has established that these SCF approaches have common identifiable elements,³ and in order to meaningfully discuss SCF approaches, a clear and specific articulation of those program elements is necessary (see [3.5]).

2. See Sentencing Advisory Council (2017), above n 1, 13–18.

3. See *ibid* xvi, 16 (Table 1).

Heightened scrutiny of the evidence base

- I.13 The Council has adopted an evidence-based approach in considering the application of SCF approaches to family violence offenders in Victoria. In particular, the Council has critically examined emerging evidence that has questioned the effectiveness of SCF approaches (see [3.15]–[3.24]).⁴
- I.14 The Council has also approached the evaluation of the evidence with heightened scrutiny, on the basis that any intervention with a perpetrator of family violence risks consequential effects for victim survivors and affected family members. While every criminal justice intervention may engender some level of risk to people other than the offender, there is a substantial difference in this risk between interventions aimed at drug and alcohol offenders (who have been the primary target of SCF approaches to date) and interventions aimed at family violence offenders.

Focus on sentencing for family violence offenders

- I.15 The terms of reference direct the Council to examine SCF approaches in the context of sentencing family violence offenders. The scope of the reference does not extend to other stages in the criminal justice process, such as arrest policies or prosecution practices. Further, it does not extend to prosecution for alleged contraventions of family violence intervention orders or family violence safety notices.
- I.16 Similarly, the Council's examination of the desirability of SCF approaches is confined to family violence offenders in Victoria, rather than drug and alcohol offenders, who, as previously noted, have been the primary target of SCF approaches in other jurisdictions.
- I.17 An SCF approach does not necessarily represent an approach to sentencing; it might be more accurately described as an approach to sentence *management*, or sentence administration, as it involves responses to non-compliance with sentencing orders.
- I.18 Nevertheless, the Council has developed its recommendations in accordance with its statutory functions (including to provide advice to the Attorney-General on *sentencing matters*),⁵ and has been cautious not to overstep the bounds of either its remit or the terms of reference.

Human rights considerations

- I.19 As a public statutory authority, the Council is required, in making a decision, to give proper consideration to relevant human rights.⁶ To that end, in developing its advice, the Council has had regard to the rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- I.20 In this respect, the Council has specifically considered the human rights implications of an SCF approach (see [3.63]–[3.83]), including a number of significant procedural fairness issues, and the potential for a disproportionate effect on certain groups, such as Aboriginal and Torres Strait Islander peoples (see [3.117]–[3.129]).

4. See also *ibid* 20–26.

5. *Sentencing Act 1991* (Vic) s 108C(f).

6. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

Consultation

- 1.21 Responding to family violence is a responsibility shared across many different organisations and agencies within the criminal justice system. The Council therefore has engaged in an extensive and broad-ranging process of consultation that has included:
- preliminary consultation with key stakeholders, prior to the publication of the SCF discussion paper;
 - a call for public submissions on the questions contained in the SCF discussion paper;
 - an online survey;
 - two discussion forums with a broad range of stakeholders on the questions contained in the SCF discussion paper;
 - further consultation with key stakeholders, subsequent to the publication of the SCF discussion paper; and
 - a discussion forum with key stakeholders on the Council's proposed recommendations.
- 1.22 The Council received 24 written submissions, including four responses via the online survey.
- 1.23 Details of the submissions received, and the consultation conducted, by the Council are presented in the Appendix to this report.

2. Context of the Council's recommendations

Overview

- 2.1 This chapter examines the broader context in which the Council's recommendations are made, as a substantial number of initiatives and reforms currently being extended or developed are likely to address some of the issues that prompted calls for a 'swift and certain' approach to sentencing family violence offenders.
- 2.2 Both prior to and following the Royal Commission into Family Violence, there has been a concerted effort, across a large number of organisations and agencies involved in the criminal justice system, to reform and improve the system's response to family violence.
- 2.3 Alongside these efforts, a number of studies, initiatives and reforms are presently underway that are not specific to, but may influence, the sentencing and management of family violence offenders.
- 2.4 Further, the first (and to date only) trial of a 'swift, certain and fair' (SCF) program in Australia (the Northern Territory's COMMIT pilot program) was recently extended and is yet to be evaluated. The Council's recommendations come during a period of not only wide-ranging and significant change but also significant uncertainty, given the number of reforms that are yet to be evaluated.

Family violence specific reforms

- 2.5 A number of recommendations by the Royal Commission into Family Violence will significantly alter the current landscape for criminal justice responses to family violence offending, including:
 - expanding the Family Violence Court Division, so that all headquarter Magistrates' Court locations in Victoria will have similar functions and powers to the Family Violence Court Division of the Magistrates' Court, including the power to make counselling orders and to hear matters associated with family violence (such as family law matters);⁷
 - increasing resourcing of legal services for family violence matters;⁸
 - amending the intervention order system⁹ and the bail process to promote victim survivor safety;¹⁰
 - extending the fast tracking of family violence matters in the Magistrates' Court;¹¹
 - improving the accessibility and safety of Magistrates' Court facilities;¹² and
 - improving perpetrator interventions as well as increasing access to men's behaviour change programs (MBCPs).¹³

7. State of Victoria, Royal Commission into Family Violence (2016), above n 1, 160 (Recommendation 60).

8. Ibid 170 (Recommendation 69).

9. Ibid 105 (Recommendations 55–56), 162 (Recommendation 62), 166 (Recommendation 66), 227 (Recommendation 79).

10. Ibid 228 (Recommendation 80).

11. Ibid 221–222, 231; State of Victoria, *Ending Family Violence: Victoria's Plan for Change* (2016) 50.

12. State of Victoria, Royal Commission into Family Violence (2016), above n 1, 170.

13. Ibid 294–300 (Recommendations 85–92).

- 2.6 Several of these recommendations have received funding in the most recent Victorian state budget.¹⁴ The recommendations that directly relate to consideration of an SCF approach are discussed below.

Extending the family violence fast tracking listing process

- 2.7 One initiative that both predates the findings of the Royal Commission into Family Violence and accords closely with the principles that underpin an SCF approach is the Magistrates' Court fast tracking listing process for criminal cases involving family violence.¹⁵
- 2.8 The system commenced in the Dandenong Magistrates' Court on 1 December 2014. The fast-tracked timelines for hearings are:
- one week from the date of release to the first listing where the accused is on bail, or four weeks from the date of the interview by police to the first listing where the accused has been summonsed;
 - four weeks from the date of the first listing to the date of the second listing;
 - four weeks from the date of the second listing to the contest mention; and
 - four weeks from the date of the contest mention to the hearing.¹⁶
- 2.9 Therefore, the longest time between police interview and trial under the fast tracking listing process is 16 weeks. Although this may still represent a delay of up to four months before an offender is held accountable for their behaviour, this is significantly faster than standard detection-to-hearing timeframes, which may involve many months' delay.
- 2.10 The aim of the fast tracking listing process is to increase perpetrator accountability for their behaviour by holding them accountable in a timely manner. Research underpinning the fast tracking listing process demonstrates the importance of early intervention when holding perpetrators accountable for their actions, in order to better ensure that their behaviour changes and that victim survivors are safer.¹⁷
- 2.11 Early indications suggest that the fast tracking listing process has caused a significant increase in the number of complainants not seeking to withdraw their complaints, an increase in successful prosecutions, and a resolution within 30–45 days for most criminal cases involving family violence.¹⁸ It is not yet known, however, whether these changes have affected recidivism by family violence offenders.
- 2.12 The fast tracking listing process has, as at 1 June 2017, been implemented in all metropolitan Melbourne Magistrates' Court locations as well as a number of regional locations, and it will be expanded to the Latrobe Valley in September 2017.¹⁹ The intention is to eventually have the program implemented state-wide.

14. State of Victoria, *Getting on with the Job: Victorian Budget 17/18*, Budget Paper No 3: Service Delivery (2017).

15. Magistrates' Court of Victoria, *Practice Direction No. 10 of 2014: Fast Tracking of the Hearing and Determination of Criminal Offences Arising out of Family Violence Incidents* (2014).

16. See for example Magistrates' Court of Victoria, *Practice Direction No. 8 of 2015: Expansion of the Fast Tracking Listing Process to the Court at Ballarat and Ringwood* (2015).

17. Magistrates' Court of Victoria and Children's Court of Victoria, *Submission to the Royal Commission into Family Violence* (2015) 15.

18. Kate Hawkins and Felicity Broughton, 'Sentencing in Domestic Violence Cases' (Paper presented at Current Issues in Sentencing Conference, National Judicial College of Australia, Canberra, 6–7 February 2016) 21.

19. For a summary of which courts have implemented the fast tracking listing process, see Sentencing Advisory Council (2017), above n 1, 41. The most recent courts to have implemented the process are Sunshine and Werribee: Magistrates' Court of Victoria, *Practice Direction No. 7 of 2017: Expansion of the Fast Tracking Listing Process to the Court at Sunshine and Werribee* (2017).

Developing risk assessment tools for family violence offenders

- 2.13 The issue of efficacy and use of risk assessment tools for family violence offenders has been considered by the Council, on the basis that, if an SCF approach were to be trialled for family violence offenders in Victoria, risk assessment tools would likely be employed to determine which cohort of offenders might be appropriate for such a program. In other jurisdictions, an offender's eligibility for an SCF program has been premised on a particular level of risk.²⁰
- 2.14 The primary tool that Corrections Victoria uses for risk assessment of offenders is the Level of Service/Risk, Need, Responsivity, which is presently under review by Corrections Victoria.²¹
- 2.15 A number of stakeholders pointed out that the Level of Service/Risk, Need, Responsivity is directed at the risk of generalist reoffending, and not necessarily the risk of an offender committing family violence.²² RMIT University's Centre for Innovative Justice noted that, as a consequence:
- [Family violence] perpetrators who use an extensive array of coercive controlling tactics could potentially be deemed as 'low risk' if they have chosen to use physical violence infrequently (or if their use of it is simply not known to the system); have not engaged in other criminal behaviour; and have at least an average 'stake in conformity' with many social norms.²³
- 2.16 There are also a number of family violence specific risk assessment tools, such as the Spousal Assault Risk Assessment tool and the Common Risk Assessment Framework. There are some identified limitations of the Spousal Assault Risk Assessment tool. For example, the tool uses a narrow definition of family violence, focusing on physical and sexual violence, and does not take emotional and psychological abuse into account, attracting criticism that the risk factors included in the tool need to be updated.²⁴
- 2.17 The Royal Commission into Family Violence recommended that the Common Risk Assessment Framework be reviewed, revised and rolled out across prescribed agencies.²⁵ That process is currently underway, though Corrections Victoria has commented that when the process is complete, it will still need to assess the revised Common Risk Assessment Framework to ensure that it is appropriate for its purposes, before being implemented.²⁶
- 2.18 There is therefore uncertainty around which tool may ultimately be used to assess the risk level of sentenced family violence offenders.

20. See for example Hawaii's HOPE program and South Dakota's 24/7 Sobriety Project: Steven S. Alm, 'A New Continuum for Court Supervision' (2013) 91(4) *Oregon Law Review* 1181, 1182.

21. Victorian Auditor-General's Office, *Managing Community Correction Orders* (2017) 26.

22. Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

23. Submission 24 (Centre for Innovative Justice, RMIT University) 9.

24. Jude McCulloch et al., *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF): Final Report* (2016) 64.

25. State of Victoria, Royal Commission into Family Violence, *Volume I: Report and Recommendations* (2016) 138 (Recommendation 1).

26. Meeting with Corrections Victoria (15 March 2017).

Improving information sharing between agencies

- 2.19 Information sharing is an important issue for the Council in considering the application of an SCF approach to family violence offenders, on the basis that SCF approaches require ongoing monitoring of offender compliance.
- 2.20 The sharing of accurate and timely information between agencies is essential for the criminal justice system to effectively supervise sentenced family violence offenders. The Royal Commission into Family Violence identified a raft of issues with information sharing on family violence, including information about escalation in offenders' risk levels, information about contraventions of court orders and information about victim survivors and family members.
- 2.21 Two particular issues raised by the Royal Commission were that:
- a number of criminal justice agencies (such as Victoria Police, the Magistrates' Court and Corrections Victoria) use separate information systems, many of which are legacy information technology systems and therefore provide limited operational functions;²⁷ and
 - at the time of the Royal Commission, there was 'no legislation that specifically authorise[d] information sharing in the context of family violence'.²⁸
- 2.22 The Victorian Parliament has since passed the *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic), which establishes an information-sharing scheme known as the Central Information Point.²⁹ The Central Information Point is designed to enable specified entities to share information in a timely and effective manner for the purpose of preventing or reducing family violence.
- 2.23 The implementation of that legislation is, though, still some time away, and stakeholders have noted that its success will depend on the necessary information technology being available across relevant agencies.³⁰
- 2.24 Alongside the broader reforms to improve information sharing on family violence between relevant agencies, the Victorian Auditor-General's Office recently highlighted the need for better communication between Corrections Victoria and Victoria Police in its review of the management of offenders on community correction orders (CCOs), stating:

[Corrections Victoria's] multiple information technology (IT) systems make managing information a complex process. Sharing information with Victoria Police about offenders is essential for effectively managing offenders who have not complied with their CCOs.

...

Although Victoria Police and [Corrections Victoria] have a memorandum of understanding about sharing information for law enforcement and case management purposes, there are some operational problems that restrict data sharing between the two agencies.³¹

27. State of Victoria, Royal Commission into Family Violence (2016), above n 25, 177.

28. Ibid 170.

29. *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic) pt 2 div 6.

30. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

31. Victorian Auditor-General's Office (2017), above n 21, 32.

- 2.25 Although the review was not specific to family violence offenders, the Victorian Auditor-General's Office noted Victoria Police's acknowledgment that 'it needs to work with [Community Correctional Services] to develop a more effective mechanism to share information about offenders on [community correction orders], particularly those who may be a higher risk to the community'.³²
- 2.26 An SCF approach involving the swift detection of non-compliance would necessitate a level of information sharing between Victoria Police and Corrections Victoria that does not currently exist, and would likely not be possible based on the current IT framework within both organisations.

Research on perpetrator interventions

- 2.27 The evidence base for best-practice interventions against family violence offenders is still developing, and is becoming localised to the Australian, and indeed Victorian, context.
- 2.28 There is relatively little evidence that MBCPs are effective in reducing recidivism for family violence offenders. In three separate meta-analyses of perpetrator intervention programs, researchers found that MBCPs reduced family violence recidivism by around 5%.³³ Australia's National Research Organisation for Women's Safety has, however, critiqued these research studies for only using a narrow definition of success (reduced recidivism).³⁴ It may be that the recidivism is of a less serious nature, or it may be that there are unseen benefits, such as a less controlling atmosphere in the home. In addition, most of these studies were conducted in the United States and involved only a small number of participants.
- 2.29 In recognition of the need to establish a sound Australian, and particularly a Victorian, evidence base, the Royal Commission recommended the establishment of a committee of experts on perpetrator interventions and behaviour change programs. The committee is to advise the government on the spectrum of programs, services and initiatives that should be available in Victoria – in the justice system and in the community – to respond to all perpetrators across varying forms and risk levels of family violence.³⁵
- 2.30 The Expert Advisory Committee on Perpetrator Interventions has now convened and has commenced its investigations into perpetrator interventions. It is expected to provide a report of advice to government in May 2018.³⁶
- 2.31 In considering the appropriateness of an SCF approach that might suggest a 'zero-tolerance' response to condition contraventions, a number of stakeholders commented that the conditions themselves (such as attendance at an MBCP) ought to be based on the evidence of best practice and 'what works'.³⁷

32. Ibid 32.

33. Julia C. Babcock et al., 'Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment' (2004) 23(8) *Clinical Psychology Review* 1023, 1044; Lynette Feder and David B. Wilson, 'A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?' (2005) 1 *Journal of Experimental Criminology* 239, 242; Esther Arias et al., 'Batterer Intervention Programmes: A Meta-Analytic Review of Effectiveness' (2013) 22 *Psychosocial Intervention* 153, 154.

34. Australia's National Research Organisation for Women's Safety, *Perpetrator Interventions in Australia: Part One – Literature Review* (2015) 36.

35. State of Victoria, *Royal Commission into Family Violence* (2016), above n 1, 297 (Recommendation 86).

36. State of Victoria, *Family Violence Rolling Action Plan 2017–2020* (2017) 36.

37. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

- 2.32 Further, stakeholders noted that fairness would demand that any escalation of the response to, for example, failure to attend an MBCP would need to be accompanied by an investment in resources. That is, there would need to be sufficient spaces in MBCPs to accommodate offenders during their CCO,³⁸ MBCPs would need to be available in as many languages as necessary to accommodate offenders from culturally and linguistically diverse populations,³⁹ and MBCPs would need to be culturally appropriate in order to target the specific needs of, for example, the Koori population.⁴⁰
- 2.33 The 2017–18 Victorian state budget includes significant funding to improve existing perpetrator intervention programs.⁴¹

Expanding the Family Violence Court Division to all headquarter Magistrates' Courts

- 2.34 One of the contested elements of an SCF approach is the extent to which it might incorporate a therapeutic approach by the judicial officer. Some researchers have held this out as a point of distinction between the HOPE program in Hawaii (where the most positive results of such a program were obtained) and other SCF approaches adopted or trialled in the mainland United States.⁴² One of the key tenets of a therapeutic approach is ensuring that, wherever possible, individuals are consistently brought back before the same judicial officer.
- 2.35 This is very much consistent with the approach already adopted in Family Violence Court Division (FVCD) courts in Victoria, which are described in detail in the SCF discussion paper.⁴³ In summary, FVCD courts provide for an integrated listing process, consolidating proceedings relating to family violence intervention orders or counselling orders (and contraventions of those orders), victims of crime compensation hearings, child support hearings, any matter arising under the *Family Law Act 1975* (Cth) and summary or indictable criminal matters.⁴⁴ Where possible, ongoing matters are heard before the same specialised judicial officer, who is supported by dedicated staff (including police prosecutors, security officers, support workers and duty lawyers) trained in family violence issues.
- 2.36 One of the key recommendations from the Royal Commission was that FVCD courts be rolled out from their current two locations (Ballarat and Heidelberg) to all Magistrates' Court headquarter court locations.⁴⁵ The most recent state budget has allocated specific funding to extend the operation of the FVCD courts to a total of five locations (including the existing two locations).⁴⁶

38. Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017); Meeting with Victoria Legal Aid (15 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

39. Currently, there is one program available in Arabic, one program available in Vietnamese and one program conducted in English tailored to offenders from South East Asia: Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017); Meeting with Victorian Aboriginal Legal Service and Victorian Aboriginal Community Services Association (12 April 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

40. Submission 16 (Victorian Aboriginal Legal Service) 14.

41. Among a number of funded initiatives are adapting offender programs for people in the Corrections system from culturally and linguistically diverse backgrounds and establishing an intensive residential diversion program for Aboriginal male perpetrators of family violence: State of Victoria (2017), above n 14, 12.

42. Steven S. Alm, 'HOPE Probation: Fair Sanctions, Evidence-Based Principles, and Therapeutic Alliances' (2016) 15(4) *Criminology & Public Policy* 1195, 1195–1214; Lorana Bartels, 'Looking at Hawaii's Opportunity with Probation Enforcement (HOPE) Program through a Therapeutic Jurisprudence Lens' (2016) 16(3) *QUT Law Review* 30, 30–49.

43. Sentencing Advisory Council (2017), above n 1, 42.

44. *Magistrates' Court Act 1989* (Vic) s 41.

45. State of Victoria, Royal Commission into Family Violence (2016), above n 1, 160–162 (Recommendations 60–62).

46. State of Victoria (2017), above n 14, 14.

Corrections Victoria offender management reforms

- 2.37 The Council's SCF discussion paper considers in detail the significant and wide-ranging reforms to Corrections Victoria's Offender Management Framework, which commenced on 16 January 2017.⁴⁷ In brief, the reforms introduce a new framework for case management that utilises evidence-based practices to reduce reoffending.
- 2.38 Under the new framework, an offender's assessed risk level will inform the level of case management and supervision that they receive. High-risk offenders will be supervised by advanced case managers, who are more experienced and have lower caseloads so that they are able to provide more intensive case management. High-risk offenders will also be given prioritised access to treatment or programs, such as MBCPs.⁴⁸ Low-risk offenders, on the other hand, will be managed by case officer staff, who meet with offenders on commencement of the CCO, but otherwise manage offenders administratively.⁴⁹
- 2.39 At a broad level, Corrections Victoria has indicated that higher-risk offenders will be subject to 'swift' responses for non-compliance with a condition of their CCO, though there are no fixed consequences for non-compliance. Corrections Victoria's aim is to support the offender to continue on their CCO where appropriate, rather than immediately returning the offender to court upon any contravention. Nevertheless, Corrections Victoria has noted that any condition contraventions by high-risk offenders demonstrating an increase to an unacceptable risk level will likely result in contravention proceedings.⁵⁰
- 2.40 Under the new model, representation in court, including prosecution of charges of contravening a CCO, will be undertaken by specialist staff from Court Assessment and Prosecutions Services.⁵¹ These specialist staff are anticipated to be in a position to objectively determine whether to initiate contravention proceedings. They may propose that other steps be taken prior to initiating contravention proceedings (such as initiating an administrative review hearing). The specialisation of Court Assessment and Prosecutions Services staff is expected to lead to an increase in the consistency and quality of information presented to the court about the offender.⁵²
- 2.41 Given its recent commencement, Corrections Victoria's new Offender Management Framework will need to operate for a substantial period (allowing the reformed practices and procedures to be embedded and rolled out) before an evaluation can take place.
- 2.42 The Victorian Auditor-General's Office's report concluded that:
- [Corrections Victoria's] reform program is comprehensive and addresses the key challenges arising from the rapid overall increase in offenders on [community correction orders], including the fast-growing cohort of high-risk offenders. If implemented effectively, the reforms, along with [Corrections Victoria's] significant recruitment exercise, should reduce high case loads and improve overall management of offenders.⁵³

47. Sentencing Advisory Council (2017), above n 1, 54–55.

48. Meeting with Corrections Victoria (7 November 2016).

49. Meeting with Corrections Victoria (12 October 2016).

50. Meeting with Corrections Victoria (7 November 2016).

51. Meeting with Corrections Victoria (7 November 2016); State of Victoria, 'Stronger Community Corrections System to Keep Victorians Safe', Media Release (16 January 2017) <<http://www.premier.vic.gov.au/stronger-community-corrections-system-to-keep-victorians-safe/>> at 12 July 2017.

52. Meeting with Corrections Victoria (7 November 2016).

53. Victorian Auditor-General's Office (2017), above n 21, viii.

- 2.43 During the Council's consultations, a number of stakeholders commented on the importance of allowing Corrections Victoria's reforms to be implemented and evaluated, as these reforms address many of the same issues that initially prompted calls for a 'swift and certain' approach.⁵⁴ The Law Institute of Victoria, for example, submitted that 'the evidence-based changes introduced by Corrections Victoria last year should be provided a chance to function before an SCF approach is introduced'.⁵⁵

Dandenong Magistrates' Court and Swinburne Centre for Forensic Behavioural Science's judicial supervision study

- 2.44 In 2016, the Centre for Forensic Behavioural Sciences was awarded funding to undertake a research project aimed at addressing the lack of information around magistrates' use and perceptions of judicial supervision (including both deferral of sentence and judicial monitoring as part of a CCO).⁵⁶ The research, which is being conducted in partnership with the Dandenong Magistrates' Court, seeks to examine:
- who is being targeted by judicial supervision and why;
 - what types of supervision are being used (for example, pre-plea, post-plea or post-sentence);
 - what, if any, barriers to judicial supervision are perceived by magistrates; and
 - what techniques are being used by magistrates in court-review hearings when undertaking supervision.⁵⁷
- 2.45 When published, the results of this research may help inform the best practice for judicial monitoring of family violence offenders.

Dandenong pilot of fast tracking charges of contravening a community correction order

- 2.46 The Dandenong Magistrates' Court, in cooperation with Corrections Victoria, is piloting a program to expedite the listing of charges of contravening a CCO. This pilot is relevant to the Council's consideration of SCF approaches, as it has been described as an initiative that is informed by the principles that underpin an SCF approach.⁵⁸
- 2.47 Described as an 'expedited court listing process to improve responses to breaches by offenders on Community Correction Orders', the pilot will involve expedited listing and court case management of eligible offenders.

54. Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017); Meeting with Corrections Victoria (15 March 2017).

55. Submission 19 (Law Institute of Victoria) 18.

56. Pauline Spencer et al., 'Examining Magistrate Perceptions and Use of Judicial Supervision' (Abstracts, National Non-Adversarial Justice Conference 2017) <<http://www.naj2017.com/1879>> at 2 June 2017.

57. Meeting with Dandenong Magistrates' Court (28 September 2016); Victorian Legal Services Board and Commissioner, 'Grants Funded' (Victorian Legal Services Board + Commissioner, 2016) <http://lsbc.vic.gov.au/?page_id=172> at 12 July 2017.

58. Meeting with Corrections Victoria (15 March 2017).

- 2.48 The Council understands that, to be eligible for the pilot, an offender must be:
- sentenced to a CCO by Dandenong Magistrates' Court during the pilot period;
 - supervised by Dandenong Community Corrections; and
 - be on a CCO for a family violence offence or a sexual offence;
 - be assessed as being at high risk of reoffending (using the Level of Service/Risk, Need, Responsivity); or
 - be assessed as being at medium or high risk of reoffending (using the Level of Service/Risk, Need, Responsivity) and be on a combined order (a sentence of imprisonment followed by a CCO).⁵⁹
- 1.49 The objective of the pilot is to improve community safety by reducing the time it takes to finalise proceedings involving charges of contravening a CCO. It is hoped that a reduction in the period of time between detection of the contravention and finalisation of the proceedings will:
- bring forward the date on which the offender is held to account by the court (strengthening the link between the offender's contravening behaviour and the consequences);
 - decrease the period of time that the offender is unsupervised in the community or disengaged from community corrections; and
 - reduce the opportunity for the offender to commit further offences while under supervision.⁶⁰
- 2.50 At the time of publication, the pilot was to have commenced on 1 September 2017. It is expected that an evaluation of the effects of the pilot will be conducted following its completion.

Northern Territory's COMMIT pilot program

- 2.51 In June 2016, the Northern Territory began piloting what has been called the COMMIT program.⁶¹ In brief, the COMMIT program adopts a number of the key elements of an SCF approach, requiring drug and alcohol offenders serving a conditional suspended sentence (a custodial sentence with the custodial component suspended) to comply with drug and alcohol treatment and testing conditions. If the offender fails to comply, they are swiftly returned before the court for hearing and the imposition of a short custodial sanction, within a predetermined range.⁶² The program was recently expanded to include parolees.⁶³
- 2.52 Since publication of the SCF discussion paper, the Council has been advised that the initial 12-month trial of the COMMIT program has been extended for a further 12 months, in part due to the low number of offenders being placed on the sentencing order.⁶⁴

59. Email from Corrections Victoria to Sentencing Advisory Council, 3 April 2017.

60. Email from Corrections Victoria to Sentencing Advisory Council, 3 April 2017.

61. Sentencing Advisory Council (2017), above n 1, 28–29.

62. Northern Territory Department of Correctional Services, *The HOPE Strategy and the COMMIT Program Manual* (2016) 7.

63. Attorney-General and Minister for Justice (NT), 'Breaking the Cycle of Crime', Media Release (11 May 2017) <<http://newsroom.nt.gov.au/mediaRelease/23193>> at 11 May 2017.

64. Teleconference with Justice Southwood, Supreme Court of the Northern Territory (19 April 2017).

- 2.53 During consultation, some stakeholders noted that any results of the trial of the COMMIT program would need to be considered in light of the unique correctional context in the Northern Territory, in particular, the high rates of incarceration in the Northern Territory, especially of Aboriginal people.⁶⁵
- 2.54 Further, the Council notes that an initial period of residential rehabilitation treatment is standard for all participants on the COMMIT program, unlike SCF programs (including the HOPE program) in the United States, which also target drug and alcohol offenders.⁶⁶ Consequently, the COMMIT program places greater emphasis on rehabilitation through treatment, rather than simply relying on any deterrent effect of a swift response (and imposition of a fixed penalty) to non-compliance.

65. Submission 23 (Victoria Police) 3; Meeting with Human Rights Law Centre (5 May 2017).

66. Teleconference with Justice Southwood, Supreme Court of the Northern Territory (19 April 2017).

3. Desirability of a 'swift, certain and fair' approach to family violence offenders

Overview

- 3.1 This chapter examines the issue of the desirability of 'swift, certain and fair' (SCF) approaches to family violence offenders in Victoria. Assessing the desirability of SCF approaches involves consideration of the available empirical evidence, as well as consideration of whether an SCF approach can be applied within the Victorian legal system. A secondary but important consideration is whether SCF approaches are practical within the current criminal justice system.
- 3.2 In summary, this chapter explains the Council's conclusion that an SCF approach to sentencing and managing family violence offenders is *not* desirable in Victoria, on the basis of:
- the mixed evidence for the effectiveness of SCF approaches to drug and alcohol offenders;
 - the absence of evidence for the effectiveness of SCF approaches to family violence offenders;
 - the potential risks to victim survivors and affected family members;
 - the procedural fairness and human rights implications;
 - the limited effectiveness of, and lack of capacity in Victoria for the imposition of, short custodial sanctions;
 - the undesirability of mandatory sanctioning and compliance-based approaches;
 - the potential for a disproportionate impact on particular offender groups; and
 - overwhelming stakeholder opposition.
- 3.3 The overwhelming majority of stakeholders opposed the introduction of an SCF approach based on the identified key elements of SCF programs. The opposition to SCF approaches was primarily founded on concerns over the evidence base, as well as fundamental opposition to the deterrence focus of SCF approaches, and concerns over the application of an SCF approach in the context of family violence and the potential impacts of such an approach on particular offender groups.
- 3.4 The few stakeholders who did support the introduction of an SCF approach qualified that it should not involve strict adherence to the identified key elements of an SCF approach, or it should focus on offenders with alcohol and substance-abuse issues, rather than attempting to apply an SCF approach to family violence offenders.

Key elements of a 'swift, certain and fair' approach

- 3.5 A significant challenge of the Council's reference has been defining 'SCF approaches' and distinguishing those approaches (and the key programs identifying as SCF approaches) from the general principles of 'swiftness', 'certainty' and 'fairness'. For example, some stakeholders suggested that an SCF approach in Victoria would not require strict fidelity to the program models but would instead involve pursuing the principles of swiftness, certainty and fairness within localised contexts.⁶⁷
- 3.6 The terms of reference, however, refer the Council to the definition of SCF approaches employed by the Royal Commission into Family Violence, and request that the Council's advice have regard to the principles of an SCF approach, as well as the available empirical evidence (see [1.3]–[1.8]). The Council therefore considers it necessary to rigorously define SCF approaches.
- 3.7 'Swift, certain and fair' is a particular program model with key elements, and it has a specific meaning within the international research relating to the management of offenders under sentence.⁶⁸ It is necessary to define 'SCF approaches' according to the use of that term in the existing literature in order to assess the evidence base for such approaches.
- 3.8 Having reviewed the literature relating to SCF programs, the Council defines SCF approaches as involving six key elements:
1. targeting offenders under sentence in the community who are subject to conditions;
 2. identifying conditions that should receive non-discretionary ('zero-tolerance') responses upon contravention;
 3. establishing a behavioural contract with the offender so that they know what is expected of them and what the consequence of non-compliance with a condition will be (usually a fixed sanction);
 4. utilising regular measures to detect condition contraventions on a regular basis (such as regular drug testing);
 5. responding to condition contraventions quickly by holding a contravention hearing within 72 hours of a detected contravention; and
 6. imposing fixed sanctions at a contravention hearing in accordance with the behavioural contract.⁶⁹
- 3.9 The Council has since consulted with two of the leading researchers on SCF programs, and confirmed with them the Council's characterisation of the key elements of SCF programs.⁷⁰
- 3.10 It has also been suggested that one of the key components of an SCF program is that the fixed sanctions imposed are short periods of custody, anywhere from a few hours to a month.⁷¹ All of the SCF programs evaluated to date have involved the imposition of fixed periods of custody as a consequence of a breach of a condition of an order.⁷²

67. See for example Submission 24 (Centre for Innovative Justice, RMIT University) 2–4, 15–18; Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

68. Sentencing Advisory Council (2017), above n 1, 11–19.

69. Sentencing Advisory Council (2017), above n 1, xvi.

70. Teleconference with Dr Angela Hawken, New York University, and Dr Jonathan Kulick, New York University (30 March 2017).

71. Sentencing Advisory Council (2017), above n 18.

72. Ibid 15–24.

- 3.11 In addition, some commentators and stakeholders consider SCF approaches to apply 'therapeutic jurisprudence'. One researcher, for example, has suggested that certain components of Hawaii's HOPE program make the program more therapeutically oriented than had previously been suggested.⁷³ These components include the potential reward of early termination from the program, the in-court discussions that occur in a supportive atmosphere and the relationship between probation officers and offenders on the program.⁷⁴
- 3.12 It is not clear, however, that these elements constitute what can properly be called 'therapeutic jurisprudence' in the way that the term is used elsewhere.⁷⁵ While therapeutic jurisprudence suggests a rehabilitative approach to the management of offenders, the HOPE program primarily focuses on deterrence through the use of fixed penalties. Some researchers have questioned whether these fixed penalties leave enough scope for the judicial officer to provide a genuinely therapeutic response or to have a therapeutic conversation.⁷⁶
- 3.13 While some specific SCF programs, courts or judicial officers may employ therapeutic elements or aspects to the programs, these elements have not been included as a key component of an SCF program in any of the existing literature on SCF programs,⁷⁷ and therefore the Council has not included therapeutic jurisprudence as a key element of an SCF approach.

The evidence base for 'swift, certain and fair' approaches

- 3.14 As the Council noted in the SCF discussion paper, the evidence base for the effectiveness of SCF approaches, including HOPE-like programs, is mixed. This evidence base is largely founded on programs in operation in the United States, which almost exclusively apply to offenders with alcohol and substance-abuse issues.⁷⁸

Evidence for the effectiveness of 'swift, certain and fair' approaches to offenders with substance-abuse issues

- 3.15 Hawaii's Opportunity Probation with Enforcement (HOPE) program is a probation⁷⁹ compliance regime that requires swift, certain and fair responses to every breach of a condition of probation. That is, once a HOPE participant is found to have breached a condition of their probation, they immediately receive a sanction (most often, a few days in

73. Lorana Bartels, *Swift, Certain and Fair: Does Project HOPE Provide a Therapeutic Paradigm for Managing Offenders?* (2017); Bartels (2016), above n 42, 30–49; Submission 24 (Centre for Innovative Justice, RMIT University) 11.

74. Bartels (2016), above n 42, 30–49.

75. For a detailed explanation of therapeutic jurisprudence, see David B. Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' (2014) 7 *Arizona Summit Law Review* 463, 463–479; David B. Wexler, 'Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development' (2010) 7 *Irish Probation Journal* 94, 94–107.

76. Cecilia Klingele, 'What Are We Hoping For? Defining Purpose in Deterrence-Based Correctional Programs' (2015) 99(5) *Minnesota Law Review* 1631, 1657; Michael Tonry, 'Legal and Ethical Issues in the Prediction of Recidivism' (2014) 26(3) *Federal Sentencing Reporter* 167, 174.

77. Sentencing Advisory Council (2017), above n 1, 11–19.

78. *Ibid* 13–19.

79. In the United States, probation is a form of community supervision imposed as a sentence on a convicted offender in lieu of incarceration. Probation allows offenders to serve a sentence while remaining in the community and complying with various conditions. In Australia, supervised release orders such as community-based orders and intensive correction orders had their origins as a form of probation that differed from probation in the United States. For a discussion of this history, see Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Australia* (3rd ed., 2014) 708.

custody). The program primarily targets drug offenders and others at high risk of recidivism,⁸⁰ though it has over time been extended to include a number of sex offenders, violent offenders and domestic violence offenders.⁸¹

- 3.16 While Hawaii's HOPE program has been positively evaluated several times,⁸² the HOPE Demonstration Field Experiment (HOPE DFE), which attempted to examine whether HOPE-like programs could be effective in jurisdictions other than Hawaii, did not demonstrate the success of HOPE.⁸³ The HOPE DFE instead found that, when compared with standard probation, HOPE-like programs do not reduce recidivism, rearrests, probation revocations or time spent in jail.⁸⁴
- 3.17 A number of critics and researchers have, however, put forward possible explanations for the poor HOPE DFE results, including that:
- the circumstances in the four DFE sites were quite different from those in Hawaii, and each site should have better weighted the local needs, structure and laws when adapting HOPE for their own jurisdictions;
 - the HOPE model may not have been well suited for replication; and
 - the HOPE model was mischaracterised.
- 3.18 The Bureau of Justice Assistance has also stated that the HOPE DFE's initial findings underscore the importance of ensuring that there is sufficient time to conduct the pilot and refine implementation prior to commencing evaluation of sites.⁸⁵ The Bureau is currently seeking applications from further locales that are interested in implementing an SCF supervision program model. This competitive grant round will lead to trials in successful locations commencing 1 October 2017, with subsequent evaluation.⁸⁶
- 3.19 To date, the evidence for the effectiveness of SCF approaches to offenders with substance-abuse issues, in various jurisdictions in the United States, is mixed.

Evidence for the effectiveness of 'swift, certain and fair' approaches to family violence offenders

- 3.20 As articulated in the SCF discussion paper, there is no direct evidence of the effectiveness of SCF approaches to family violence.⁸⁷ Since the publication of the SCF discussion paper, there has been no further evaluation or research published on whether SCF approaches are effective for family violence offenders.
- 3.21 In addition to there being a lack of evidence on SCF approaches and family violence offenders, a number of stakeholders also raised concerns about the ability of SCF approaches to create behavioural change for family violence offenders.⁸⁸

80. See Angela Hawken, 'HOPE: Theoretical Underpinnings and Evaluation Findings' (Testimony prepared for the Oregon State Legislature, 10 April 2009).

81. Michael D. Campbell et al., *State of the Art of HOPE Probation* (2015) 12.

82. Sentencing Advisory Council (2017), above n 1, 20.

83. *Ibid* 22–24.

84. *Ibid* 20–24.

85. Bureau of Justice Assistance, *Swift, Certain, and Fair (SCF) Supervision Program – Including Project HOPE FY 2017 Competitive Grant Announcement* (2017) 8.

86. *Ibid* 12.

87. Sentencing Advisory Council (2017), above n 1, 27–28.

88. Submission 16 (Victorian Aboriginal Legal Service) 5; Submission 19 (Law Institute of Victoria) 13–14.

- 3.22 RMIT University's Centre for Innovative Justice, for example, noted that family violence offending is more complex than drug or alcohol related offending, in that drug and alcohol offending is detectable, and offenders with substance-abuse issues are more likely to accept responsibility and seek help for those behaviours. The Centre for Innovative Justice stated that, by contrast, family violence offending is less overt, and family violence offenders are less likely to seek help in relation to their use of violent or controlling behaviours.⁸⁹
- 3.23 The Centre for Innovative Justice cited the Marin County Family Violence Court (in California) as evidence of the effectiveness of SCF approaches for family violence offenders;⁹⁰ however, there are no published evaluations of that court, and the Council is not able to draw any conclusions about its effectiveness.
- 3.24 Further, as observed in the SCF discussion paper, there is a distinction between problem-solving courts and SCF approaches. The Marin County Family Violence Court is a therapeutic court that uses a range of interventions to attempt to address the underlying issues that may be contributing to family violence perpetration, including both rewards and sanctions. Alongside rewards for compliance, within this court model, the court is able to impose 'flash incarceration without a hearing' as one of 15 possible sanctions for non-compliance with an order imposed by that court.⁹¹ Another important point of distinction between the Marin County Family Violence Court program and SCF approaches is that the Marin County Family Violence Court program requires offenders to participate in a number of intensive mandatory treatment programs.⁹²

'Swift, certain and fair' approaches for family violence offenders in Victoria

- 3.25 A key question for the Council is whether SCF approaches developed primarily for offenders with substance-abuse issues can be applied to family violence offenders, particularly given the complex dynamics of family violence offending. There are marked differences between the approaches and interventions directed towards family violence offenders and the approaches and interventions directed towards offenders who have substance-abuse issues.
- 3.26 Some key differences between drug and alcohol offending and family violence offending relevant to the application of SCF approaches are that:
- drug and alcohol contraventions are relatively straightforward, while almost all contraventions by family violence offenders are contestable;⁹³
 - drug and alcohol related contraventions are easily detectable, while contraventions by family violence offenders often require the statement of the victim survivor to substantiate any claim of contravention;⁹⁴ and
 - in the family violence context, there are often continuing emotional, financial and legal ties between the offender and the victim survivor, such that the imposition of any sanction could indirectly have a negative effect on victim survivors.⁹⁵

89. Submission 24 (Centre for Innovative Justice, RMIT University) 13.

90. Submission 24 (Centre for Innovative Justice, RMIT University) 3–4.

91. Superior Court of California (Marin), *Marin County Integrated Family Violence Court Program: Policies and Procedures* (2012) 23.

92. For example, to satisfy one program stream of the Marin County Family Violence Court program, an offender is required to participate in three sessions of an 'intensive outpatient program' (of three hours' duration per week) for a minimum of six months: *ibid* 18–22.

93. Submission 19 (Law Institute of Victoria) 13; Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

94. Sentencing Advisory Council (2017), above n 1, 85.

95. Submission 20 (Eastern Community Legal Centre) 2–3; Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017); Meeting with Domestic Violence Victoria (20 April 2017).

- 3.27 It has also been noted that another difference is that charges for drug and alcohol offending are less likely to be withdrawn than charges for family violence. Although it happens infrequently, family violence charges may be withdrawn on the basis of a subsequent risk assessment or changes in circumstances before a prosecution commences, a factor that weighs against the imposition of an immediate custodial response.⁹⁶
- 3.28 The SCF discussion paper poses a range of questions on the appropriateness of SCF approaches in the context of family violence offending and reports on preliminary consultation with a range of stakeholders from within the family violence sector on this issue.

Stakeholders' views

- 3.29 The overwhelming majority of stakeholders – including Victoria Police, Victoria Legal Aid, the Law Institute of Victoria, The Victorian Bar and the Criminal Bar Association, Liberty Victoria and the Victims of Crime Commissioner – specifically commented that the evidence base for SCF approaches is currently insufficient to justify its introduction in Victoria.⁹⁷
- 3.30 Liberty Victoria described the state of the current evidence base as 'mixed at best',⁹⁸ a characterisation echoed in a number of submissions.⁹⁹ Liberty Victoria concluded that there is currently insufficient evidence to support the adoption in Victoria of a strict SCF program that resembles Hawaii's HOPE program or its counterparts elsewhere in the United States.¹⁰⁰
- 3.31 Stakeholders suggested that the difficulties encountered by the HOPE DFE indicate the likely difficulties that would be faced if there were an attempt to replicate Hawaii's HOPE program (or a similar SCF approach) in Victoria.¹⁰¹ The Law Institute of Victoria further noted that the HOPE DFE shows the difficulties in replicating the HOPE model for the same group of offenders in a different jurisdiction within the United States, and that it would be 'unforeseeable as to what problems might arise with replicating a similar program in Victoria'.¹⁰²
- 3.32 The Victorian CASA Forum (Centres Against Sexual Assault) submitted that:
SCF approaches that have been evaluated have been in jurisdictions quite different from Victoria, and have been undertaken largely with drug and alcohol offenders rather than particularly with identified family violence offenders. Even in this more specific context, the evidence is mixed[.]¹⁰³
- 3.33 Both the CASA Forum and No To Violence/Men's Referral Service suggested that the compliance-based approach of SCF programs may not be appropriate for the family violence context.¹⁰⁴ No To Violence/Men's Referral Service submitted that there is a need to prioritise safety and risk management over compliance when considering interventions in the family violence context.¹⁰⁵ It was submitted that the safety of victim survivors might, at times, override other objectives, such as perpetrator accountability and long-term behavioural change.¹⁰⁶

96. Comments by Council member (15 June 2017).

97. Submission 8 (Victims of Crime Commissioner) 7; Submission 13 (Victorian CASA Forum) 3; Submission 15 (Liberty Victoria) 3–4; Submission 16 (Victorian Aboriginal Legal Service) 5; Submission 17 (Victoria Legal Aid) 7; Submission 18 (Victorian Bar and Criminal Bar Association) 2–3; Submission 19 (Law Institute of Victoria) 11; Submission 22 (No To Violence/Men's Referral Service) 2; Submission 23 (Victoria Police) 3.

98. Submission 15 (Liberty Victoria) 3.

99. Submission 19 (Law Institute of Victoria) 5.

100. Submission 15 (Liberty Victoria) 2.

101. Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017).

102. Submission 19 (Law Institute of Victoria) 11.

103. Submission 13 (Victorian CASA Forum) 3.

104. Submission 13 (Victorian CASA Forum) 3; Submission 22 (No To Violence/Men's Referral Service) 3.

105. Submission 22 (No To Violence/Men's Referral Service) 3.

106. Submission 22 (No To Violence/Men's Referral Service) 4 ('Compliance and a reduction in recidivism should be treated as secondary goals to the immediate safety of women and children affected by family violence.')

- 3.34 Similarly, Corrections Victoria suggested that SCF approaches may overemphasise compliance with conditions of orders, as there is inadequate evidence to suggest that increased compliance with conditions of sentencing orders necessarily translates into a reduction in other kinds of offending.¹⁰⁷
- 3.35 A number of stakeholders considered an SCF approach unsuitable for family violence offending because of the difficulty of identifying 'binary' conditions in a family violence context, the potential for almost all condition contraventions to be contested,¹⁰⁸ and the potential increased risks to victim survivors in the family violence context.¹⁰⁹ The Law Institute of Victoria, for example, illuminated the many ways that contraventions may be contested, stating that:
- It is unclear as to how a SCF approach could be applied to family violence offenders. SCF sentencing schemes have hitherto been primarily used to address drug and alcohol offending. All that is required for testing for condition compliancy in this context is a simple substance test. Testing for breaches of [a family violence intervention order] would be far more complex and would make an SCF approach more difficult to implement.¹¹⁰
- 3.36 The Law Institute of Victoria included a range of case studies in its submission to illustrate the difficulties of applying an SCF approach in a family violence context, demonstrating that almost all conditions have the potential to be contested in a family violence context.¹¹¹ Similarly, the Victorian Aboriginal Legal Service submitted that the nuances of contraventions of orders in the family violence context are not conducive to fixed penalties.¹¹²
- 3.37 Several stakeholders further expressed concern that SCF approaches, particularly where they involve short terms of custody as a sentence for contravention of a condition of an order, could lead to an increase in risks to victim survivors. No To Violence/Men's Referral Service submitted that this would be particularly relevant for men who are already at a high risk of committing further family violence.¹¹³ The Victorian Aboriginal Legal Service made similar comments, noting that there are likely to be heightened risks to victim survivors as a consequence of any SCF approach.¹¹⁴
- 3.38 Only two stakeholders (both anonymous) were in favour of the adoption of an SCF approach being applied to family violence offenders in a way that would be consistent with the identified key elements of SCF programs, including fixed periods of imprisonment for breaches of non-custodial orders.¹¹⁵ Neither of these stakeholders provided an explanation for their views.

107. Corrections Victoria noted the findings of the HOPE II evaluation, which found that, although there were reductions in drug use in SCF participants, this did not necessarily translate into a reduction in property offences, and therefore increased compliance was not a reliable proxy measure of the development of pro-social behaviours: Meeting with Corrections Victoria (15 March 2017).

108. Submission 19 (Law Institute of Victoria) 31; Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

109. Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 12; Submission 8 (Victims of Crime Commissioner) 7; Submission 13 (Victorian CASA Forum) 4.

110. Submission 19 (Law Institute of Victoria) 5.

111. Submission 19 (Law Institute of Victoria) 13–14.

112. Submission 16 (Victorian Aboriginal Legal Service) 5.

113. Submission 22 (No To Violence/Men's Referral Service) 3.

114. Submission 16 (Victorian Aboriginal Legal Service) 6.

115. Submission 2 (Anonymous); Submission 4 (Anonymous).

‘Swift, certain and fair’ approaches for family violence offenders with substance-abuse issues in Victoria

- 3.39 The SCF discussion paper also raised questions about whether, for family violence offenders with substance-abuse issues, powers relating to alcohol exclusion orders and conditions could be expanded and/or whether abstinence-based conditions could be monitored through SCRAM (Secure Continuous Remote Alcohol Monitoring) technology.¹¹⁶
- 3.40 There is currently insufficient evidence on the effectiveness of SCRAM to justify utilising this technology in an exclusively family violence context, particularly given that mandatory abstinence could increase, rather than decrease, the risk to victim survivors.¹¹⁷
- 3.41 In addition, although there has been some promising studies on the use of SCRAM in other jurisdictions,¹¹⁸ there is mixed evidence on whether, in general, abstinence-based approaches to drug and alcohol offenders are effective.¹¹⁹

Stakeholders’ views

- 3.42 Many stakeholders – including Victoria Legal Aid, Domestic Violence Victoria, the Victorian Aboriginal Legal Service, the Australian Community Support Organisation’s Community Offender Advice and Treatment Service (ACSO COATS) and the Neighbourhood Justice Centre – did not support an abstinence-based program for family violence offenders in Victoria.¹²⁰
- 3.43 Victoria Legal Aid further stated that if an abstinence-based approach were implemented in Victoria, it would need to be accompanied by comprehensive counselling support and treatment programs.¹²¹
- 3.44 ACSO COATS stated that abstinence-focused approaches are unrealistic, particularly when there is a shortage of access to residential treatment units or detoxing facilities, as such access is necessary if an alcohol or drug user is expected to achieve abstinence. ACSO COATS considered that an abstinence-based approach may simply set people up to fail, and a treatment approach to drug and alcohol abuse is preferred.¹²²
- 3.45 Two stakeholders supported the introduction of a trial of SCF approaches for alcohol and drug offenders: the Foundation for Alcohol Research and Education (FARE) and Deakin University’s Violence Prevention Group. Both stakeholders acknowledged that there is currently no evidence for the effectiveness of an SCF approach for family violence offenders separate from offenders with a history of substance-abuse issues.¹²³ FARE proposed the implementation of a program similar to South Dakota’s 24/7 Sobriety Project to target family

116. Sentencing Advisory Council (2017), above n 1, 75–76.

117. Meeting with Victorian Aboriginal Legal Service and Victorian Aboriginal Community Services Association (12 April 2017); Meeting with Dr Keri Alexander, Turning Point Alcohol and Drug Centre (11 April 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

118. Melissa Pepper and Paul Dawson, *Alcohol Abstinence Monitoring Requirement: A Process Review of the Proof of Concept Pilot* (2016) 3–5.

119. See the special issue of the *Drug and Alcohol Review*, focusing on intimate partner violence and substance misuse: Gail Gilchrist and Kelsey Hegarty (eds) ‘Special Issue: Intimate Partner Violence and Substance Misuse’ (2017) 36(1) *Drug and Alcohol Review* 1, 1–145.

120. Meeting with Victorian Aboriginal Legal Service and Victorian Aboriginal Community Services Association (12 April 2017); Submission 17 (Victoria Legal Aid) 8–9; Meeting with Dr Keri Alexander, Turning Point Alcohol and Drug Centre (11 April 2017); Meeting with Domestic Violence Victoria (20 April 2017); Meeting with Neighbourhood Justice Centre (11 April 2017); Email from Dr James C. Oleson, Associate Professor of Criminology, University of Auckland to Sentencing Advisory Council (7 April 2017).

121. Submission 17 (Victoria Legal Aid) 8–9.

122. Meeting with ACSO COATS (23 March 2017).

123. Submission 14 (Foundation for Alcohol Research and Education) 8–9; Submission 9 (Violence Prevention Group, Deakin University) 8.

- violence offenders with alcohol abuse issues.¹²⁴ Particular emphasis was placed on the finding of a drop in domestic violence arrests in South Dakota.¹²⁵
- 3.46 Other stakeholders consulted by the Council, however, questioned whether this particular finding necessarily indicates a reduction in family violence offending, as perpetrators may continue to inflict family violence through other non-physical forms when alcohol and other drug use ceases.¹²⁶ Domestic Violence Victoria, for example, questioned whether the removal of alcohol or drug use would necessarily lead to a reduction in family violence offending.¹²⁷
- 3.47 It was suggested that, in some cases, a family violence offender's desistance from alcohol and drugs might lead to their use of more coercive behaviours, such as exerting financial control over a victim survivor. Coercive and controlling behaviours, such as financial abuse, are less likely to be reported to police,¹²⁸ and therefore are less likely to lead to arrest. This, however, does not signal a desistance from family violence offending behaviours. These stakeholders considered the attempt to indirectly target family violence offending through abstinence-based approaches unlikely to be effective in the longer term.¹²⁹
- 3.48 One stakeholder cautioned that, while it is important that both offenders and victim survivors are able to access alcohol and drug treatment, it is prudent to ensure that other safety measures are maintained, and that while alcohol and drug treatment can assist in reducing family violence, it should not be considered a replacement for other family violence interventions.¹³⁰
- 3.49 Victoria Police noted that, in 2014, it had considered a program that would target offenders with alcohol abuse issues, with mandatory alcohol treatment and electronic monitoring using SCRAM technology.¹³¹ A decision was made not to implement the program due to a range of issues, including the substantial costs involved in providing treatment services alongside the SCRAM bracelet and monitoring the abstinence condition, the significant police resources required to monitor such a program and potential issues with the *Bail Act 1977 (Vic)*.¹³²

The Council's view

- 3.50 The Council considers the evidence base for SCF approaches to be insufficient to justify their introduction in Victoria for family violence offenders. This conclusion is based on the Council's assessment that there is inadequate evidence for the effectiveness of either SCF approaches in general or SCF programs involving abstinence-based approaches to family violence offenders (monitored using SCRAM technology). This conclusion was shared by the majority of stakeholders.

124. Submission 14 (Foundation for Alcohol Research and Education) 5. For an overview of South Dakota's 24/7 Sobriety Project, see also Sentencing Advisory Council (2017), above n 1, 18–19.

125. Submission 14 (Foundation for Alcohol Research and Education) 7; see also Sentencing Advisory Council (2017), above n 1, 28.

126. Meeting with Dr Keri Alexander, Turning Point Alcohol and Drug Centre (11 April 2017); Meeting with Domestic Violence Victoria (20 April 2017); Meeting with Neighbourhood Justice Centre (11 April 2017).

127. Family violence includes behaviour that is physically, sexually, emotionally, psychologically or economically abusive, threatening or coercive, or controlling or dominating such that a family member fears for his or her own or another's safety or wellbeing: *Family Violence Protection Act 2008 (Vic)* s 5; Meeting with Domestic Violence Victoria (20 April 2017).

128. State of Victoria, Royal Commission into Family Violence (2016), above n 25, 27.

129. Meeting with Dr Keri Alexander, Turning Point Alcohol and Drug Centre (11 April 2017); Meeting with Domestic Violence Victoria (20 April 2017); Meeting with Neighbourhood Justice Centre (11 April 2017).

130. Meeting with Dr Keri Alexander, Turning Point Alcohol and Drug Centre (11 April 2017).

131. Submission 23 (Victoria Police) 4; Witness Statement of Superintendent Timothy John Hansen, Community Safety Division, Victoria Police to the Royal Commission into Family Violence (9 July 2015) 15.

132. Submission 23 (Victoria Police) 4–5.

Potential risk to victim survivors

- 3.51 As used in other jurisdictions (primarily against offenders with substance-abuse issues) SCF programs have not expressly prescribed safeguards relating to people other than the offender. The offender, together with the response to the offender's behaviour, is the explicit concern of SCF approaches.
- 3.52 The potential to increase risks to victim survivors, however, is a primary consideration of any intervention in the family violence context. Some of the reasons that SCF approaches may lead to increased risks to victim survivors are:
- that SCF approaches may require victim survivors to report the offender's non-compliance with conditions of the order (for example, if there is a condition to not contact the victim survivor), which would likely lead the offender to blame the victim survivor for reporting the behaviour; and
 - an offender subject to an SCF approach carrying custodial penalties may externalise the blame for any breach leading to a custodial penalty, which may place the victim survivor at increased risk upon the offender's release.
- 3.53 The Council therefore considers the potential risk to victim survivors, especially in light of the evidence base for SCF approaches, to be a key consideration.

Stakeholders' views

- 3.54 A range of stakeholders strongly advised the Council of the need for heightened scrutiny when considering the introduction of reforms relating to family violence.¹³³
- 3.55 It is in this context that a number of stakeholders – including the Victorian Aboriginal Legal Service, the Victim Survivors' Advisory Council, the Law Institute of Victoria, the CASA Forum, the Eastern Community Legal Centre, the Victims of Crime Commissioner, the Salvation Army, Victoria Police and Victoria Legal Aid – considered the increased risk to the victim survivor and their family following the offender's release to outweigh any potential benefit of SCF responses, such as providing a brief period of protection or respite.¹³⁴
- 3.56 The Law Institute of Victoria stated that:
- An SCF approach to family violence offending runs the risk of escalating family violence despite seeking to reduce it ... [S]hort custodial periods would increase the immediate risk to victim survivors ... [and] do little to reduce an individual's level of aggression ... Victim survivors should not be placed in harm's way when there is no guarantee that SCF approaches will yield greater offender accountability or compliance.¹³⁵
- 3.57 The Eastern Community Legal Centre stated that in their experience:
- sanctions in the form of short periods of custody *do* increase the risk to victim/survivors and protected persons, particularly for offenders who have experience with the criminal justice system.¹³⁶

133. Submission 17 (Victoria Legal Aid) 7; Submission 23 (Victoria Police) 5–6; Submission 8 (Victims of Crime Commissioner) 7.

134. Submission 16 (Victorian Aboriginal Legal Service) 6; Meeting with Victim Survivors' Advisory Council (28 March 2017); Submission 19 (Law Institute of Victoria) 5; Submission 13 (Victorian CASA Forum) 4; Submission 20 (Eastern Community Legal Centre) 2; Submission 8 (Victims of Crime Commissioner) 7; Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 8; Submission 23 (Victoria Police) 5; Submission 17 (Victoria Legal Aid) 7.

135. Submission 19 (Law Institute of Victoria) 5, 15, citing Jessica L. Mooney, and Michael Daffern, 'The Relationship between Aggressive Behaviour in Prison and Violent Offending Following Release' (2015) 21(4) *Psychology, Crime & Law* 314, 316.

136. Submission 20 (Eastern Community Legal Centre) 2 (emphasis in original).

3.58 Similarly, the Salvation Army stated that:

While short, sharp stints of incarceration can remove the perpetrator from the family home and deter from immediate risks of family violence, it also has the potential to further aggravate the perpetrator, placing the victim at greater risk upon their release.¹³⁷

3.59 The Victims of Crime Commissioner further submitted:

We cannot take this risk in family violence matters, by implementing an extremely costly and unproven concept, in the vague hope that it might work.¹³⁸

3.60 The CASA Forum commented that, where the imposition of an SCF sanction did lead to heightened risk, they doubted that the police response or other support available to victim survivors would be sufficiently timely or protective to mitigate that risk.¹³⁹

3.61 The Victim Survivors' Advisory Council stated that an SCF approach would pose an especially high risk if the short period of custody imposed did not allow for the offender to engage in any treatment program (or indeed interrupted such a program).¹⁴⁰

The Council's view

3.62 The Council considers that the potential risk to victim survivors and affected family members posed by an SCF approach cannot be justified, especially given the contentious evidence on the effectiveness of such an approach. Further, as is discussed in detail in Chapter 4, the Council considers there to be better avenues for pursuing offender accountability that more appropriately balance the need to hold offenders accountable for their behaviour with the need to prioritise the safety of victim survivors.

Procedural fairness and human rights concerns

3.63 The SCF discussion paper provides an overview of the procedural fairness issues, as well as human rights concerns, raised by SCF approaches, and poses several questions addressing whether and how SCF approaches could operate within Victoria's criminal justice system.¹⁴¹

3.64 Procedural fairness is one of the hallmarks of an effective criminal justice system, requiring that all persons charged with a punishable offence be treated fairly. A number of procedural fairness rights are enumerated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), such as the right to:

- be presumed innocent until proven guilty;
- prompt and detailed notice of the charges alleged;
- adequate time and facilities to prepare a defence;
- communicate with a lawyer or advisor; and
- be tried in person and to defend oneself personally or through legal assistance.¹⁴²

137. Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 8.

138. Submission 8 (Victims of Crime Commissioner) 7.

139. Submission 13 (Victorian CASA Forum) 4.

140. Meeting with Victim Survivors' Advisory Council (28 March 2017).

141. Sentencing Advisory Council (2017), above n 1, 80–84.

142. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25.

- 3.65 In Victoria, many of these rights are given effect by provisions in the *Criminal Procedure Act 2009* (Vic). For example, accused persons are entitled to be provided with notice of the charges laid against them as well as details of the prosecution's case, in order to have time to prepare a defence.¹⁴³ It would be very difficult to reconcile these procedural fairness guarantees with the requirement of most SCF programs that condition contraventions be met with a response within 72 hours of detection.¹⁴⁴
- 3.66 In Hawaii's HOPE program, offenders who are alleged to have contravened their order are held in custody for up to three days prior to the hearing of their matter before a court. In describing the operation of Hawaii's HOPE program, the program's creator, Judge Alm, commented that, upon detection of a positive drug test:
- The defendant is transferred to the jail and we set a hearing two or three days later ... Initially the hearing was held the same day the defendant was taken into custody. When the number of probationers in HOPE grew, the Prosecutor's Office asked that the hearing be held in two days.¹⁴⁵
- 3.67 Holding offenders in custody following an alleged condition breach for up to three days prior to a hearing means that an offender has effectively already served their custodial punishment before their matter is determined by a court. This raises several issues, including whether non-judicial officers should be permitted to detain an offender in custody without judicial approval, whether serving a sanction prior to a judicial hearing conflicts with the presumption of innocence and whether the process conflicts with the right to fair notice.¹⁴⁶
- 3.68 In defence of what is, in effect, the serving of a custodial period before a finding of guilt, SCF researchers have pointed to the fact that, in almost all instances, the evidence of the failed drug test (which triggers the offender's arrest) is incontrovertible.¹⁴⁷ As of 2015, there had only been around 30 contested hearings in HOPE,¹⁴⁸ though this may be in part because of a perceived futility in challenging the allegation after already having served the punishment.
- 3.69 In circumstances that involve the breach of conditions other than an abstinence condition, however, the evidence is less likely to be as incontrovertible and may be open to challenge. In such circumstances, it is questionable whether such a fundamental suspension of natural justice (the right to be heard before the imposition of a punishment) could be justified.
- 3.70 Detention of alleged offenders prior to a judicial finding of guilt also raises issues relating to the separation of powers, and to the general principle that the involuntary detention of a person in custody by the state is punitive and can therefore only occur following the exercise of judicial power.¹⁴⁹
- 3.71 In *North Australian Aboriginal Justice Agency Limited v Northern Territory*, the High Court considered the Northern Territory's 'paperless' arrest powers, empowering police officers to arrest a person without a warrant (on the basis of an offence for which an infringement notice could be issued), and to hold that person in custody for up to four hours, or longer if the person is intoxicated.¹⁵⁰

143. *Criminal Procedure Act 2009* (Vic) ss 37, 41.

144. For further discussion of the difficulties with prosecution of contraventions within 72 hours, see Sentencing Advisory Council (2017), above n 1, 80–81.

145. Campbell et al. (2015), above n 81, 67.

146. For further discussion, see Sentencing Advisory Council (2017), above n 1, 81–82.

147. Teleconference with Dr Angela Hawken, New York University, and Dr Jonathan Kulick, New York University (30 March 2017).

148. Robert L. DuPont et al., *The HOPE Probation Strategy and Fidelity to It: A Summary* (2015) 14.

149. *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569.

150. *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569. See further *Police Administration Act* (NT) s 133AB(1).

- 3.72 The plaintiffs in that case argued that the legislation in question precluded the judiciary from exercising their supervisory function in relation to persons held in involuntary detention, in a way that was incompatible with the separation of powers doctrine, which they contended operated in the Northern Territory.¹⁵¹
- 3.73 The majority of the High Court upheld the legislation in question, narrowing the provisions to mean that someone detained under the legislation would need to be brought before a court as soon as reasonably practicable, with the four-hour period operating as an upper limit on what might be considered a reasonable amount of time.¹⁵²
- 3.74 If an SCF approach were introduced, the detention of alleged offenders prior to a hearing before an SCF judicial officer may raise issues similar to those ventilated in *North Australian Aboriginal Justice Agency Limited v Northern Territory*.
- 3.75 In addition, the Council notes the range of issues in relation to the application of SCF approaches to particular groups of offenders, as outlined in the SCF discussion paper. This includes concerns about the application of SCF approaches to Aboriginal and Torres Strait Islander offenders, and the interaction of SCF approaches with recommendations made by the Royal Commission into Aboriginal Deaths in Custody.¹⁵³

Stakeholders' views

- 3.76 A number of stakeholders – including the International Commission of Jurists Victoria, Liberty Victoria, the Victorian Bar and Criminal Bar Association, the Victorian Aboriginal Legal Service and the Human Rights Law Centre – considered an SCF approach to be unworkable for family violence offenders in the Victorian criminal justice system due to incompatibility with procedural fairness principles.¹⁵⁴
- 3.77 The International Commission of Jurists Victoria noted that 'procedural fairness', as a principle of natural justice, has a long history in Australia,¹⁵⁵ and commented that an SCF approach would detrimentally affect the 'right to be heard and comment on adverse material'.¹⁵⁶ The International Commission of Jurists Victoria also considered that expedited prosecutions of contraventions of orders would not allow sufficient time for an offender to seek legal representation and advice.¹⁵⁷ Similarly, the Victorian Bar and the Criminal Bar Association considered holding a contravention hearing with a 72-hour timeframe to be 'unfair, if not unrealistic, when one considers the need to gather evidence and the availability of resources to complete this task'.¹⁵⁸ Liberty Victoria expressed similar concerns, noting that 'increased pressure to deal with offenders expeditiously, have already jeopardised ... procedural fairness safeguards'.¹⁵⁹

151. *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569. For a summary of this case, see John Eldridge, "'Paperless arrests': *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 326 ALR 16' (2016) 37 *Adelaide Law Review* 283, 283–293.

152. *Ibid.*

153. For further discussion of the issues around the application of SCF approaches to specific groups, see Sentencing Advisory Council (2017), above n 1, 77–79.

154. Submission 21 (International Commission of Jurists Victoria) 13; Submission 15 (Liberty Victoria) 5; Submission 18 (Victorian Bar and Criminal Bar Association) 3; Submission 16 (Victorian Aboriginal Legal Service); Meeting with Human Rights Law Centre (5 May 2017).

155. Submission 21 (International Commission of Jurists Victoria) 4, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *Annetts v McCann* (1990) 170 CLR 569; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

156. Submission 21 (International Commission of Jurists Victoria) 4, citing Robert S. French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context* (2014) 47.

157. Submission 21 (International Commission of Jurists Victoria) 5.

158. Submission 18 (Victorian Bar and Criminal Bar Association) 3.

159. Submission 15 (Liberty Victoria) 5.

- 3.78 There was also strong opposition from several stakeholders to the notion that an offender could be held in custody prior to a contravention hearing, simply on the basis of an alleged contravention.¹⁶⁰
- 3.79 A number of stakeholders further considered SCF approaches to be inconsistent with the purposes of sentencing in Victoria¹⁶¹ and the principle of parsimony,¹⁶² which requires that a custodial sentence should not be imposed unless the purposes of the sentence cannot be achieved through the imposition of a less severe penalty, such as a CCO.¹⁶³
- 3.80 The submissions of the International Commission of Jurists Victoria and the Victorian Aboriginal Legal Service both noted the human rights concerns raised by the application of SCF approaches to Aboriginal and Torres Strait Islander offenders.¹⁶⁴ In particular, they raised the right to equality before the law,¹⁶⁵ and the need, in appropriate circumstances, to accommodate differences in order to better ensure equal protection.¹⁶⁶
- 3.81 The issue of procedural fairness also relates to the risk to victim survivors potentially posed by SCF approaches. Research has shown a close connection between offenders' sense of fair treatment and victim survivors' safety.¹⁶⁷ If justice is executed in a way that instils a sense of procedural injustice, it weakens the prospect of the offender's compliance, putting victim survivors and affected family members at risk.¹⁶⁸

The Council's view

- 3.82 The Council is of the view that an SCF approach to the management of family violence in Victoria would be inconsistent with procedural fairness and would detrimentally affect a number of human rights. Specifically:
- the timeframes envisioned by SCF approaches do not provide sufficient time for accused persons to seek legal advice and prepare a defence;
 - fixed and mandatory penalties of short periods of custody for condition breaches are inconsistent with the principle of parsimony;
 - SCF approaches may disproportionately affect Aboriginal and Torres Strait Islander peoples; and
 - SCF approaches would conflict with a number of human rights, especially for Aboriginal and Torres Strait Islander offenders.
- 3.83 The Council considers that these substantial and compelling considerations weigh strongly against the implementation of an SCF approach in Victoria.

160. Submission 18 (Victorian Bar and Criminal Bar Association) 4; Meeting with Human Rights Law Centre (5 May 2017).

161. Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 9–12.

162. Submission 21 (International Commission of Jurists Victoria) 9, 13.

163. Submission 21 (International Commission of Jurists Victoria) 11–12, citing *Sentencing Act 1991 (Vic)* ss 5(3), 5(4C).

164. Submission 21 (International Commission of Jurists Victoria); Submission 16 (Victorian Aboriginal Legal Service).

165. *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 8, 19; *Equal Opportunity Act 2010 (Vic)*.

166. For example, an Aboriginal and Torres Strait Islander offender may miss an appointment, in contravention of a CCO condition, due to a family funeral obligation, which is necessary for them to attend to maintain family and cultural ties: Submission 16 (Victorian Aboriginal Legal Service) 12; Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

167. Submission 21 (International Commission of Jurists Victoria) 6; Deborah Epstein, 'Procedural Justice: Tempering the State's Response to Domestic Violence' (2002) 43 *William and Mary Law Review* 1843, 1905; see also Chandra Gavin and Nora K. Puffett, *Criminal Domestic Violence Case Processing: A Case Study of the Five Boroughs of New York City* (2005) 38.

168. Submission 21 (International Commission of Jurists Victoria) 6; see generally Epstein (2002), above n 167, 1905.

Effectiveness of, and capacity for, short custodial sanctions

- 3.84 As outlined in the SCF discussion paper, all SCF programs examined by the Council use short periods of custody as the primary sanction for contravention of the conditions of an order.¹⁶⁹ There are a range of issues concerning the use of short terms of imprisonment in the context of family violence offenders, including:
- the lack of opportunity to meaningfully engage with offenders during custodial sentences of two to three days' imprisonment;
 - potential increased risks for offenders serving short terms of imprisonment in police custody; and
 - practical issues concerning the lack of facilities in Victoria to accommodate sentenced offenders for short terms of imprisonment.¹⁷⁰
- 3.85 Prison facilities managed by Corrections Victoria require offenders to undergo a reception process of two to three days duration, which makes it unfeasible for offenders serving short terms of imprisonment to be held at prison facilities.¹⁷¹
- 3.86 Police cells are similarly unfeasible and have been operating very close to, or beyond, capacity. They are currently being used to hold prisoners on remand, as well as sentenced prisoners. While there are 373 police cell beds in Victoria, there are limitations on the use of these beds due to restrictions on placing different offender groups (for example, women, children and protected prisoners) in shared cells and the need for available space for newly arrested detainees. Victoria Police advised the Council that there is extremely limited capacity to hold offenders on short terms of imprisonment required by an SCF approach.¹⁷²
- 3.87 The lack of capacity to hold sentenced prisoners in police custody in Victoria is likely to persist in the coming years. There has been an increase in the number of police officers, which may increase detected crime, and therefore arrests, and lead to an increased use of police cells to hold accused persons in custody.¹⁷³
- 3.88 Further, the Council notes that the Commonwealth Government's implementation of the Optional Protocol to the Convention against Torture, which governs how people are held in custody, will likely place greater restrictions on the mixing of sentenced and unsentenced prisoners in custody.¹⁷⁴ Further, compliance with the protocol may require that only those police cells that satisfy the requirements of the protocol and the convention be utilised, which may place even greater strain on police cells to meet even the existing capacity needs.

169. See Sentencing Advisory Council (2017), above n 1, 13–16.

170. Ibid 86–87.

171. Meeting with Corrections Victoria (12 October 2016).

172. Submission 23 (Victoria Police) 5–6.

173. In December 2016, the Victorian Government announced an additional 2,729 police officers to be recruited over four years: Premier of Victoria, 'Record Frontline Police Boost to Keep Victorians Safe', Media Release, (4 December 2016) <<http://www.premier.vic.gov.au/record-frontline-police-boost-to-keep-victorians-safe/>> at 19 June 2017.

174. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 42 ILM 26 (entered into force 22 June 2006).

Stakeholders' views

- 3.89 A number of stakeholders – including the Victim Survivors' Advisory Council, ACSO COATS, the Victorian Aboriginal Legal Service and the Salvation Army – questioned the utility of short periods of custody for family violence offenders. These stakeholders expressed the concern that there would be no opportunity to undertake rehabilitation or therapeutic interventions with an offender during such a short timeframe, and that instead the offender would simply be 'warehoused' for the duration.¹⁷⁵
- 3.90 The Victorian Aboriginal Legal Service commented that:
- Short term custody stays do nothing to resolve the underlying issues that create family violence, such as trauma and mental health issues. In fact, short term custodial stays may exacerbate such issues, as access to mental health treatment is unlikely to be guaranteed in short term detention.¹⁷⁶
- 3.91 The Salvation Army submitted:
- Short, sharp stints of incarceration have numerous impacts on perpetrators of family violence who are suffering from alcohol or drug addictions, none of which would address long term risk to victims nor the immediate impacts of alcohol or drugs. The criminogenic effects of incarceration are well known, and should be avoided where possible.¹⁷⁷
- 3.92 Several members of the Victim Survivors' Advisory Council, all of whom have lived experiences of family violence, questioned the use of short terms of imprisonment on the basis that it would simply perpetuate a cycle of ongoing offending, or otherwise would not provide for any therapeutic intervention with the offender.¹⁷⁸ RMIT University's Centre for Innovative Justice's submission suggested that 'the imposition of brief custodial sanctions can be useful in some contexts';¹⁷⁹ however, the Centre for Innovative Justice also noted that the evidence base for the effectiveness of short terms of imprisonment for family violence offenders is mixed.¹⁸⁰
- 3.93 One of the most common concerns raised by stakeholders was the resourcing implications of an SCF approach. Several stakeholders considered that the investment and resources that would be required to implement an SCF approach would be better directed towards utilising and improving existing frameworks, such as police detention powers in the *Family Violence Protection Act 2008* (Vic).¹⁸¹
- 3.94 In addition, Victoria Police expressed concern that if police were required to execute arrest warrants on offenders who contravene orders under an SCF approach, this would place substantial operational demands on their resources.¹⁸² Similarly, the Law Institute of Victoria stated that the criminal justice system does not currently have the capacity to accommodate an SCF approach, stating:

A massive increase in funding would be required to expand custodial capacity and support services to the extent necessary to implement a SCF approach without diverting resources away from other areas of an already chronically underfunded criminal justice system.¹⁸³

175. Meeting with Victim Survivors' Advisory Council (28 March 2017); Meeting with ACSO COATS (23 March 2017); Submission 16 (Victorian Aboriginal Legal Service) 6, 10; Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 8.

176. Submission 16 (Victorian Aboriginal Legal Service) 6.

177. Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 8.

178. Meeting with Victim Survivors' Advisory Council (28 March 2017).

179. Submission 24 (Centre for Innovative Justice, RMIT University) 14.

180. Submission 24 (Centre for Innovative Justice, RMIT University) 14.

181. Submission 8 (Victims of Crime Commissioner) 4; Submission 21 (International Commission of Jurists Victoria) 8; Submission 23 (Victoria Police) 4; Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

182. Submission 23 (Victoria Police) 6.

183. Submission 19 (Law Institute of Victoria) 5.

- 3.95 Similarly, the Victims of Crime Commissioner submitted that:
- To attempt implementation would, potentially, cost the tax-payers of this State tens (more likely hundreds) of millions of dollars in set-up and on-costs.¹⁸⁴
- 3.96 The Commissioner stated that, rather than introducing a new legislative sentencing scheme, 'family violence matters can be appropriately dealt with by utilising current offences and sentencing legislation, albeit differently to current practice'.¹⁸⁵ This sentiment was echoed by several other stakeholders, who considered existing legislative powers sufficient to respond to family violence offending and non-compliance with orders,¹⁸⁶ and to allow for family violence offenders to be detained following contraventions of orders, such as family violence intervention orders and family violence safety notices.¹⁸⁷

The Council's view

- 3.97 The Council notes the comments of Victoria Police, that there is very limited capacity to hold offenders for short terms of imprisonment in Victoria's current custodial infrastructure. Further, to increase the use of those facilities would raise a range of operational issues, such as the mixing of sentenced and unsentenced prisoners, and risks to the safety of both the offender and Victoria Police staff, particularly where the offender is affected by drug or alcohol withdrawal.
- 3.98 The Council also pays particular regard to the submissions of the Victim Survivors' Advisory Council, as well as organisations drawing on the experience of victim survivors in their submissions, such as the CASA Forum. These organisations have a particular insight into the dynamics of family violence and the difficulties of imposing sanctions such as short terms of imprisonment, when many offenders and victim survivors will be in continuing relationships or contact, and the imposition of the sanction may place a victim survivor in a position of increased risk. The complex dynamics of family violence require discretionary responses from judicial officers and are not amenable to SCF approaches, which demand the imposition of predetermined penalties for contravention behaviours.
- 3.99 Given the capacity issues, the inability of offenders to engage in therapeutic interventions and especially the potential increased risk to victim survivors, the Council does not support the use of short terms of imprisonment, as are often utilised in SCF approaches, for family violence offenders.
- 3.100 Where an offender has contravened a condition of a family violence intervention order or family violence safety notice, or has contravened a CCO by further offending, Victoria Police already has the ability to arrest an offender. Further, the court already has the ability to remand an offender pending the hearing of their charge where the offender poses a continuing risk to the victim survivor.

184. Submission 8 (Victims of Crime Commissioner) 14.

185. Submission 8 (Victims of Crime Commissioner) 4.

186. For example, the International Commission of Jurists Victoria submitted that '[t]he increased police detention powers in the *Family Violence Protection Act* should be sufficient to deal with potential breaches as they occur'. Submission 21 (International Commission of Jurists Victoria) 8.

187. One magistrate noted that family violence offenders are often remanded following contravention of a family violence intervention order or safety notice: Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

Undesirability of mandatory sanctions and a compliance-based approach

- 3.101 Another criticism levelled at SCF approaches is that they focus on punitive responses in the form of mandatory sentences to act as a deterrent, while neglecting to address the underlying drivers of an offender's behaviour.¹⁸⁸
- 3.102 While some proponents of SCF approaches argue that such approaches may be more therapeutic than originally perceived,¹⁸⁹ the Council has concluded, based on the available empirical evidence and information, that SCF approaches prioritise offender compliance with conditions of orders over engagement in treatment programs.¹⁹⁰
- 3.103 Further, a compliance-based approach contradicts Corrections Victoria's reformed Offender Management Framework, which uses the Level of Service/Risk, Need, Responsivity to address the underlying causes of offender behaviour.¹⁹¹ Corrections Victoria intends to reduce the level of prescriptiveness in its approach to managing an offender's non-compliance with CCO conditions, providing staff with a decision-making framework within which the staff member will use their professional judgment to make ongoing assessments about appropriate responses to an offender's non-compliance.¹⁹² This is in stark contrast to the zero-tolerance approach to non-compliance with conditions required by SCF approaches.
- 3.104 SCF approaches operate in such a way as to reduce discretion, both for the corrections officer in terms of pursuing a contravention proceeding and for the judicial officer in terms of determining the penalty for contravention. It is through a non-discretionary approach to prosecution and imposition of penalty that SCF approaches lay claim to 'certainty'.
- 3.105 The imposition of mandatory penalties, particularly mandatory custodial penalties, raises serious concerns about how such an approach could sit with the principles that underpin sentencing in Victoria, including:
- the principle of proportionality, requiring a court to impose a penalty that is just and appropriate in all of the circumstances;¹⁹³
 - the principle of parsimony, requiring a court to impose a sentence that is only as severe as is necessary to achieve the purposes of the sentence;¹⁹⁴ and
 - the express legislative requirement that a custodial sentence is to be a sentence of last resort.¹⁹⁵
- 3.106 Mandatory sentencing schemes emphasise certainty between the offence and the penalty. The desire for certainty must also be balanced with the well-established principle that sentences should be proportionate to the gravity of the offence and the culpability of the offender. Mandatory penalties have the potential of treating unlike cases (or contravention behaviours) alike, which may result in certainty but would also constitute inappropriate consistency and be unjust.
- 3.107 Research has also shown mandatory sentencing schemes to have a disproportionate impact on disadvantaged or marginalised groups.¹⁹⁶

188. Sentencing Advisory Council (2017), above n 1, 26.

189. Alm (2016), above n 42, 1195–1214; Bartels (2016), above n 42, 30–49.

190. Sentencing Advisory Council (2017), above n 1, 29–30.

191. For further discussion of Corrections Victoria's reformed model, see Sentencing Advisory Council (2017), above n 1, 54–55.

192. Meeting with Corrections Victoria (7 November 2016).

193. *Sentencing Act 1991* (Vic) s 5(1)(a).

194. *Sentencing Act 1991* (Vic) s 5(3).

195. *Sentencing Act 1991* (Vic) s 5(4).

196. An example is the disproportionate impact of the (since repealed) mandatory sentencing laws for property offences on Aboriginal people in the Northern Territory. For further discussion, see Australian Human Rights Commission, 'Laws Mandating Minimum Terms of Imprisonment ("Mandatory Sentencing") and Indigenous People', in Australian Human Rights Commission (ed.) *Social Justice Report 2001* (2001) 101–131.

Stakeholders' views

- 3.108 A range of stakeholders opposed SCF approaches on the basis that these approaches overemphasise compliance with conditions.¹⁹⁷ Corrections Victoria in particular questioned the notion that simply complying with conditions indicates the development of pro-social behaviours, or a reduction in family violence.¹⁹⁸
- 3.109 In their submission, the Law Institute of Victoria provided a number of hypothetical case studies to illustrate the potential danger of focusing on condition compliance in the context of family violence.¹⁹⁹ For example, a family violence offender might be prohibited from contacting their ex-partner but might inadvertently cross paths with them in the street and receive an SCF response.
- 3.110 Victoria Legal Aid considered SCF approaches to contradict therapeutic principles, which attempt to address the underlying causes of offending behaviours and the circumstances that may contribute to offending.²⁰⁰ Similarly, the Law Institute of Victoria further commented that SCF approaches are based on the deterrence/rational choice approach to behavioural change.²⁰¹
- 3.111 The Neighbourhood Justice Centre advised that it has moved away from a solely compliance-based approach for the management of offenders on CCOs, instead taking a broader view that involves first equipping offenders to complete orders. This approach requires linking offenders to services and programs prior to being placed on a CCO. The Neighbourhood Justice Centre considered SCF approaches and other similar models that emphasise compliance with conditions of orders to be 'reactive', and that such approaches may simply set up offenders to fail.²⁰²
- 3.112 The Neighbourhood Justice Centre emphasised the importance of creating a 'scaffolding' around an offender, to ensure that an offender is in the best position to engage with treatment and services and to refrain from criminal behaviour:
- The intention ... is to ensure that the person is in the best position to be able to maintain (a) the treatment readiness that they need to maintain, (b) their engagement with services, (c) refraining from engaging in criminal behaviour. That is about getting them to a point where they can complete the conditions of the order, as opposed to 'comply' with the conditions of the order.²⁰³
- 3.113 Victoria Police noted the possible inconsistency in directing a large amount of resources towards enforcing sentencing order conditions within expedited timeframes while other kinds of offending are met with a less prompt response from the criminal justice system. Such an approach may suggest to victim survivors that non-compliance with a CCO condition, for example, attendance at a men's behaviour change program (MBCP), is of greater importance to the system than the prosecution of further offending.²⁰⁴

197. Meeting with Corrections Victoria (15 March 2017); Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 12; Submission 19 (Law Institute of Victoria) 13; Meeting with Neighbourhood Justice Centre (11 April 2017). In addition, although RMIT University's Centre for Innovative Justice disagreed with the Council's characterisation of SCF approaches, the Centre did oppose the introduction of a purely compliance-based approach to family violence offenders in Victoria: Submission 24 (Centre for Innovative Justice, RMIT University) 13.

198. Meeting with Corrections Victoria (15 March 2017).

199. Submission 19 (Law Institute of Victoria) 14.

200. Submission 17 (Victoria Legal Aid) 7.

201. Submission 19 (Law Institute of Victoria) 3.

202. Meeting with Neighbourhood Justice Centre (11 April 2017).

203. Meeting with Neighbourhood Justice Centre (11 April 2017).

204. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

The Council's view

- 3.114 The Council does not consider purely compliance-based approaches to offender management to reflect best-practice approaches to managing family violence offenders. An overemphasis on compliance with conditions as part of an SCF approach is likely to represent an inappropriate allocation of resources.
- 3.115 Further, a reliance on mandatory sanctions, without the necessary discretion to account for particular circumstances, risks injustice, particularly where the alleged contravening behaviour is not of a 'binary' nature (such as having passed or failed a drug test) but rather it may be contested.
- 3.116 As stated in its *Sentencing Guidance in Victoria: Report*, the Council considers mandatory sentencing schemes to be incompatible with the framework of structured discretion for sentencing in Victoria and liable to result in 'certainty' in the form of inappropriate consistency and, ultimately, injustice.²⁰⁵

Disproportionate impact on particular offender groups

- 3.117 In the SCF discussion paper, the Council outlined particular offender groups for whom the application of an SCF approach may raise specific issues.²⁰⁶ The Council suggested that the following groups might be disproportionately affected by SCF approaches:
- low-risk offenders (who might be drawn away from pro-social factors such as employment and education, and into contact with higher-risk offenders);
 - offenders with cognitive disabilities (who may fail to adhere to conditions of orders due to difficulties with understanding and meeting the demands asked of them);
 - Aboriginal and Torres Strait Islander offenders (for whom short terms of imprisonment pose an acute risk, and who are already overrepresented in Australian prisons); and
 - female offenders (who are often themselves victim survivors of family violence, and who are also more likely to have primary carer responsibilities).

Stakeholders' views

- 3.118 The Victorian Aboriginal Legal Service raised issues concerning the application of an SCF approach to Aboriginal and Torres Strait Islander offenders, particularly the potential effect of short terms of imprisonment, stating:

There are a number of Aboriginal deaths in custody cases – such as that of Ms Dhu in Western Australia – whereby an Aboriginal person has died in custody on a short term stay where adequate mental, physical and cultural health provisions were not provided. In fact, it could be argued that it is within these short term jail spells in police watch houses that Aboriginal deaths in custody are most likely to occur ...

The Royal Commission into Aboriginal Deaths in Custody contains strong recommendations about ensuring incarceration is a last resort for Aboriginal community members. Despite this, the evidence shows that Aboriginal and Torres Strait Islander incarceration across the country is higher than ever. Introducing what amounts to short term mandatory sentencing is in direct conflict with the aims of the [Royal Commission into Aboriginal Deaths in Custody], and will only serve to compound the already existing disparity in indigenous representation in prisons.²⁰⁷

205. See further Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016) 231.

206. Sentencing Advisory Council (2017), above n 1, 77–79.

207. Submission 16 (Victorian Aboriginal Legal Service) 10, 12.

- 3.119 Similar comments were made by the International Commission of Jurists Victoria and the Human Rights Law Centre. The International Commission of Jurists Victoria argued that SCF approaches, if applied to Aboriginal and Torres Strait Islander offenders, would:
- offend against *Charter* and *Equal Opportunity* provisions that have the objectives of non-arbitrary treatment and of positive discrimination to lessen the numbers of Aboriginal people in custody.²⁰⁸
- 3.120 The Human Rights Law Centre further noted that SCF approaches might conflict with both the Royal Commission into Aboriginal Deaths in Custody and the *International Conventions on the Elimination of All Forms of Racial Discrimination*.²⁰⁹
- 3.121 Representatives from the Victorian Aboriginal Community Services Association and the Victorian Aboriginal Legal Service further noted that there are often complex issues that can contribute to an Aboriginal and Torres Strait Islander person's apparent non-compliance with a court order,²¹⁰ and noted that for some Aboriginal and Torres Strait Islander people, a short term of imprisonment may hold little deterrent value:
- For many Aboriginal people, sadly jail is a familiar aspect of life and does not provide much of a deterrent at all (in fact, some former inmates say it is easier to be in jail than on the outside).²¹¹
- 3.122 The Victorian Aboriginal Legal Service further raised concerns that SCF approaches could increase the rates of removal of Aboriginal and Torres Strait Islander children from their homes (if their primary caregiver receives a short term of imprisonment). They noted that this could then contribute to the further criminalisation of another generation of Aboriginal and Torres Strait Islander children, as 'removing an Aboriginal child from their family is the first step in an almost inevitable progression to youth justice and the adult prison system'.²¹²
- 3.123 The Victorian Aboriginal Legal Service stated that because they are seeing an increasing number of Aboriginal and Torres Strait Islander women on CCOs and children on youth justice orders, an SCF approach would risk further exacerbating the incarceration of Aboriginal and Torres Strait Islander women and children.²¹³ In noting this, the Victorian Aboriginal Legal Service stated that 'the impacts of this type of scheme have the potential to be more harmful than the purpose the proposed legislation is attempting to curb'.²¹⁴
- 3.124 Lastly, the Victorian Aboriginal Legal Service submitted that they would prefer to see increased support for the development of programs that target the underlying drivers of family violence in Aboriginal communities, and increased access to culturally appropriate counselling services for both victim survivors and offenders.²¹⁵
- 3.125 Several stakeholders also raised the potential adverse effects of an SCF approach for other offender groups.

208. Submission 21 (International Commission of Jurists Victoria) 8.

209. Meeting with Human Rights Law Centre (5 May 2017), citing Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) and the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

210. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

211. Submission 16 (Victorian Aboriginal Legal Service) 7. Similar comments were made at one of the Council's discussion forums: Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

212. Submission 16 (Victorian Aboriginal Legal Service) 7.

213. Submission 16 (Victorian Aboriginal Legal Service) 8. See also Adrienne Walters and Shannon Longhurst, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 10.

214. Submission 16 (Victorian Aboriginal Legal Service) 14.

215. Submission 16 (Victorian Aboriginal Legal Service) 14.

- 3.126 RMIT University's Centre for Innovative Justice submitted that offenders with acquired brain injury would be disproportionately impacted by any regime that increased the punishment of administrative contraventions of orders.²¹⁶
- 3.127 inTouch Multicultural Centre Against Family Violence noted that SCF approaches may have a disproportionate effect on female offenders from culturally and linguistically diverse communities.²¹⁷ The concerns about the potential for SCF approaches to increase the rates of removal of Aboriginal and Torres Strait Islander children from their homes similarly apply to the children of non-Indigenous offenders with primary carer responsibilities, as the children may face removal into care to mirror the short term of imprisonment to be served by their guardian.

The Council's view

- 3.128 The Council shares many of the concerns of the Victorian Aboriginal Legal Service, and other stakeholders,²¹⁸ that an SCF approach is likely to have an adverse effect on Aboriginal and Torres Strait Islander offenders, and that it would be inconsistent with the recommendations made by the Royal Commission into Aboriginal Deaths in Custody. SCF approaches emphasise strict compliance with conditions and do not allow a sentencing judge the flexibility to consider the particular circumstances of Aboriginal and Torres Strait Islander offenders, offenders with cognitive disabilities, low-risk offenders and female offenders.
- 3.129 The Council considers the potential disproportionate impact of SCF approaches on a range of offender groups to be a further reason that SCF approaches are undesirable and inappropriate for sentencing family violence offenders in Victoria.

Conclusion on the desirability of a 'swift, certain and fair' approach to family violence offenders in Victoria

- 3.130 The Council concludes that SCF approaches do not have an adequate evidence base for family violence offenders and pose a range of difficulties for application in the family violence context. Crucially, the Council considers that SCF approaches would potentially increase the risks to victim survivors, and these risks cannot be justified on the current evidence. SCF approaches also raise a range of procedural fairness and human rights issues and have the potential to disproportionately affect particular groups in Victoria, including Aboriginal and Torres Strait Islander people. In addition, there are serious concerns about the capacity of the current criminal justice system to accommodate an SCF approach.
- 3.131 In light of its research and consultation, the Council makes the following recommendation:

Recommendation 1

There is insufficient evidence that a 'swift, certain and fair' approach to sentencing and sentence management of family violence offenders would be effective or appropriate in Victoria, and such an approach should not be implemented.

216. Submission 24 (Centre for Innovative Justice, RMIT University) 13–14. One stakeholder, however, noted that an SCF approach may be preferable for a select group of offenders with cognitive impairments, as it creates a more clear link between the offending and the consequence than the current timeframes for criminal justice responses: Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017).

217. Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017).

218. Submission 21 (International Commission of Jurists Victoria) 7–9; Submission 15 (Liberty Victoria) 5; Meeting with Human Rights Law Centre (5 May 2017).

New 'family violence offender compliance order' considered and dismissed

- 3.132 The Council's SCF discussion paper raised the possibility of a new sentencing order, the 'family violence offender compliance order'.²¹⁹ This order was to be directed at family violence offenders who would otherwise have served a term of imprisonment, and it would enable the possibility of short terms of imprisonment as a penalty for contravention of conditions of the order.
- 3.133 The family violence offender compliance order was modelled on the drug treatment order and conceived as comprising two parts:
1. a custodial component of relatively short length (for example, a period of up to three months) that would be unactivated, in a similar manner to the unactivated custodial component of the drug treatment order;²²⁰ and
 2. a community component with conditions based on the existing conditions of a CCO, including such conditions as requiring the offender to attend an MBCP and drug and/or alcohol treatment.
- 3.134 The Council tested this proposal in consultation with a range of stakeholders. While some stakeholders were supportive of such an order for family violence offenders,²²¹ the majority were not.²²²

Substance abuse or addiction contrasted with family violence

- 3.135 The primary reason most stakeholders were opposed to family violence offenders being sentenced to a specific order, in a manner similar to offenders with substance-abuse issues, was based on the differences between these two groups of offenders.
- 3.136 In order to be eligible for a drug treatment order, there must have been a causative nexus between an offender's drug or alcohol addiction and their offending, the offending must have been non-violent, and the offender must have pleaded guilty and consented to comply with all of the requirements of the Drug Court program.²²³
- 3.137 Based on a wealth of consistent evidence demonstrating the success of Drug Courts as a best-practice response to such offenders,²²⁴ there is a clear justification for allowing such offenders to remain in the community in order to treat the underlying cause of their offending, rather than sentencing them to a term of imprisonment.
- 3.138 The same cannot be said for family violence offenders. In order to receive a sentence equivalent to a drug treatment order, a family violence offender would similarly need to have committed an offence of such seriousness that it warranted a custodial order. In such circumstances, there is no compelling justification not to impose an immediate custodial order.

219. Sentencing Advisory Council (2017), above n 1, 71–72.

220. *Sentencing Act 1991* (Vic) ss 18ZC–18ZE.

221. Submission 10 (Magistrates' Court of Victoria) 9. At least one participant at the Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017) was in favour of the family violence offender compliance order.

222. Submission 8 (Victims of Crime Commissioner) 10; Submission 13 (Victorian CASA Forum) 5; Submission 19 (Law Institute of Victoria) 24; Submission 18 (Victorian Bar and Criminal Bar Association) 4; Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017); Meeting with Corrections Victoria (15 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

223. *Sentencing Act 1991* (Vic) s 18Z(1).

224. For a summary of Drug Courts in operation in Australia, as well as access to evaluations of Australian Drug Courts and an overview of the international research, see Australian Institute of Criminology, 'Australian Responses to Illicit Drugs: Drug Courts' (Australian Institute of Criminology, 2017) <http://www.aic.gov.au/criminal_justice_system/courts/specialist/drugcourts.html> at 5 July 2017.

- 3.139 Absent drug and alcohol addiction, there is no analogous causal nexus for family violence offenders between a health condition and an offender's commission of family violence. For example, an offender addicted to drugs or alcohol who has committed theft may have stolen in order to have money to pay for their drug addiction. There is no corresponding justification for an offender who commits family violence that warrants the same policy response.
- 3.140 Victoria Legal Aid's submission summarised the views of a number of stakeholders, stating:
- We strongly believe that offences committed in the context of family violence should be subject to the same criminal law sanctions that apply to other serious criminal offending. Departure from our existing laws and processes through the creation of specific categories of offences or specific sentencing regimes for family violence offenders may undermine efforts to bring family violence into focus and make perpetrators of family violence accountable in the same way that people who commit offences in other contexts are made accountable.²²⁵
- 3.141 Ultimately, the Council considered that the family violence offender compliance order was premised on the effectiveness of short terms of imprisonment for family violence offenders, and was designed to implement an SCF approach that aligns with the elements of HOPE and HOPE-like programs.²²⁶ However, in light of all of the concerns discussed above, especially the absence of an evidence base to warrant an SCF approach to family violence offenders, the introduction of such an order is unjustified.

Use of imprisonment and parole

- 3.142 In consulting on the family violence offender compliance order, it was noted that such an order, which would include an unactivated custodial sentence, would be inappropriate for most family violence offenders whose offending was of such seriousness as to warrant a custodial sentence to be served.²²⁷ The Council considered whether such an order might then only apply to offenders who are required to serve an immediate sentence of imprisonment before commencing the new order.
- 3.143 The Council heard from a number of stakeholders that such an order involving the close supervision of offenders in the community, in combination with a term of imprisonment, can already be achieved through the imposition of a term of imprisonment with a non-parole period.²²⁸
- 3.144 The broad powers of the Adult Parole Board can require a parolee to attend before the Board upon any report of a change in circumstances or dynamic risk factors, any report of a pattern of non-compliance or similar evidence of threatened or actual non-compliance.²²⁹
- 3.145 The Council therefore notes that, when sentencing, judicial officers may wish to give particular consideration to the type of supervision that would be most appropriate for a family violence offender upon release from custody following a term of imprisonment. Specifically, judicial officers may wish to consider whether the increased monitoring powers available to the Adult Parole Board would be more appropriate than supervision in the community on a CCO for some family violence offenders required to serve an immediate term of imprisonment.

225. Submission 17 (Victoria Legal Aid) 5.

226. Sentencing Advisory Council (2017), above n 1, 71–72.

227. Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

228. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017); Meeting with Magistrate Spencer and Magistrate Hawkins, Magistrates' Court of Victoria (4 April 2017); Meeting with Neighbourhood Justice Centre (11 April 2017).

229. *Corrections Act 1986* (Vic) ss 71A, 74, 77, 77D, 78–78C.

4. Promoting accountability of family violence offenders on a community correction order

Overview

- 4.1 The Council has recommended against the implementation of an SCF approach in Victoria based on the key elements of SCF programs. However, the Council considers that there are a number of reforms that could strengthen existing systems and further the aims of such an approach. These reforms include more prompt and targeted responses to family violence offenders on CCOs. Such reforms are intended to promote accountability for family violence offenders on CCOs.
- 4.2 The Council notes that responding to family violence is a responsibility shared across government, the criminal justice system and the wider community, and that there are a range of reforms currently being undertaken across a number of sectors that aim to reduce the prevalence of, as well as improve system responses to, family violence (see [2.5]–[2.50]). The recommendations contained in this chapter are confined to the issues raised by the terms of reference and must be considered within the context of broader changes to existing systems following the Royal Commission into Family Violence.
- 4.3 This chapter presents the Council's recommendations on:
- expanding the Magistrates' Court of Victoria's fast tracking listing process to include charges against family violence offenders for contravening a CCO;
 - better utilising the existing tool of judicial monitoring by increasing its use and ensuring consistency in how it is used;
 - fully resourcing all agencies and organisations affected by these reforms; and
 - ensuring that these reforms are properly evaluated.
- 4.4 The Council's recommendations aim to strengthen the system's response to family violence offenders on CCOs, promote opportunities for meaningful change for family violence offenders and, ultimately, contribute to better protection of Victorians from family violence.

Fast tracking listing process for charges of contravening a community correction order for family violence offenders

- 4.5 In 2014, the Magistrates' Court of Victoria began trialling the fast tracking listing process for criminal proceedings involving family violence.²³⁰ This involves hearing criminal proceedings involving family violence within expedited timeframes so that the proceedings are finalised within four months.²³¹ The aim of the fast tracking listing process is to increase offender accountability by having family violence matters dealt with in a timely manner.²³² The process is not exclusively concerned with sentencing, but it does represent a key strategy designed to facilitate prompt court responses to family violence offending.
- 4.6 At the moment, if a family violence offender has been sentenced to a CCO and is subsequently prosecuted for contravening the order, the proceedings for the charge of contravening a CCO are not, as a matter of course, included in the fast tracking listing process.²³³ Corrections Victoria has noted that there are considerable listing delays in some court locations. It is common for contravention proceedings to be first listed six months after the charges have been laid, and finalisation of the matter can take 18 months or longer at some locations.²³⁴
- 4.7 The Dandenong Magistrates' Court will soon commence a trial of fast tracking charges of contravening a CCO (see [2.46]–[2.50]). In addition, some magistrates already informally include charges of contravening a CCO in the fast tracking listing process.²³⁵
- 4.8 The SCF discussion paper posed a question on whether the fast tracking listing process should be formally extended to include charges of contravening a CCO.

Stakeholders' views

- 4.9 There was broad support for extending the fast tracking listing process to include charges of contravening a CCO in circumstances of family violence, most notably from the Magistrates' Court of Victoria,²³⁶ as well as other organisations such as McAuley Community Services for Women and Victoria Legal Aid.²³⁷ Other stakeholders also commented generally on the importance of prompt responses from the criminal justice system to family violence offending.²³⁸
- 4.10 The Victims of Crime Commissioner strongly supported the inclusion of charges of contravening a CCO in the family violence fast tracking listing process, citing the comments of the then coroner Judge Ian Gray in relation to the death of Luke Batty:

The well known fact [is] that if public authorities, including courts, do not act quickly in respect of intimate partner violence, then further incidents are likely to occur and become more serious, and potentially fatal.²³⁹

230. For a description of the fast tracking listing process, see Sentencing Advisory Council (2017), above n 1, 41.

231. See for example Magistrates' Court of Victoria (2015), above n 16.

232. Pauline Spencer, 'Strengthening the Web of Accountability: Criminal Courts and Family Violence Offenders' (2016) 41(4) *Alternative Law Journal* 225, 227.

233. Meeting with Deputy Chief Magistrate Broughton and Magistrate Hawkins, Magistrates' Court of Victoria (24 October 2016).

234. Meeting with Corrections Victoria (15 March 2017).

235. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

236. Submission 10 (Magistrates' Court of Victoria) 6; Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017).

237. Submission 11 (McAuley Community Services for Women) 5; Victoria Legal Aid stated that 'the fast track listing model provides a means of providing prompt legal consequences for offending in the context of family violence', and 'has the potential for greater use': Submission 17 (Victoria Legal Aid) 4; Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

238. Submission 18 (Victorian Bar and Criminal Bar Association) 2; Submission 9 (Violence Prevention Group, Deakin University) 5; Submission 24 (Centre for Innovative Justice, RMIT University) 4–5, 17–18.

239. Submission 8 (Victims of Crime Commissioner); *Finding with Inquest into the Death of Luke Geoffrey Batty*, COR 2014 0855 (28 September 2015) [579].

- 4.11 Corrections Victoria also supported including charges of contravening a CCO in the fast tracking listing process and said that this would not have a significant effect on their resources. Indeed, Corrections Victoria said that this might reduce the work of Court Assessment and Prosecutions Services staff because they would not have to obtain months of updated information about the offender's behaviour between the charge date and the listing date.²⁴⁰ In addition, Corrections Victoria has now streamlined processes for preparing briefs of evidence for contravention reports and said that such briefs could be completed within the expedited timelines.²⁴¹
- 4.12 There are, however, a number of organisations for which there will be resource implications. Victoria Legal Aid emphasised the need for appropriate funding to support their ability to provide legal representation for accused persons within the expedited timeframes.²⁴²
- 4.13 Between July 2015 and June 2016, Victoria Legal Aid duty lawyers across the state made 5,789 appearances in matters where a person contravened a CCO and also breached a family violence order.²⁴³ Victoria Legal Aid submitted that within their existing resources, duty lawyers would be unable to assist more people without compromising effective access to justice or the quality of the legal services provided.²⁴⁴
- 4.14 Further, inTouch Multicultural Centre Against Family Violence noted that there are already existing shortages of interpreters, which poses challenges for the current fast tracking of family violence matters.²⁴⁵ In addition, the Magistrates' Court of Victoria will need additional resources in order to ensure that including new offences in the fast tracking listing process does not delay the hearing of other criminal matters that do not involve family violence.

The Council's view

- 4.15 Given the importance of promoting swift responses to non-compliance with court-ordered conditions, the Council is of the view that charges of contravening a CCO should be formally included in the Magistrates' Court of Victoria's fast tracking listing process. No stakeholders opposed this recommendation, and some courts are already doing this in practice. There are, however, a number of agencies that will need to receive additional resources in order to accommodate expedited workloads.
- 4.16 Further, although Corrections Victoria commented that expediting the listing of charges of contravening a CCO is unlikely to have a further impact on their resources,²⁴⁶ this may need to be reassessed following the implementation of the recommendation.

Recommendation 2

When a family violence offender has been sentenced in the Magistrates' Court of Victoria to a community correction order, any subsequent charge alleging a contravention of that order should be listed in accordance with the Magistrates' Court of Victoria's family violence fast tracking listing process.

240. Meeting with Corrections Victoria (15 March 2017).

241. Meeting with Corrections Victoria (15 March 2017).

242. Meeting with Victoria Legal Aid (15 March 2017).

243. Submission 17 (Victoria Legal Aid) 10.

244. Submission 17 (Victoria Legal Aid) 10.

245. Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017).

246. Meeting with Corrections Victoria (15 March 2017).

Contravention of a community correction order by family violence offenders sentenced in the higher courts

- 4.17 As described in the SCF discussion paper, approximately 89 offenders received a CCO in the higher courts (usually the County Court) for family violence related offending in the 2015–16 financial year. This comprised 39 offenders who received a CCO and 50 offenders who received a term of imprisonment combined with a CCO.²⁴⁷
- 4.18 In light of the small volume of family violence related contravention matters that come before the higher courts, the Council has not made any specific recommendations in relation to the creation of a fast tracking listing process in the County Court for family violence offenders charged with contravening a CCO.
- 4.19 Instead, the Council's recommendation focuses on the Magistrates' Court, on the basis that this jurisdiction determines the overwhelming majority of matters involving contravention of a CCO by a family violence offender, and the recommendation represents an extension to the existing fast tracking listing process.
- 4.20 Nevertheless, the Council considers that the County Court may wish to examine ways to expedite the listing of such matters, where possible.

Judicial monitoring on a community correction order

- 4.21 If a court is considering sentencing a family violence offender to a CCO, the court must order Corrections Victoria to prepare a pre-sentence report.²⁴⁸ A Corrections Victoria staff member will then meet with the offender, assess their circumstances and then write a report advising the court about the offender's suitability for the proposed order, the availability of any necessary services and the appropriate optional conditions.²⁴⁹ If the court then decides to sentence an offender to a CCO, it must attach a number of mandatory conditions, and it must attach at least one of a number of optional conditions. One of the optional conditions a court may impose is a judicial monitoring condition.²⁵⁰
- 4.22 Judicial monitoring involves courts (usually post-sentence) monitoring an offender's compliance with court-imposed conditions. This might include, for example, monitoring their attendance at treatment and rehabilitation programs, the quality of their participation in such programs, their abstinence from substances and their contact with prohibited persons. The Western Australian Law Reform Commission has said that the purpose of judicial monitoring:
- is to encourage compliance with the court's orders and to enable swift and effective responses to non-compliance or changes in the offender's circumstances.²⁵¹

247. These figures are based on the Director of Public Prosecution's family violence 'flag' and is likely to understate the number of family violence offenders: see Sentencing Advisory Council (2017), above n 1, 35.

248. *Sentencing Act 1991* (Vic) s 8A.

249. *Sentencing Act 1991* (Vic) s 8B.

250. For a detailed explanation of CCOs, as well as the mandatory and optional conditions of a CCO, see Sentencing Advisory Council, *Contravention of Community Correction Orders* (2017) 3–5.

251. Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report*, Project No. 96 (2009) 5.

- 4.23 There are, however, two distinct types of judicial monitoring: surveillance and supervision.²⁵² The *surveillance* version of judicial monitoring involves a judicial officer occasionally checking in with the offender and generally 'keeping an eye on them'. The *supervision* version of judicial monitoring, on the other hand, is more intensive. Supervision-focused judicial monitoring can involve some or all of the following:
- repeated communication of behavioural expectations and consequences of non-compliance;
 - individualised communication between the offender and the judicial officer that aims to engage and motivate the offender; and
 - application of incentives and sanctions to reinforce linkage between good and bad behaviour and resulting consequences.²⁵³
- 4.24 In Victoria, the judicial monitoring condition currently allows the sentencing judicial officer to fix dates on which an offender must reappear before the judicial officer for review of their progress on the order. The condition is designed to be used when the judicial officer believes it is necessary to review the offender's compliance with the order.²⁵⁴ Judicial officers retain considerable discretion in determining when the condition should be used, how it should be employed in practice and how often review hearings take place.
- 4.25 Currently, at the judicial monitoring hearing, the court has the power to demand the production of certain information, and the power to order the attendance and evidence of certain witnesses.²⁵⁵ If an offender fails to appear at a judicial monitoring hearing, the court may also issue a warrant to arrest the offender.²⁵⁶ The court's powers are otherwise relatively limited. At the judicial monitoring hearing, the court may cancel the judicial monitoring condition, vary the condition to increase or decrease the time between review hearings, set a date for a further review hearing, order that more information be provided at a later review hearing or take no further action.²⁵⁷

Judicial monitoring of offenders with substance-abuse issues

- 4.26 The evidence around the effectiveness of judicial monitoring is largely drawn from studies undertaken in drug treatment courts, primarily in American jurisdictions. Most of these studies report positive results from judicial monitoring, and recommend tailoring the intensity and frequency of the hearings to suit the offender's individual risk level.²⁵⁸ This aligns with research on Victoria's Drug Court, where judicial monitoring is one of the key intervention strategies, having achieved a 34% greater reduction in reoffending over two years than a control group of offenders not in the Drug Court.²⁵⁹ That said, judicial monitoring is just one of the interventions utilised in the Drug Court; therefore, it is difficult to identify the precise effect that judicial monitoring might have had on the positive outcomes of the evaluation.

252. Michael Rempel et al., 'Does Judicial Monitoring Deter Domestic Violence Recidivism' (2008) 14(2) *Violence Against Women* 185, 203.

253. *Ibid.*

254. Explanatory Memorandum, Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic) 14. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3290 (Robert Clark, Attorney-General).

255. *Sentencing Act 1991* (Vic) s 48L(1).

256. *Sentencing Act 1991* (Vic) s 48L(3).

257. *Sentencing Act 1991* (Vic) s 48L(2).

258. Douglas B. Marlowe et al., 'Adapting Judicial Supervision to the Risk Level of Drug Offenders: Discharge and 6-Month Outcomes from a Prospective Matching Study' (2007) 88(Suppl 2) *Drug and Alcohol Dependence* S4, S4–S13; Douglas B. Marlowe et al., 'Are Judicial Status Hearings a "Key Component" of Drug Court? Six and Twelve Months Outcomes' (2005) 79(2) *Drug and Alcohol Dependence* 145, 145–155.

259. KPMG, *Evaluation of the Drug Court of Victoria: Final Report* (2014) 4.

Judicial monitoring of family violence offenders

- 4.27 The Law Institute of Victoria, in its submission, identified judicial monitoring as one of the 'most promising approaches in reducing family violence offending'.²⁶⁰ There are a number of advantages to using such hearings for family violence offenders, most notably the potential to strengthen the web of accountability around an offender and emphasise 'the clear role of the legal system in keeping family violence offenders accountable'.²⁶¹
- 4.28 There is currently relatively little empirical evidence on the effectiveness of judicial monitoring of family violence offenders, especially in Australia. One group of researchers in New York published a report in 2005 finding that judicial monitoring had little effect on recidivism.²⁶² However, those same researchers published a further report in 2012 using a stronger experimental design (a randomised controlled trial) and found more promising support for the use of judicial monitoring for family violence offenders.²⁶³ Other studies have also found positive effects from judicial monitoring of family violence offenders.²⁶⁴ None of these studies, however, took place in a Victorian (or Australian) context.
- 4.29 The 2005 report was a quasi-experimental study of two groups of offenders in the Bronx (in New York), comparing offenders who received judicial monitoring with cases in which the offenders did not. The study found no difference between the two groups for rearrest or reoffending rates. However, in addition to the positive results for judicial monitoring of family violence offenders in the 2012 report, the practice of 'judicial monitoring' in the 2005 report also differed significantly from the use of judicial monitoring in Victoria.
- 4.30 First, in the 2005 report, the 'judicial hearing officer' overseeing judicial monitoring was a retired judge, not a sitting judicial officer. This meant that if the offender disengaged with the order and needed to be resentenced, they were transferred to another court.²⁶⁵ The judicial hearing officer also engaged with the offender in a formulaic fashion, noting the progress of the offender on the order and the number of appointments attended or missed. The feedback provided by the judicial hearing officer is described in the report as 'brief, matter-of-fact, and often employ[ing] terminology that the offenders may not have fully grasped'.²⁶⁶
- 4.31 The Council notes with caution the adverse conclusion drawn in the 2005 report. The report is of limited relevance to the Victorian context, given the differing approach taken to judicial monitoring, and the fact that the hearings were not conducted by a sitting judicial officer.

Current use of judicial monitoring for family violence offenders in Victoria

- 4.32 Currently, relatively few family violence offenders in Victoria who are sentenced to a CCO (including a CCO combined with imprisonment) have a judicial monitoring condition attached.

260. Submission 19 (Law Institute of Victoria) 12.

261. Submission 20 (Eastern Community Legal Centre) 4.

262. Rempel et al. (2008), above n 252, 185–207.

263. Melissa Labriola et al., *Testing the Efficacy of Judicial Monitoring: A Randomized Trial at the Rochester New York Domestic Violence Courts* (2012).

264. See for example Edward W. Gondolf, 'Mandatory Court Review and Batterer Program Compliance' (2000) 15(4) *Journal of Interpersonal Violence* 428, 428–437.

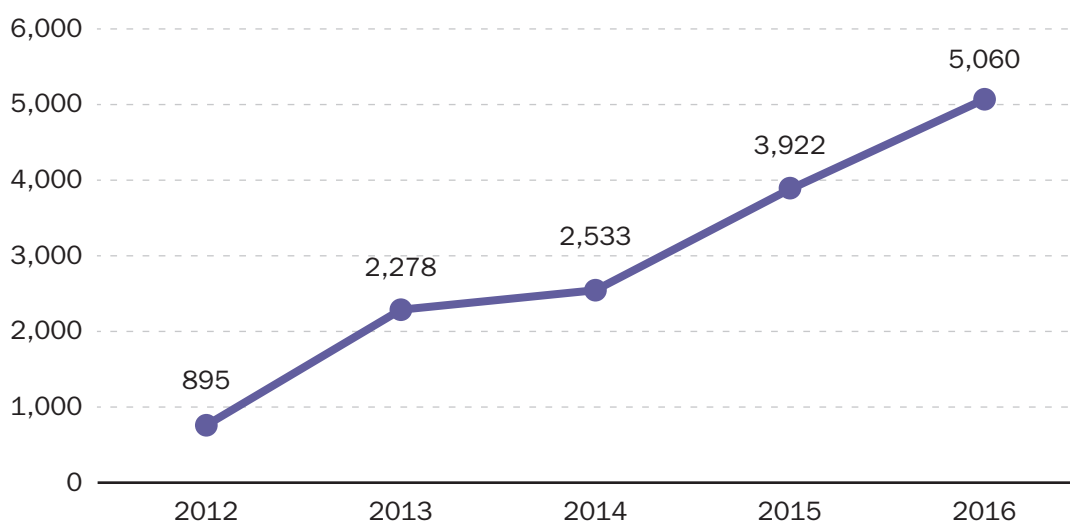
265. Rempel et al. (2008), above n 252, 196.

266. *Ibid* 204.

Magistrates' Court of Victoria

- 4.33 There has been a marked increase in the number of judicial monitoring hearings held each year in the Magistrates' Court of Victoria. Figure 1 shows the number of judicial monitoring hearings that have been listed across the venues of the Magistrates' Court from 2012 to 2016, indicating a steady increase each year.
- 4.34 Data from the Magistrates' Court, however, indicates that a judicial monitoring condition was attached in 14% of cases in which a family violence offender was sentenced to a CCO (510 of 3,560 cases) during the 2015–16 financial year.

Figure 1: Number of judicial monitoring hearings by calendar year, Magistrates' Court of Victoria, 2012 to 2016



Source: data provided to the Council by the Magistrates' Court of Victoria, showing state-wide figures

Neighbourhood Justice Centre

- 4.35 One Victorian court that attaches a judicial monitoring condition to 'virtually all' CCOs is Victoria's Neighbourhood Justice Centre, a multi-jurisdictional court with a wide array of support services.²⁶⁷ The Neighbourhood Justice Centre offers a highly integrated model for the management of offenders, with the Auditor-General identifying active judicial monitoring as one of three key features of the Neighbourhood Justice Centre model.²⁶⁸ The judicial monitoring hearings held at the Neighbourhood Justice Centre are characterised more as a 'review' of the offender's progress on an order, not as an opportunity to 'monitor' an offender's compliance with the terms of their order. The Neighbourhood Justice Centre considered 'compliance' with the order to be a responsibility that should rest with Corrections Victoria. Magistrate David Fanning from the Neighbourhood Justice Centre described his role as follows:

Really the emphasis for ... me is looking at those matters that are causing or leading to the offending. That could be anything from alcohol or drug issues, to employment, to education, and the like. So all those things are more important to me, that's what in my view monitoring or reviewing is about, rather than simply compliance with the order.²⁶⁹

267. Meeting with Neighbourhood Justice Centre (11 April 2017).

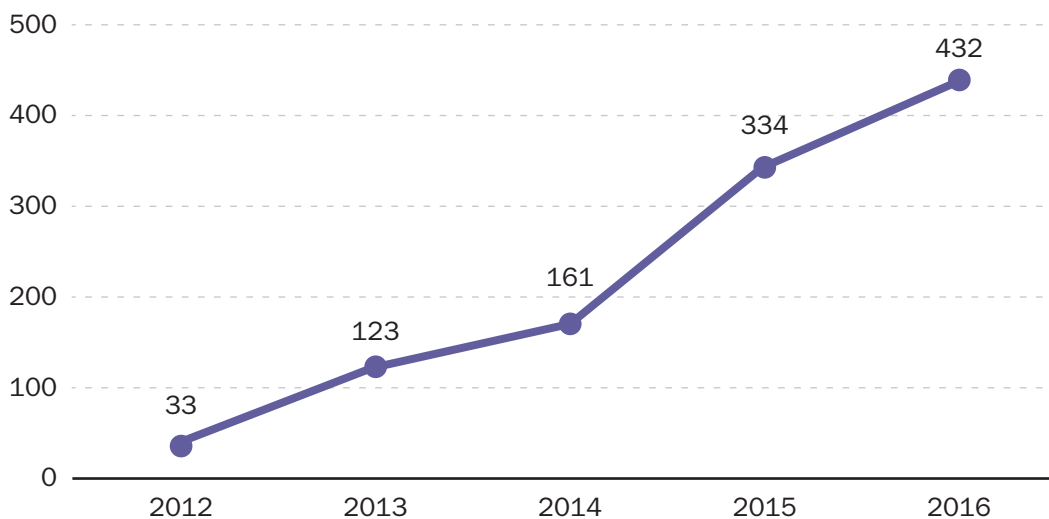
268. Victorian Auditor-General's Office Report (2017), above n 21, ix.

269. Meeting with Neighbourhood Justice Centre (11 April 2017).

Higher courts

- 4.36 Court Services Victoria's higher courts sentencing database does not record data on the conditions attached to CCOs. The Council therefore searched reported decisions generally for the number of cases in which the higher courts attached a judicial monitoring condition to a CCO, regardless of whether the CCO was imposed for family violence offending.²⁷⁰ The Council identified 63 reported cases sentenced in 2015–16 in which an offender sentenced to a CCO received a judicial monitoring condition.²⁷¹
- 4.37 There was considerable variation in the time before the first judicial monitoring hearing, ranging from less than three weeks in one case²⁷² to one year in another,²⁷³ and averaging around four months from the sentence or the release date.
- 4.38 Figure 2 shows that there has been a marked increase in the number of judicial monitoring hearings in the County Court of Victoria since 2012 (when CCOs were introduced as a sentencing option).²⁷⁴
- 4.39 As discussed at [4.17], approximately 89 offenders received a CCO in the higher courts for family violence-related offending in 2015–16. The Council was able to identify only four published cases of family violence offenders sentenced to a CCO in 2015–16 where a judicial monitoring condition was attached to the CCO. The first listed judicial monitoring hearing in those four cases was no less than three months after the sentencing hearing or the offender's release from prison.²⁷⁵

Figure 2: Number of judicial monitoring hearings by calendar year, County Court, 2012 to 2016



Source: data provided to the Council by the County Court of Victoria

270. The Council searched for reported cases on AustLII using key search terms such as 'judicial monitoring', 'judicial supervision' and 'monitoring'.

271. The Council notes that this is unlikely to reflect the true number of offenders receiving judicial monitoring as a condition of a CCO in the higher courts.

272. *Director of Public Prosecutions v Erradi* [2015] VCC 1672 (20 November 2015) [26]–[30].

273. *Director of Public Prosecutions v Jury* [2016] VCC 277 (9 February 2016) [96].

274. See also County Court Criminal Division, *November 2016* (2016) 1 ('we continue to manage issues such as ... the sharp increase in ... judicial monitoring').

275. *Director of Public Prosecutions v Hose* [2015] VCC 1395 (14 July 2015) [50]; *Director of Public Prosecutions v Krepp* [2016] VCC 529 (29 April 2016) [84]; *Director of Public Prosecutions v Lindus* [2016] VCC 526 (2 May 2016) [28]; *Deng-Mabior v R* [2015] VSCA 179 (17 July 2015) [45].

Increased use of judicial monitoring for family violence offenders

- 4.40 The Council asked stakeholders for their views on whether courts should increase their use of judicial monitoring conditions when sentencing family violence offenders. The Council notes the recommendation of the Victorian Auditor-General that the Neighbourhood Justice Centre's approach to offender management be further examined. The Council also notes the data analysis showing the relative underuse of the condition for family violence offenders in both the Magistrates' Court of Victoria and the County Court of Victoria.
- 4.41 The Council considers there to be strong potential for the increased use of judicial monitoring for family violence offenders, in order to increase the court's oversight of family violence offenders on CCOs and promote offender accountability.

Stakeholders' views

- 4.42 Most stakeholders supported an increase in the use of judicial monitoring for family violence offenders,²⁷⁶ and no stakeholder opposed the idea:
- The Magistrates' Court of Victoria emphasised that effective supervision mechanisms can remind offenders of the expectations of safe behaviours and the consequences of unsafe behaviours, allow for the identification and management of dynamic risk factors and motivate ongoing engagement in therapeutic programs.²⁷⁷
 - Victoria Legal Aid commented that judicial monitoring can be 'life-changing' for some offenders when undertaken effectively,²⁷⁸ and stated that there is 'scope for expanded use of judicial monitoring in appropriate cases'.²⁷⁹
 - The Victorian Bar and the Criminal Bar Association noted that judicial monitoring can enable the court to ensure Corrections Victoria are supporting the offender in complying with the conditions of a CCO, such as ensuring timely access to treatment programs.²⁸⁰
 - The Neighbourhood Justice Centre, in addition to being a strong proponent of judicial monitoring, supported hearings in which there are reciprocal obligations on service providers and offenders.²⁸¹
 - The Victims of Crime Commissioner gave the Magistrates' Court of Victoria's Court Integrated Service Program as a good example of how courts can help to regularly monitor offender's behaviour.²⁸²
 - RMIT University's Centre for Innovative Justice strongly urged the Council to 'make increased judicial monitoring a central platform of its recommendations'.²⁸³
 - The Eastern Community Legal Centre considered judicial monitoring a useful part of a restorative justice model that reduces risk to victim survivors by focusing on improving family violence offenders' behaviours.²⁸⁴
 - The No To Violence/Men's Referral Service commented that judicial monitoring can help shift the burden of monitoring the offender's behaviour from their family to the court (as well as the broader family violence service system).²⁸⁵

276. See for example Submission 13 (Victorian CASA Forum) 4.

277. Submission 10 (Magistrates' Court of Victoria) 4.

278. Meeting with Victoria Legal Aid (15 March 2017).

279. Submission 17 (Victoria Legal Aid) 4.

280. Submission 18 (Victorian Bar and Criminal Bar Association) 3.

281. Meeting with Neighbourhood Justice Centre (11 April 2017).

282. Submission 8 (Victims of Crime Commissioner) 8.

283. Submission 24 (Centre for Innovative Justice, RMIT University) 11.

284. Submission 20 (Eastern Community Legal Centre) 3.

285. Submission 22 (No To Violence/Men's Referral Service) 5–6.

- Victorian Magistrate Pauline Spencer has previously written about the potential of judicial monitoring as one important component of a 'web of accountability' that can surround family violence offenders.²⁸⁶
- McAuley Community Services for Women suggested that judicial monitoring could 'provide continuing contact with the court and the *same judicial officer*, as well as compelling the perpetrator to engage with the causes of their offending and holding the perpetrator to account'.²⁸⁷
- Liberty Victoria did 'not oppose an increased and more consistent use of judicial monitoring to ensure there is a "web of accountability" surrounding family violence offenders'.²⁸⁸

4.43 Some stakeholders cautioned against the overuse of judicial monitoring.²⁸⁹ Corrections Victoria, for example, noted that attending each judicial monitoring hearing could disrupt the protective factors that reduce an offender's risk of recidivism.²⁹⁰

The Council's view

- 4.44 The Council supports the increased use of judicial monitoring for family violence offenders on CCOs.
- 4.45 Increased use of judicial monitoring represents an enhanced role for sentencers in the management of offenders subject to community sanctions. It allows the court to review an offender's progress on the order and to praise good progress, or admonish unsatisfactory progress (coupled with linking the offender to necessary services) if an offender is not engaged. Further, judicial monitoring offers the opportunity to create a relationship between the offender and the judicial officer based on the offender's accountability to the court, particularly when the offender is consistently seen by the same judicial officer.
- 4.46 The Council acknowledges, however, that there ought to be a clear articulation of both the role of the judicial officer (in monitoring an offender's progress on an order) and the role of Corrections Victoria (in managing that order and ensuring compliance). It is not intended (nor appropriate) for judicial monitoring to result in the judicial officer taking on the responsibilities of Corrections Victoria; similarly, it is not intended as a means for Corrections Victoria to delegate its responsibility for sentence management and administration to the court.
- 4.47 When done well, judicial monitoring can significantly increase offenders' perceptions of procedural fairness (a key component of effective deterrence).²⁹¹ More importantly, however, in the context of family violence offenders, judicial monitoring allows the opportunity to gauge ongoing risk factors and to address those risks.
- 4.48 The Council also acknowledges that there are potential issues in the increased use of judicial monitoring. There is a risk that over-emphasising the therapeutic and rehabilitative aims of sentencing can distract attention from the equally legitimate aims of deterrence and punishment. There is also a risk that, without proper training, judicial monitoring might result

286. Spencer (2016), above n 232, 225–229.

287. Submission 11 (McAuley Community Services for Women) 5.

288. Submission 15 (Liberty Victoria) 3.

289. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

290. For example, mandating an offender's attendance at judicial monitoring on a fortnightly basis is likely to mean that they have to miss a day of work every fortnight, which could have adverse consequences for their rehabilitation: Meeting with Corrections Victoria (15 March 2017).

291. Gil Mclvor, 'Beyond Supervision: Judicial Involvement in Offender Management', in Fergus McNeil, Peter Raynor and Chris Trotter (eds), *Offender Supervision: New Directives in Theory, Research and Practice* (2010) 215–238.

in judicial officers making decisions that they are not professionally trained to make. A further risk is that matters disclosed by an offender to a judicial officer in a conversation as part of a judicial monitoring hearing (potentially in the absence of the offender's legal representative) may later unfairly influence any subsequent decision made by the judicial officer in respect of that offender.

- 4.49 In addition, the Council is cautious that judicial monitoring should still only be used in appropriate cases, and notes that the overuse of judicial monitoring for low-risk family violence offenders could have adverse effects, disrupting an offender's employment and drawing them into increased contact with the criminal justice system. The desire to keep family violence offenders within the view of the court must be balanced against the need to facilitate rehabilitation and avoid disruption to factors such as employment and pro-social ties, and other factors that create a 'stake in conformity' that can support desistance from family violence offending.
- 4.50 These challenges are not, however, insurmountable. The judicial supervision study discussed at [2.44]–[2.45] will likely assist the Judicial College of Victoria in developing an evidence-based model of judicial monitoring for Victoria. The Judicial College can then deliver targeted training to judicial officers about how to conduct a judicial monitoring hearing, how to avoid blurring the lines between judicial officers and correctional staff and how to best protect offenders' rights to procedural fairness. If judicial monitoring hearings are based on an evidence-based model and judicial officers are properly trained in the use of that model, then the potential advantages that judicial monitoring hearings might offer would outweigh the risks that judicial monitoring might be used or delivered inappropriately.
- 4.51 The Council therefore supports the increased use of judicial monitoring for family violence offenders on CCOs. A number of agencies would be responsible for this increased use, including:
- Corrections Victoria staff responsible for authoring pre-sentence reports (ensuring that reports include consideration of the appropriateness and effectiveness of a judicial monitoring condition for family violence offenders);
 - prosecutors responsible for making sentencing submissions (ensuring that prosecutors consider whether to recommend that the court attach a judicial monitoring condition when sentencing a family violence offender to a CCO); and
 - courts making the ultimate decision about whether a judicial monitoring condition should be attached to a CCO imposed on a family violence offender.
- 4.52 The Council recommends amending the *Sentencing Act 1991* (Vic) to require authors of pre-sentence reports (where one has been ordered by the court) to include consideration about the effectiveness and appropriateness of a judicial monitoring condition for family violence offenders. The court would then be required to consider the advice contained in the pre-sentence report.²⁹²

Recommendation 3

The *Sentencing Act 1991* (Vic) should be amended to provide that if a court finds a person guilty of an offence involving family violence and orders a pre-sentence report, the author of that report must include consideration of the relevance and appropriateness of a judicial monitoring condition.

292. *Sentencing Act 1991* (Vic) s 37(b).

Prosecutor submissions regarding judicial monitoring

- 4.53 A further avenue to increase the principled use of judicial monitoring as a condition of a CCO imposed on a family violence offender is to encourage prosecutors to make recommendations about that condition during plea hearings.
- 4.54 The *Policy of the Director of Public Prosecutions for Victoria* currently provides instructions for solicitors and counsel on arrangements for giving evidence and cross-examination in matters involving family violence.²⁹³ The policy does not currently provide guidance on submissions relating to judicial monitoring of family violence offenders. The Council considers that the Director of Public Prosecutions' policy could be further expanded to discuss submissions relating to judicial monitoring.
- 4.55 Further, Victoria Police Prosecutions may wish to build upon any guidance provided by the Director of Public Prosecutions' Policy, and tailor such guidance to the summary jurisdiction.

Recommendation 4

The Director of Public Prosecutions should consider revising the *Policy of the Director of Public Prosecutions for Victoria* to include policy guidance on sentencing submissions regarding judicial monitoring for family violence offenders in appropriate cases.

Victoria Police should consider developing policy guidance for Victoria Police prosecutors on sentencing submissions regarding judicial monitoring for family violence offenders in appropriate cases.

Increased judicial consideration of imposing a judicial monitoring condition for family violence offenders on a community correction order

- 4.56 Judicial monitoring appears to be a relatively underutilised resource in the web of accountability around family violence offenders in the community. There was unanimous support for an increased use of judicial monitoring. The Council strongly supports the increased use of this optional CCO condition, consistent with the evidence-based model for judicial monitoring discussed at [4.114]–[4.117].
- 4.57 Some stakeholders considered judicial officers to be in a unique position to assess the risk of family violence offenders.²⁹⁴ Therefore, courts should, in addition to considering any recommendation from Corrections Victoria, independently assess whether judicial monitoring is appropriate for a family violence offender in any given case.
- 4.58 The Council does not suggest, however, that judicial monitoring simply be attached as a condition to all CCOs imposed on family violence offenders. There may be instances where judicial monitoring is unnecessary in the particular circumstances of a given case.

Recommendation 5

When sentencing a family violence offender to a community correction order, judicial officers should give particular consideration to attaching a judicial monitoring condition.

293. Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (2017).

294. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

Scheduling judicial monitoring hearings

- 4.59 Currently, judicial monitoring hearing dates for a CCO are set by the court at the time of sentencing. A magistrate may, for example, set a judicial monitoring hearing date for three months following the commencement of a CCO.
- 4.60 A number of stakeholders commented on the ineffectiveness of scheduling a judicial monitoring hearing many months after the commencement of a CCO, when offenders often struggle with compliance with their CCO in the first month.²⁹⁵ This is particularly the case for offenders released onto a CCO after an imprisonment sentence. Some stakeholders noted that, at this critical time, there is often little support.²⁹⁶
- 4.61 The Council is acutely aware of the risk to victim survivors when an offender is released from custody. Often, family violence offenders are released from custody to return to the home of the victim survivor.²⁹⁷ It is therefore critically important that family violence offenders are subject to a web of accountability so that they are supervised by Corrections Victoria and kept within the view of the court soon after release on a CCO.
- 4.62 The Council's *Contravention of Community Correction Orders* report found that the period immediately after a CCO commenced proved to be critical in terms of managing offenders' risk of reoffending. Nearly half of offenders within the study group who contravened their CCO by further offending did so within the first three months of their CCO beginning (44%).²⁹⁸ Four per cent contravened their CCO with further offending in the first week, and 18% did so in the first month. Over nine out of 10 contraventions by further offending occurred within the first 12 months of commencement of the CCO (92%).²⁹⁹
- 4.63 Further, that report also notes that offenders sentenced to a CCO for breach of a family violence intervention order had a relatively higher rate of contravention than other offenders; also when such offenders contravened by reoffending, the most common offending was by a further breach of a family violence intervention order.³⁰⁰
- 4.64 If judicial monitoring is to be effective in assisting offenders to complete their orders, it is crucial that the engagement occurs before offenders contravene their order, either by further offending or by failure to comply with another condition of the order. These findings show that the period of time immediately following the commencement of a CCO is a period of high risk of contravention.
- 4.65 Corrections Victoria stated that the appropriate timeframe for the first judicial monitoring hearing would be at least six weeks after the imposition of a CCO.³⁰¹ Corrections Victoria considered that this timeframe would allow the case manager enough time to conduct the initial assessment processes, prepare a case plan, make relevant referrals to treatment services and prepare a report for the court on the offender's progress for the judicial monitoring hearing.³⁰²

295. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

296. Meeting with ACSO COATS (23 March 2017); Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

297. The data provided by the Coroner's Court of Victoria contained at least one example of this occurring: Submission 8 (Coroner's Court of Victoria) 7 ('Case Study 3').

298. Sentencing Advisory Council (2017), above n 250, 35.

299. Ibid 35.

300. Ibid (2017) 52.

301. Meeting with Corrections Victoria (15 March 2017).

302. Meeting with Corrections Victoria (15 March 2017).

- 4.66 Representatives of the Magistrates' Court of Victoria stated that an appropriate timeframe for the first judicial monitoring hearing would be no later than six weeks after the imposition of a CCO.³⁰³ An offender who is considered to be higher risk may need to be returned to court earlier.³⁰⁴
- 4.67 The Council notes that there is a need to balance the benefits of promptly returning the offender before the court for a judicial monitoring hearing with the practical timeframes required by Corrections Victoria to have an offender assessed and referred to treatment programs, consistent with the terms of their order.
- 4.68 The Council considers that, for family violence offenders, there is an interest in scheduling the first judicial monitoring hearing no later than six weeks after the commencement of the CCO for offenders who do not have to serve a period of imprisonment following the imposition of the sentence. Where an offender is considered to be at very high risk of reoffending, the judicial officer may wish to order that the first judicial monitoring hearing is earlier than six weeks after the sentence date.
- 4.69 Both Corrections Victoria and the Magistrates' Court of Victoria considered that where an offender has been sentenced to a CCO combined with a term of imprisonment, the first judicial monitoring hearing ought to occur earlier than for an offender sentenced to a CCO alone. It was suggested that around two weeks after the offender had been released into the community would be a reasonable timeframe, provided that Corrections Victoria had engaged with the offender prior to release.³⁰⁵
- 4.70 The Council notes that these timeframes may need to be revisited following the publication of the findings of the Dandenong Magistrates' Court and Swinburne Centre for Forensic Behavioural Science's judicial supervision study (see [2.44]–[2.45]).
- 4.71 There is limited evidence on which to base guidance for judicial officers on how frequently to schedule judicial monitoring hearings. One stakeholder noted research indicating that regular judicial monitoring hearings (such as fortnightly or monthly) produces better results than less regular or 'as-needed' hearings.³⁰⁶ However, these findings only arose with the 'high-risk' participants, as defined by the presence of antisocial personality disorder and/or previous failure in treatment.³⁰⁷ Similar studies found that low-risk offenders performed equivalently or better when assigned to as-needed hearings.³⁰⁸
- 4.72 Guidance on the frequency of judicial monitoring hearings ought to be informed by the findings of the Dandenong Magistrates' Court and Swinburne Forensic Behavioural Science's judicial supervision study, as well as other developing research on the use of judicial monitoring for family violence offenders. The Council considers that guidance on the timing and frequency of judicial monitoring hearings ought to be components of the evidence-based model developed by the Judicial College of Victoria, as recommended by the Council (see [4.114]–[4.117]).

303. Meeting with Magistrate Spencer and Magistrate Hawkins, Magistrates' Court of Victoria (4 April 2017).

304. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

305. Meeting with Corrections Victoria (15 March 2017); Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017). Particular comment was made by several stakeholders at the Council's Stakeholder Discussion Forum on Proposed Recommendations on the importance of the availability of services, including housing services, for offenders upon their release from custody: Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

306. In particular, one stakeholder stated that the Marlowe studies (Marlowe et al. (2007), above n 258, S4–S13; Marlowe et al. (2005), above n 258, 145–155) recommend either fortnightly or monthly judicial monitoring hearings: Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

307. Marlowe et al. (2007), above n 258, S4–S13.

308. Marlowe et al. (2005), above n 258, 146.

Recommendation 6

When a court attaches a judicial monitoring condition to a community correction order imposed on a family violence offender, the court should schedule the first judicial monitoring hearing no later than:

- six weeks after the sentencing hearing if there is no period of imprisonment to be served; or
- two weeks after the offender's release date if there is a period of imprisonment to be served after the sentencing hearing.

Court-ordered Corrections Victoria directed judicial monitoring hearings

4.73 Corrections Victoria does not currently have the power to direct an offender on a CCO to attend a judicial monitoring hearing. The Magistrates' Court of Victoria's submission stated:

Currently judicial monitoring dates for a CCO are set by the court at the date of sentencing. A magistrate may, for example, set a Judicial Monitoring date for 3 months into the order however the offender may struggle with compliance in the first month of their CCO. Currently there is no mechanism, short of contravention, that a [Corrections Victoria] case manager can use to bring a person back before the court quickly to use the authority of the court to help motivate compliance.

A legislative change to the condition of judicial monitoring to allow [Corrections Victoria] to direct an offender to attend court for judicial monitoring would give an additional tool to [Corrections Victoria] Case Managers and the courts.³⁰⁹

4.74 The lack of a mechanism to bring the offender back within the view of the court, without needing to initiate a charge of contravening a CCO, was raised several times during consultation.³¹⁰ Corrections Victoria was supportive of legislative change to enable its staff to direct an offender to return to court for a judicial monitoring hearing.³¹¹ The Law Institute of Victoria also supported the expansion of judicial monitoring powers, so that a judicial monitoring hearing 'may be [triggered] by non-compliance with CCO conditions in addition to the passage of a specified period of time'.³¹²

4.75 The Council's SCF discussion paper outlines the processes employed by Corrections Victoria in order to effectively manage offenders on CCOs, including:

- case management approaches, such as calling a 'compliance meeting' with an offender;
- senior staff member intervention, involving issuing a warning to an offender; or
- Administrative Review Hearing initiation, involving a hearing with senior Corrections Victoria or Department of Justice and Regulation staff.³¹³

4.76 Several stakeholders, however, considered that it may be beneficial to have the ability to bring an offender back before the court for a judicial monitoring hearing in circumstances that fall short of contravention of a CCO.³¹⁴

309. Submission 10 (Magistrates' Court of Victoria) 6, affirmed in Meeting with Magistrate Spencer and Magistrate Hawkins Magistrates' Court of Victoria (4 April 2017).

310. Submission 10 (Magistrates' Court of Victoria) 6; Meeting with Corrections Victoria (15 March 2017).

311. Meeting with Corrections Victoria (15 March 2017).

312. Submission 19 (Law Institute of Victoria) 23.

313. Sentencing Advisory Council (2017), above n 1, 53–57.

314. Submission 10 (Magistrates' Court of Victoria) 6; Meeting with Corrections Victoria (15 March 2017).

Response to escalating risk of family violence

- 4.77 A direction by Corrections Victoria for a family violence offender to attend a judicial monitoring hearing could be triggered in response to an escalation of risk that does not constitute a contravention.
- 4.78 Such circumstances may involve a Corrections Victoria case manager becoming aware of a particular event or change in circumstances that may trigger an escalation of risk. For example, when an offender has impending family law proceedings, it may be desirable to leverage the authority of the court to deliver a consistent message about offender accountability. A hearing may also be triggered by an emerging pattern of non-attendance at appointments, where the level of non-compliance falls short of that which would trigger the initiation of contravention proceedings, but where a response involving the court may be desirable.
- 4.79 A hearing may also be triggered by Corrections Victoria because of feedback from a service provider of a men's behaviour change program (MBCP) that undertakes ongoing communication with victim survivors or affected family members alongside the offender's participation in the MBCP. Information may emerge, for example, about an offender's concerning attitudes or behaviour in response to the repartnering of a victim survivor. A judicial monitoring hearing may therefore provide an opportunity to reinforce the offender's accountability and the court's authority, prior to an escalation of behaviour that may constitute family violence or may result in a contravention.
- 4.80 A Corrections Victoria directed judicial monitoring hearing would not be intended as a substitute for the prosecutorial discretion to initiate contravention proceedings in appropriate circumstances. Instead, it would provide another tool in a suite of responses available to both the court and Corrections Victoria (where a court orders that Corrections Victoria has the ability to direct the timing of judicial monitoring hearings).
- 4.81 More active use of the court's authority and the facilitation of greater communication between the judicial officer and Corrections Victoria were supported in the submissions of a range of stakeholders who work in the family violence space.³¹⁵ For example, Magistrate Pauline Spencer has written that:
- The court needs to be linked with the broader family violence service system and there needs to be protocols and systems for the timely sharing of information across the web of accountability.³¹⁶
- 4.82 During consultation, Magistrate Spencer noted that it would be useful for Corrections Victoria to have the power to direct an offender to attend a judicial monitoring hearing (where a judicial monitoring condition has been imposed), commenting that:
- at the moment we set [the judicial monitoring hearings], and it's a bit unclear about how often we should set them. We can set them three months in, but the person might struggle in the first month, and I think [it would be useful] if Corrections can say, 'You're not doing well, you need to go back and see [the Magistrate]'.³¹⁷
- 4.83 This approach to more active use of the court as a strand of the web of accountability is broadly consistent with a range of other submissions, which encouraged increased communication and cooperation between the courts and Corrections Victoria to identify and manage risks for family violence offenders.³¹⁸

315. See for example Submission 20 (Eastern Community Legal Centre) 4: 'Judicial monitoring in such cases ... signifies the clear role of the legal system in keeping family violence offenders accountable'.

316. Spencer (2016), above n 232, 226.

317. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

318. Submission 13 (Victorian CASA Forum) 5; Submission 20 (Eastern Community Legal Centre) 3; Submission 24 (Centre for Innovative Justice, RMIT University); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

- 4.84 During consultation, the Council considered and tested whether the courts' powers at a judicial monitoring hearing should be extended, for example, by empowering judges at a judicial monitoring hearing to vary the conditions of a CCO or to impose penalties for contravention behaviours. Strong concerns were raised about such reforms, especially given their potential to offend the separation of powers.³¹⁹ Stakeholders cautioned against the transfer of prosecutorial functions – such as the decision to charge an offender with contravening a CCO – to the judicial officer, and cautioned against even the appearance of the judicial officer directing the laying of charges.³²⁰
- 4.85 Other stakeholders expressed concern that the ability to impose sanctions in a judicial monitoring hearing would undermine the function of the hearing as an open discussion between the judicial officer and the offender. This ability to impose sanctions would also mean that offenders would require legal representation, which would increase the timeframes for listings as offenders would need time to seek such representation and prepare for the hearing.³²¹ Ultimately, such changes would transform the judicial monitoring hearing into a CCO contravention hearing.
- 4.86 The Neighbourhood Justice Centre emphasised the need for 'an environment of engagement' in order for judicial monitoring hearings to be effective. The introduction of powers to vary other conditions of a CCO, or to impose sanctions, was said to render this impossible.³²²

The Council's view

- 4.87 The Council is of the view that an amendment to the *Sentencing Act 1991* (Vic) that gives the court the power to impose a condition allowing for Corrections Victoria directed judicial monitoring hearings would preserve the judicial function and maintain a distinction between prosecutorial and judicial functions.
- 4.88 In light of the legal and procedural issues, and stakeholder feedback, the Council does not consider that it is appropriate to vary or increase the powers available to a court at a judicial monitoring hearing. To do so would be to change the fundamental character of a judicial monitoring hearing and focus the court on compliance with the order, rather than issues around progress, risk and continuing accountability.
- 4.89 Allowing Corrections Victoria to direct an offender's attendance at a judicial monitoring hearing may provide some of the benefits of the Neighbourhood Justice Centre's 'problem-solving hearing'. The problem-solving hearing (which occurs in the absence of the magistrate) aims to identify issues that may have arisen and develop a plan to restabilise the offender.³²³
- 4.90 The proposed reform has a similar potential to enable the offender and Corrections Victoria to collaboratively identify and manage risks, under the guidance of the presiding judicial officer. The presence of the judicial officer adds weight to the hearing and assists in holding the offender to account.

319. Submission 15 (Liberty Victoria) 6; Submission 21 (International Commission of Jurists Victoria) 6; Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

320. Submission 15 (Liberty Victoria) 6; Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

321. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017); Meeting with Neighbourhood Justice Centre (11 April 2017).

322. Meeting with Neighbourhood Justice Centre (11 April 2017).

323. Meeting with Neighbourhood Justice Centre (11 April 2017).

Corrections Victoria direction as additional option to judicial monitoring condition

- 4.91 Importantly, not every judicial monitoring condition would empower Corrections Victoria to direct an offender to attend judicial monitoring hearings. It would instead be an additional optional power for sentencing courts, without removing any of the existing functions of the judicial monitoring condition.
- 4.92 The Council also considers that Corrections Victoria and the courts should develop a protocol around the circumstances in which Corrections Victoria would issue a direction for the offender to attend a judicial monitoring hearing, to ensure judicial monitoring is used appropriately and to address the issues of improper use of judicial monitoring discussed at [4.48]–[4.49]. In relation to family violence offenders, such a protocol might draw on the revised risk assessment tools for family violence offenders discussed at [2.13]–[2.18].
- 4.93 Further, the Council considers that, in circumstances in which the court has attached a judicial monitoring condition, any direction by Corrections Victoria to an offender to attend a judicial monitoring hearing should only be undertaken by Court Assessment and Prosecutions Services staff. As discussed at [2.40], these are specialist staff within Corrections Victoria who are responsible for court-based enforcement of community correction orders.
- 4.94 In any event, the Council considers that, as an additional safeguard, the court should have the ability to remove the condition allowing Corrections Victoria directed judicial monitoring hearings, consistent with the existing powers of the court at judicial monitoring hearings to cancel or vary the judicial monitoring condition itself.
- 4.95 The proposed amendment provides the court with an additional power within the existing framework for judicial monitoring hearings. In the event that the court no longer considers Corrections Victoria directed judicial monitoring hearings to be appropriate, the court will not be bound to continue with the condition and may remove it in accordance with its existing powers at a judicial monitoring hearing. For clarity, this power to remove the condition allowing Corrections Victoria to direct the offender to attend a judicial monitoring hearing may need to be explicit in the amended legislation.
- 4.96 Further, the existing safeguard, whereby Corrections Victoria or the offender may make an application to vary the condition, will continue to be available.
- 4.97 The Council notes that the proposed amendment would not be limited in application to family violence offenders. A court may attach Corrections Victoria directed judicial monitoring hearings to any judicial monitoring condition for an offender on a CCO. The Council considers that this will provide an additional tool for the management of other higher-risk offenders on CCOs by both the courts and Corrections Victoria.

Recommendation 7

The *Sentencing Act 1991* (Vic) should be amended to allow a court, when making a community correction order, to attach a condition that an offender be required to attend a judicial monitoring hearing:

- as directed by the court, at a specified time or times; and/or
- as directed by Corrections Victoria, at any time for the duration of the order.

Corrections Victoria, in consultation with the courts, should develop and implement a protocol identifying the appropriate circumstances in which an offender would be directed by Corrections Victoria to attend a judicial monitoring hearing.

Information to be provided at judicial monitoring hearings

- 4.98 The Victorian Auditor-General's report on Corrections Victoria's management of offenders on CCOs raises a number of issues relating to the communication between Victoria Police and Corrections Victoria. This includes, for example, instances in which Victoria Police has failed to communicate information about offenders on CCOs to Corrections Victoria, leading to Corrections Victoria having an incomplete (and possibly inaccurate) appreciation of the offender's risk level.³²⁴
- 4.99 Although Victoria Police and Corrections Victoria have a memorandum of understanding about sharing information for law enforcement and case management purposes, there are operational problems that restrict data sharing between the two agencies (see [2.24]–[2.26]).
- 4.100 In some cases, important information about contact with offenders on CCOs is not communicated to Corrections Victoria staff members and therefore may not be brought to the court's attention when the offender returns to court for a judicial monitoring hearing.
- 4.101 It is important that, where possible, sufficient information is placed before the court, so that judicial officers conducting judicial monitoring hearings are not reliant on offenders self-reporting their compliance with CCO conditions or their progress on the CCO.
- 4.102 The Council's recommendation does not specify how such information should be obtained by Corrections Victoria, nor whether there should be particular amendments to Corrections Victoria's protocols regarding contact with victim survivors or information sharing with service providers of programs such as MBCPs. The Council believes that Corrections Victoria is best placed to determine the most appropriate approaches to, and protocols for, obtaining relevant information to be provided to the court for a judicial monitoring hearing.
- 4.103 There is, however, certain information that should be brought to the court's attention as a priority in order to best assist the court in understanding dynamic risk factors. In particular, where it is safe to do so, the court should be provided with all relevant and available information on the offender's compliance with the conditions of the order; any pending charges or family violence intervention orders or family violence safety notices, and any impending criminal or civil law proceedings of relevance (such as family law matters).

Recommendation 8

When providing information to a court for a judicial monitoring hearing involving a family violence offender, Corrections Victoria should, where appropriate, include all relevant and available information in relation to:

- any known interactions between the offender and any victim survivors or affected family members;
- any pending or completed applications for a family violence intervention order, family violence safety notice or personal safety intervention order involving the offender; and
- the status of any pending criminal proceedings or relevant civil matters, including family law proceedings, involving the offender.

324. Victorian Auditor-General's Office (2017), above n 21, 32.

Development of a principled model for the use of judicial monitoring for family violence offenders

- 4.104 A number of stakeholders commented on the inconsistency in, or inadequacy of, the exchange between the offender and the judicial officer in many judicial monitoring hearings.³²⁵ For example, RMIT University's Centre for Innovative Justice submitted that:
- [A] substantial flaw of the current system is that most encounters between family violence offenders and the justice system are anonymous, one-off exchanges in overcrowded court lists. These exchanges – which, as referred to earlier, can average three minutes in the civil context of Family Violence Intervention Order hearings – do little to encourage a sense of accountability on the part of the offender. In fact, the anonymity of the court hearing and the detached manner of a busy Magistrate can sometimes compound the perception of the perpetrator that the 'system' is against him; that the court has little authority; and that he is likely to get away with disobeying any Order that has been made.³²⁶
- 4.105 Magistrate Pauline Spencer also noted that, because there is currently no settled framework for the most effective approach to judicial supervision of family violence offenders, many judicial officers have different approaches to supervision.³²⁷ Some favour an 'accountability approach', which 'seeks to deter further offending by using judicial supervision hearings to set expectations and to deliver timely, consistent and escalating consequences for non-compliance or re-offending'.³²⁸ Others use a 'solution-focused' approach to supervision, linking the offender to the 'necessary treatment and supports and [building] the motivation of the offender to engage in these interventions'.³²⁹ Others employ a combination of these two strategies.³³⁰
- 4.106 A number of stakeholders commented that judicial education would be the most appropriate means of minimising inconsistencies in judicial monitoring,³³¹ that judicial officers appear to be given limited training in how to utilise the judicial role to best engage with offenders,³³² and that any future judicial education should be supported by an evidence-based framework.³³³
- 4.107 The research necessary for the development of a framework for supervising offenders (though not specifically family violence offenders) is currently underway through a joint project between Swinburne University's Centre for Forensic Behavioural Science and the Dandenong Magistrates' Court.³³⁴ The Magistrates' Court of Victoria envisages that this framework will guide future professional development.³³⁵

325. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

326. Submission 24 (Centre for Innovative Justice, RMIT University) 11.

327. Spencer (2016), above n 232, 227. This sentiment was echoed at the Council's discussion forums, with one stakeholder commenting that the way judicial monitoring is conducted is 'almost entirely personality-based': Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

328. Spencer (2016), above n 232, 227.

329. Ibid 228.

330. Ibid.

331. Submission 10 (Magistrates' Court of Victoria) 6; Meeting with Victorian Aboriginal Legal Service and Victorian Aboriginal Community Services Association (12 April 2017); Submission 3 (E. James). A number of stakeholders also commented generally on the need for consistent responses to family violence offenders from the criminal justice system: Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 10.

332. Meeting with Victoria Legal Aid (15 March 2017).

333. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

334. Victorian Legal Services Board and Commissioner (2016), above n 57.

335. Submission 10 (Magistrates' Court of Victoria) 6.

- 4.108 One element of effective judicial supervision consistently raised by stakeholders is the need for offenders to appear before the same judicial officer for return appearances. This has the benefit of enabling the judicial officer to:
- develop a deeper understanding of the offender's overall profile;
 - develop an understanding of the offender's responsiveness to supervision, and therefore their risk level;
 - identify and respond to dynamic risk factors; and
 - understand what does and does not work with particular offenders in terms of behaviour change.³³⁶
- 4.109 As noted at [4.48]–[4.49], any increase in the use, intensity or frequency of judicial monitoring, in the absence of a clear and articulated methodology on best practice, could have a detrimental effect and could draw some offenders away from pro-social or protective factors (such as employment).
- 4.110 In order to effectively utilise the judicial monitoring powers under the CCO scheme, judicial officers need training to effectively engage with offenders, particularly offenders engaging in family violence. Further education is also likely to promote the use of judicial monitoring and therefore enable judicial officers to confidently utilise the CCO scheme to actively contribute to establishing a web of accountability around family violence offenders.
- 4.111 No stakeholder opposed judicial education to promote and improve the use of judicial monitoring.

Judicial education and training delivered by the Judicial College of Victoria

- 4.112 The Judicial College of Victoria is the statutory body tasked with providing continuing education and training for judicial officers.³³⁷ The Council considers the Judicial College to be best placed to develop and deliver judicial education and training programs in relation to the use of judicial monitoring for family violence offenders.
- 4.113 The Judicial College currently delivers judicial education for magistrates on family violence;³³⁸ however, there are no current judicial education programs related to judicial monitoring. During consultation, the Judicial College agreed that such a program would fill an existing gap within the current training available to judicial officers.³³⁹
- 4.114 The Council proposes that the Judicial College, in consultation with the courts as well as with expert stakeholders, develop an evidence-based model for judicial monitoring of family violence offenders. Among others, the expert stakeholders might include the:
- Diverse Communities and Intersectionality Working Group;
 - Judicial Advisory Group on Family Violence; and
 - Expert Advisory Committee on Perpetrator Interventions.

336. Submission 24 (Centre for Innovative Justice, RMIT University) 11.

337. *Judicial College of Victoria Act 2001* (Vic) s 1.

338. Judicial College of Victoria, *2017: A Path to Learning* (2017) 7 (describing a two-day program titled 'The Intimate Terrorism of Family Violence' directed at magistrates).

339. Meeting with Judicial College of Victoria (4 May 2017).

- 4.115 The evidence-based model will provide a basis for the education materials, which ought to address such topics as:
- the unique nature of family violence;
 - the identification of dynamic risk factors;
 - the circumstances in which judicial monitoring might be appropriate for a family violence offender sentenced to a CCO; and
 - the most effective ways to engage with family violence offenders at a judicial monitoring hearing.
- 4.116 This is not an exhaustive list. The materials may also wish to address the question of the most appropriate scheduling and frequency of judicial monitoring hearings, in line with the cautions raised by the Council about the potential danger of overuse or inappropriate use (see [4.48]–[4.49]).
- 4.117 The judicial education programs should also provide guidance and practical training on the most effective ways to engage with family violence offenders at a judicial monitoring hearing. Victoria Legal Aid has noted that training is necessary to assist judicial officers to undertake effective therapeutic intervention, including how to communicate with offenders effectively, for example, by using appropriate language.³⁴⁰ The Judicial College may wish to draw on the findings of the research conducted by the Dandenong Magistrates' Court and Swinburne University's Centre for Forensic Behavioural Science in developing their education materials in this regard.
- 4.118 In addition, a number of stakeholders considered it important to continue to build the overall capacity of judicial officers to understand the nature and dynamics of family violence and to respond appropriately.³⁴¹ The training provided by the Judicial College on judicial monitoring should be tailored to the specific dynamics of the family violence context.
- 4.119 The Judicial College will need to receive additional funding to develop and deliver these education materials.

Recommendation 9

The Judicial College of Victoria, in consultation with the courts and expert stakeholders, should develop an evidence-based model for judicial monitoring of family violence offenders. The model should address such topics as:

- the unique nature of family violence;
- the identification of dynamic risk factors;
- the circumstances in which judicial monitoring might be appropriate for a family violence offender sentenced to a community correction order; and
- the most effective ways to engage with family violence offenders at a judicial monitoring hearing.

The Judicial College of Victoria should deliver judicial education and training on applying the evidence-based model for judicial monitoring of family violence offenders.

The Judicial College of Victoria should receive additional resources to provide this education and training.

340. Meeting with Victoria Legal Aid (15 March 2017).

341. Submission 3 (E. James); Submission 12 (The Salvation Army Victoria Social Programme and Policy Unit) 10.

Resourcing of the Council's recommendations

- 4.120 The Council heard from a number of stakeholders that the court system in Victoria is operating at capacity.³⁴² A recent report commissioned by Victoria Legal Aid suggests that this is particularly true in the summary jurisdiction.³⁴³ While some courts, and some judicial officers, may have the capacity to conduct further judicial monitoring hearings, many venues are already operating at capacity.³⁴⁴ In addition, a range of legislative amendments has led to increased pressures on judicial officers and court listings.³⁴⁵
- 4.121 An increase in the numbers of judicial monitoring *conditions* imposed will of course mean an increase in the number of judicial monitoring *hearings*.
- 4.122 In order to support the increased use of judicial monitoring, there will need to be increased resources provided to courts, to meet the demand for expedited listings and the increased numbers of judicial monitoring hearings. The investment will need to apply to both the summary and the indictable streams of the courts.
- 4.123 Several stakeholders noted that any amendments to sentencing family violence offenders would need to be supported by sufficient resource investment.³⁴⁶ For example, inTouch Multicultural Centre Against Family Violence observed that there are already existing shortages of interpreters, posing challenges for fast tracking matters involving culturally and linguistically diverse clients.³⁴⁷ This is also relevant to an increased use of judicial monitoring. Further funding of interpreting services will be necessary to support the increased use of judicial monitoring for culturally and linguistically diverse family violence offenders.
- 4.124 Increasing the use of judicial monitoring will also have an effect on courts, requiring judicial officers to undertake a larger number of judicial monitoring hearings in addition to their regular caseload. The use of court-ordered Corrections Victoria directed judicial monitoring hearings may also contribute to an increase in the number of judicial monitoring hearings that will need to be listed within expedited timeframes.
- 4.125 In addition to the courts, the following agencies and organisations will require additional resources to respond to an increase in the use of judicial monitoring:
- Corrections Victoria (who will need to appear at the judicial monitoring hearings);³⁴⁸
 - Victoria Legal Aid (who do not routinely provide offenders with representation at judicial monitoring hearings,³⁴⁹ but note that the 'opportunity for an effective intervention is often lost where ... a person cannot be provided with legal advice and representation');³⁵⁰
 - the Victorian Aboriginal Legal Service (who routinely represent clients at judicial monitoring hearings and will require additional funding to accommodate an increase in judicial monitoring hearing appearances);³⁵¹

342. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

343. Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid's Summary Crime Program* (2017).

344. Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

345. Stakeholder Discussion Forum on Proposed Recommendations (31 May 2017).

346. Submission 17 (Victoria Legal Aid) 10; Submission 11 (McAuley Community Services for Women) 3; Submission 13 (Victorian CASA Forum) 7.

347. Meeting with inTouch Multicultural Centre Against Family Violence (14 March 2017).

348. Meeting with Corrections Victoria (15 March 2017).

349. This is due to the limitations of Victoria Legal Aid's current levels of funding and the inability to provide representation to offenders at all hearings.

350. Submission 17 (Victoria Legal Aid) 10.

351. Meeting with Victorian Aboriginal Legal Service and Victorian Aboriginal Community Services Association (12 April 2017).

- Victoria Police (both the Prosecutions Division, who may be required to attend judicial monitoring hearings, and front-line police, who may have to execute additional warrants if offenders fail to appear at a judicial monitoring hearing); and
 - the Office of Public Prosecutions (if required by the judicial officer to attend).
- 4.126 An increased use of judicial monitoring will therefore require initial investment across a range of agencies and organisations. It is anticipated, however, that monitoring an offender's progress on the order (and promoting engagement with services) and managing emerging risk will reduce the number of offenders contravening their CCOs. This could potentially reduce the expenditure on prosecutions of charges of contravening a CCO, and could ideally also avoid the expense of the offender committing further offences in the future.
- 4.127 As noted at [4.119], the Judicial College of Victoria will require additional resources to develop and deliver judicial education on judicial monitoring. Courts may require additional resources in order to support judicial officers to take time out from their caseloads to undertake additional professional development.
- 4.128 In order to support the efficacy of judicial monitoring, increased funding for programs – to which offenders can be referred to complete conditions of their CCOs – will also be necessary. No To Violence/Men's Referral Service drew attention to the insufficiency of the current funding of MBCPs.³⁵² Where judicial monitoring is imposed in combination with attendance at an MBCP, additional funding of MBCPs will assist in achieving timely compliance with court-ordered programs.³⁵³
- 4.129 In addition, a number of stakeholders drew attention to other areas of the family violence system requiring increased funding.³⁵⁴ The Council notes and supports the continued investment across the criminal justice system to assist appropriate responses to family violence.

Recommendation 10

The Victorian Government should provide additional resources to agencies and organisations affected by:

- a. an increase in the number of judicial monitoring hearings; and
- b. the listing of charges of contravening a community correction order in the Magistrates' Court fast tracking listing process.

Such agencies and organisations include, but are not limited to:

- the courts;
- Corrections Victoria;
- Victoria Police (including front-line police and Victoria Police prosecutors);
- Victoria Legal Aid;
- the Victorian Aboriginal Legal Service; and
- the Office of Public Prosecutions.

352. Submission 22 (No To Violence/Men's Referral Service) 6.

353. Meeting with No To Violence/Men's Referral Service (21 April 2017).

354. For example, one submission called for the restoration of 'special police family violence units' and retraining for police officers who fail to promptly or adequately investigate repeated complaints of breaches: Submission 3 (E. James); 'We continue to call for trained and adequately resourced policing, lawyers and magistrates': Submission 11 (McAuley Community Services for Women) 3.

Evaluation of the Council's recommendations

- 4.130 The research in favour of the use of judicial monitoring for offenders with alcohol and substance-abuse issues – as well as the current evidence for the use of judicial monitoring for family violence offenders – is discussed at [4.26]–[4.31]. Although there is some research in favour of the use of judicial monitoring for family violence offenders, further research is needed to examine the effectiveness of the use of judicial monitoring for family violence offenders in the Victorian context.
- 4.131 The use of judicial monitoring for family violence offenders had wide support from stakeholders, and many, most notably the Magistrates' Court of Victoria, considered judicial monitoring to be a supervision mechanism consistent with the 'principles for effective intervention' for family violence offenders.³⁵⁵ In order to further develop the understanding of, and support for, best-practice approaches to family violence offenders, further empirical research seeking to assess the effects of judicial monitoring – and whether and how it makes a difference with family violence offenders – would be of great value.
- 4.132 Several stakeholders commented on the lack of evidence on effective approaches to family violence offenders.³⁵⁶ The Victorian Association for the Care and Resettlement of Offenders submitted:
- We still have little evidence or agreement on what responses should look like or what actually works apart from the concept that they need to 'work' for both victims and perpetrators.³⁵⁷
- 4.133 The Victims of Crime Commissioner noted that if there were a better collection of data on family violence offences, the effectiveness of sentences imposed could be more easily accessed and assessed.³⁵⁸ Indeed, more consistent collection of data would support evaluation of interventions across the family violence sector. One initiative in this regard is the Crime Statistics Agency Victoria's provision of key data on family violence measures, published in the 2015–16 Victorian Family Violence Database.³⁵⁹
- 4.134 Many stakeholders supported and prioritised evaluation of existing programs. The Magistrates' Court of Victoria's submission stated their commitment to the 'implementation, evaluation and expansion of evidence-based reforms to sentencing law, practice and programs'.³⁶⁰ Similarly, Corrections Victoria supported the use of evaluative frameworks to assess court-based interventions.³⁶¹
- 4.135 Victoria Legal Aid commented that there have been a range of criminal justice reforms introduced to improve the response to family violence offending, including fast-tracking of family violence matters in the Magistrates' Court, as well as expansion of the Family Violence Court Division. Victoria Legal Aid recommended that the results and impact of these reforms be evaluated before further changes are introduced.³⁶² In order to build an evidence base for reforms, the importance of evaluation must be considered at the development stages of any intervention or pilot program.

355. Submission 10 (Magistrates' Court of Victoria) 4.

356. Swift, Certain and Fair Stakeholder Discussion Forum (7 March 2017); Swift, Certain and Fair Stakeholder Discussion Forum (9 March 2017).

357. Submission 6 (Victorian Association for the Care and Resettlement of Offenders).

358. Submission 8 (Victims of Crime Commissioner) 4.

359. Crime Statistics Agency Victoria, 'Family Violence Data Dashboards' (Crime Statistics Agency, 2016) <<https://www.crimestatistics.vic.gov.au/family-violence-data-portal/family-violence-data-dashboards>> at 26 July 2017.

360. Submission 10 (Magistrates' Court of Victoria) 3.

361. Meeting with Corrections Victoria (15 March 2017).

362. Submission 17 (Victoria Legal Aid) 5.

- 4.136 The Council notes that greater attention should be paid to evaluating reforms, in order to build the evidence base for effective court-based interventions with family violence offenders. In particular, given the cautions expressed at [4.92], the Council's recommended reform allowing a court to attach a condition that Corrections Victoria may direct an offender to attend a judicial monitoring hearing should be evaluated to ensure that it is being used appropriately.

Recommendation 11

The Victorian Government should develop a framework to evaluate the effectiveness of court-based family violence interventions, including:

- the use of judicial monitoring for family violence offenders;
- Corrections Victoria directed judicial monitoring hearings;
- the Magistrates' Court fast tracking listing process for prosecution of family violence offending; and
- listing charges of contravening a community correction order imposed for family violence offending in the Magistrates' Court fast tracking listing process.

Package of recommendations

- 4.137 The Council's recommendations represent a package of interrelated reforms. The Council cautions against separate implementation on the basis that the reforms are reliant on one another. For example, it would not be desirable to increase the use of judicial monitoring for family violence offenders in the absence of the development of a principled model. Further, the introduction of the power for a court to attach a condition allowing Corrections Victoria to direct an offender to attend a judicial monitoring hearing must be accompanied by the development of a clear protocol for the appropriate use of that direction by Corrections Victoria.
- 4.138 Similarly, the Council emphasises that implementation of the recommended reforms will necessarily require additional resources, as discussed at [4.120]–[4.129].

Appendix: consultation

Preliminary consultation: meetings/events

Date	Meeting/event
28 September 2016	Meeting with Dandenong Magistrates' Court
6 October 2016	Meeting with Chief Magistrate, Magistrates' Court of Victoria
12 October 2016	Meeting with Corrections Victoria
24 October 2016	Meeting with Deputy Chief Magistrate Broughton and Magistrate Hawkins, Magistrates' Court of Victoria
24 October 2016	Meeting with Victoria Police
25 October 2016	Meeting with Magistrate Parsons and Observation of the Drug Court, Dandenong Magistrates' Court
3 November 2016	Presentation to the Magistrates' Court Family Violence Taskforce
3 November 2016	Meeting with Magistrates of the Heidelberg Magistrates' Court and Observation of the Family Violence Court Division
7 November 2016	Meeting with Corrections Victoria
7 November 2016	Meeting with Judge Hannan and Judge Taft, County Court of Victoria
8 November 2016	Meeting with Victoria Police
9 November 2016	Teleconference with Dr Lorana Bartels
6 December 2016	Meeting with Prisoner Management Unit, Victoria Police
4 January 2017	Meeting with Victoria Legal Aid
12 January 2017	Meeting with Corrections Victoria

Consultation: meetings/events

Date	Meeting/event
7 March 2017	Swift, Certain and Fair Stakeholder Discussion Forum
9 March 2017	Swift, Certain and Fair Stakeholder Discussion Forum
14 March 2017	Meeting with inTouch Multicultural Centre Against Family Violence
15 March 2017	Meeting with Victoria Legal Aid
15 March 2017	Meeting with Corrections Victoria
23 March 2017	Meeting with Community Offender Advice and Treatment Service, Australian Community Support Organisation (ACSO COATS)
27 March 2017	Meeting with Office of the Minister for the Prevention of Family Violence, Department of Premier and Cabinet
28 March 2017	Meeting with Victim Survivors' Advisory Council
30 March 2017	Teleconference with Dr Angela Hawken, New York University, and Dr Jonathan Kulick, New York University
3 April 2017	Meeting with Victims of Crime Commissioner
4 April 2017	Meeting with Magistrate Spencer and Magistrate Hawkins, Magistrates' Court of Victoria
5 April 2017	Meeting with Victoria Police
11 April 2017	Meeting with Neighbourhood Justice Centre
11 April 2017	Meeting with Dr Keri Alexander, Turning Point Alcohol and Drug Centre
12 April 2017	Meeting with Victorian Aboriginal Legal Service and Victorian Aboriginal Community Services Association
19 April 2017	Teleconference with Justice Southwood, Supreme Court of the Northern Territory
20 April 2017	Meeting with Domestic Violence Victoria
21 April 2017	Meeting with No To Violence/Men's Referral Service
4 May 2017	Meeting with Judicial College of Victoria
4 May 2017	Meeting with Office of Public Prosecutions
5 May 2017	Meeting with Human Rights Law Centre
31 May 2017	Stakeholder Discussion Forum on Proposed Recommendations
6 June 2017	Teleconference with Magistrate Spencer
6 June 2017	Meeting with Domestic Violence Victoria
10 July 2017	Meeting with Expert Advisory Committee on Perpetrator Interventions

Submissions

Number	Date received	Person/organisation
1	22 February 2017	J. Reside
2	25 February 2017	Anonymous
3	25 February 2017	E. James
4	28 February 2017	Anonymous
5	17 March 2017	Confidential
6	28 March 2017	Victorian Association for the Care and Resettlement of Offenders
7	29 March 2017	Coroners Court of Victoria
8	31 March 2017	Victims of Crime Commissioner
9	31 March 2017	Violence Prevention Group, Deakin University
10	31 March 2017	Magistrates' Court of Victoria
11	31 March 2017	McAuley Community Services for Women
12	31 March 2017	The Salvation Army Victorian Social Programme and Policy Unit
13	31 March 2017	Victorian CASA Forum (Centres Against Sexual Assault)
14	31 March 2017	Foundation for Alcohol Research and Education (FARE)
15	4 April 2017	Liberty Victoria
16	6 April 2017	Victorian Aboriginal Legal Service
17	11 April 2017	Victoria Legal Aid
18	13 April 2017	Victorian Bar and Criminal Bar Association
19	13 April 2017	Law Institute of Victoria
20	13 April 2017	Eastern Community Legal Centre
21	13 April 2017	International Commission of Jurists Victoria
22	21 April 2017	No To Violence/Men's Referral Service
23	26 April 2017	Victoria Police
24	1 May 2017	Centre for Innovative Justice, RMIT University

References

Bibliography

- Alm, Steven S., 'A New Continuum for Court Supervision' (2013) 91(4) *Oregon Law Review* 1181.
- Alm, Steven S., 'HOPE Probation: Fair Sanctions, Evidence-Based Principles, and Therapeutic Alliances' (2016) 15(4) *Criminology & Public Policy* 1195.
- Arias, Esther, Ramon Arce and Manuel Vilarino, 'Batterer Intervention Programmes: A Meta-Analytic Review of Effectiveness' (2013) 22 *Psychosocial Intervention* 153.
- Attorney-General and Minister for Justice (NT), 'Breaking the Cycle of Crime', Media Release (11 May 2017) <<http://newsroom.nt.gov.au/mediaRelease/23193>>.
- Australia's National Research Organisation for Women's Safety, *Perpetrator Interventions in Australia: Part One – Literature Review* (ANROWS, 2015) <<https://anrows.org.au/file/1431/download?token=CvIPN3nR>>.
- Australian Human Rights Commission, 'Laws Mandating Minimum Terms of Imprisonment ("Mandatory Sentencing") and Indigenous People', in Australian Human Rights Commission (ed.), *Social Justice Report 2001* (Human Rights and Equal Opportunity Commission, 2001) 101–131.
- Australian Institute of Criminology, 'Australian Responses to Illicit Drugs: Drug Courts' (Australian Institute of Criminology, 2017) <http://www.aic.gov.au/criminal_justice_system/courts/specialist/drugcourts.html>.
- Babcock, Julia C., Charles E. Green and Chet Robie, 'Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment' (2004) 23(8) *Clinical Psychology Review* 1023.
- Bartels, Lorana, 'Looking at Hawaii's Opportunity with Probation Enforcement (HOPE) Program through a Therapeutic Jurisprudence Lens' (2016) 16(3) *QUT Law Review* 30.
- Bartels, Lorana, *Swift, Certain and Fair: Does Project HOPE Provide a Therapeutic Paradigm for Managing Offenders?* (Springer, 2017).
- Bureau of Justice Assistance, *Swift, Certain, and Fair (SCF) Supervision Program – Including Project HOPE FY 2017 Competitive Grant Announcement* (United States Department of Justice, 2017) <<https://www.bja.gov/funding/SCF17.pdf>>.
- Campbell, Michael D., Helen DuPont, Keith Humphreys, Marie Raghianti and Rom Trader, *State of the Art of HOPE Probation* (Institute for Behavior and Health, 2015) <http://www.ibhinc.org/s/HOPE_State_of_the_Art_of_HOPE_Probation.pdf>.
- Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (Commonwealth of Australia, 1991).
- County Court Criminal Division, *November 2016* (County Court of Victoria, 2016) <https://www.countycourt.vic.gov.au/sites/default/files/Criminal%20Division%20-%20November%202016%20Update_3.pdf>.
- Crime Statistics Agency Victoria, 'Family Violence Data Dashboards' (Crime Statistics Agency, 2016) <<https://www.crimestatistics.vic.gov.au/family-violence-data-portal/family-violence-data-dashboards>>.
- Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Office of Public Prosecutions Victoria, 2017) <<http://www.opp.vic.gov.au/resources/policies>>.

DuPont, Robert L., Cherly Unouye, Steven S. Alm and Corrine Shea, *The Hope Probation Strategy and Fidelity to It: A Summary* (Institute for Behavior and Health, 2015).

Eldridge, John, "'Paperless arrests': *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 326 ALR 16' (2016) 37 *Adelaide Law Review* 283.

Epstein, Deborah, 'Procedural Justice: Tempering the State's Response to Domestic Violence' (2002) 43 *William and Mary Law Review* 1843.

Feder, Lynette and David B. Wilson, 'A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?' (2005) 1 *Journal of Experimental Criminology* 239.

Freiberg, Arie, *Fox & Freiberg's Sentencing: State and Federal Law in Australia* (3rd ed., Thomson Reuters, 2014).

French, Robert S., 'Administrative Law in Australia: Themes and Values Revisited', in Matthew Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24–48.

Gavin, Chandra and Nora K. Puffett, *Criminal Domestic Violence Case Processing: A Case Study of the Five Boroughs of New York City* (Centre for Court Innovation, 2005) <<http://www.courtinnovation.org/sites/default/files/Citywide%20FinalI.pdf>>.

Gilchrist, Gail and Kelsey Hegarty (eds), 'Special Issue: Intimate Partner Violence and Substance Misuse' (2017) 36(1) *Drug and Alcohol Review* 1.

Gondolf, Edward W., 'Mandatory Court Review and Batterer Program Compliance' (2000) 15(4) *Journal of Interpersonal Violence* 428.

Hawken, Angela, 'HOPE: Theoretical Underpinnings and Evaluation Findings' (Testimony prepared for the Oregon State Legislature, 10 April 2009).

Hawkins, Kate and Felicity Broughton, 'Sentencing in Domestic Violence Cases' (Paper presented at Current Issues in Sentencing Conference, National Judicial College of Australia, Canberra, 6–7 February 2016) <<http://njca.com.au/wp-content/uploads/2015/04/Hawkins-Kate-Sentencing-in-Domestic-Violence-Cases-paper.pdf>>.

Judicial College of Victoria, *2017: A Path to Learning* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/sites/default/files/2017%20Prospectus%20-%20External.pdf>>.

Klinge, Cecilia, 'What Are We Hoping For? Defining Purpose in Deterrence-Based Correctional Programs' (2015) 99(5) *Minnesota Law Review* 1631.

KPMG, *Evaluation of the Drug Court of Victoria: Final Report* (KPMG, 2014) <<https://www.magistratescourt.vic.gov.au/sites/default/files/Default/141218%20Evaluation%20of%20the%20Drug%20Court%20of%20Victoria.pdf>>.

Labriola, Melissa, Amanda B. Cissner, Robert C. Davis and Michael Rempel, *Testing the Efficacy of Judicial Monitoring: A Randomized Trial at the Rochester New York Domestic Violence Courts* (Centre for Court Innovation, 2012).

Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid's Summary Crime Program* (Victoria Legal Aid, 2017) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-evaluation-of-the-appropriateness-and-sustainability-of-victoria-legal-aids-summary-crime-program-report.pdf>>.

Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report*, Project No. 96 (Law Reform Commission of Western Australia, 2009) <http://www.lrc.justice.wa.gov.au/_files/P96-FR.pdf>.

Magistrates' Court of Victoria and Children's Court of Victoria, *Submission to the Royal Commission into Family Violence* (Magistrates' Court of Victoria, 2015) <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/150708%20FV%20submission%20final_WEB%20VERSION.pdf>.

Magistrates' Court of Victoria, *Practice Direction No. 10 of 2014: Fast Tracking of the Hearing and Determination of Criminal Offences Arising out of Family Violence Incidents* (Magistrates' Court of Victoria, 2014) <<https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Practice%20Direction%2010%20of%202014.pdf>>.

Magistrates' Court of Victoria, *Practice Direction No. 8 of 2015: Expansion of the Fast Tracking Listing Process to the Court at Ballarat and Ringwood* (Magistrates' Court of Victoria, 2015) <<https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Practice%20Direction%208%20of%202015.pdf>>.

Magistrates' Court of Victoria, *Practice Direction No. 7 of 2017: Expansion of the Fast Tracking Listing Process to the Court at Sunshine and Werribee* (Magistrates' Court of Victoria, 2017) <<https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Practice%20Direction%207%20of%202017%20-%20Expansion%20of%20the%20fast%20tracking%20listing%20process%20to%20the%20Court%20at%20Sunshine%20and%20Werribee.pdf>>.

Marlowe, Douglas B., David S. Festinger, Karen L. Dugosh and Patricia A. Lee, 'Are Judicial Status Hearings a "Key Component" of Drug Court? Six and Twelve Months Outcomes' (2005) 79(2) *Drug and Alcohol Dependence* 145.

Marlowe, Douglas B., David S. Festinger, Karen L. Dugosh, Patricia A. Lee and Kathleen M. Benasutti, 'Adapting Judicial Supervision to the Risk Level of Drug Offenders: Discharge and 6-Month Outcomes from a Prospective Matching Study' (2007) 88(Suppl 2) *Drug and Alcohol Dependence* 54.

McCulloch, Jude, JaneMaree Maher, Kate Fitzgibbon, Marie Segrave and James Roffee, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF): Final Report* (Monash University School of Social Sciences, 2016) <<http://artsonline.monash.edu.au/gender-and-family-violence/review-of-the-family-violence-risk-assessment-risk-management-framework-craf-final-report/>>.

McIvor, Gil, 'Beyond Supervision: Judicial Involvement in Offender Management', in Fergus McNeil, Peter Raynor and Chris Trotter (eds), *Offender Supervision: New Directives in Theory, Research and Practice* (Willan, 2010) 215–238.

Mooney, Jessica L. and Michael Daffern, 'The Relationship between Aggressive Behaviour in Prison and Violent Offending Following Release' (2015) 21(4) *Psychology, Crime & Law* 314.

Northern Territory Department of Correctional Services, *The HOPE Strategy and the COMMIT Program Manual* (Northern Territory Department of Correctional Services, 2016).

Pepper, Melissa and Paul Dawson, *Alcohol Abstinence Monitoring Requirement: A Process Review of the Proof of Concept Pilot* (Mayor of London: Office for Policing and Crime, 2016) <http://www.drugsandalcohol.ie/26335/1/Alcohol_Abstinence_Monitoring_Requirement.pdf>.

Premier of Victoria, 'Record Frontline Police Boost To Keep Victorians Safe', Media Release (4 December 2016) <<http://www.premier.vic.gov.au/record-frontline-police-boost-to-keep-victorians-safe/>>.

Rempel, Michael, Melissa Labriola and Robert C. Davis, 'Does Judicial Monitoring Deter Domestic Violence Recidivism' (2008) 14(2) *Violence Against Women* 185.

Sentencing Advisory Council, *Sentencing Guidance in Victoria* (Sentencing Advisory Council, 2016) <<https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentencing%20Guidance%20in%20Victoria%20Report.pdf>>.

Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Discussion Paper* (Sentencing Advisory Council, 2017) <<https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/SwiftCertainAndFairApproachesToSentencing.pdf>>.

Sentencing Advisory Council, *Contravention of Community Correction Orders* (Sentencing Advisory Council, 2017) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Contravention_of_Community_Correction_Orders.pdf>.

Spencer, Pauline, 'Strengthening the Web of Accountability: Criminal Courts and Family Violence Offenders' (2016) 41(4) *Alternative Law Journal* 225.

Spencer, Pauline, Benjamin Spivak, James Ogloff, Stephane Shepherd and Diane Sivasubramaniam, 'Examining Magistrate Perceptions and Use of Judicial Supervision' (Abstracts, National Non-Adversarial Justice Conference, 2017) <<http://www.naj2017.com/1879>>.

State of Victoria, 'Stronger Community Corrections System to Keep Victorians Safe', Media Release (16 January 2017) <<http://www.premier.vic.gov.au/stronger-community-corrections-system-to-keep-victorians-safe/>>.

State of Victoria, *Ending Family Violence: Victoria's Plan for Change* (State of Victoria, 2016) <[https://www.vic.gov.au/system/user_files/Documents/fv/160803.10%2010%20Year%20Plan%20Booklet%20\(Online\).pdf](https://www.vic.gov.au/system/user_files/Documents/fv/160803.10%2010%20Year%20Plan%20Booklet%20(Online).pdf)>.

State of Victoria, *Family Violence Rolling Action Plan 2017–2020* (State of Victoria, 2017) <http://www.vic.gov.au/system/user_files/Documents/fv/Family%20Violence%20Rolling%20Action%20Plan%202017-2020.pdf>.

State of Victoria, *Getting On with the Job: Victorian Budget 17/18*, Budget Paper No 3: Service Delivery (State of Victoria, 2017) <https://s3-ap-southeast-2.amazonaws.com/budgetfiles201718.budget.vic.gov.au/BP3_2017-18_ServiceDelivery.pdf>.

State of Victoria, Royal Commission into Family Violence, *Volume I: Report and Recommendations* (State of Victoria, 2016).

State of Victoria, Royal Commission into Family Violence, *Volume III: Report and Recommendations* (State of Victoria, 2016).

Superior Court of California (Marin), *Marin County Integrated Family Violence Court Program: Policies and Procedures* (Superior Court of California (Marin), 2012).

Tonry, Michael, 'Legal and Ethical Issues in the Prediction of Recidivism' (2014) 26(3) *Federal Sentencing Reporter* 167.

Victorian Auditor-General's Office, *Managing Community Correction Orders* (Victorian Government Printer, 2017).

Victorian Legal Services Board and Commissioner, 'Grants Funded' (Victorian Legal Services Board + Commissioner, 2016) <http://lsbc.vic.gov.au/?page_id=172>.

Walters, Adrienne and Shannon Longhurst, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (Human Rights Law Centre and Change the Record, 2017) <https://www.hrlc.org.au/s/OverRepresented_online.pdf>.

Wexler, David B., 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' (2014) 7 *Arizona Summit Law Review* 463.

Wexler, David B., 'Therapeutic Jurisprudence and Its Application to Criminal Justice Research and Development' (2010) 7 *Irish Probation Journal* 94.

Case law

Annetts v McCann (1990) 170 CLR 569
Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1
Deng-Mabior v R [2015] VSCA 179 (17 July 2015)
Director of Public Prosecutions v Erradi [2015] VCC 1672 (20 November 2015)
Director of Public Prosecutions v Hose [2015] VCC 1395 (14 July 2015)
Director of Public Prosecutions v Jury [2016] VCC 277 (9 February 2016)
Director of Public Prosecutions v Krepp [2016] VCC 529 (29 April 2016)
Director of Public Prosecutions v Lindus [2016] VCC 526 (2 May 2016)
North Australian Aboriginal Justice Agency Limited v Northern Territory (2015) 256 CLR 569
Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319
Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294

Legislation and Bills

Victoria

Bail Act 1977 (Vic)
Charter of Human Rights and Responsibilities Act 2006 (Vic)
Corrections Act 1986 (Vic)
Criminal Procedure Act 2009 (Vic)
Equal Opportunity Act 2010 (Vic)
Family Violence Protection Act 2008 (Vic)
Family Violence Protection Amendment (Information Sharing) Act 2017 (Vic)
Judicial College of Victoria Act 2001 (Vic)
Magistrates' Court Act 1989 (Vic)
Sentencing Act 1991 (Vic)

Northern Territory

Police Administration Act (NT)

Commonwealth

Family Law Act 1975 (Cth)

International

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46 (10 December 1984)
United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 57/199 (18 December 2002)
United Nations International Conventions on the Elimination of All Forms of Racial Discrimination, GA Res 2106/xx (21 December 1965)

Quasi-legislative materials

Explanatory Memorandum, Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic)
Finding with Inquest into the Death of Luke Geoffrey Batty, COR 2014 0855 (28 September 2015)
 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011 (Robert Clark, Attorney-General)

Sentencing Advisory Council

Level 3

333 Queen Street

Melbourne VIC 3000

Telephone 1300 363 196

Facsimile 03 9908 8777

contact@sentencingcouncil.vic.gov.au

www.sentencingcouncil.vic.gov.au

Follow us on Twitter @SACvic