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6 December 2022

Yoorrook Justice Commission
Issues Paper 1: Systemic Injustice in the Criminal Justice System
Submitted online: https://yoorrookjusticecommission.org.au/submissions/

Dear Commissioners,

SYSTEMIC INJUSTICE IN THE CRIMINAL JUSTICE SYSTEM

1. Thank you for the opportunity to make a submission to the Yoorrook Justice Commission. Thank you also for granting an extension of time to make this submission.

2. This is a public submission and is not confidential.

ABOUT LIBERTY VICTORIA

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

4. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and

the defence. More information on our organisation and activities can be found at: libertyvictoria.org.au.

5. Some of the below adopts previous submissions made by Liberty Victoria.

THE ISSUES PAPER

6. This submission responds to the Yoorrook Justice Commission's Issues Paper 1: Systemic Injustice in the Criminal Justice System.

7. At the outset, it should be acknowledged that 527 First Peoples have died in custody since the recommendations of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) were published over 30 years ago.

8. Despite the clear recommendation of RCIADIC that imprisonment should be utilised only as a sanction of last resort (Recommendation 92), in Victoria we see a largely bipartisan embrace of penal populism – with the enactment over the past decade of presumptive and mandatory sentencing, bail and parole reforms that we know have had a disproportionate and deleterious impact on First Peoples, sometimes with fatal consequences.

9. Liberty Victoria has made many submissions to governments (both State and Federal) addressing some of these issues, including over recent times:

   (a) Our submission to the Victorian Legislative Council's Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System dated 20 September 2021;

   (b) Our submission to the Victorian Legal and Constitutional Affairs References Committee's Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia dated 2 June 2022;

   (c) Our submission to the Victorian Legislative Council's Legal and Social Issues Committee's Inquiry into Children Affected by Parental Incarceration dated 13 May 2022 (including reference to the disproportionate rate of incarceration on First Peoples, the disproportionate impact of parental incarceration on First Peoples, and the distinct cultural rights held by First Peoples); and

(d) Our submission to the Cultural Review of the Adult Custodial Corrections System dated 21 December 2021, and our adoption of the submission of the Victorian Aboriginal Legal Service (**VALS**).

10. We adopt those submissions.

11. It should be noted that the final report of the Inquiry into Victoria's Criminal Justice System, published in May 2022, made many findings and recommendations that would be of interest to the Yoorrook Justice Commission. This includes, broadly, the need to raise the minimum age of criminal responsibility, to reform the *Bail Act 1977* (Vic), and to review the operation of mandatory sentencing provisions.

12. The following submission focusses on:

(a) The need to raise the minimum age of criminal responsibility;

(b) Victoria's harsh bail laws;

(c) The pitfalls of presumptive and mandatory sentencing; and

(d) The operation and effect of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**).

Raising the Age

13. The minimum age of criminal responsibility in Victoria should be raised from 10 to 14 as a matter of urgency.[1]

14. As we submitted to the Inquiry into Victoria's Criminal Justice System, in 2019 the United Nations Committee on the Rights of The Child (**UNCRC**) recommended in General Comment No 24 on 'Children's Rights in Juvenile Justice' that all State parties increase the minimum age of criminal responsibility to at least 14 years.[2] The UNCRC stated:

> *Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice*

1 Liberty Victoria's submission to the Victorian Legislative Council's Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System, [35]–[43].

2 United Nations Committee on the Rights of the Child, General Comment No 24, 'Children's Rights In Juvenile Justice', [33].

system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.[3]

15. Recently, the United Nations Human Rights Council Universal Periodic Review (**UPR**) highlighted the need for Australia to raise the minimum age of criminal responsibility.[4]

16. As observed by the UNCRC, there is a strong evidentiary basis to support this reform. We refer to the Raise the Age campaign statement to the Council of Attorneys-General (**CAG**) dated 19 May 2021,[5] of which Liberty Victoria is a signatory, and the resources referred to there.

17. Victoria now has the opportunity to follow the initiative of the Australian Capital Territory and the Northern Territory on this crucial issue (although the Northern Territory has only committed to raising the age to 12, which is inadequate).

18. Children under 14 are developmentally immature. Early contact with the criminal justice system and punitive responses to childhood offending are criminogenic; they contribute to higher rates of incarceration and recidivism.

19. Such a low age of criminal responsibility disproportionately affects some of the most vulnerable children in the community. Children who enter the criminal justice system far too often are those that have experienced neglect, abuse, and trauma.[6] Contact with the criminal justice system does little to address the complex needs of these children, and often exacerbates them.

20. First Peoples children are significantly over-represented in the system, and especially in detention.

21. We note the Inquiry into Victoria's Criminal Justice System recommended to raise the age (recommendation 10).

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3 Ibid [2].

4 Human Rights Council, Forty-seventh session, 21 June–9 July 2021, Agenda item 6, Universal periodic review, Report of the Working Group on the Universal Periodic Review, Australia <https://undocs.org/A/HRC/47/8>.

5 See Raise The Age, CAG Statement <raisetheage.org.au/cag-statement> and Raise The Age, 'Public statement to accompany the release of submissions to the Council of Attorneys-General on raising the age' <static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a431a0c1675068081a0e5f/1621373344888/Public+statement+to+accompany+CAG+submissions+v2.pdf>.

6 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision: 1 July 2014 to 30 June 2018* (Report, 2019); Law Council of Australia, 'Children and Young People' (Justice Project: Final Report, August 2018), 8.

Bail Laws

22. First Peoples are a grossly overrepresented cohort in the Victorian prison population. In 2020, the rate for Aboriginal adults in custody was 1,837.7 per 100,000 Victorian Aboriginal Adults, while the general adult imprisonment rate for Victorian adults was 135.1.[7] Accordingly, First Peoples are held in custody at a rate well over 10 times that of non-indigenous people.

23. A significant part of the problem is Victoria's harsh and punitive bail laws.

24. As we submitted to the Inquiry into Victoria's Criminal Justice System, the laws relating to obtaining bail should be reformed urgently so that more people have access to bail. The current bail system frequently puts First Peoples, women, and people with poor mental health in a position where, even for minor offences, they are placed in the same category as those accused of much more serious offences when their bail decisions are made.

25. The legislative amendments that followed the Coghlan Review have created a system far stricter than even that which was recommended by the expert advice to the Government. It results in a system where, for example, a person who is charged with a shop-steal offence (as an indictable offence), and is then alleged to commit another shop-steal offence while on bail is placed in a category where they must 'show compelling reasons' why they should be granted bail.[8] If they are bailed and commit another shop-steal, they would then need to show 'exceptional circumstances' in order to be granted bail (the same test for bail as someone charged with murder or terrorism offences).

26. Successive bail reforms have disproportionately impacted minority and marginalised groups. This includes First Peoples. By 2019, just under half of First Peoples prisoners were on remand. Liberty Victoria is deeply concerned that the fair and proper administration of justice is adversely affected as a result. Further, the continued tightening of bail laws is contrary to the findings and recommendations made by RCIADIC.

27. Ways in which bail laws should be amended to be fairer and to slow the unacceptable growth of the remand population are set out in the Liberty Victoria Rights Advocacy Project's report *Bailing Out a Broken Bail System*.[9] They include:

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7 Final Report of the Inquiry into Victoria's Criminal Justice System, 61.
8 See *Bail Act 1977* (Vic) s 4AA and Schedule 2.
9 Liberty Victoria, Rights Advocacy Project, *Bailing Out A Broken Bail System*, 2021, pp 23-26.

(a) Implementing a single 'unacceptable risk' test for bail;

(b) Repeal of laws that impose a reverse onus test when the applicant is accused of having committed offences whilst on bail;

(c) Repeal of the offences of committing on offence whilst on bail, failing to answer bail, and breaching bail conditions;

(d) Introduction of a 'no real prospect test', the effect of which would be to limit the Court's power to remand an accused where the accused has no real prospect of being sentenced to a term of imprisonment; and

(e) Strengthening s 3A of the *Bail Act 1977* (Vic) to provide better protection against the disproportionate denial of bail faced by First Peoples bail applicants.

28. Liberty Victoria supports the approach suggested by the Victoria Law Reform Commission (**VLRC**) in 2007 which was endorsed by the Court of Appeal in *Robinson v The Queen* (***Robinson***) [10] In 2007, the Victorian Law Reform Commission ('VLRC') stated:[11]

> *We recommend the removal of reverse onus tests so all bail decisions are made on the basis of unacceptable risk. We do not believe this will alter the outcome of bail decisions because decision makers have told us unacceptable risk is always the ultimate test. Reverse onuses apply to a small number of offences, many of which do not commonly come before the court. They include: murder and treason; arson causing death; serious drug offences; a violent breach of a family violence or stalking order by a person with a history of violence; aggravated burglary; and indictable offences where a weapon is used.*
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> *The commission believes decision makers will continue to treat seriously bail applications for offences that currently attract a reverse onus. There is no suggestion that applications for offences not currently included in the reverse onus categories are treated lightly*
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> *...A common criticism of the current Act is that the inclusion of offences in the reverse onus categories is ad hoc. Most serious violence offences are not included, such as attempted murder, rape or serious assault. The same arguments are canvassed in bail applications that do not involve a reverse onus, and the ultimate issue for the decision maker is whether the accused person poses an unacceptable risk. This simplified approach should apply to all offences.*

29. The Court in *Robinson* said '[t]his reform would greatly simplify Victorian bail law, without weakening it in any way. The Commission's reasoning is compelling'.[12]

30. To refuse bail where alleged offenders are not found to be an unacceptable risk of reoffending represents an unjustifiable limitation to the presumption of innocence. It

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10 (2015) 47 VR 226; [2015] VSCA 161

11 Victorian Law Reform Commission, Review of the Bail Act: Final Report (2007), 7. See also 54

12 *Robinson v The Queen* (2015) 47 VR 226; [2015] VSCA 161, 239 [47] (Maxwel P and Redlich JA).

places massive pressure on accused persons to plead guilty in circumstances where they may have a defence at law to the charges.

31. Liberty Victoria is concerned that bail laws are increasingly being used as a means of preventative detention in some circumstances where prisoners, even if found to have committed the charged offences, would not receive lengthy sentences of imprisonment. The problem is even more acute in the present circumstances given the delays caused by the COVID-19 pandemic.

32. We also note some of the findings and recommendations of the Inquiry into Victoria's Criminal Justice System:

    (a) FINDING 37: Women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation;

    (b) FINDING 38: Section 3A of the *Bail Act 1977* (Vic) requires decision makers to take into account any issues arising from an accused person's Aboriginality when determining whether to grant or deny bail. However, this section of the Act is poorly understood and underutilised;

    (c) FINDING 39: Victoria's bail system must balance the maintenance of community safety with the presumption of innocence for people accused of an offence. Victoria's criminal justice system does not currently appropriately or fairly balance these objectives;

    (d) RECOMMENDATION 52: That the Victorian Government review the operation of the *Bail Act 1977 (Vic),* drawing on previous reviews by the Victorian Law Reform Commission and former Supreme Court judge Paul Coghlan, with a view to amendments to simplify the bail tests, make presumptions against bail more targeted to serious offending and serious risk, and ensure that bail decision makers have discretion to consider a person's circumstances when deciding whether to grant bail. This review should ensure that the views of victims and law enforcement are taken into account;

    (e) RECOMMENDATION 58: That the Victorian Government identify and remove barriers to culturally appropriate bail processes for Aboriginal and Torres Strait Islander peoples, and in particular:

(a) support the Victorian Aboriginal Legal Service to continue to facilitate the Custody Notification Service in conjunction with increases in demand, as required by ss 464AAB and 464FA of the *Crimes Act 1958* (Vic);

(b) amend s 464FA of the *Crimes Act 1958* (Vic) to provide that an investigating official must contact the Victorian Aboriginal Legal Service in all circumstances where a person taken into custody self identifies as an Aboriginal person;

(c) support the development of guidelines on the application of s 3A of the *Bail Act 1977* (Vic) in partnership with Aboriginal organisations and peak legal bodies, to ensure appropriate consideration of a person's Aboriginality during bail processes, in accordance with the recommendation of the Australian Law Reform Commission in its report, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.

Presumptive and Mandatory Sentencing

33. Liberty Victoria is deeply concerned about the gradual erosion of judicial discretion in sentencing and the move towards presumptive and mandatory models of sentencing.[13] Over the last decade there have been at least fourteen pieces of legislation introducing and then ratcheting up presumptive and mandatory sentencing in Victoria.

34. These reforms have a disproportionate impact on First Peoples.

35. Many bills that restrict judicial discretion have passed into law despite there having been no evidence to support the proposition that a significant number of sentencing outcomes are out of step with community expectations. The evidence demonstrates that, when people are properly informed about the facts of a particular case, there is little or no discrepancy between informed public expectation and actual sentencing outcomes.[14] Further, the evidence supports the proposition that, when fully informed, members of the public support judicial discretion in sentencing.[15]

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13 'Presumptive sentencing' refers to criminal offences where there is a statutory presumption of a particular type and/or minimum length of sentence, subject to exceptions. This includes presumptive sentences of imprisonment with minimum non-parole periods subject to 'special reasons' exceptions. 'Mandatory sentencing' refers to criminal offences where a particular type of sentence and/or minimum length of sentence must be imposed and there are no exceptions. See Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* 195, 203 nn 55–6.

14 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience; an Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769; Karen Gelb, 'More Myths and Misconceptions', *SAC* (Research Paper, 2008); Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study', Trends & Issues in Crime and Criminal Justice, *Australian Institute of Criminology* (Research Paper, February 2011). See also SAC, *Sentencing Guidance in Victoria* (Report, June 2016) 319–20 [10.44]–[10.45]; 'Is Sentencing in Victoria Lenient? Key Findings of The Victorian Jury Sentencing Study' *SAC* (Web Page, 23 August 2018) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Is_Sentencing_in_Victoria_Lenient.pdf>:

> Overall, 62% of jurors would have imposed a sentence that was more lenient than the judge, while 2% would have imposed a sentence of equal severity. The difference was not minor: overall, jurors imposing a prison sentence were more lenient than the judge by an average of 12 months. Jurors (16%) were also more likely than judges (8%) to suggest a non-custodial sentence.
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> After being provided with the judge's sentencing remarks and a booklet of information on sentencing law and practice, the overwhelming majority (87%) of jurors thought the judge's sentence was either 'very appropriate' or 'fairly appropriate'. Only 3% of jurors thought the judge's sentence was 'very inappropriate'.

See also *R v WCB* (2010) 29 VR 483, 490–2 [20]–[29] (Warren CJ and Redlich JA).

15 Kate Warner et al, 'Mandatory Sentencing? Use [with] discretion' (2018) 43(3) *Alternative Law Journal* 289:

> [W]hen the public are provided with illustrative cases or are reminded that under mandatory sentencing all offenders guilty of a particular offence will be given the same sentence regardless of the circumstances of the offence or their individual circumstances, the public are largely in favour of sentences being determined on a case-by-case basis. In addition, research has revealed strong public attachment to judicial discretion, even if people feel that sentencing 'in general' is too lenient. (Citations omitted).

36. We refer to and adopt our submission to the Sentencing Advisory Council's Sentencing Guidance Reference.[16]

37. The foundational problem caused by mandatory sentencing was well described by Mildren J in *Trenerry v Bradley*:[17]

> *Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.*[18]

38. That passage was cited with approval by the Court of Appeal in the recent judgment of *Buckley v The Queen* ('*Buckley*'),[19] where President Maxwell and Justice Forrest stated:

> *Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.*[20]

39. We also share the Law Council of Australia's concerns that mandatory sentencing laws:[21]

    (a) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

    (b) Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR); and the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;

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16 Liberty Victoria, Submission to the Sentencing Advisory Council's Sentencing Guidance Reference, (Web Page, 8 February 2016) <https://libertyvictoria.org.au/content/sentencing-guidance-reference>.
17 (1997) 6 NTLR 175
18 Ibid 187.
19 [2022] VSCA 138.
20 Ibid, [5] (Maxwell P and T Forrest JA) (citations omitted).
21 Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (May 2014).

(c) Increase costs to the community through higher incarceration rates;

(d) Disproportionately affect vulnerable groups within the community, including First Nations people and persons with a mental illness or intellectual disability.

(e) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

(f) Fail to deter crime;

(g) Increase the likelihood of recidivism because prisoners are placed in a learning environment for crime inhibiting rehabilitation prospects;

(h) Wrongly undermine the community's confidence in the judiciary and the criminal justice system as a whole; and

(i) Displace discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and so fails to eliminate inconsistency in sentencing.

40. The abolition of sentencing options has compounded the impact of increasingly restricted judicial discretion. In recent years the Victorian Government has removed the ability of courts to impose suspended sentences[22] and home detention orders.[23]

41. Judicial officers now have four main sentencing dispositions available to them: adjourned undertakings for the offender to be of good behaviour, fines, Community Correction Orders ('CCO'), and gaol.

42. CCOs are often not appropriate for offenders as the conditions that attach to these orders can adversely impact a person's ability to maintain employment and care-giving responsibilities. Offenders who are at risk of experiencing homelessness, have mental health issues, or come from culturally and linguistically diverse backgrounds often face greater difficulties maintaining compliance with these orders. Sadly, courts have no option in circumstances where an offence calls for a sentence greater than a fine, but

22 *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).
23 *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

does not warrant imprisonment. Historically, suspended sentences could be used in such circumstances to great effect.

43. The CCO regime has been reformed so that a CCO now cannot be combined with a sentence of imprisonment of more than 12 months (not including pre-sentence detention).[24] For some offences a CCO is not available as a sentencing option at all, and for other offences only in very restricted circumstances.[25] These reforms have been a serious mistake.

44. In Victoria's first guideline judgment, *Boulton v The Queen*,[26] the Court of Appeal observed:

> *[I]mprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage…*
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> *The CCO option offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide…*[27]

45. As we have previously said, judicial officers need more, not fewer, sentencing options. With a greater set of options, judges and magistrates are better equipped to do justice in an individual case.[28]

46. Further, it is clear that, when faced with a presumptive or mandatory term of imprisonment (whether with regard to the head sentence or the non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, presumptive and mandatory sentencing reforms are bound to see an increase in

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24 *Sentencing Act 1991* (Vic) s 44(1).
25 See *Sentencing Act 1991* (Vic) (Vic) ss 5(2G) and 5(2H).
26 [2014] VSCA 342; (2014) 46 VR 308.
27 Ibid 334 [108], 335 [114] [127]-[128] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) (citations omitted).
28 Liberty Victoria, 'Submission on the Sentencing (Community Correction Order) and Other Acts Amendment Bill (Web Page, 31 October 2016) <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-comment-CCO-bill-20161031web.pdf>.

contested hearings, committals and trials which places further pressure on a court system that is already strained and suffering from serious delays only exacerbated by the COVID-19 pandemic. This has obviously deleterious consequences for complainants, victims, witnesses, and investigators.

47. Further, we note that there have been significant judicial warnings about the effects of prescriptive and mandatory sentencing. In *Esmaili v The Queen* (*'Esmaili'*),[29] Justice Croucher stated '[o]ther jurisdictions have tried similar approaches to sentencing and failed. It is a great pity that we are making the same mistakes'.[30] In *Esmaili,* the Court of Appeal warned of the deleterious effects of presumptive and mandatory sentences, noting that the provisions would lead to the compression of sentences and shorter periods of supervision on parole.[31] This must be seen in conjunction with reforms to Victoria's parole system after the Callinan Review, with the consequence that a significant number of prisoners are released with no, or very limited, periods of supervision on parole. That is not in the community's interests.

48. We continue to oppose bills that restrict judicial discretion in sentencing and call for evidence-based reforms instead of those based on short-term populist appeal.

49. We endorse the recommendation of the Inquiry into Victoria's criminal justice system "that the Victorian Government, in reviewing the *Sentencing Act 1991* (Vic), investigate the operation, effectiveness and impacts of the Act's minimum sentencing provisions (mandatory sentencing)" (recommendation 67).

29 [2020] VSCA 63.
30 Ibid [100].
31 Ibid [63] (Priest and Kyrou JJA).

OPCAT

50. In 2017, the Australian Government ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), voluntarily agreeing to meet obligations under the Protocol, including establishing a domestic detention oversight/visiting body or bodies (the National Preventive Mechanism, or **NPM**), and facilitating visits by the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**). Australia sought an initial postponement of three years, and then an additional one-year extension, to meet these obligations.

51. Compliance with those obligations would strengthen protections against the death, torture and ill-treatment of detained Aboriginal and/or Torres Strait Islander people across all places of deprivation of liberty in Victoria, including (but not limited to) prisons, youth prisons, police custody, secure residential care facilities, and mental health institutions. Liberty Victoria hopes that Yoorrook will take this opportunity to recommend to the Victorian Government that it proceeds with proper, culturally appropriate implementation of OPCAT, including funding and legislating the Victorian NPM, as a matter of urgency. This unique opportunity to *prevent* harm to detained people, as distinct from other oversight or accountability mechanisms (such as complaints adjudication) which follow allegations of ill-treatment, cannot be squandered.

52. In October this year, the UN SPT suspended its first ever visit to Australia, citing lack of cooperation, asserting that the SPT had been "prevented from visiting several places where people are detained, experienced difficulties in carrying out a full visit at other locations, and was not given all the relevant information and documentation it had requested." Crucially, the SPT has only suspended its visit, not terminated it, and there is still an opportunity for Australia to provide the necessary assurances for the visit to resume. If these are not provided, the SPT may then choose to terminate its visit and make its report public. If this is the case, Australia will be only the second country to have ever had an SPT visit terminated. At the time of the suspension, Liberty Victoria made a public statement to the effect that it was "dismayed to learn

that government obstruction has led the United Nations' torture prevention body to suspend its visit to Australia," and "call[ing] on all Australian governments to comply fully with the work of OPCAT and the SPT, and to eliminate mistreatment from any place of detention where it may be found."

53. Since the visit was suspended, the SPT has invited Australia "to provide all necessary assurances to the Subcommittee in order for it to be able to resume its visit as soon as possible". Following Australia's appearance before the UN Committee against Torture in November, the Committee's Concluding Observations echoed this invitation.

54. While it is to be commended that Victoria had passed legislation to facilitate the SPT's visit, Liberty Victoria encourages the Victorian Government to take the opportunity at the upcoming Standing Meeting of Attorneys-General to work constructively with the Federal, State and Territory Governments to resolve the outstanding issues that continue to impede the resumption of the SPT visit and establishment of the Australian NPM across all jurisdictions (noting that OPCAT was discussed in the August 2022 meeting).

55. In a matter that deserves the Victorian Government's urgent attention, the deadline for having an operational Victorian NPM is 20 January 2023. Yet, four years on from ratification of OPCAT, there has been seemingly no progress at all in Victoria, in contrast to other jurisdictions that have at least nominated their NPM bodies (including Western Australia, Northern Territory, Australian Capital Territory, South Australia and Tasmania). Liberty Victoria reiterates concerns and recommendations ventilated in previous submissions, such as the Victorian Cultural Review of the Adult Custodial Corrections System, that the Victorian Government must establish the Victorian NPM, in full compliance with OPCAT, with the requisite funding and legislation.

56. Liberty Victoria supports the following recommendations of the Victorian Aboriginal Legal Service's submission to Yoorrook:

(a) The Victorian Government must urgently commence robust, transparent and inclusive consultations with the Victorian Aboriginal Community on the implementation of OPCAT in a culturally appropriate way.

(b) The Victorian Government should work with other Australian Governments to ensure that:

(i) the visit of the SPT is resumed; and

(ii) any reports relating to the SPT visit are made public.

(c) The future mechanism for independent detention oversight in Victoria must:

(i) Be established by legislation;

(ii) Have jurisdiction over all places where individuals are or may be deprived of their liberty, regardless of the length of time of detention (this includes police vehicles, police cells and PSO "pods" at train stations);

(iii) Have sufficient resources to carry out its mandate in a culturally appropriate way.

57. Liberty Victoria expands on the above recommendations, as follows:

(a) Legislation for the NPM must enshrine the powers, privileges and immunities outlined in OPCAT, including (but not limited to):

(i) unfettered access to places of detention, detained people and information regarding conditions and treatment in detention (including medical information), and

(ii) robust protections against reprisals for detained people, detention staff, contractors and others (such as civil society organisations).

(b) Echoing the UN Committee against Torture's Concluding Observations, the Victorian NPM must have "the necessary resources and functional and

operational independence to fulfil its preventive mandate in accordance with the Optional Protocol, including access to all places of deprivation of liberty as prioritized by the NPMs themselves":

(c) The Victorian Government must not adopt the Federal Government's non-compliant approach of distinguishing between so-called "primary" and "secondary" places of deprivation of liberty;

(d) If the Victorian Government decides to nominate an existing body the Victorian NPM, then it must ensure that a separate unit, that is properly funded, be established within that body, to enable the effective and independent exercise of the NPM mandate.

Conclusion

58. Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.

Michael Stanton

President, Liberty Victoria