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## Comments on the Sentencing Further Amendment Bill 2010

### *Summary*

The Interchurch Criminal Justice Taskforce welcomes the Government's keen interest in the objectives of achieving just outcomes within the criminal justice system, and of improving community safety. We support the focus in the current Bill on transparency in sentencing, and on offences that are seen as being of serious concern from the perspective of community safety.

However, we have significant concerns:

We ask that the implementation of this legislation be delayed until a range of non-custodial sentencing alternatives is in place and tested for effectiveness, lest judicial discretion, and thus the interests of justice, be curtailed.

We call on the Government to make available additional resources to ensure that Intensive Corrections Management Orders are an effective alternative to suspended sentences.

We also emphasise that, in order to effectively advance community safety, further legislative change in the complex area of sentencing needs to be undertaken gradually, in light of a review of the effectiveness of earlier changes; and the focus on sentencing reform must be balanced by a focus on rehabilitation and more broadly based prevention programs.

### *Background*

The Sentencing Further Amendment Bill 2010, which would amend the *Sentencing Amendment Act 2010* and the *Sentencing Act 1991*, was presented to Parliament in December 2010. The provisions of the Bill commented on here would abolish suspended sentences for the offences of causing serious injury recklessly, aggravated burglary, arson and arson causing death, and trafficking a commercial quantity of a drug of dependence, when these offences are heard in the higher courts. This extends considerably the offences for which the 2010 Act had abolished suspended sentences, namely: serious offences, including murder, manslaughter, intentionally causing serious injury, rape, and other serious sexual offences.

The **Interchurch Criminal Justice Taskforce** was established in 2010 to work towards just outcomes within the Victorian criminal justice system. A priority for the Taskforce is to promote community safety in ways which are just and compassionate both towards the victims of crime and offenders.

### *General comments*

The Taskforce strongly affirms efforts to increase community safety, and strategies which increase public confidence in the sentencing system.

Greater transparency in sentencing, which underlies key provisions of this Bill is, is also supported – as the Sentencing Advisory Council put it in its final report on suspended sentences: “sentencing orders that are contingent upon a prison sentence being imposed but do not involve an offender



serving prison time should be recast as orders in their own right.”<sup>1</sup> We note at the outset, though, that alternatives need to be in place to allow judges to apply appropriate non-custodial sentences when they consider this would be in the interests of justice.

We also support the Bill in its seeking to focus on offences that are seen as being of serious concern from the perspective of community safety (in addition to those defined as ‘serious’ in the 2010 Act). But there is a caveat here too: each offence is unique, and even though a particular class of offences might be of serious concern to the community, there can be a wide range of actual offences within that class.

There are also, however, several aspects of the Bill that are cause for concern. These relate both to the current Bill, and to further sentencing amendments that were foreshadowed in the Second Reading Speech for this Bill.

### ***Recommendations***

Arising out of the more detailed comments below are the following recommendations:

- That the implementation of this legislation be delayed until a range of non-custodial sentencing alternatives is in place and tested for effectiveness.
- Monitoring and review of the impact of changes to sentencing is necessary before and after the provisions of this Bill take effect, in order to enable changes to be made to the sentencing regime in light of the evidence of what is found to be working or not working.
- Additional resources must be made available to ensure that Intensive Corrections Management Orders are an effective alternative to suspended sentences.
- That the work of the Sentencing Advisory Council in the provision of accurate public information about sentencing outcomes in Victoria be further extended.
- Further legislative change in the complex area of sentencing should be undertaken gradually, in light of a review of the effectiveness of earlier changes.
- The present focus on sentencing reform should be balanced by a focus on rehabilitation and on more broadly based prevention programs.

### ***The importance of judicial discretion to obtaining just outcomes***

Given the great variances in cases that come before the courts, and the difference in severity of offences that meet the threshold for classification as a ‘significant’ offence, the removal of discretion will inevitably lead to injustice. The circumstances of each case are different, and a key role of a judge is to determine the sentence appropriate in the specific facts and circumstances of each offence and offender. This is a crucial role and one that requires that an appropriate range of legislatively defined sentencing options are in place.

The guidelines for sentencing contained in the *Sentencing Act 1991* (at s5 (1) (a) - (e)) also entail a fine balancing of a number of sentencing objectives - just punishment of the offender, deterrence of the offender or others, facilitation of the offenders rehabilitation, denunciation of the offence itself, protection of the community from the offender, or a combination of these purposes.

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<sup>1</sup> Sentencing Advisory Council 2008 *Suspended Sentences and Intermediate Sentencing Orders - Suspended Sentences Final Report—Part 2*, p xxiv, at [http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/suspended\\_sentences\\_final\\_report\\_part\\_2.pdf](http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/suspended_sentences_final_report_part_2.pdf)



Suspended sentences are one of the options that have been utilised by judges so as to achieve the most appropriate sentencing outcome for a particular offender or offence, consistent with the sentencing guidelines, and within the constraints of the legislative provisions.

Judges have considered suspended sentences to be the most appropriate sentences in generally consistent circumstances. For example, suspended sentences are regularly most common with respect to offenders over 50 years of age, and imprisonment is regularly least common with respect to offenders under 20 years of age. Female offenders are more commonly in receipt of suspended sentences than are male offenders<sup>2</sup>. Offenders in employment are less likely to receive an immediate prison term. It can be deduced from these patterns that the impact of a prison sentence on an offender is a consistent consideration in determining sentences.

There are also issues around the circumstances of the offence that relate to the suspension of sentences. For example, the Sentencing Advisory Council reports, in relation to aggravated burglary cases in which a wholly suspended sentence was imposed in the higher courts over the period 2004-2009, that

In almost all the cases the aggravated burglary was motivated by the offender seeking revenge on the victim for some real or perceived wrong that the offender, or their loved ones, had suffered at the hands of the victim. Very few cases of these aggravated burglary offences were motivated primarily by monetary gain. A large number of the cases occurred where the offender, or co-offenders, knew their victim beforehand, and few occurred where offender and victim were complete strangers. A large number of cases also involved the offender being under the influence of alcohol, or having a history of alcohol problems.<sup>3</sup>

### ***Providing and resourcing effective alternatives to imprisonment***

In its most recent report on the use of suspended sentences<sup>4</sup> the Sentencing Advisory Council recommended that if suspended sentences are to be abolished, a number of alternative sentencing options should be enacted to replace their role as a sentencing option; and that replacement of suspended sentences should not come into effect until the necessary resources, staffing and processes have been put in place by the courts and Corrections Victoria to support the implementation of the alternatives.

Following the 2010 Act, Intensive Corrections Management Orders are being developed as a sentencing option, but it will be some time before their effectiveness as a sentence is known – for example, only after some period of operation will it be possible to discern whether these new orders have been effectively designed and implemented, or whether, for example, they result in a high rate of breaching, and thus imprisonment; or if they do not immediately gain the confidence of the judiciary. If they are not effective, then they will need to be modified, in order to ensure that there

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<sup>2</sup> Derived from the various Sentencing Advisory Council, Sentencing Snapshots – [www.sentencing.council.vic.gov.au/sentencing-statistics/sentencing-snapshots](http://www.sentencing.council.vic.gov.au/sentencing-statistics/sentencing-snapshots)

<sup>3</sup> Sentencing Advisory Council 2010, Sentencing Snapshot, Sentencing trends in the higher courts of Victoria, 2004–05 to 2008–09, No. 98, Aggravated burglary, at p 2, located at <http://www.sentencingcouncil.vic.gov.au/content/publications/aggravated-burglary-higher-courts-sentencing-snapshot>

<sup>4</sup> Sentencing Advisory Council 2008 *Suspended Sentences and Intermediate Sentencing Orders - Suspended Sentences Final Report—Part 2*, p xxiv, at [http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/suspended\\_sentences\\_final\\_report\\_part\\_2.pdf](http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/suspended_sentences_final_report_part_2.pdf)



are robust non-custodial options available to judges in making sentencing decisions where prison is an undesirable outcome. To add to the number of such orders before their effectiveness can be evaluated would not be in the interests of justice.

Drawing on data from the various 'Sentencing Snapshots' published by the Sentencing Advisory Council, it would seem that the significant offences created in the Bill accounted for 24 wholly suspended sentences in 2008/09. This is equivalent to around 7% of those on Intensive Corrections Orders at any one time.

This is a material increase. If Intensive Corrections Management Orders are to be an effective alternative, then resources will be needed for the preparation of pre-sentencing reports; and a skilled and trained workforce will be required to manage the orders.

If these resources are not available and the system not operating effectively, jail will become the only credible sentencing option in many instances.

Nor do other alternative sentencing options seem to be provided for, and it has been proposed that home detention be abolished as an option. Overall these developments are moving in the opposite direction from that recommended by the Sentencing Advisory Council.

There is thus a serious risk that the Bill would unduly curtail the ability of the judiciary to tailor sentences to the circumstances of a particular offence or offender. The objectives of the Government and the community would seem best served by delaying this legislation until a range of non-custodial sentencing alternatives is in place and tested for effectiveness in meeting the principles within the Sentencing Act. This may entail operating the new and old systems in parallel.

### **Recommendations:**

- Delay implementation of this legislation until a range of non-custodial sentencing alternatives is in place and tested for effectiveness.
- Ensure that sufficient additional resources are made available to ensure that intensive Corrections Management Orders are an effective alternative to suspended sentences.
- Monitor and review the impact of changes to sentencing before and after this Bill is considered, in order to make changes in light of what is seen to be working or not working.

### ***Building public confidence in sentencing***

Much of the information that is received by the public about sentencing outcomes is through the media, and much of that is of a headline nature. Many people who sit through court cases tell us that matters are much more complex than they appear in a short media item, and that it can be difficult to convey the full picture to someone who has not been directly involved.

It is also important to note that, while sentencing outcomes in specific cases are often criticised as being 'out of touch' with community expectations, research indicates that sentencing practices may actually be well founded in the eyes of the public once the full situation is understood.

Research coordinated by Dr Austin Lovegrove at Melbourne University found that, if members of the public were fully briefed on the facts that were put to the Court in actual cases of serious offences in which the offender has strong claims to mitigation, they would in most cases have sentenced more



leniently than the Judge who heard the cases.<sup>5</sup> The Chairman of the Sentencing Advisory Council was reported as commenting that 'the findings were consistent with the Council's work.'<sup>6</sup>

Difficult as it is to convey accurate and complex information, this is a necessary element in building public confidence, and the Lovegrove study provides a model for effective public communication on these issues. Further work in this direction would therefore seem to be a priority, as other studies indicate that sentencing practices are in fact made more severe as a reaction to public opinion<sup>7</sup>. The work of the Sentencing Advisory Council in this area should be extended.

### **Recommendation:**

- That the work of the Sentencing Advisory Council be extended in the provision of accurate public information about sentencing outcomes in Victoria.

### ***Undue reliance on imprisonment is not in the interests of community safety***

In addition to the importance of enabling a just outcome to be achieved in each particular case, there are sound broader policy reasons for providing judges with sentencing options other than incarceration.

The impact of a prison sentence on an individual offender can be negative and severe, leading to alienation from society and family, reduced employment prospects, and so on. This further alienation from society does not contribute to community safety. It would be particularly unsatisfactory if those who under the current law have their sentences suspended were instead to be incarcerated because of the absence of appropriate sentencing options, as these are people who, under current law, Judges would have assessed should not go to prison.

An increase in prison numbers would be expensive: Recent Productivity Commission data<sup>8</sup> indicates that the full cost of imprisonment of a person in Victoria is \$240.66 per day, equivalent to \$88,000 per year. The resources required per offender to manage the Intensive Corrections Management Orders for each participant can be expected to be significantly less than this amount.

In addition to these costs arising directly from additional imprisonment, there are a number of other reasons why this Bill will not serve the interests of the community if it results in more people going to jail. This was addressed in our recent Brochure "[Crime, Prisons and Community: A Christian Approach](#)". It was also addressed by the Heads of Churches in their open letter of 6 August 2010 to members of the Victorian Parliament on community safety. A copy of that letter is attached, for ease of reference.

Among these reasons are that there are often 'flow on' social impacts if an offender is jailed. A difficult instance is when the offender has parental responsibilities. The dislocation of families and the harmful and enduring impacts on children are factors one would expect a judicial decision maker to take into account. Once again the impact on the family, as against the imperative to punish the

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<sup>5</sup> Lovegrove A *Public Sentencing Shock*, (2007) 81(11) LIJ, p. 58, at <http://www.liv.asn.au/News-and-Publications/Law-Institute-Journal/Archived-Issues/LIJ-November-2007/Public-sentencing-shock>

<sup>6</sup> Munro I, 2006 'Public softer on crime than judges, study finds', *The Age*, September 30, 2006, at <http://www.theage.com.au/news/national/public-softer-on-crime-than-judges-study-finds/2006/09/29/1159337341315.html>

<sup>7</sup> Freiburg A and Ross S 1999 'Sentencing Reform and Penal Change: The Victorian Experience', cited in Lovegrove op cit.

<sup>8</sup> Productivity Commission 2011 **Report on Government Services 2011**, Table 8A.9 Real Net Operating Expenditure, per prisoner per day (2009-2010 dollars), at <http://www.pc.gov.au/gsp/reports/rogs/2011>



offender by incarceration, is a dilemma which can only be assessed in the real circumstances, rather than by a fixed course of action. These are surely circumstances where discretion is required.

The documents just referenced also outline the general case for advancing community safety through investment in preventative measures – early childhood and family support; through early intervention in mental health, drug and alcohol programs; through diversion programs. The current Victorian Child Protection Inquiry provides an opportunity to explore some of these linkages, and opportunities for investment in the true interests of the community.

So, placing more people in jail will not achieve the overriding objective of increased community safety; nor will it advance the life outcomes for those involved; but it will come at a cost of resources that could have a higher community safety return if deployed elsewhere.

It is our hope and our recommendation that this and future reforms to sentencing legislation will result in the Victorian criminal justice system having a balanced approach that includes a focus on rehabilitation and more broadly based prevention programs.

### **Recommendation:**

- That the present focus on sentencing reform be balanced by a focus on rehabilitation and more broadly based prevention programs.

### ***Further proposed legislative changes***

Many of the concerns that are raised here about the current Bill would apply even more strongly to moves to abolish suspended sentences altogether, as foreshadowed in the Second Reading speech for this Bill. In particular, the 'widening of the net' to encompass more offences and offenders, would result in an even greater need to have alternatives in place, alternatives that are seen to be effective and that have the confidence of the judiciary.

### **Recommendation:**

- That further legislative change in the complex area of sentencing be undertaken gradually, in light of a review of the effectiveness of previous changes.

Interchurch Criminal Justice Taskforce

8 February 2011

**Attachment:** Open letter of 6 August 2010 from Heads of Churches on community safety

## Victorian Heads of Churches

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6 August 2010

### **A safer Victoria:** *An open Letter to Victorian Parliamentarians and election candidates*

We are writing to urge a greater effort on the part of all our politicians and community leaders to respond to the community demand for a safer Victoria.

We recognise the importance of the rule of law: this includes responding to crimes against the person and their possessions. However, increased emphasis on imprisonment as a punishment, and on longer sentences, are not the best or most effective ways to reduce crime.

Even though repeat offending rates have been falling in Victoria, there are still significant problems in our justice system:

- There has been a 49% increase in Victorian prison beds in the past ten years
- 50% of prisoners return to jail after being released
- Only 6% of those imprisoned in Victoria have completed secondary schooling
- Almost 50% of offenders in custody have some history of mental illness, and just over 25% of newly remanded prisoners have a diagnosed mental illness
- Around 70% of all prisoners admit to having recently used an illegal drug, and around 55% have drug and alcohol issues associated with their offence

Our prison chaplains tell us that prison makes people worse by fragmenting the offender's family and community relationships and increasing exposure to criminal influence which makes them more likely to offend on release. The abolition of suspended sentences could make this situation worse.

Victoria is budgeting to spend an extra \$126 million over four years on an additional 244 prison beds. Taxpayers are spending an average of \$113,000 per year to keep each prisoner locked away.

There are better ways to make our community safer.

A safe community starts with adequate support for families, child protection, early learning programs, affordable housing, mental health services, family violence programs, decent work opportunities and drug and alcohol counselling.



Effective school retention programs have a key role to play in enabling young people to build lives that do not include crime. And when young people do offend, they need special treatment to reflect their vulnerability and to maximise the chances of their rehabilitation.

An investment in early intervention and improved mental health services will significantly reduce the number of offenders. Addressing these issues through intensive support breaks the cycle of exclusion and criminal behaviour.

People who feel part of their community are less likely to commit crime, so it is important that when people leave prison they are equipped to fully re-join the community. Their skills, health and links with their family and community will be crucial. Without housing and employment, community inclusion is unlikely.

Unfortunately there will always be a place in our society for some prisons to keep the community safe. But to make a lasting impact on community safety we must prevent crime in the first place through community strengthening and through individual and family support, and we must ensure that offenders are equipped and assisted to fully re-join our community. It's time we saw the debate shift to reducing the number of prisoners in Victoria rather than increasing them.

Yours sincerely

+ Philip Freier  
Anglican Archbishop of Melbourne

+ Andrew W. Curnow  
Anglican Bishop of Bendigo

+ John McIntyre  
Anglican Bishop of Gippsland

+ John Parkes  
Anglican Bishop of Wangaratta.

+ Denis J Hart  
Catholic Archbishop of Melbourne

+ Peter J Connors  
Catholic Bishop of Ballarat

+ Christopher Prowse  
Catholic Bishop of Sale

+ Joseph Grech  
Catholic Bishop of Sandhurst

Paul Cameron  
Executive Officer  
Churches of Christ in Victoria and Tasmania

Graeme Rigley (Major)  
Divisional Commander  
Melbourne Central Division  
The Salvation Army

Isabel Thomas Dobson  
Moderator  
Synod of Victoria and Tasmania  
Uniting Church in Australia



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