Submission to the Sentencing Advisory Council on "Swift, Certain and Fair sentencing approaches to family violence offenders"

Prepared by the International Commission of Jurists Victoria

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i. Organisational Context

As a volunteer organisation comprising of legal practitioners and academics, the International Commission of Jurists Victoria ('ICJV') is committed to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJV is distinguished from other organisations by its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

The ICJV strives to:

- Promote adherence to and observance of the *Universal Declaration of Human Rights* and other similar international instruments;

- Promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia and the nations of Southeast Asia and the Pacific;

- Provide an organisation through which the legal profession and others interested in human rights can protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms;

- Help, advise and encourage all who seek to achieve, by means of the Rule of Law universal respect for and promote the observance of human rights and fundamental freedoms;

- Co-operate with similar organisation in Australia and other countries .

- Examine new proposals that affect the administration of justice, both domestic and abroad.

The ICJV seeks to fulfil its objectives through public education and seminars, submissions, publishing, and advocacy.

ii. Scope of Submission

The ICJV welcomes the opportunity to provide feedback on the Sentencing Advisory Council's discussion paper: *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders.*

This submission will focus on responding to Question 11, 'Procedural Fairness,' of the discussion paper. In particular, sections C, D and E.

iii. Background: Family Violence

Family violence is considered to be one of the many forms of violence against women, and one of the most universal human rights violations.[1]

In 1992, the Committee on the Elimination of All Forms of Discrimination Against Women – the treaty body established to monitor the *Convention on Elimination of All Forms of Discrimination Against Women* (CEDAW) – adopted General Recommendation 19,[2] which adds the issue of family violence to the terms of the Convention, given that the recommendation acknowledges that violence within the family is one of the most insidious and prevalent forms of violence against women.[3]

Under the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*,[4] the Committee has developed jurisprudence that reiterates the understanding of family violence as a human rights violation.[5]

Australia is a State Party to both the Convention and its Optional Protocol.[6] Therefore, Australia is charged with the duty to take the necessary actions to

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[1] General Assembly of the United Nations, *In-Depth Study on all Forms of Violence Against Women – Report of the Secretary-General*, 61st session, UN Doc A/61/122/Add.1 (6 July 2016) 37; WHO et al., *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (World Health Organisation 2013) 2.

[2] See: Committee on the Elimination of Discrimination Against Women General Recommendation 19 (1992) (CEDAW Doc A/47/38, 1992); *Handbook for Legislation on Violence Against Women* from the Department of Economic and Social Affairs Division for the Advancement of Women (United Nations, New York 2009).

[3] CEDAW, General Recommendation 19, [23].

[4] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* (Optional Protocol), opened for signature 10 December 1999, 2131 UNT 83 (entered into force 22 December 2000).

[5] See: Paragraph 9.3 of Communication No: 2/2003, *Ms. A. T. v Hungary*. Other communications in relation to domestic violence were issued by the Committee, namely: *Sahide Goekce (deceased) v. Austria*, 5/2005; *Fatma Yildirim (deceased) v Australia*, 6/2005. The communications produced by the Committee amount to what can be called jurisprudence in relation to CEDAW.

[6] Australia signed CEDAW in 17 July 1980 and ratified the Convention in 28 July 1983. On 4 December 2008, Australia becomes a party to the CEDAW Optional Protocol. See: United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women – States Parties Ratification, Accessions and Successions* http://www.un.org/womenwatch/daw/cedaw/states.htm; United Nations, *Signature and Accessions/Ratifications to the Optional Protocol* http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm .

respond to family violence, and to act with the due diligence to prevent, punish and provide an effective remedy.[7]

iv. Procedural Fairness

In their discussion paper, the Sentencing Advisory Council asked:

> *"If a SCF approach were to be implemented in Victoria, what procedural fairness issues should be considered?*

a. Exceptional Circumstances and Reasonable Excuses

'Procedural fairness' means to act fairly in the administration of decision making. It does not relate to the specific decision itself. However, if certain measures of procedural fairness are neglected, the ultimate decision may prove unjust. Listening and giving due consideration to the individual to whom would be affected is one such measure.

As a principle of natural justice, procedural fairness has a long history of legal reflection in Australia.[8]

From the perspective of the ICJV, a "swift, certain, fair" (SCF) approach to sentencing would pose certain issues pertaining to procedural fairness; in particular, the "right to be heard and comment on adverse material".[9]

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[7] *General Assembly of the United Nations, In-Depth Study on all Forms of Violence Against Women – Report of the Secretary-General*, *61st Session, UN Doc A/61/122/Add.1 (6 July 2006);* Dorothy Thomas and Michele Beasley, 'Domestic Violence as a Human Rights Issue,' (1994-1995) 58 *Albany Law Review* 1119. Scholarly work arguing the case for the expansion of the concept of State responsibility to cover private acts of violence has been accompanied by developments in international case-law and human rights treaties allowing a broader understanding of the State responsibility under international human rights law. See: Patricia Pais, "Challenging the Efficicacy of Ex-officio Prosecution of Domestic Violence Offences: A Comparative Analysis," in Julia Tomas and Nicol Epple (eds.), *Sexuality Oppression and Human Rights* (Inter-Disciplinary Press, 2015) 27, 31; also, Rhonda Copelon, "International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Law Making," in Elizabeth M. Schneider et al., *Domestic Violence and the Law: Theory and Practice* (Foundation Press, 2008) 904-06.

[8] For cases on procedural fairness, see: *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.

[9] Chief Justice Robert French (2014), "Administrative Law in Australia: Themes and Values Revisited," in Groves, M. (ed), *Modern Administrative Law in Australia: Concepts and Context*, Cambridge University Press, vol.25, 47.

Therefore, the ICJV submits that any SCF approach must follow in the tradition of procedural fairness by allowing for the provision of an exceptional circumstances and/or reasonable excuses defence to be made. That is, such an approach should remain consistent with the existing legal framework for breaches of conditions:

> "An offender who is subject to a community correction order must not contravene that order, unless the offender has a reasonable excuse".[10]

Community Corrections Orders (CCOs) can incorporate many conditions, which are chosen based on the individual circumstances of the offender. In relation to family violence offenders, appropriate conditions may include: unpaid community work, regular attendance at a Men's Behaviour Change Program, prohibited places of residence, drug and/or alcohol testing, dissociation with the victim/s, electronic monitoring, and compliance with curfews, among others.

SCF approaches have primarily focused on contraventions relating to drug and alcohol offenders.[11] However, in the family violence area, there is greater possibility for situations to arise where a contravention may be mitigated. For example, as the discussion paper points out, the contravention of a no-contact condition may be complicated in cases where the victim has initiated the contact.[12] As is well known, offenders and victims are often in an ongoing relationship and there are complex and continuing emotional, financial and legal ties between them and continuing complex power dynamics.[13]

Moreover, given the 72-hour desired timeframe for SCF, it is unlikely that an offender would have time to seek legal representation and advice on how best to defend their reasonable excuse.

Whilst it is important that compliance is stressed by the courts, it is equally important that the opportunity and time needed to prepare and provide a detailed explanation for a contravention is provided. As set out in the judgement of Mason J in *Kiao v West*, individuals "must have access to

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[10] *Sentencing Act 1991* (Vic) s 83AD(1).

[11] SCF programs specifically for drug/alcohol offenders: HOPE (Hawaii), Decide Your Time (Delaware), 24/7 Sobriety Project (South Dakota).

[12] Sentencing Advisory Council "Swift, Certain, and Fair Approaches to Sentencing Family Violence Offenders" (Discussion Paper, Victorian State Government, February 2017) 83 ('Discussion Paper').

[13] Etienne G Krug et al., *World Report on Violence and Health* (World Health Organisation, 2002) chapter 4, 87-103; Jane Ursel, Leslie Tutty, and Janice LeMaistre (eds.), *What's Law Got to Do With It? The Law, Specialised Courts and Domestic Violence in Canada* (Cormorant Books 2008).

relevant information and adverse allegations and have time to prepare a response to them".[14]

From the perspective of ICJV, one particular SCF approach would fundamentally curtail this opportunity. This approach is set out in the discussion paper:

> Administratively, through changes in the way in which Corrections Victoria manages and prosecutes condition contraventions by a family offenders on a CCO.[15]

The ICJV submits that Corrections Victoria should not be granted the power to sentence an offender for a contravention. Such an approach would accord judicial power to Corrections Victoria, which is an arm of the Executive. This violates the fundamental principle of separation of powers.[16]

Such a grant of power to Corrections Victoria would also conflict with the right to a fair trial, which is protected by s 24 of the *Charter of Human Rights and Responsibilities Act 2006*:

> A person charged with a criminal offence . . . has the right to have the charge or proceeding determined by a competent, independent and impartial court or tribunal after a fair and public hearing.

Moreover, given the above considerations as to the rights of offenders, from the point of view of preventing family violence, procedural fairness is of great importance. Research has shown a close connection between offenders' sense of fair treatment and victims' safety.[17] If justice is executed in a way that instils a sense of procedural injustice, it weakens the prospect of the perpetrator's compliance, putting victims of abuse at risk.[18]

b. The Principle of Equality

[14] *Kiao v West* (1985) 159 CLR 550.
[15] Discussion Paper, above n 12, 67.
[16] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[17] Deborah Epstein, "Procedural Justice: Tempering the State's Response to Domestic Violence," (2002) 43, *William and Mary Law Review* 1843, 1905; Also, see Chandra Gavin and Nora Puffett, "Criminal Domestic Violence Case Processing – A Case Study of the Five Boroughs of New York City," (2005) *Centre for Court Innovation* 38.
[18] Ibid, 217.

The context for sentencing in Victoria differs from that in Hawaii and the other American states where the SCF approach has been tried. There is an extensive legislative and common law framework relating to sentencing of family violence offenders, much of which is based on the principle of equality before the law.

The *Charter of Human Rights and Responsibilities Act (2006)* sets out a general protection for the right to equality before the law.[19] Section 24(1) sets out a right to a fair hearing.[20], In the recent *Matsoukatidou* case[21] concerning the treatment of South Sudanese people by the court system, Justice Bell examined the application of the principle of equality before the law in Victoria.

The *Equal Opportunity Act* that sets out the objective of achieving substantive equality.[22] Justice Bell found it means that the law may need to treat parties differently so that they have equal protection,[23.] and ruled that the court in *Matsoukatidou* had not done so.

Over 25 years ago the *Aboriginal Deaths in Custody Royal Commission* tabled its report.[24] It found that Aboriginal people are more likely to die in custody because they were more likely to be in custody. It recommended imprisonment should be the sanction of last resort.[25] This recommendation is another part of the Victorian sentencing context. It encourages courts to positively discriminate in cases concerning Aboriginal offenders in an attempt to achieve substantive equality.

In 1997 the *Bringing Them Home* Report estimated that between one in three and one in ten Aboriginal children were forcibly removed from their families and communities between 1910 and 1970.[26]

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[19] *Charter of Human Rights and Responsibilities Act (2006)* (Vic), s 8. See also, s 8(3) for the proposition that requires courts to treat people equally and not arbitrarily, and the related discussion in the case of *Matsoukatidou v Yarra Ranges Council* (2017) VSC 61, Bell J, [103].

[20] Ibid, [117].

[21] *Matsoukatidou v Yarra Ranges Council* (2017) VSC 61.

[22] *Equal Opportunity Act 2010* (Vic) s 10.

[23] Ibid, [105]-[106].

[24] Royal Commission into Aboriginal Deaths in Custody 1991b, *Royal Commission into Aboriginal Deaths in Custody National Report: Volume 1* (Commissioner Elliott Johnson) Australian Government Publishing Service, Canberra.

[25] Royal Commission into Aboriginal Deaths in Custody 1991a, *Royal Commission into Aboriginal Deaths in Custody National Report: Overview and Recommendations* (Commissioner Elliott Johnson) Australian Government Publishing Service, Canberra, recommendations 92–121.

[26] Human Rights and Equal Opportunity Commission, "Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families",

In 2014-2015, Aboriginal children were seven times more likely than non-Aboriginal children to be the subject of reports of harm and the risk of harm.[27] It is likely that this statistic represents family trauma caused by historical mistreatment due to government policies. It is likely that Aboriginal people traumatised by past experience will be subject to Family Violence Intervention Orders and face the consequences of the implementation of an SCF approach.

In 2006, there were 215 Aboriginal prisoners in Victorian jails. In 2016 there were 531.[28] Clearly, any attempt to apply the Aboriginal Deaths in Custody Royal Commission's recommendations has been overridden by other sentencing considerations.

Arguably, the SCF approach would disproportionately affect Aboriginal people and 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.

Arguably, a mandatory regime would offend against the right to a fair hearing if there was to be no possibility for arguing that exceptional circumstances explain a breach.

Any recommendations regarding the SCF approach should weigh whether the sentencing regime for family violence offenders in Victoria is slow, uncertain or unfair. There is no evidence that taking away discretion from judicial officers by legislating for automatic custodial sanctions for some breaches will have a deterrent effect.

Perhaps the current judicial monitoring provisions with CCOs should be more widely used to manage offenders at high risk of recidivism. The increased police detention powers in the *Family Violence Protection Act* should be sufficient to deal with potential breaches as they occur without introducing new measures that may offend the principle of equality before the law by weighing more heavily on an Aboriginal population already facing historical disadvantage.

1997, 37.

[27] Child Family Community Australia, online, October 2016.

[28] Crime Statistic Agency figures for the year ending 31 March 2016.

Custodial sanctions for contravening a FVIO have risen from 17% in 2011 to 29.7% in 2014. While statistics are not available to reveal a precise connection, it is likely the increased number of Aboriginal people in jail in Victoria includes those serving sentences for breaches of family violence laws. The increase in incarceration for those offending against family violence intervention orders has not been accompanied by any downward shift in rates of offending.[29.]

It is submitted that it is likely that adopting the SCF approach would offend against equality before the law provisions in Victoria by weighing more heavily on Aboriginal offenders.

c. The Principle of Parsimony

The principle that forms the basis of SCF approaches to sentencing is that the deterrence value of punishment is highest when punishment follows immediately and consistently from a violation. Severity of punishment is not necessarily a reliable indicator of deterrence.[30] By this rationale, the Discussion Paper considers whether it is advisable to make amendments to the current CCO regime[31] to enable more immediate and consistent judicial responses to breaches of certain CCO conditions, when the CCO is ordered in response to a family violence offence. The response that is suggested is predetermined incarceration in response to breach of a condition.

The discussion paper queries whether a SCF approach would be consistent with the principles underlying Victorian sentencing practices.[32] This submission argues that proposed or possible measures derived from an SCF programme are not consistent with Victorian sentencing principles. In particular, amendments to the *Sentencing Act 1991* to enable an SCF approach would undermine the principle of parsimony, and could not be justified by reference to principles of general or specific deterrence. Instead, it is argued that the CCO scheme as it stands is sufficient to fulfil the desired objectives of SCF.

The Discussion Paper suggests that the SCF approach to sentencing could entail implementing a "zero-tolerance" policy in dealing with breach of certain conditions imposed by a CCO,[33] when the CCO was ordered following

[29] Ibid.
[30] Discussion paper, above n 12, [2.3]-[2.5].
[31] *Sentencing Act 1991* (Vic), Pt 3A.
[32] See, eg, Discussion paper, above n 12, [2.41].
[33] Discussion paper, above n 12.

conviction for an offence that has a family violence aspect.[34] This would apply to a broad range of offences, and it is assumed that it also includes conviction for breaching a Family Violence Intervention Order. Breach of a FVIO carries a maximum sentence of two or five years in prison.[35]

The CCO scheme took effect in January 2012[36] and replaced the Combined Custody Treatment Order, the Intensive Correction Order, the Intensive Correction Management Order, the Community Based Order, and suspended sentences. [37] The Victorian Court of Appeal in its guideline judgment on CCOs has described the defining rationale of the CCO as "a flexible sentencing option, enabling punitive and rehabilitative purposes to be served simultaneously."[38]

The CCO scheme differs from the previous community orders in that it offers sentencing courts a greater range of conditions that can be imposed as part of a sentence,[39] as well as broad discretion to include other conditions that the Court sees fit.[40] Possible conditions include mandatory treatment and rehabilitation, non-association, residence or place exclusion, curfew, alcohol exclusion, judicial monitoring or electronic monitoring. The court also retains a discretion to combine a CCO with a custodial sentence.

In addition, the sentencing court can cancel, suspend, vary or reduce the CCO upon application, at any point while the CCO is on foot, in light of changing circumstances of the offender.

In case of breach of CCO, the sanctions available to the sentencing court are: to vary the order, confirm the order, cancel the order and re-sentence

[34] Discussion paper, above n 12, 2, [1.5].

[35] *Family Violence Protection Act* 2008 (Vic), ss 123, 123A.

[36] Introduced by the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

[37] Parliamentary debates, Hansard, Legislative Assembly, 15 September 2011, (Mr Clark, Attorney-General), 3291, 3292. Also, as stated in *Boulton v R* [2014] VSCA 342 (22 December 2014), fn 31: CBOs were introduced by the *Penalties and Sentences Bill 1985* (Vic). They were designed to combine three types of existing community based dispositions: probation orders, community service work orders and attendance care orders. The CCO continues this combined structure." It is noted that the SCF approaches implemented in the US, upon which the measures in this report are derived, were directed towards filling a gap in the US parole system. It is notable that in Victoria there have been two generations of modification to community-based orders that have superseded probation orders to enable more tailored responses to documented needs.

[38] *Boulton v R* [2014] VSCA 342 (22 December 2014), [2].

[39] *Sentencing Act 1991* (Vic), Part 3A, Div 4.

[40] *Sentencing Act 1991* (Vic), s 48.

the offender, or cancel the order and make no further order.[41] In addition, the breach itself is a criminal offence that carries a maximum penalty of 3 months in prison.[42]

The "zero-tolerance" approach suggested by the SCF concept would suggest imposing an automatic custodial sentence for breach of specified CCO conditions. It is not clear if it would be left to the sentencing court to determine which conditions would be met with a zero-tolerance approach and specified in the particular order, or whether it would be determined by Parliament and entrenched in legislation. Likewise for determining the duration of the custodial sanctions that would be applied. The report does, however, suggest that sanctions would be of minimal duration—ranging from a few hours to a month.[43]

It is submitted that an SCF approach to sentencing for breach of a CCO with respect to family violence offenders is contrary to the object and purpose of the CCO scheme, that it is inconsistent with fundamental principles of the *Sentencing Act*, and that there is nothing to suggest that the proposed imposition of automatic or quasi-mandatory custodial sentence would be an effective deterrent for family violence.

Firstly, the purpose of the CCO scheme is to enable effective solutions for mid-range offences that are punitive but also promote rehabilitation and community reintegration. Flexibility is a key attribute of the CCO scheme, allowing the courts to make orders and follow up on those orders in response to the needs of the offender. The court retains a broad discretion to respond to breaches of the orders, including the possibility of re-sentencing for the index offence, or sentencing anew if the offender is charged with breach. The court considers the principles and purposes of sentencing as stated in the *Sentencing Act* in making that determination, thereby retaining the possibility of a term of imprisonment if it is considered in the interests of justice and community safety to do so.

Secondly, ss 5(3) and 5(4C) of the *Sentencing Act* entrench the principle of parsimony with respect to CCOs and custodial sentences.

Section 5(3):

> A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

[41] *Sentencing Act 1991* (Vic), s 83AS.
[42] *Sentencing Act 1991* (Vic), S 83AD.
[43] Discussion Paper, above n 12, xvi.

Section 5(4C):

> A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order.

These provisions stands for the principle that a non-custodial sentence is generally a more appropriate disposition for mid-range offending. Only when a non-custodial sentence cannot provide condign punishment or sufficient denunciation should an offender be sentenced to a term in prison.[44] The principle of parsimony is essential to the CCO scheme, and as such it contains the implicit acknowledgement that a term of imprisonment may be neither an appropriate nor an effective disposition for mid-range offending.[45]

The report of the Royal Commission into Family Violence[46] acknowledges that while court processes and a criminal justice response to family violence play an important role in providing avenues of recourse for victims,[47] there ought to be more emphasis on specialised court mechanisms and restorative justice processes in response to reports of family violence.[48] The report does not offer support for the proposition that imposing harsher sentences in order to reflect greater degrees of punishment and denunciation for breach of a condition will have a positive impact on reducing the prevalence of family violence. In fact, research suggests that harsher sentences seem to have less of a deterrent effect on convicted offenders of family violence than treatment programs.[49]

In conclusion, the CCO scheme reflects the principle of parsimony by facilitating the possibility for non-custodial dispositions that have a therapeutic aspect as well as punitive, that take into the account various principles and purposes of sentencing including protection of the community and condign punishment. In addition, they increase the role of non-court service providers who may be in a better position to facilitate the kinds of restorative justice or therapeutic measures that would be more conductive to reducing incidents of family violence.

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[44] *Boulton v R* [2014] VSCA 342 (22 December 2014), [140].

[45] See, esp *Boulton v R* [2014] VSCA 342 (22 December 2014), [103]-[110] for an analysis of the punitive aspects of incarceration measured against the therapeutic possibilities of a non-custodial sentence.

[46] Royal Commission into Family Violence, "Summary and Recommendations", March 2016.

[47] Ibid, ch 16.

[48] Ibid ch 22.

[49] Jane Ursel, Leslie Tutty and Janice LeMaistre, *What's Law Got to Do With it? The Law, Specialised Courts and Domestic Violence in Canada* (Cormorant Books 2008), 116.

The SCF approach seems to add little to the scheme that is already in place except for imposing zero-tolerance sentencing obligations on the court, with respect to certain provisions. As such, it undermines the principle of parsimony upon which the CCO scheme is built. In so doing, it creates a real possibility of aggravating the problem of family violence, and serving as a disincentive to report family violence. It is submitted that the flexible and personalised options of the CCO, and the discretion of a judge or magistrate in determining the appropriate response to breach on a case-by-case basis, offers a more effective range of possible responses than compulsory incarceration.

v. Conclusion

Due to problems arising out of procedural fairness and inconsistencies with the principles of equality and parsimony, the ICJV submits that a "swift, certain, fair" approach to sentencing family violence offenders should not be implemented in Victoria.