

30 June 2011

Sentencing Advisory Council
4/436 Lonsdale St
Melbourne VIC 3000

Dear Chief Executive Officer

**YACVic's letter in response to the Statutory Minimum Sentences for Gross
Violence Project**

The Youth Affairs Council of Victoria (YACVic) is a vibrant, member based organisation that represents and advocates for young people and the organisations that work with them. YACVic has worked for and with young Victorians and the services that support them for over 50 years. YACVic welcomes the opportunity to provide advice around the introduction of the statutory minimum sentence for offences of intentionally causing serious injury and recklessly causing serious injury when either offence is committed with gross violence.

YACVic does not support the introduction of statutory minimum sentences for gross violence, particularly in relation to young people aged 16 to 21 years. The key reasons for this are:

- it undermines Victoria's Dual Track system,
- it does not take account of the age and developmental stages of adolescence and early adulthood,
- it does not recognise the evidence that demonstrates children and young people respond well to rehabilitative and diversionary approaches,
- there is little evidence to support this approach in terms of reducing recidivism
- it may disproportionately affect Aboriginal people
- it contravenes the *Children, Youth and Families Act 2005*; and
- it contravenes the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Convention on the Rights of the Child*.

Each of these reasons is expanded on pages three to six.

Our Submission

How the exceptional circumstances in which a court may impose a non-parole period of less than the statutory minimum sentence should best be specified.

(b) Should exceptional circumstances apply differently to juvenile offenders (aged 16 and 17)?

YACVic strongly supports Youthlaw's submission that children aged 16 and 17 be exempt from the proposed mandatory minimum sentences for gross violence. In addition, we submit that mandatory minimum sentences of four years should not apply to young people aged between 18 and 21 years, due to the importance of the dual track system and the need for continued approach that is centred on rehabilitation.

Were minimum sentences to be introduced in relation to young people and gross violence, YACVic submits that exceptional circumstances must apply differently to juvenile offenders than adult offenders. The reason for this is that young people in the criminal justice system are highly likely to have experienced a range of difficulties, vulnerabilities and disadvantage.

This is best illustrated through the Youth Parole Board and Youth Residential Board Annual Report 2009-2010, which discusses a 2009 survey by the Department of Human Services of 164 young people (155 males and 9 females) who are in custody in Victoria.¹ The survey paints a troubling picture of young people in the youth justice system. For example:

- 27 per cent of young people presented with issues regarding their intellectual functioning,
- 47 per cent had experienced difficulties at school resulting in either suspension or expulsion,
- 26 per cent 'presented with mental health issues',
- 24 per cent of young people had experienced self harm in the past or suicidal ideation,
- 83 per cent of young people were users of drugs,
- A significant proportion of young people had acquired brain injuries, which were undiagnosed,
- Many young people had experienced family violence,
- There was an overrepresentation of Aboriginal young people²

Exceptional circumstances

As has been noted, young people who have committed an offence may be experiencing a range of vulnerabilities and difficulties, or a combination of difficulties. These include:

- mental health issues,
- an intellectual or learning disability,
- substance abuse issues,
- homelessness or a risk of homelessness,
- disengagement from school,
- family breakdown, violence and abuse,
- responsibilities as a carer.³

We submit that consideration of such issues has to be made in the provisions regarding exceptional circumstances. In addition, consideration must be given to a young person's previous criminal history, such as a lack of any prior convictions, as well as the circumstances of the offence, including the nature of a young person's involvement and whether there was any coercion or other relevant factors that contributed to their offending.

There are many other exceptional circumstances, however, that should be relevant and no list could ever be exhaustive of all these circumstances. We submit that it is imperative that exceptional circumstances provisions in relation to young people and offences of gross violence be drafted *as broadly as possible* in order to allow the courts to retain as much discretion as possible in sentencing of young offenders in relation to the offences involving gross violence.

General comments regarding the proposed changes

Age and brain development in young people

Recent neurobiological research has revealed that young people continue to experience brain maturation until into their twenties.⁴ Studies examining the development of different areas of the brain reveal that:

'those regions [of the brain] associated with high levels of executive function including task initiation and management, self-image, impulse control, judgment, strategising pathways and managing strong emotion, only fully mature well into the 20s'⁵.

In light of this research, it is imperative that the age and maturation stages of young people be taken into account by courts in all sentencing decisions regarding young people. The introduction of mandatory sentences for offences involving gross violence fails to take account of the neurological changes referred to above, which impacts upon the decision making skills and impulse control of young people.

Impact on Dual track

YACVic holds grave concerns about the introduction of two-year minimum detention sentences for juvenile offenders aged 16 or 17, specifically in relation to highly vulnerable or disadvantaged young people. We are also very concerned about the impact of four-year minimum sentences for gross violence on young people aged between 18 and 21 years, as it appears they will be precluded from the current 'dual track' system operating in Victoria. YACVic strongly supports Victoria's current 'dual track' system, by which a court may make a youth justice centre order or youth residential centre order for a young person aged between 18 and 21 years at the time of sentencing,⁶ if there are 'reasonable prospects for the rehabilitation' of the young person or that the young person is 'particularly impressionable, immature or likely be subjected to undesirable influences in an adult prison'.⁷ Given that the *Sentencing Act 1991* (Vic) permits the Magistrate's Court to order a young person to serve a maximum of two years in a youth residential centre or youth justice centre and the County or Supreme Court may order a maximum period of three years,⁸ it appears that these orders will no longer be available for young people aged between 18 and 21 in relation to gross violence.

Diversionsary practices

In 2009 in response to the *Parliamentary Inquiry into Strategies to prevent high volume offending and recidivism by young people* YACVic prepared a joint submission with the Centre for Multicultural Youth (CMY), Youth Referral and Independent Person Program (YRIPP) and the Centre for Excellence in Child and Family Welfare. This response emphasised the need for prevention and early intervention strategies to prevent youth offending as well as the importance of a 'rehabilitative and diversionsary approach as [the] focus for youth justice services in Victoria'.⁹ The research indicates that young people achieve better 'rehabilitative outcomes' than adults¹⁰ and that 'the less justice system intervention, the better in terms of reducing recidivism for young people'.¹¹

YACVic strongly supports the \$25.2 million provided in the 2011-12 State Budget to continue drug and alcohol treatment services for those in the youth justice system, and provide diversionsary measures for young people, such as group conferencing.¹² YACVic submits that the proposed changes regarding mandatory sentencing fail to recognise the importance of diversionsary approaches to youth offending and the critical need for rehabilitation to be the key focus in all policy, law, and programs regarding young people in the criminal justice system.

Evidence

In addition, a number of literature reviews on reoffending conducted in the last ten years suggest that the imposition of more severe penalties does not act as a general or specific deterrent.¹³ Instead, longer periods of detention may have the contrary effect, as young people in custody are cut off from their social supports, may come into contact with those with 'anti-social attitudes' who they may continue to spend

time with after their release, and their time in custody may have a 'negative effect on...long-term job stability', which further disadvantages them and may contribute to reoffending.¹⁴

Mandatory sentencing disproportionately impacting on Aboriginal populations

Across Australia and in Victoria there is an overrepresentation of Aboriginal young people in the criminal justice system.¹⁵ For example, the detention rate for aboriginal juveniles is 397 per 100,000, which is 28 times higher than the rate for non-Aboriginal juveniles (14 per 100,000). In 2007, Aboriginal juveniles accounted for 59 percent of the total detention population¹⁶. This overrepresentation of young people in the criminal justice system is only likely to increase with the proposed introduction of minimum sentences due to the disproportional contact that young Aboriginal people have with the criminal justice system.

Contravenes existing laws and the Charter of Human Rights and Responsibilities Act 2006 (Vic)

We submit that minimum sentences should not apply at all in the Children's Court, as they are inconsistent with the principles contained in the *Children, Youth and Families Act 2005* (Vic). Section 32 specifies a range of sentencing considerations the Court can take account of, such as the 'suitability of the sentence to the child', the importance of preserving the relationship between a child and their family, the importance of children continuing education, employment, and training, and the 'need to minimise the stigma to the child'.¹⁷ In addition, the sentencing of children and young people in the Children's Court may be deferred for a period of time while individuals 'take steps to address the issues that led to the offending behaviour'.¹⁸ Children and young people may also take part in a diversion program, which focuses on addressing reasons for offending as well as including 'counselling...education, training' and a range of support.¹⁹

We refer to Youthlaw's submission to the *Suspended Sentences Review*, which notes that 'discretion allows for judges and magistrates to consider the various interests of relevant stakeholders in a particular matter' and the 'weight to be applied to these various interests will vary from case to case and cannot be calculated as a fixed formula'.²⁰ In contrast, mandatory sentences provide a 'one size fits all approach', which 'leads inevitably to harsh and unfair sentences'²¹ given that the circumstances surrounding young people who have committed an offence are likely to be vastly different, as are the personal characteristics, needs, and vulnerabilities of each young person.

Furthermore, the introduction of mandatory two year sentences for gross violence for 16 and 17 year olds and four years for 18 year olds appears to be incompatible with section 25(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that a 'child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the

child's rehabilitation,²² as well as contravening Article 37(b) of the *Convention on the Rights of the Child*, which specifies that '...detention or imprisonment of a child...shall be used only as a measure of last resort and for the shortest appropriate period of time'.²³ Ultimately, the strong emphasis on detention in the proposed changes is not in line with the promotion of rehabilitation of young people in the criminal justice system, nor is it a measure of last resort.

Victoria has been identified as leading state in imposing the 'least intrusive order necessary' for young offenders in Australia, resulting in the majority of young offenders being diverted from custody'.²⁴ It is important that the focus on diversionary programs and rehabilitation of young people in the criminal justice system be maintained.

We are happy to provide further information in relation to any of the issues and concerns we raise, should that be of assistance. Please do not hesitate to contact Alice Tudehope, Manager of Policy and Projects on 9267 3722.

Yours sincerely



Georgie Ferrari
CEO

¹ Youth Parole Board and Youth Residential Board Victoria, *Annual Report 2009-10*, 2010, published by the Victorian Government Department of Human Services, p. 12.

² *Ibid.*, p. 15.

³ VCOSS, *Statutory Minimum Sentences for Gross Violence*, June 2011, p. 4.

⁴ Peter Gluckman, Felicia Low, and Kathryn Franko, 'Puberty and adolescence: transitions in the life course', in *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence, A Report from the Prime Minister's Chief Science Advisor*, May 2011, Office of the Prime Minister's Science Advisory Committee, p. 24.

⁵ *Ibid.*, p. 24.

⁶ *Sentencing Act 1991* (Vic), s 3.

⁷ *Sentencing Act 1991* (Vic), s 32.

⁸ *Sentencing Act 1991* (Vic), s 32(3).

⁹ YACVic, Centre for Multicultural Youth (CMY), Youth Referral and Independent Person Program (YRIPP), and the Centre for Excellence in Child and Family Welfare, *A response to the Drugs and Crime Prevention Committee Inquiry into strategies to prevent high volume offending by young people*, September 2008, p. 7.

¹⁰ Andrew Day, Devin Howells and Debra Rickwood, *The Victorian Juvenile Justice Rehabilitation Review*, prepared for the Department of Human Services, Victoria, January 2003, p. 64.

¹¹ YACVic, CMY, YRIPP, and the Centre for Excellence in Child and Family Welfare, *A response to the Drugs and Crime Prevention Committee Inquiry into strategies to prevent high volume offending by young people*, September 2008, 1-3616

¹² YACVic, *YACVic's Analysis of the 2011-12 State Budget*, 2011, p. 2.

¹³ Donald Ritchie, *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, April 2011, p. 21-22; see also C. Cesaroni and N. Bala (2008), 'Deterrence as a Principle of Youth Sentencing: No effect on Youth, but a Significant Effect on Judges'. *Queens Law Journal*, 34, p. 450 and Smart Justice, 'More prisons are not the answer to reducing crime', 19 July 2010, http://www.smartjustice.org.au/cb_pages/more_prisons_are_not_the_answer_to_reducing_crime.php, accessed on 30 July 2011.

¹⁴ Donald Ritchie, *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, April 2011, p. 21-22; see also C. Cesaroni and N. Bala (2008), 'Deterrence as a Principle of Youth Sentencing: No effect on Youth, but a Significant Effect on Judges'. *Queens Law Journal*, 34, p. 450.

¹⁵ Australian Institute of Criminology, 'Trends in juvenile detention in Australia', *Trends & issues in crime and criminal justice*, No. 416, May 2011, p. 3 and 6.

¹⁶ Australian Institute of Criminology, 'Juvenile detention', February 2011.

¹⁷ *Sentencing Act 1991* (Vic), s 32.

¹⁸ Sentencing Advisory Council, *Sentencing Young People*, <http://www.sentencingcouncil.vic.gov.au/landing/about-sentencing/sentencing-information/sentencing-options/sentencing-young-people>, accessed on 22 June 2011.

¹⁹ Sentencing Advisory Council, *Sentencing Young People*, <http://www.sentencingcouncil.vic.gov.au/landing/about-sentencing/sentencing-information/sentencing-options/sentencing-young-people>, accessed on 22 June 2011.

²⁰ Youthlaw, *Suspended Sentences Review*, www.youthlaw.asn.au/upload/suspendedsentences1.doc, accessed on 30 June 2011, p. 3.

²¹ Smart Justice, *Mandatory Sentencing*, 25 May 2010,

http://www.smartjustice.org.au/cb_pages/fs_mandatory_sentencing.php, accessed on 30 June 2011, p. 1.

²² *Charter of Human Rights and Responsibilities Act 2006* (Vic), sections 23(3) and 25(3).

²³ *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Article 37(b).

²⁴ Sherilyn Hanson, *YMCA World Alliance Youth Justice Campaign*, the Bridge Project, February 2009, p. 18.