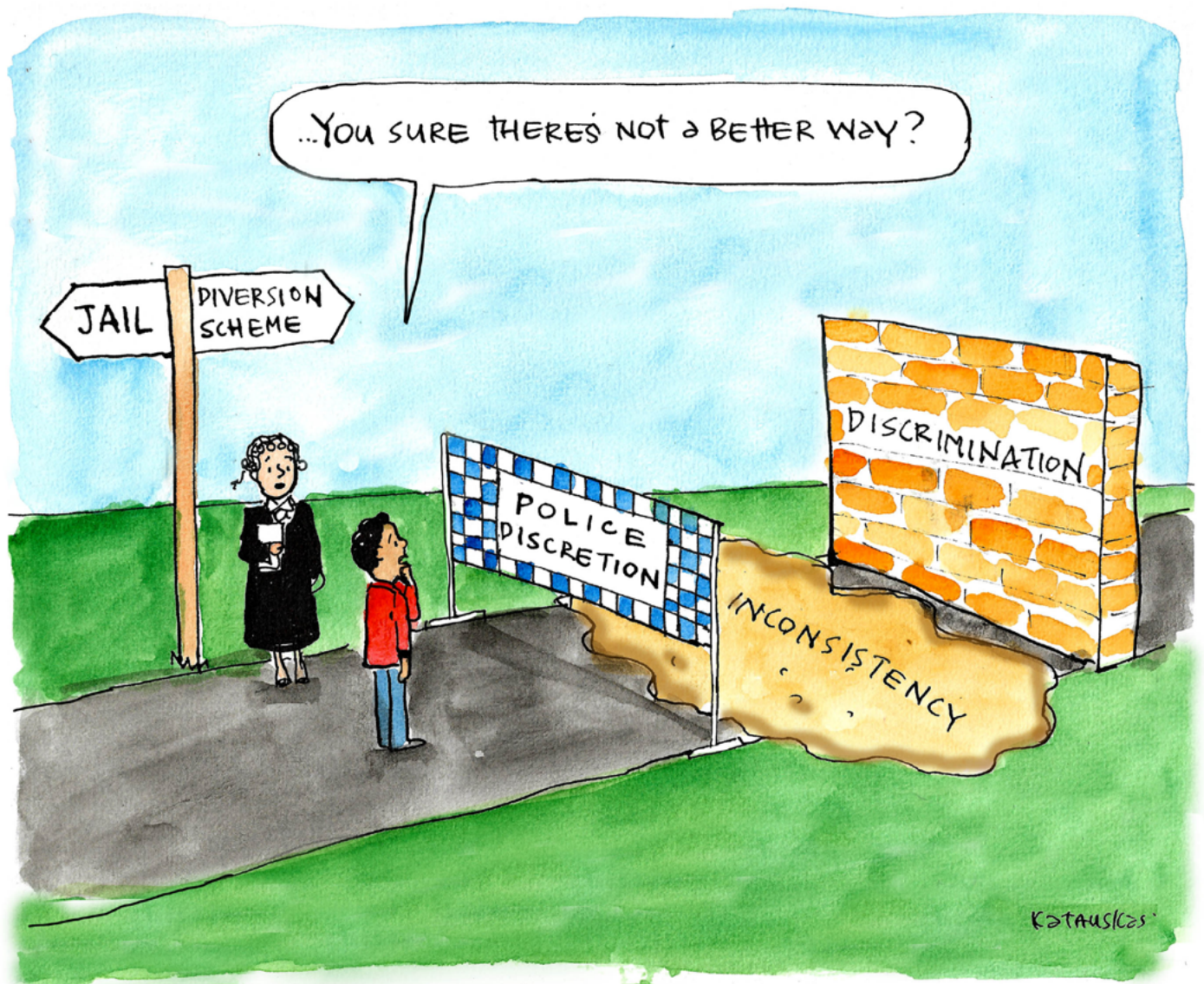


# Justice Diverted?

## Prosecutorial discretion and the use of diversion schemes in Victoria



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## About the Report

This report was written by Emily Scott, Bethany King, Saranya Saravanan and David De Witt as members of Liberty Victoria's Rights Advocacy Project ('RAP'). RAP is a community of lawyers and activists working to advance human rights in Australia. RAP works across a range of issues including equality, government accountability, refugee and asylum seeker rights and criminal justice reform.

The authors wish to thank their supervisors Stewart Bayles and Sam Norton, and Coordinator Paige Darby, for their generosity, expertise and commitment to this project.

We also extend our gratitude to the incredible Fiona Katauskas for providing the cartoon which begins this report, and to Michael Prezel for his work on the design and layout.

We are indebted to the insight, support and assistance provided by the various stakeholders with whom we consulted in the preparation of this report, as well as to the cooperation of Victoria Police and the support afforded to this initiative by the Victorian Magistrates' and Children's Courts.

Finally, we thank Liberty Victoria for their ongoing commitment to human rights and stewardship in the law reform sphere. We are immensely grateful for the opportunity to have participated in the Rights Advocacy Project and excited by the prospect of effecting positive change.

## About Liberty Victoria

Liberty Victoria is one of Australia's leading civil liberties organisations. It has been working to defend and extend human rights and freedoms in Victoria for over 70 years. The aims of Liberty Victoria are to:

- ↳ help foster a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity;
- ↳ secure the equal rights of everyone and oppose any abuse or excessive power by the state against its people;
- ↳ influence public debate and government policy on a range of human rights issues. Liberty Victoria has policy statements on issues such as access to justice, a charter of rights and freedom of speech and privacy; and
- ↳ make submissions to government, support court cases defending infringements of civil liberties, issues media releases and hold events.

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### Abbreviations

<b>ATSI</b>	Aboriginal and Torres Strait Islander	<b>CYFA</b>	Children, Youth and Families Act 2005 (Vic)
<b>CALD</b>	Culturally and linguistically diverse	<b>LIV</b>	Law Institute of Victoria
<b>CBA</b>	Criminal Bar Association of Victoria	<b>SMLS</b>	Springvale Monash Legal Service
<b>CCYD</b>	Children's Court Youth Diversion Program	<b>VALS</b>	Victorian Aboriginal Legal Services
<b>CJDP</b>	Criminal Justice Diversion Program	<b>VLA</b>	Victoria Legal Aid
<b>CPA</b>	Criminal Procedure Act 2009 (Vic)	<b>YDPP</b>	Youth Diversion Pilot Program

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## Executive Summary

In Victoria, being charged with a criminal offence can result in a range of different outcomes. One such outcome is 'diversion', a legislative scheme which empowers a court to deal with a criminal charge in a manner designed to minimise the negative impacts on an accused's prospects of rehabilitation by preserving their criminal history.

As the name suggests, this is achieved by 'diverting' the matter from the criminal justice system and thus avoiding a finding of guilt (and the consequential recording of such a finding on a person's criminal record).

The effectiveness of these programs is well established. They give people the opportunity to participate in rehabilitative programs, in some cases to provide reparation to any victims, and to contribute to the community in a manner that is designed to reduce the likelihood of reoffending.

Theoretically, "diversion" is available to any person who is charged with a criminal offence that is able to be heard and determined in the Magistrates' Court. In practice, it is generally restricted to people who are charged with relatively minor offences, and where the offending is thought to be out of character. However, an additional barrier to being able to participate in a diversion program is the requirement that the prosecution consent to such a course.

Victoria Police informants and prosecutors hold absolute discretion when deciding whether or not to recommend an accused for a diversion program and whether to provide their consent. There is currently no guidance, legislative or otherwise, as to how that discretion should be exercised. An accused person has no right of appeal against a refusal by the prosecution to consent to diversion, nor is there any ability for a court to review this refusal and grant diversion where the prosecution withholds its consent.

Without appropriate guidance or oversight, individual police officers can adopt idiosyncratic and inconsistent decision-making practices vulnerable to bias and prejudice. This has the potential to impact detrimentally on minority groups, including Aboriginal and Torres Strait Islander communities and people of colour, who are already disproportionately represented in the criminal justice system and stand to benefit most from participation in diversion programs.

This report analyses the diversion schemes currently operating in the Magistrates' and Children's Courts of Victoria, following our consultations with these Courts, consideration of various preceding reports and reviews, and discussions with key stakeholders.

There is considerable overlap in the issues surrounding diversion in both the youth and adult criminal justice systems, particularly with respect to the role of the prosecution. However, the complexity of the issues surrounding diversion in the youth justice system requires further research and consideration, falling outside the scope of this report. We also acknowledge that there are differences in the ways in which the youth and adult schemes operate in practice. Therefore, whilst we explore issues across both youth and adult diversion, the recommendations we have issued in this report focus on the adult system. We hope that this report will assist current and future initiatives aimed at the improvement of the youth scheme.

This report advocates for legislative reform to allow the ultimate decision regarding diversion to fall with judicial officers rather than the prosecution, on the grounds that the decision to refer an individual for diversion is more akin to a sentencing option than a charge withdrawal.

In lieu of the immediate legislative reform, this report also recommends developing practical guidelines to increase transparency and accountability in prosecutors' decision-making in this critically important process.

Chapter 1 outlines the background and current legislative framework for the adult and youth diversion schemes.

Chapter 2 discusses why the diversion program is an integral part of the criminal justice system.

Chapter 3 identifies the issues that are impeding the success of the diversion schemes and focuses on the impact of diversion schemes on vulnerable groups, namely, Aboriginal and Torres Islander (ATSI) people, culturally and linguistically diverse (CALD) communities, and survivors of family violence.

Chapter 4 highlights the legal issues implicit within the current legislative framework governing adult and youth diversion.

Chapter 5 presents our recommendations for legislative and practical reforms, based on our research and consultations with key stakeholders.

# 1. The Current Legal Framework

A combination of legislative schemes and informal rules operate in both the adult and children's jurisdiction to determine who receives the benefit of diversion.

## 1.1 Adult Diversion

This scheme, known as the Criminal Justice Diversion Program (CJDP) began as a pilot program in 1997 at Broadmeadows Magistrates' Court, before expanding to Sunshine and Mildura. It was reviewed in 2000 and the positive results, including high completion rates and low recidivism, resulted in it being rolled out to all Victorian courts by November 2001.

In July 2003 the program gained formal ongoing status. It was legislatively enshrined in section 128A of the *Magistrates' Court Act 1989* (Vic), before being incorporated into section 59 of the new *Criminal Procedure Act 2009* (Vic).

In 2008, the Sentencing Advisory Council produced a statistical profile on the use of the program to that point, confirming that it had becoming 'an important option for the Magistrates' Court in dealing with low-level offending'.<sup>1</sup>

### 1.1.1 The legislation

The *Criminal Procedure Act 2009* (Vic) (CPA) outlines the legislative framework for adult diversion in Victoria. Section 59 of the CPA empowers a court to deal with criminal offences, with some limited exceptions, by way of diversion.

Offences that are precluded from the diversion program are prescribed in section 59(1)(a) and (b). These include offending that is punishable by a minimum or fixed sentence or penalty, including some traffic offences involving drugs or alcohol pursuant to section 49(1) of the *Road Safety Act 1986* (Vic).

Section 59 of the CPA otherwise provides

that the Magistrates' Court may adjourn a proceeding for up to 12 months to enable an accused to participate in and complete a diversion program if, at any time before taking a formal plea from an accused in a criminal proceeding for a summary offence or an indictable offence that may be heard and determined summarily:

- a. The accused acknowledges to the Magistrates' Court responsibility for the offence; and
- b. It appears appropriate to the Magistrates' Court, which may inform itself in any way it considers appropriate, that the accused should participate in a diversion program; and
- c. **Both the prosecution and the accused consent** to the Magistrates' Court adjourning the proceeding for this purpose.

If a diversion program is completed successfully by an accused (meaning to the satisfaction of the Magistrates' Court) then no plea is to be taken and the Court must discharge the accused without any finding of guilt.

Subsection 5 of the CPA provides that if an accused does not complete a diversion program to the satisfaction of the Magistrates' Court and the accused is subsequently found guilty of the charge, the Court must take into account the extent to which the accused complied with the diversion program when sentencing the accused.

Interestingly, subsection 6 of the CPA states that '*Nothing in this section affects the requirement to observe the rules of natural justice*'. Further discussion about this subsection occurs later in this report.

### 1.1.2 The legislation in practice

The practical impact of the above framework is that a proceeding in the Magistrates' Court may be adjourned in order to allow an accused to complete a diversion

<sup>1</sup> Sentencing Advisory Council, *The Criminal Justice Diversion Program in Victoria: A Statistical Profile* (2008).

program. This only occurs where an accused acknowledges responsibility for the offence and undertakes to complete the program. This mechanism allows an accused to avoid a finding of guilt, upon successful completion of the program.

In order for an accused to be afforded this opportunity, the prosecution must consent to the proceeding being adjourned for this purpose.

The time at which diversion is considered varies in practice. Sometimes informants (or the superiors authorising their police brief) may provide their view at an early stage about the appropriateness of diversion. On other occasions, the appropriateness of diversion might be considered by police prosecutors once the matter reaches court (see below for a discussion on the role of the informant in deciding whether a matter ought to be recommended for diversion). Lawyers acting on behalf of an accused person might make a request, whether formal or informal, for the prosecution or an informant to consider consenting to diversion.

Where police are satisfied that a matter is appropriate for diversion, they complete and sign a *Diversion Notice* (included at **Appendix A** of this report) which confirms their position and suggests any conditions that might be attached as a prerequisite of completion.

This notice is provided to the Magistrates' Court's Diversion Coordinator who then facilitates the matter being put before a magistrate or judicial registrar for final determination as to whether diversion can proceed and, if so, whether any conditions are to be included.

### **1.1.3 Other research and calls for reform**

The CJDV was first evaluated in 2004 by Turning Point Alcohol and Drug Centre and Health Outcomes International Pty Ltd on behalf of the Victorian Department of Justice. Their report incorporated findings from their 2004 Process Evaluation and Policy & Legislation Review of the program. They found that the program had been a success, albeit noting:

*Other concerns regarding the program related to a lack of consistency in the approval for diversion by police informants,*

*but there was also strong recognition by most stakeholders that the role of the informant was crucial to ensuring police adoption and support for the program.<sup>2</sup>*

Despite these concerns, legislation formalising the scheme, in first the *Magistrates' Court Act 1989* (Vic), then the CPA, enshrined the requirement for prosecutorial consent.

In 2006, a detailed report on the CJDV by Springvale Monash Legal Service (**SMLS**) concluded as its key recommendation that further research be conducted into the benefits of diversion being recommended without the consent of the police informant and in addition, into the benefits of granting legal practitioners the power to make representations to the magistrate in the event of refusal by the informant to recommend diversion.<sup>3</sup>

In January 2015, an article in *The Age* proclaimed "Victoria's Chief Magistrate orders diversion review".<sup>4</sup> The article stressed that the CJDV was in urgent need of review since it had not been reviewed since 2004.<sup>5</sup> It noted that there were several key issues that needed to be addressed, including concerns that the police prosecuting crimes had the power to 'veto' an accused's request for diversion without appropriate judicial oversight.<sup>6</sup>

Following the announcement of the review, several organisations were approached for comment, including the Criminal Bar Association of Victoria (**CBA**),<sup>7</sup> Law Institute of Victoria (**LIV**)<sup>8</sup> and Victorian Aboriginal

2 Department of Justice, *Court Diversion Program Evaluation Overview – Final Report* (2004) 7.

3 Springvale Monash Legal Service Inc, 'Criminal Justice Diversion Program' (Discussion Paper, 2006) 26-27.

4 Nino Bucci, 'Victoria's Chief Magistrate Orders Diversion Review', *The Age* (online), 10 January 2015 <<https://www.theage.com.au/national/victoria/victorias-chief-magistrate-orders-diversion-review-20150107-12jnb5.html>>.

5 Ibid.

6 Ibid.

7 Criminal Bar Association of Victoria, Submission to the Magistrates' Court of Victoria, *Review of the Criminal Justice Diversion Program*, 5 June 2015.

8 Law Institute of Victoria, Submission to the Magistrates' Court of Victoria, *Review of the Criminal Justice Diversion Program*, 26 May 2015.

Legal Service (VALS).<sup>9</sup> These organisations unanimously supported the removal of the requirement for prosecutorial consent in the diversion process.

The Court's review has now been completed. The Magistrates Court of Victoria's 2015-16 Annual Report notes that, in response to an internal report on the current operation of the diversion program, the Court's Executive Committee "considers that diversion should be available at the instance of a magistrate and not initiated by notice of a member of Victoria Police."<sup>10</sup>

Further, after participating in the Court's review, the Criminal Court Users Committee "reinforced its longstanding view that the Chief Magistrate recommend to the Attorney General that the granting of the diversion program should be a matter for the discretion of the magistrate and not be subject to veto by the prosecution".<sup>11</sup>

## 1.2 Youth Diversion

The Youth Diversion Pilot Program (YDPP) commenced on 1 June 2015. It was initially scheduled to run for a period of 12 months, but ultimately concluded at the end of 2016. Following this pilot, the Victorian Government announced funding to deliver a state-wide youth diversion program.

The program was evaluated by Professor Stuart Thomas, Dr Marg Liddell and Dr Diana Jones of RMIT University who found that 'the consensus view was that the YDPP filled an important gap and provided an increased suite of options to help keep young people 'diverted' away from the criminal justice system.<sup>12</sup>

In 2016, following incidents at Parkville

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9 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 2015; Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016.

10 Magistrates' Court of Victoria, 'Annual Report 2015-16' (30 September 2016) 12.

11 Ibid 13.

12 Stuart Thomas et al, 'Evaluation of the Youth Diversion Pilot Program (YDPP: Stage 3)' (Final Report, RMIT University, 16 December 2016) 4.

Youth Justice Centre, the Victorian Department of Health and Human Services commissioned a report to systematically evaluate Victoria's youth justice services, which recommended the development of an evidence-based diversion framework to support a consistent diversion program state-wide.<sup>13</sup>

From January 2017, the Department of Health and Human Services started delivering the Children's Court Youth Diversion service (CCYD) in all Children's Courts across Victoria.<sup>14</sup> Following the passage of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, the youth diversion program is now enshrined in legislation, the *Children, Youth and Families Act 2005* (Vic) (CYFA). Amongst other things, the CYFA provides for a legislated diversion program aimed at youth accused (Part 5.2, Division 3A).

### 1.2.1 The legislation

Section 356D(1) of the CYFA provides that subject to Division 9, at any time before taking a formal plea from a child in a criminal proceeding for an offence, the Court may, on its own motion or on application by the child or the prosecutor, adjourn the proceeding for a period not exceeding 4 months to enable the child to participate in and complete a diversion program.

Section 356D(3) of the CYFA stipulates that the Court may not adjourn a proceeding for the purpose of the child completing a diversion program if:

- a. the prosecutor does not consent to the adjournment; or
- b. the child does not consent to the adjournment in accordance with section 356E.

It follows that the diversion process in the youth justice system contains the same requirement of prosecutorial discretion as the CPA.

However, unlike the CPA which applies to adult accused, section 356F of the CYFA outlines

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13 Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Executive Summary, Victorian Government, July 2017) 34.

14 Children's Court of Victoria, *Youth Diversion* <<https://www.childrenscourt.vic.gov.au/jurisdictions/criminal/youth-diversion>>.

the following matters that a prosecutor **must** consider when determining whether to consent to an adjournment for a child accused under section 356D(1):

- a. the availability of suitable diversion programs;
- b. the impact on the victim (if any);
- c. the child's failure to complete previous diversion programs (if any);
- d. the alleged level of involvement of the child in the offending;
- e. any other matter that the prosecutor considers relevant.

It is to be noted that the use of the word 'must' in section 356F points to the prosecutor's positive obligation to consider the matters outlined above. Despite this, the legislation does not contain a requirement that the prosecutor provide any reasons for their decision with respect to diversion.

Importantly, section 356D(2) of the CYFA gives the Court power to refuse a plea of guilty from a child accused, or alternatively allows for the withdrawal of such a plea. This power may be exercised if there has not been an application for diversion and where the Court considers it necessary to consider the appropriateness of diversion (and provided the court has not yet heard any evidence in the proceeding). Again however, section 356D(2)(d) provides that in the case of a withdrawal of a plea, the Court must still be satisfied that the prosecutor does not object to diversion.

### **1.2.2 The legislation in practice**

Diversion Coordinators attend all scheduled sittings of the Criminal Division of the Children's Court. In order for a matter to reach a Diversion Coordinator, the prosecution and the accused must first consent to diversion, and the Magistrate must subsequently issue a referral. The Diversion Coordinators conduct same-day assessments and advise the court on the accused's suitability. When conducting an assessment, the Diversion Coordinator consults with the young person, their family or carer, Victoria Police prosecutors and legal representatives. The Diversion Coordinator will then issue a recommendation to the Magistrate in report form.

If diversion is considered appropriate, the Magistrate will make a diversion order. This

may contain a range of conditions, underpinned by the principles of diversion and targeted to promote reparation of harm caused by the offence/s. The Diversion Coordinators will manage risks identified through assessment by engaging supports to promote the completion of the diversion activity.<sup>15</sup>

During our consultation with Magistrates in the Melbourne Children's Court, we were informed that, in practice, the Magistrates tend to have more active roles in recommending diversion for juvenile accused, and that the prosecution was more likely than not to provide their consent.

It was noted that both Magistrates and the prosecution were greatly assisted by the reports prepared by the Court's Diversion Coordinator, detailing matters relevant to the accused's eligibility for diversion.

In instances where the prosecution were planning not to consent to diversion, we were told that the discussion regarding that decision would usually be made in open court, ensuring that the ultimate decision was reached in a transparent and accountable manner.

Despite this informal arrangement, the Magistrates said that they would prefer to have the ultimate discretion in recommending diversion, because no matter how transparent this conversation was, if the prosecution refused to recommend diversion, that was essentially the end of the matter.

Moreover, while this informal practice seems to address some of the issues present in the CJDP, it is important to note that this has been the experience of judicial officers in one particular Children's Court.

As detailed further below, we consider that changing the legislation to remove the requirement of the prosecution's consent would be preferable, to ensure consistency across all Children's Courts in Victoria.

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15 Children's Court of Victoria, *Youth Diversion* <<https://www.childrenscourt.vic.gov.au/jurisdictions/criminal/youth-diversion>> (accessed 30 April 2018).



### 1.2.3 Other research and calls for reform

In 2012, the Victorian Department of Justice announced an enquiry seeking views from the public about diversion responses for young people encountering the criminal justice system in Victoria. Their background discussion paper contended that young people primarily commit low level offences and the majority do not re-offend after their first offence. It further stated that '[e]vidence suggests that, in appropriate cases, diversion early in the criminal justice process can be a successful and highly cost-effective way to deal with crime.'<sup>16</sup>

In doing so, it drew on previous reports considering responses to young people in the criminal justice system, including:

- ↳ The Parliament of Victoria's Drugs and Crime Prevention 2009 Inquiry into strategies to prevent high volume offending by young people.<sup>17</sup>
- ↳ The Victorian Auditor General's 2008 Report into services for young offenders, focusing on services provided by the Department of Human Services and the Magistrates' Court of Victoria.
- ↳ The Commonwealth Parliament Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011 Doing Time - Time for Doing report on the high level of involvement of Indigenous young people in the criminal justice system.

A number of community organisations provided submissions to the inquiry, among them Victoria Legal Aid (VLA), the LIV and the Smart Justice for Young People coalition.

All of these works advocated for the introduction of a legislated pre-plea diversion program in the Children's Court, similar to that already operating within the Magistrates' Court of Victoria. In addition, the submissions highlighted the limitations surrounding the idiosyncratic application of prosecutorial discretion in the CJDP, and recommended that any youth diversion program allow for the Court

to refer a young person for diversion without the need for consent from the prosecution.

In 2017, VLA published a further research paper supporting the introduction of a legislated youth diversion program. Specifically, it was again recommended that in such a scheme, Children's Court Magistrates be allowed to refer young people to diversion irrespective of police recommendation. In relation to the then pilot program, it was noted that 'there are few guidelines to assist police in defining 'suitability' and referral is inevitably discretionary', which, 'research suggests... generally works against the interests of young people'.<sup>18</sup>

Despite these clear recommendations, the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, when introduced, included a requirement for prosecutorial consent to recommendations for young people to undertake diversion, similar to the CJDP.

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16 Department of Justice, State of Victoria, Practical Lessons, Fair Consequences: Improving Diversion for Young People in Victoria (2012) 2.

17 Drugs and Crime Prevention Committee, Inquiry into Strategies to prevent high volume offending and recidivism by young people, Final Report (July 2009), 297.

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18 Eleni Martakis, 'Appropriate legal interventions for children and young people in Victoria' (Research brief, Victoria Legal Aid, March 2014) 17.

## 2. Why Diversion?

The Magistrates' Court of Victoria's CJDP website begins by stating that the program:

provides mainly first time offenders with the opportunity to avoid a criminal record by undertaking conditions that benefit the accused, victim and the community as a whole<sup>19</sup>

The main purposes of the program, as stated by the Victorian government, are:

- ↳ To prevent re-offending;
- ↳ To assist the offender's rehabilitation;
- ↳ To utilise community resources for appropriate counselling or treatment; and
- ↳ To ensure appropriate reparation is made to the victim.<sup>20</sup>

Similarly, the CCYD is guided by a number of key purposes as set out section 356C of the CYFA, including the need to:

- ↳ Divert a child from the criminal justice system where possible and appropriate;
- ↳ Reduce the risk of stigma caused by contact with the criminal justice system;
- ↳ Respond to a child's offending in a manner that acknowledges the child's needs and assists with rehabilitation;
- ↳ Provide the child with opportunities to strengthen and preserve relationships with family and other persons of importance in the child's life, and ongoing pathways to connect with education, training and employment.<sup>21</sup>

We are indebted to previous reviews that have been undertaken on adult and youth diversion schemes as outlined above. These previous works provide comprehensive analysis of the

19 Magistrates' Court of Victoria, *Criminal Justice Diversion Program* <<https://www.magistratescourt.vic.gov.au/jurisdictions/criminal-and-traffic/criminal-justice-diversion-program>>.

20 Springvale Monash Legal Service Inc, 'Criminal Justice Diversion Program' (Discussion Paper, 2006),13.

21 Sections 356C(a), (b), (d), (e) and (f).

development of these programs, and highlight the key benefits and challenges of the diversion programs.

In summary, these reviews have identified that diversion programs:

1. Centre a therapeutic justice rather than a punitive approach, assisting the accused to access appropriate community supports and making provision for involvement of the victim in the process;
2. Reduce recidivism rates;
3. Allow the accused to avoid a criminal record which assists them to achieve their rehabilitative goals and move on with their lives; and
4. Provide economic benefits to the community.

### 2.1 Therapeutic jurisprudence and rehabilitation

Therapeutic jurisprudence has been described as 'using the law as a therapeutic agent in the lives of vulnerable people who require treatment more than (or in addition to) punishment'.<sup>22</sup>

The introduction of problem-solving or problem-oriented courts such as drug courts and Koori courts can be seen as an extension of the principles of therapeutic jurisprudence.<sup>23</sup> Such problem-solving courts employ 'intensive judicial case management, the involvement of a multidisciplinary court team and therapeutic judging techniques'.<sup>24</sup>

22 Monash University Castan Centre for Human Right Law, *Alternatives to Imprisonment for Vulnerable Offenders International Standards and Best Practice*, Report for Australian Government Attorney-General's Department (July 2012), 23.

23 Emma Jane Colvin, *Conditional Justice: Therapeutic Bail in Victoria* (Doctoral thesis, Monash University, 2014) 36-37.

24 The Australasian Institute of Judicial Administration, *Court Diversion Programs* <<https://aija.org.au/research/resources/>>

The legislative processes relating to diversion are currently more restrictive than these holistic approaches. Nevertheless, since the purpose of diversion is to afford an accused the ‘opportunity to avoid a criminal record by undertaking conditions that benefit the accused, victim and the community as a whole’,<sup>25</sup> it necessarily follows that the diversion process is wholly relevant to an accused’s rehabilitation, making it an important part of therapeutic jurisprudence.

This is particularly the case when it is considered that diversion programs aim to disrupt the ‘cycle of contact with the criminal justice system’ by seeking to address the underlying causes of such offending.<sup>26</sup>

It is perhaps even more crucial for such diversion programs to be available in the case of youth accused, in order to divert them from the criminal justice system as early as possible.<sup>27</sup>

The Victorian Government’s 2017 Youth Justice Review and Strategy notes that ‘once in contact with Victoria’s youth justice system, the life outcomes of young people are poor and there is no change in their offending patterns.’<sup>28</sup> Helping young people to ‘grow out of crime at an earlier age’ is not only a therapeutic approach in addressing criminality,<sup>29</sup> but as is outlined below, can also lead to a reduction in recidivism rates.

Appropriate referrals to support programs, for example, can seek to address the issues

underlying criminal behaviour,<sup>30</sup> provide avenues for ‘appropriate reparation to victims’<sup>31</sup> and make the experience within the justice system a more therapeutic and ultimately beneficial one.

In addition, there is significant scope for diversion plans to be tailored in culturally appropriate ways to meet the needs of ATSI accused, by utilising the structures already in place in the Victorian Koori Court. The Australian Law Reform Commission acknowledged the potential promise of such approaches in their 1986 report into the recognition of Aboriginal customary laws,<sup>32</sup> and this approach has since been adopted in limited terms by the Magistrates’ Court of Victoria, with significant scope for expansion.

Several diversionary initiatives currently operating within Victoria have shown great promise in aiding the rehabilitation of juvenile and adult accused. These include:

- ↳ The ROPES program, which was re-established at Latrobe Valley with 35 young people participating as of 2016.<sup>33</sup>
- ↳ The Koori Women’s Diversion Pilot Program, which recently commenced at Latrobe Valley and Loddon Mallee. A magistrate’s referral is one of the paths to the program. The program is designed to reduce Koori women’s contact with the criminal justice system, provide a referral pathway into programs and services to reduce Koori women’s offending and reoffending, support Koori women on court orders, bail and community corrections orders to successfully complete their orders, and assist Koori women to navigate the justice and broader service system.<sup>34</sup>
- ↳ The New Directions Program, which aims to divert young accused into a program

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[court-diversion-programs/](#)>.

25 Magistrates’ Court of Victoria, *Criminal Justice Diversion Program* <<https://www.magistratescourt.vic.gov.au/jurisdictions/criminal-and-traffic/criminal-justice-diversion-program>>.

26 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates’ Court of Victoria, *Review of the Diversion Program in the Magistrates’ Court*, 8 March 2016, 7.

27 Smart Justice for Young People, Youth Diversion makes sense, 2 <[http://www.smartjustice.org.au/cb\\_pages/files/Diversion%20paper\(3\).pdf](http://www.smartjustice.org.au/cb_pages/files/Diversion%20paper(3).pdf)>.

28 Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Executive Summary, Victorian Government, July 2017) 7.

29 Victoria Legal Aid, Submission to the Department of Justice, *Improving diversion for young people in Victoria*, September 2012, 2.

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30 Ibid.

31 Criminal Bar Association of Victoria, Submission to the Magistrates Court of Victoria, *Review of the Criminal Justice Diversion Program*, 5 June 2015, 2.

32 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 279-280 [489].

33 Magistrates’ Court of Victoria, ‘*Annual Report 2015-16*’ (30 September 2016) 38.

34 Ibid 38, 42.

overseen by the local Police Youth Officer and involves a combination of support services and community work. This program has been successful in reducing the reappearance of young people before the Court. At the Bairnsdale Children's Court, the program's success was recognised at a large meeting attended by the President of the Children's Court, Judge Chambers.<sup>35</sup>

- ↳ Operation Minta, which is aimed at providing appropriate court outcomes for people charged with a begging offence. This program, a joint collaboration between the CJDP, Victoria Police, Melbourne City Council, Homeless Law and the Salvation Army, was conducted for the third consecutive year during the 2015-2016 year period.<sup>36</sup>
- ↳ CJDP partnerships with various organisations to provide voluntary work placements for diversion participants, including at the Salvation Army, the RSPCA, the Warrnambool City Council, Lifeline Gippsland, and Connect GV (Shepparton).<sup>37</sup>
- ↳ Youth Support Service: A program funded by the Department of Human Services that offers diversion addressing the underlying drivers of youth offending behaviours, and available to police in the Melbourne metro and some regional areas via the 'Supportlink' referral website. The police directly refer young people aged between 10 and 17 years, at risk of becoming involved in or in the early stages of involvement with youth justice, to a youth worker for general casework support and links to relevant services and programs.<sup>38</sup>

## 2.2 Reducing recidivism

The results from the 2004 Process Evaluation of the CJDP show that the recidivism rate of the participants was low. For example, it was noted that in a sample of 100 participants, only 0 to 7%

35 Ibid 38.

36 Ibid 52.

37 Ibid.

38 Smart Justice for Young People, *Youth Diversion makes sense*, 3 <[http://www.smartjustice.org.au/cb\\_pages/files/Diversion%20paper\(3\).pdf](http://www.smartjustice.org.au/cb_pages/files/Diversion%20paper(3).pdf)>.

would be convicted of a subsequent offence in the 12 months following their commencement on the diversion program.<sup>39</sup>

A 2012 submission from VLA on youth diversion prepared after the establishment of the CJDP recommended a universal diversionary scheme for young people, based on the success of the CJDP in lowering recidivism rates.<sup>40</sup>

We support the recommendations of SMLS in their 2006 review of the CJDP, where they stated that to fully understand the effectiveness of the diversion program pertaining to recidivism rates, there needs to be more research carried out on the rates of recidivism of non-participants of diversion and on the cases of eligible participants who were not referred to diversion.<sup>41</sup>

An analysis of recidivism in relation to the informal programs in place for juvenile offenders before the advent of the CCYD provides some insight in this regard. Prior to the CCYD, diversion for young accused in Victoria took two forms; police cautioning and police referral (with a Magistrate's consent) to an informal diversion program. Such informal programs Victoria included ROPES and Right Step, as well as Youth Justice Group Conferencing (YJGC) run by the Department of Human Services.<sup>42</sup>

Smart Justice for Young People identified the following results from these programs in relation to juvenile accused:<sup>43</sup>

- ↳ Over 88% of young people participating in ROPES did not reoffend.
- ↳ Over 75% of young people who participated in Right Step did not reoffend within 6 months. 66% of participants

39 Department of Justice, Court Diversion Program Evaluation Overview – Final Report (2004) 6.

40 Victoria Legal Aid, Submission to the Department of Justice on 'Improving diversion for young people in Victoria', September 2012, 1.

41 Springvale Monash Legal Service Inc, 'Criminal Justice Diversion Program' (Discussion Paper, 2006) 8.

42 Eleni Martakis, 'Appropriate legal interventions for children and young people in Victoria' (Research brief, Victoria Legal Aid, March 2014) 4-5.

43 Smart Justice for Young People, *Youth Diversion makes sense*, 8 <[http://www.smartjustice.org.au/cb\\_pages/files/Diversion%20paper\(3\).pdf](http://www.smartjustice.org.au/cb_pages/files/Diversion%20paper(3).pdf)>.

completed the program successfully and had not reoffended after 1 year.

- ↳ At the completion of service delivery through Youth Support Service, support goals (e.g. improved family relations, re-engagement with school and training) were achieved for 78% of YSAS clients in the Melbourne metro and Latrobe Valley YSS youth diversion programs.
- ↳ Over 80% of young people involved in Youth Justice Group Conferencing had not reoffended two years later compared to 57% of young people placed on Probation or a Youth Supervision Order.

These statistics indicate that community-based diversion programs are more effective in reducing recidivism amongst youth accused than the traditional criminal justice model.<sup>44</sup> It is suggested that, upon further analysis of the effectiveness of the adult scheme, similar results would be identified.

### 2.3 Avoiding a criminal record

Once charged with a criminal offence, where that offence is likely to be found proven by the court, the only mechanism currently provided by the Victorian criminal justice system for a person to avoid a criminal record is their successful participation in the CJDP, or in the case of young people, the CCYD. The Victorian Criminal Bar Association notes this as one of the main benefits of the CJDP, describing the program as an “excellent opportunity... to avoid an accessible criminal record.”<sup>45</sup>

Where a diversion program is granted and successfully completed, magistrates may still make orders for the forfeiture and disposal of weapons (including firearms),<sup>46</sup> confiscation of proceeds of crime,<sup>47</sup> and other orders such as victim restitution and compensation orders<sup>48</sup> but an accused is otherwise discharged with no

finding of guilt.<sup>49</sup>

The Sentencing Advisory Council’s 2008 statistical profile on the CJDP notes that:

The imposition of conditions on the defendant can fulfil purposes such as punishment and denunciation, and the fact that participation in the program does not result in a criminal record can have a significant rehabilitative effect.<sup>50</sup>

This means that a refusal to grant diversion can have significant and lasting consequences on an individual’s future, should that individual accordingly incur a criminal record.

The effects of this are furthered by the fact that Victoria is currently the only state in Australia which lacks legislation providing for a spent convictions scheme, by which a person’s criminal record can be removed from official records or prevented from being disclosed after a mandated time period.<sup>51</sup>

In the absence of such legislation, Victoria Police has been provided with the ultimate authority to determine which information will be released in response to requests for criminal record checks by prospective employers, government agencies, consulates, and other such organisations.

Victoria Police’s policy, documented in the ‘Victoria Police Information Release Policy - National Police Certificate’, mandates that all prior findings of guilt made in open court (subject to some exclusions around driving offences) are disclosable for ten years (five years in the case of children). The Policy further clarifies that ‘[f]indings of guilt without conviction and findings of guilt resulting in a good behaviour bond are findings of guilt and will be released under this policy.’<sup>52</sup>

44 Ibid.

45 Criminal Bar Association of Victoria, Submission to the Magistrates’ Court of Victoria, *Review of the Criminal Justice Diversion Program*, 5 June 2015, 1.

46 Pursuant to the *Control of Weapons Act 1990* (Vic), s 9; *Firearms Act 1996* (Vic), s 151.

47 Pursuant to the *Confiscation Act 1997* (Vic), Division 1 of Part 3 and Part 10.

48 Pursuant to the *Sentencing Act 1991* (Vic), Part 4.

49 Criminal Procedure Act 2009 (Vic), section 59(4); Children, Youth and Families Act 2005 (Vic) section 356I.

50 Sentencing Advisory Council, *The Criminal Justice Diversion Program in Victoria: A Statistical Profile* (2008).

51 See Liberty Victoria’s Rights Advocacy Project, *A Legislated Spent Convictions Scheme for Victoria: Recommendations for Reform* (2017).

52 Victoria Police, Information Sheet - Information Release Policy - National Police Certificate

The practical impact of this policy is that any prior offending, however minor, will appear on a criminal record check for the next five to ten years. In addition, if a person is found guilty of additional criminal charges after that time, all prior findings of guilt are again disclosed.<sup>53</sup>

We note also that because the policy is discretionary, there have unfortunately been instances of diversion programs that have been successfully completed nonetheless appearing on criminal records. Whilst an issue that falls outside the scope of this report, it follows that there is a critical need for legislation governing the disclosure of criminal records that would confine this discretion to ensure consistency and uphold the integrity of the diversion program.

This issue was previously explored by Liberty Victoria's Rights Advocacy Project in their 2017 report 'A Legislated Spent Convictions Scheme for Victoria'. This report further documented the detrimental consequences of the current state of affairs. In brief, these include:

- ↳ Placing Victorians at a disadvantage when applying for interstate or federal jobs;
- ↳ Perpetuating discrimination on the basis of an irrelevant criminal record, particularly in the area of employment;
- ↳ Impacting upon the rights enshrined in Victoria's Charter of Human Rights and Responsibilities, including the rights to equality and privacy;<sup>54</sup>
- ↳ Frustrating the parliamentary and judicial intention that findings of guilt which result in sentences imposed 'without conviction' not be disclosed, for example to future employers.<sup>55</sup>

In addition, this indiscriminate disclosure inhibits individuals' attempts to pursue rehabilitative and deterrent activities such as gaining employment and resolving their migration status.

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(2015) <[http://www.police.vic.gov.au/content.asp?Document\\_ID=692](http://www.police.vic.gov.au/content.asp?Document_ID=692)>.

53 Ibid.

54 Liberty Victoria's Rights Advocacy Project, *A Legislated Spent Convictions Scheme for Victoria: Recommendations for Reform* (2017), 1-7.

55 As evidenced by *Sentencing Act 1991* (Vic) section 8(1)(c).

In the case of young people, the impact of prior findings of guilt are magnified. Labelling young people as criminal offenders 'entrenches antisocial behaviour by making it more difficult for a young person to grow out of their offending'.<sup>56</sup>

Young people searching for their first job, already disadvantaged by lack of prior experience, will face the significant stigma of a criminal record. In addition, should there be further offending once they reach adulthood, young people with a criminal record will most likely be precluded from consideration for diversion in the adult system<sup>57</sup> and will be exposed to harsher sentencing outcomes.<sup>58</sup>

They also face an inevitable further ingratiation within the criminal justice system. This entrenchment within the criminal justice system is particularly disadvantageous for vulnerable groups of people, and groups who are already overrepresented in the criminal justice system, such as young ATSI accused.

As has been noted by VALS, the initiation of these youth into the criminal justice system is often influenced by factors outside their control, such as complex personal circumstances and social difficulties faced at an early age.<sup>59</sup> Because it is apparent that there exists an informal policy of only granting diversion once, upon being charged with an offence, these people may 'use up' the scheme at an early stage of their lives.<sup>60</sup>

It follows from the above that there are clear benefits to individuals in avoiding a criminal record. Further, reducing recidivism is evidently beneficial to communities, and

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56 Victoria Legal Aid, Submission to the Department of Justice on 'Improving diversion for young people in Victoria', September 2012, 2.

57 The CJDP is available to 'mainly first time offenders': Magistrates' Court of Victoria, *Criminal Justice Diversion Program*, <<https://www.magistratescourt.vic.gov.au/jurisdictions/criminal-and-traffic/criminal-justice-diversion-program>>.

58 *Sentencing Act 1991* (Vic), s 5(2) includes the offenders previous character as one of the factors that must be taken into account when sentencing an adult.

59 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 2015, 2.

60 Ibid 2-3.

increasing access to diversion is therefore a matter of public interest.

## 2.4 Economic benefits to the community

The idea of ‘justice reinvestment’ can be understood as representing ‘a form of economic modelling whereby resources are redirected from punitive responses to crime into preventative strategies and early diversion from the criminal justice system’.<sup>61</sup>

This approach does not require any extra funding than that which has already been allocated to corrections institutions.<sup>62</sup> It is also an evidence-based approach, which ensures that money is spent on addressing underlying issues of criminality effectively.<sup>63</sup>

The economic rationale underscoring this premise is that rather than spending money on subsequent court appearances and imprisonment, such funds could be better utilised on early intervention for accused, which ultimately saves the community’s resources.<sup>64</sup>

Diversionary programs are inspired by notions of justice reinvestment.<sup>65</sup> With regard to their long-term impact, it has been noted that community-based diversion programs cost ‘one-tenth or less of the amount’ that is needed to detain juvenile accused in a detention facility.<sup>66</sup>

The Victorian Government’s Youth Justice Review and Strategy released in July 2017 notes that the majority (58%) of expenditure on youth justice services is focused on custodial supervision, while only 3% is allocated to court-based diversion and restorative justice, including the Children’s Court Pre-Plea Diversion Program and Youth Justice Group

Conferencing.<sup>67</sup>

It is clear that preventing further criminality of an accused by diverting them away from the criminal justice system as early as possible and investing in programs aimed at their rehabilitation not only benefits them, but the whole community in a social and economic sense. It goes without saying that keeping people out of the justice system affords them the opportunity to participate in society and the economy.

Further, diversionary programs already exist around Australia.<sup>68</sup> This means that enhancing these mechanisms of justice reinvestment and thus reaping the further economic benefits that follow does not require reinventing the wheel.

In light of such benefits, a community, governmental and judicial focus on improving our current diversion systems for both adult and juvenile accused makes overwhelming sense.

## 2.5 Room for growth

In the Magistrates’ Court of Victoria, the 2015-16 year saw 199,960 criminal cases finalised. In 6,872, or 3.44 per cent of those cases, accused persons participated in the CJDP, down slightly from 7,286 cases the previous year. Of the referrals received from prosecuting agencies, 89 per cent of accused were found suitable for diversion by a judicial registrar or magistrate and placed on a diversion plan, compared with 90 per cent in 2014–15.<sup>69</sup>

From our consultations with their respective representatives, it is apparent that the Victorian Magistrates’ and Children’s Courts strongly support their diversion programs as unique intervention opportunities and confirm that there is scope for further growth in the programs should there be increased demand.

61 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84 (2017) 223-224.

62 Ibid.

63 Ibid.

64 Ibid.

65 Monash University Castan Centre for Human Rights Law, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *A Justice Reinvestment Approach to Criminal Justice in Australia*, March 2013, 16.

66 Smart Justice for Young People, *Youth Diversion makes sense*, 9 <[http://www.smartjustice.org.au/cb\\_pages/files/Diversion%20paper\(3\).pdf](http://www.smartjustice.org.au/cb_pages/files/Diversion%20paper(3).pdf)>.

67 Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Executive Summary, Victorian Government, July 2017) 7.

68 Monash University Castan Centre for Human Rights Law, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *A Justice Reinvestment Approach to Criminal Justice in Australia* (endorsed by Liberty Victoria), March 2013, 16.

69 Magistrates’ Court of Victoria, *Annual Report 2015-16* (30 September 2016) 58.

# 3. Access to Justice Issues with the CJDP

## 3.1 The requirement that the prosecution consent

As discussed above, the legislation governing diversion requires prosecutorial consent before a sentencing magistrate or judge in both the adult and children's jurisdictions can make a diversion order.

This precondition in the adult jurisdiction was considered in the unreported decision of *DPP v Venier-Moro & Anor* [2015] VSC 704 (15 December 2015). This case involved an appeal by the DPP to the Judicial Review and Appeals List of the Supreme Court of Victoria of the decision of a County Court judge to refer an accused to diversion in circumstances where the prosecution had not consented.

The Supreme Court held that because the prosecution had not consented to diversion, the County Court judge did not have the jurisdiction to make the orders and the matter was remitted back to the County Court.

His Honour Justice Forrest held that the power (or the jurisdiction) of the Court is conditional upon satisfaction of the three conditions of subsection 59(2), these being: the accused's acknowledgement of responsibility, the consideration by the Magistrates' Court that diversion is appropriate and the consent of both the prosecution and the accused.<sup>70</sup>

The court noted that no Diversion Notice could be found on the police brief, the informant asserted that he did not sign a Diversion Notice, and no Diversion Notice could be located on the County Court file or the prosecutor's file.<sup>71</sup>

It is accordingly clear that the court will be in jurisdictional error if referring an accused to diversion in circumstances where the prosecution has not consented.

## 3.2 Informal and undisclosed practices

Despite the relevant legislation specifying the necessity of prosecutorial consent, the CPA is silent about the factors police ought to consider when making a decision about diversion.<sup>72</sup> Similarly, the Act does not prescribe any procedure that police ought to observe when considering the appropriateness of diversion.

In the absence of legislative direction, police (both at a station level and in prosecution units at court) are given unlimited and unchecked discretion as to whether to refer matters for diversion. The result of this discretion is the development of informal and undisclosed practices and procedures<sup>73</sup> applied inconsistently at various levels of the police hierarchy, including:

- ↳ Where the informant makes the initial determination about recommending diversion in the process of preparing the police brief;
- ↳ Where the informant's station sergeant then considers whether to overrule the informant's decision to refer a matter for diversion, as part of the sergeant's role in authorising the police brief;
- ↳ In the application of the broader policies and guidelines applied by the police prosecution unit stationed at the court the accused person attends (for example the Police Prosecution team stationed at the Dandenong Magistrates Court may have differing practices to those of the Heidelberg Magistrates Court unit); and
- ↳ In the impact of the individual beliefs and practices of the prosecutor who conducts the case conference of the accused's matter.

70 *DPP v Venier-Moro & Anor* [2015] VSC 704 [7].

71 *Ibid* [10].

72 cf Section 356F of the CYFA.

73 Criminal Bar Association of Victoria, Submission to the Magistrates' Court of Victoria, Review of the Criminal Justice Diversion Program, 5 June 2015, 2.



The development of individual practices at each of the above levels has become problematic because of the broad disparities evident upon scrutiny of their application.

From our consultations with those with experience working in the criminal justice system, it is apparent that police have developed a “broad-brush” approach in their own effort to establish consistency. These rules often involve refusing diversion for reasons such as:

- ↳ The extent of harm caused to the victim, e.g. the value of the property stolen by an accused;
- ↳ The existence of any prior criminal history;
- ↳ The provision of diversion in the past;
- ↳ The way in which the accused conducted him/herself at the time of arrest or during their record of interview;
- ↳ The belief that the particular charge is not appropriate for diversion (e.g. as is discussed further below, this has been seen in relation to family violence matters).

The following internal documents ostensibly assist police to make decisions about the appropriateness of diversion:

1. Adult Diversion Policy, including Diversion Criteria Matrix and Future Offending Risk Table<sup>74</sup>
2. Victoria Police Manual - Policy Rules: Disposition of offenders<sup>75</sup>
3. Victoria Police Manual - Procedures and Guidelines: Disposition of offenders<sup>76</sup>
4. Victoria Police Manual - Procedures and Guidelines: Laying of charges<sup>77</sup>

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74 Victoria Police, ‘Prosecutions Division, Hot Issues: Adult Diversion Policy’, internal policy document, dated 4 June 2017.

75 Victoria Police, ‘Policy Rules: Disposition of Offenders’, Victoria Police Manual, last updated 30 March 2015, 7.

76 Victoria Police, ‘Procedures and Guidelines: Disposition of Offenders’, Victoria Police Manual, last updated 4 March 2013, 2-3.

77 Victoria Police, ‘Procedures and Guidelines: Laying of charges’, Victoria Police Manual, last updated 30 March 2015, 5-8.

We support Victoria Police’s position as set out in their Adult Diversion Policy that:

As of Monday 3 October 2016, the recent position taken in the Children’s Court of Victoria in relation to prosecutors only objecting to diversion being granted when exceptional circumstances exist is to be adopted in the Magistrates’ Court of Victoria.<sup>78</sup>

However, the policy then advises that, when determining whether exceptional circumstances exist, prosecutors must consider whether they have ‘serious concerns’ in relation to diversion being recommended, with reference to the circumstances or seriousness of the offending in accordance with the Diversion Criteria Matrix (**see below - Figure 1**).

Problematically, the Matrix is overly simplistic and prescriptive, for example mandating that ‘under no circumstances’ is the accused to be considered for diversion where the matter involves family violence offences or the accused has been found guilty by a court within the preceding 5 years.

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78 Victoria Police, ‘Prosecutions Division, Hot Issues: Adult Diversion Policy’, internal policy document, dated 4 June 2017, 1.

**FIGURE 1: VICTORIA POLICE DIVERSION CRITERIA MATRIX**

DIVERSION CRITERIA MATRIX		Offence Seriousness		
		1 – Minor	2 – Medium	3 – Major
Future Offending Risk	3 – Major	No	No	No
	2 – Medium	Possible	Possible	No
	1 – Minor	Yes	Possible	No

**OFFENCE SERIOUSNESS TABLE**

Rating	Offence Seriousness
3 – Major	<p>Under no circumstances should the following offences be considered:</p> <ul style="list-style-type: none"> <li>• Sex offences</li> <li>• Family violence offences</li> <li>• Traffic Drug of Dependence</li> <li>• Any offence involving a serious injury</li> <li>• Any offence attracting a mandatory sentence</li> <li>• Any offence incurring 'vehicle impoundment' provisions</li> </ul>
2 – Medium	<p>All offences other than the above in consideration with:</p> <ul style="list-style-type: none"> <li>• The attitude of any victim (if any)</li> <li>• The context of the offending</li> <li>• Public Interest considerations</li> </ul>
1 – Minor	<p>Any Summary Offences (other than those attracting a mandatory sentence) in consideration with:</p> <ul style="list-style-type: none"> <li>• The attitude of the victim (if any)</li> <li>• The context of the offending</li> <li>• Public Interest considerations</li> </ul>

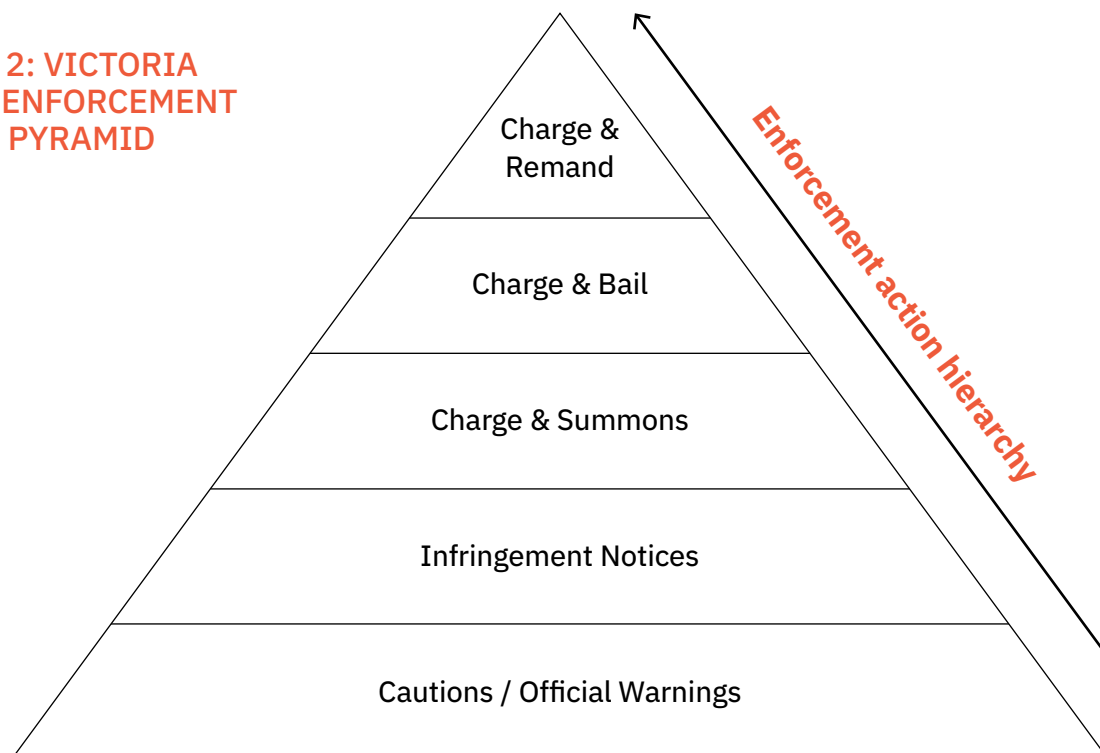
## FUTURE OFFENDING RISK TABLE

Rating	Description
<b>3 – Major</b>	Under no circumstances should Diversion be offered if: <ul style="list-style-type: none"> <li>the accused has been found guilty by a court within the preceding 5 years</li> </ul>
<b>2 – Medium</b>	Consideration may be given if: <ul style="list-style-type: none"> <li>The accused has been subject to a previous diversion/caution or warning</li> <li>The accused has been processed by way of penalty notice</li> <li>The accused has a prior conviction that is 5 years or older</li> </ul>
<b>1 – Minor</b>	A diversion should be offered if: <ul style="list-style-type: none"> <li>The accused has no court priors</li> </ul>

Victoria Police’s Procedures and Guidelines regarding Disposition of Offenders represents the range of enforcement options available to police officers in the form of an ‘Enforcement

Action Pyramid’ (see below - **Figure 2**).<sup>79</sup> This pyramid, despite including cautions, official warnings and infringement notices, makes no mention of diversion.

**FIGURE 2: VICTORIA POLICE ENFORCEMENT ACTION PYRAMID**



<sup>79</sup> Victoria Police, ‘Procedures and Guidelines: Disposition of Offenders’, Victoria Police Manual, last updated 4 March 2013, 2.

The Procedures and Guidelines go on to note that offenders should be dealt with ‘in the most effective but least severe way’ with regard to the following Enforcement Action Guidelines

(see below - **Figure 3**).<sup>80</sup> Notably, there is no mention of markers of vulnerability, such as whether the person identifies as ATSI or belongs to a CALD community.

**FIGURE 3: VICTORIA POLICE ENFORCEMENT ACTION GUIDELINES**

**ENFORCEMENT ACTION GUIDELINES**

Consideration	Matters to be considered
Nature, severity and gravity of the offence	<ul style="list-style-type: none"> <li>• Seriousness or triviality of the offence or that it is of a 'technical' nature only</li> <li>• Mitigating or aggravating circumstances</li> <li>• Property offence vs offence against the person</li> </ul>
Characteristics and circumstances of the offender or victim	<ul style="list-style-type: none"> <li>• Youth, age, intelligence, physical health, mental health or special infirmity of the offender or victim</li> <li>• Whether the offender is a child or young person. See 'when considering enforcement action against a child or young person' (below)</li> <li>• Offender's culpability and degree of responsibility for the offence, including whether the offender is remorseful, is cooperative or makes admissions</li> <li>• Previous history of the offender</li> <li>• Relationship between the victim and offender</li> <li>• Reason for offending (full circumstances of the offence, including causal factors)</li> <li>• Likelihood of the offender reoffending</li> </ul>
Any injury, loss or damage resulting directly from the offence	<ul style="list-style-type: none"> <li>• What impact has the offence had on the victim?</li> <li>• Extent of any injury, loss or damage</li> <li>• Extent to which compensation is or will be available to the victim</li> </ul>
Appropriateness of the action in light of community expectations, effect of deterrence on the individual and of the community in general	<ul style="list-style-type: none"> <li>• What action would the community see as appropriate?</li> <li>• Whether the alleged offence is of considerable community concern</li> <li>• What is the least severe action that can be taken to reduce the probability of the offender committing future offences?</li> <li>• What is the least severe action that can be taken to achieve appropriate intervention or deterrence in the community?</li> <li>• The prevalence of the alleged offence and the need for appropriate intervention, both personal and general</li> </ul>
Requirements that apply to the specific enforcement action	Refer to VPMP Disposition of offenders

80 Ibid 2-3.

Victoria Police's Policy Rules regarding Disposition of Offenders sets out an 'Enforcement Action Framework' describing the eligibility requirements for each enforcement option along the spectrum; from cautions to official warnings, to infringement notices, to a charge and recommendation for diversion program, to a charge and a summons. Disappointingly, the eligibility requirements for diversion in this framework (**see following page – Figure 4**) merely duplicate the factors set out in section 59 of the CPA, providing no further guidance for prosecutors. They state that diversion must be 'appropriate in the circumstances and that the existence of prior convictions does not disqualify an offender from the program but is a factor to be considered.'<sup>81</sup>

Victoria Police's Procedures and Guidelines regarding Laying of Charges<sup>82</sup> contain no further guidance on matters to be taken into consideration when assessing an accused's suitability for diversion.

In addition to the limitations identified above, our consultations have revealed that the above documents are **inconsistently followed** (and sometimes completely ignored), often further altered by individual prosecution offices and frequently amended without warning by senior decision-makers within Victoria Police (i.e. via internal emails).

Police prosecutors who were consulted expressed frustration with the frequent, unpredictable changes imposed on them by seniors. Some prosecutors suggested that often these amendments are made without any explanation and have contradicted previous directions given to them about diversion. Some prosecutors feel these internal guidelines inhibit their ability to make appropriate discretionary decisions about diversion based on the merits of each individual case (particularly in cases where blanket bans were put on particular types of offending).

Troublingly, the above rules are also **not openly recorded or disclosed** to other stakeholders and are **subject to frequent**

**change.** Without any knowledge of the specific rules or criteria being applied by the police member dealing with their matter, an accused (or their defence practitioner) is unable to intelligently discuss why their matter ought to be considered for diversion, nor address any concerns that police may have in making this decision.

Ultimately, the above disparities result in inconsistent outcomes for accused persons depending on their informant, the court their charges are sent to, and the prosecutor that picks up their brief on the day of court.

Two specific examples of practice disparities resulting in inconsistent outcomes include:

### **Example 1 – the role of the informant**

Despite no reference being made to the role of the informant in the relevant legislation, police prosecution units place different weight on the opinion of the informant in making a decision about the appropriateness of diversion. Prosecutors at Heidelberg Magistrates Court, for example have previously indicated that they cannot agree to diversion without the consent of the informant, despite this not being required by the legislation.

The problems associated with this approach were recognised by the LIV in their 2012 submission prior to the introduction of the youth diversion scheme:

...s59 CPA provides the Informant with an unfettered power of veto in relation to whether a matter can proceed by way of diversion and allows room for the Informant to bring their own idiosyncratic views to proceedings.

For example, it is not uncommon for an informant to preclude a person's participation in the diversion program where the person has exercised their right to silence, the argument being that the exercise of that right indicates an absence of remorse.

On 28 February 2011 the LIV wrote to the Attorney General Robert Clark, to raise the issue of Informant discretion in the matter of recommending or consenting to a matter proceeding by

81 Victoria Police, 'Policy Rules: Disposition of Offenders', Victoria Police Manual, last updated 30 March 2015, 7.

82 Victoria Police, 'Procedures and Guidelines: Laying of charges', Victoria Police Manual, last updated 30 March 2015, 5-8.

**FIGURE 4: VICTORIA POLICE  
ENFORCEMENT ACTION FRAMEWORK**

Enforcement Action	Requirements		VPM Procedures & Guidelines
	Eligibility	Ineligibility/Limitations	
<b>Charge and recommendation for diversion program</b>	<ul style="list-style-type: none"> <li>• A proceeding for an offence must be commenced not later than the time provided by the appropriate legislation</li> <li>• Offence must be eligible for diversion under s.59(1), <i>Criminal Procedure Act 2009</i>. This includes an offence incurring demerit points under the Road Safety Act or regulations.</li> <li>• A diversion program can be recommended in either the Magistrates' or Children's Courts</li> <li>• Defendant must admit the offence</li> <li>• A diversion is appropriate in the circumstances</li> <li>• The existence of prior convictions does not disqualify an offender from this program but is a factor to be considered in determining appropriateness</li> <li>• Diversion will not commence until agreement of:               <ul style="list-style-type: none"> <li>→ Informant, the police member authorising the brief of evidence for prosecution, or a qualified prosecutor</li> <li>→ defendant or their legal advisor</li> <li>→ where the defendant is a Victorian Police employee, the Assistant Commissioner, PSC</li> <li>→ court</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Ineligible offences:</li> <li>• Offence punishable by a minimum or fixed sentence or penalty, including</li> <li>• cancellation or suspension of a drivers licence/permit</li> <li>• other alcohol or drug related driving offences under section 49(1), <i>Road Safety Act</i></li> <li>• listed as relevant offence regarding vehicle impoundment in section 84C, <i>Road Safety Act</i></li> </ul>	<b>VPMG Laying of Charges</b>

way of diversion and requesting the removal of s59(2)(c) from the CPA.<sup>83</sup>

Similarly, SMLS, in their 2006 review of the CJDP, noted:

The discretion of the informant, with regard to offences which are diverted to the program, has created the opportunity for bias or discouragement of referral to the program based on an informant's subjective assessment of an accused.<sup>84</sup>

In the event that an informant indicates that they believe a matter is not appropriate for diversion, in many cases (particularly at Heidelberg) this view will prevail, even if the police prosecutor dealing with the matter at court believes it is appropriate, and despite the fact that prosecutors have more relevant experience and training.

Conversely, our discussions with key stakeholders have revealed that Prosecutors at Melbourne and Dandenong Magistrates Courts will commonly recommend diversion without seeking out the informant's views and in some cases will consent to diversion despite the fact it is not supported by the informant.

### **Example 2 – diversion for family violence offending**

The recent community focus on addressing family violence has resulted in significant uncertainty on the part of prosecutorial bodies about the appropriateness of such matters for diversion.

Police were formerly hesitant to support diversion for offending relating to family violence, particularly breaches of intervention orders, regardless of how minor breaches might be. However, in late 2017, prosecutors at Melbourne Magistrates Court advised practitioners that diversion could not be recommended in any matter where allegations featured **any** form of family violence, not only matters that involved a breach of a pre-existing intervention order. Practitioners were told that

83 Law Institute of Victoria, Submission to the Department of Justice, *Diversion for Young People in Victoria*, 5 October 2012, 6.

84 Springvale Monash Legal Service Inc, 'Criminal Justice Diversion Program' (Discussion Paper, 2006), 10.

"a senior Victoria Police member" had directed that this was now the non-negotiable police position.

A few weeks later, the ostensible ban on diversion for family violence matters appeared to have lapsed, with no explanation provided.

As a result of this short-lived policy, people with the misfortune of having their charges listed within this period were denied the opportunity to have their matter considered for diversion, irrespective of their circumstances. Those who had entered a guilty plea during this period had no opportunity for their matter to be reconsidered once the ban was lifted.

Despite the removal of this blanket ban, practitioners are still commonly advised by prosecutors that diversion cannot be offered for family violence offending or that it is only appropriate in "exceptional circumstances". No further guidance or clarification has been provided about what might constitute "exceptional circumstances" or how this test might be applied in practice.

### **3.3 Lack of consistency in Magistrates' decisions to refuse diversion**

In the case of *DPP v Venier-Moro & Anor*<sup>85</sup> as already outlined above, the Supreme Court also considered the transcript of what had transpired in the County Court, which included the following dialogue between counsel for the prosecution and the judge regarding the diversion process:

*MR NIBBS:* Generally, the magistrates won't give –

*HIS HONOUR:* Why?

*MR NIBBS:* Well, generally it's done by a duty magistrate behind doors. I've been in the situation where – as I described with my learned friend, where we'd sought a diversion for a matter, a magistrate had knocked us back, we then fronted a different magistrate for the plea and –

*HIS HONOUR:* So, what, did they give it?

*MR NIBBS:* Well they said, "Why hasn't this been put through

85 [2015] VSC 704 (15 December 2015)

diversion?” So I like —

*HIS HONOUR:* It’s untidy isn’t it?<sup>86</sup>

The above dialogue evidences the lack of consistency and the issues that arise in the current scheme which requires prosecutorial consent and a final judicial determination.

This has been recognised by VLA, which has noted that ‘[t]he requirement for prosecution consent enables police to refuse adult diversion without an independent and objective review of this decision.’<sup>87</sup> Accordingly, VLA has stated that it is ‘important for police not to hold the quasi-judicial role as gatekeepers of a [youth] diversionary program’.<sup>88</sup>

### 3.4 Impact on vulnerable groups

#### 3.4.1 ATSI and CALD accused

Justice systems in post-colonial countries around the world show an over-representation of indigenous peoples.<sup>89</sup> Koori young people are significantly over-represented in the Victorian criminal justice system, for reasons including intergenerational trauma, broken connection to country, over-policing, undermining diversionary limits and exclusion from mainstream culture.<sup>90</sup>

CALD communities - in the case of young people, particularly those from Maori, Pacific Islander and South Sudanese backgrounds - are also over-represented in the criminal justice system.<sup>91</sup>

Given that one of the aims of diversion programs is to divert accused persons from the justice system as much and as soon as

possible, it is crucial to ensure that the current diversionary schemes are accessible to ATSI and CALD accused.

VALS notes:

While closing the gap in justice outcomes between Aboriginal and non-Aboriginal people is heavily dependent on improved social and economic outcomes, reform of practices within the justice system are also necessary. Approaches that focus on crime prevention, diversion and rehabilitation are critical if we are to reduce re-offending and over-representation.<sup>92</sup>

Whilst acknowledging the complexity of the barriers ATSI and CALD accused face in having equal access to diversion, the scope of this paper is confined to the need for prosecutorial consent, and how this part of the diversionary scheme affects ATSI and CALD accused persons’ access to the scheme.

VALS recently noted that ‘police contact and police misconduct remains a critical issue for Aboriginal and Torres Strait Islander people in Victoria.’<sup>93</sup>

The Australian Law Reform Commission’s 2018 report into the incarceration rate of Aboriginal and Torres Strait Islander Peoples found that ‘Aboriginal and Torres Strait Islander people are seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts’. They noted as the reason for this that:<sup>94</sup>

there is evidence that the law is applied unequally—for example Aboriginal and Torres Strait Islander young people are less likely to be cautioned and more likely to be charged than

86 [2015] VSC 704 (15 December 2015), [20].

87 Victoria Legal Aid, Submission to the Department of Justice on ‘Improving Diversion for Young People in Victoria’, September 2012, 4, 6.

88 Ibid.

89 Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Executive Summary, Victorian Government, July 2017) 9.

90 Ibid.

91 Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Executive Summary, Victorian Government, July 2017) 9-10.

92 Victorian Aboriginal Legal Service, *Submission to the Victoria Police Consultation on Field Contact Policy and Cross Cultural Training* (July 2013) <<http://www.policeaccountability.org.au/wp-content/uploads/2014/03/VALS-field-contact-and-cross-cultural-training-sub-2013.pdf>>.

93 Victorian Aboriginal Legal Service, Submission, Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria, September 2017, 3.

94 Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Report No 133 (2017) 453 [14.24].



non-Indigenous young people.<sup>95</sup>

The Human Rights Law Centre and Change the Record Coalition elaborate:

ATSILS [Aboriginal and Torres Strait Islander Legal Services] have consistently pointed to a bias in the exercise of police discretion against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly young people.<sup>96</sup>

Writing on the relationship between police and ATSI communities in 2011, the Office of Police Integrity found that the high numbers of Koori accused processed for ‘behaviour in public’ offences (10.7 times more likely than all Victorians), where the decision to charge is associated with high levels of police discretion, ‘may indicate there is an over-policing of Kooris in some communities’.<sup>97</sup>

The *Corrective Services, Australia* publication released by Australian Bureau of Statistics reports that ATSI prisoners represented 27% of the total full-time adult prisoner population (during the September quarter 2017), whilst only accounting for approximately 2% of the total Australian population aged 18 years and over.<sup>98</sup> Similarly, the Victorian Department of Justice and Regulation conducted consultations with young people of colour to explore the causes of over-representation as part of their review of the youth justice program in 2017. These consultations revealed that:

{Y}oung African people feel targeted because of their skin colour and feel excluded from opportunities, which in

turn drives their offending behaviour.<sup>99</sup> Participants of African heritage, for example, reported being regularly engaged by police, particularly when congregating in groups or driving a vehicle, which they felt was a direct consequence of media reports about the “Apex gang”.<sup>100</sup>

The Department noted that many of these young people are returning to the system multiple times and contended that ‘[t]he youth justice system has not responded to this group of young people effectively.’<sup>101</sup>

Daniel Haile-Michael and Maki Issa of Flemington-Kensington Community Legal Centre’s Police Accountability Project, following their detailed consultations with the community, described the situation as at 2015 in their report ‘The More Things Change, the More They Stay the Same’:

...our research demonstrates that significant issues of racial profiling, over-policing and underpolicing persist for young people of colour in Melbourne.

...The situation of young people of colour experiencing racialised policing are compounded by a complex legal system which gives young people two options: either plead guilty and minimise the sentence or face a tougher sentence by attending court alone.<sup>102</sup>

The recent resignation of former head of the Professional Standards Command over racist and obscene comments to fellow officers and posts made under an online pseudonym<sup>103</sup>

95 Ibid 451 [14.16].

96 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (2017) 22.

97 Office of Police Integrity Victoria, *Talking Together – Relations between Police and Aboriginal and Torres Strait Islanders in Victoria: Review of the Victoria Police Strategic Plan 2003-2008*, 20.

98 Based on Australian Demographic Statistics (cat. no. 3101.0) and Estimates and Projections, *Aboriginal and Torres Strait Islander Australians, 2001 to 2026* (cat. no. 3238.0)).

99 Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting needs and reducing offending* (Executive Summary, Victorian Government, July 2017) 9-10.

100 Ibid 198.

101 Ibid 9-10.

102 Daniel Haile-Michael & Maki Issa, ‘The More Things Change, the More They Stay the Same. Report of the FKCLC Peer Advocacy Outreach Project on racial profiling across Melbourne’ (Flemington Kensington Community Legal Centre), July 2015, 21.

103 Cameron Houston & Chris Vedelago, ‘Disgraced senior ethics cop subject of previous racism complaints’, *The Age* (online), 27 February 2018 <<https://www.theage.com.au/national/victoria/>

and recent revelations of police brutality against a man with disabilities during a mental health check<sup>104</sup> have again called to light systemic and problematic racism and bigotry within Victoria Police's organisational culture.

Despite genuine aspirations for change within the force,<sup>105</sup> it is apparent that racial profiling and associated biases remain a persistent and pervasive cultural issue for Victoria Police.

It follows that affording unreviewable discretion to individual police officers in the decision to grant or refuse diversion leaves significant scope for actual or perceived prosecutorial bias based on race and other minority attributes.

The current legislation as it stands does not ensure transparency on the part of the decision-maker, because the prosecution does not need to provide any written or oral reasons for recommending or refusing diversion.

When such decision-makers make decisions without judicial scrutiny and transparency, the entire scheme is susceptible to bias, or at the very least, the perception of bias.<sup>106</sup>

In their 2006 review of the CJDP, SMLS warn of this risk, stating:

The lack of clear police guidelines and varying levels of education of the program amongst the police, allows the Informant to consider personal unchallenged views and potential biases as well as external factors when making the decision to divert the accused. Given that the program cannot commence without the consent of the prosecution, this discretion can

create a huge barrier for the program.<sup>107</sup>

The potential detrimental effect of such bias on the number of ATSI and CALD accused being recommended for diversion is clear. VALS, in their 2016 submission as part of the Magistrates' Court enquiry into the CJDP, stated that 'the current [diversion] framework does not afford the same level of benefit and access to Aboriginal and Torres Strait Islander people when compared to non-Aboriginal and Torres Strait Islander people.'<sup>108</sup>

Notably, only 110 of a total of 6,000 accused (1.6 percent) identified as ATSI during the diversion interview process for matters in the Magistrates' Court of Victoria during 2015-16.<sup>109</sup>

The overrepresentation of ATSI individuals in the justice system compared with the statistics on those being granted diversion further illuminates the significant concern that the current diversion process is failing these communities.

Further, the inconsistent approach to determining which offences are suitable for diversion, both by informants, and by prosecutors,<sup>110</sup> leaves ATSI and CALD accused vulnerable to both direct and indirect discriminatory treatment. For example, with respect to the latter, the current system means that a police informant may make a decision not to recommend diversion for an offence that is committed usually or mostly by ATSI and CALD accused.<sup>111</sup>

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[disgraced-senior-ethics-cop-subject-of-previous-racism-complaints-20180227-p4z1xh.html](https://www.theage.com.au/national/victoria/beatn-abused-humiliated-and-filmed-by-victoria-police-20180321-p4z5f2.html)>.

104 Nick McKenzie, 'Beaten, abused, humiliated and filmed by Victoria Police', *The Age* (online), 2 April 2018 <<https://www.theage.com.au/national/victoria/beatn-abused-humiliated-and-filmed-by-victoria-police-20180321-p4z5f2.html>>.

105 Victoria Police, *Equality is not the Same: Year 3 report* (2016), 28-46 <[http://www.police.vic.gov.au/content.asp?Document\\_ID=47751](http://www.police.vic.gov.au/content.asp?Document_ID=47751)>.

106 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016, 2.

107 Springvale Monash Legal Service Inc, Criminal Justice Diversion Program: Discussion Paper (2006), 20 (emphasis added).

108 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016, 1.

109 Magistrates' Court of Victoria, *Annual Report 2015-16* (30 September 2016) 58.

110 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016, 5.

111 Ibid.

### 3.4.2 Family violence matters

As is outlined above, our consultations with experienced criminal law practitioners, have revealed that prosecution commonly refuse to consider diversion for matters involving family violence irrespective of the circumstances.

The CBA has also noted that matters involving charges relating to family violence are not being referred to diversion, ‘regardless of the level of seriousness associated with the facts’.<sup>112</sup>

On one view, this might seem like an appropriate response to address the severity of crimes related to family violence. Sending a message that such matters would be dealt with in a harsh manner is perhaps a good deterrent for perpetrators of family violence and might also be in line with the recommendation of the Royal Commission into Family Violence that family violence cases be dealt with within a specialist court setting.<sup>113</sup>

On the other hand, some of the offences being prosecuted are of a minor nature, for example, for incidents involving the breach of an intervention order by attending at a person’s workplace, driving past their house, or sending them an SMS when it is prohibited by the order.

Clearly, a blanket ban which does not allow for discretion leaves broad scope for unjust outcomes that fail to consider the circumstances of offending and the accused in each case.

In addition, there are *survivors* of family violence who have been disproportionately prosecuted themselves and are being increasingly represented in the criminal justice system, for example, for allegedly breaching mutual intervention orders.<sup>114</sup> Such survivors,

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112 Criminal Bar Association of Victoria, Submission to the Magistrates’ Court of Victoria, Review of the Criminal Justice Diversion Program, 5 June 2015, p.2.

113 Marie Segrave, Dean Wilson & Kate Fitz-Gibbon, ‘More police won’t necessarily lead to better outcomes on family violence – here’s what we need’, *The Conversation* (online), 25 January 2017 <<https://theconversation.com/more-police-wont-necessarily-lead-to-better-outcomes-on-family-violence-heres-what-we-need-70755>>.

114 Tallace Bissett, *Police responses to family violence, significant reforms still needed* (7 February 2017) Law & Advocacy Centre for Women. <[https://lacw.com.au/police-responses-to-family-violence-significant-](https://lacw.com.au/police-responses-to-family-violence-significant-reforms-still-needed/)

because of the informal refusal to allow diversion for family violence matters, have been charged with criminal offences and entrenched within the justice system as a result of this broad-brush approach.

It is uncontroversial to state that appropriate and tailored diversion programs would benefit individuals touched by family violence far more than subjecting them to further contact with the criminal justice system. For example, if a survivor ends up with a recorded conviction, it places them at a great disadvantage in terms of future employment opportunities and the ability to be financially independent, which is often one of the most important tools for survival.

Additionally, one of the recommendations in Report VI of the Royal Commission into Family Violence (‘Royal Commission’) is to establish a statutory youth diversion scheme,<sup>115</sup> which has now come into fruition.

The Royal Commission found that young people who use violence at home ‘often present with a number of complex behavioural, mental, physical and emotional issues’.<sup>116</sup> Moreover, the Royal Commission stated that in its submission, Victoria Police had noted that a high percentage of children who had used violence against their parents in 2014 had been victims of family violence themselves.<sup>117</sup> The Royal Commission concluded that diversion schemes may be ‘appropriate and effective for adolescents using violence at home’.<sup>118</sup>

The Royal Commission further noted that while diversion for adult perpetrators of family violence has been criticised for various reasons, including undermining the seriousness of such offences, the same criticisms may not be applicable to adolescent perpetrators, given their unique set of circumstances linked to this kind of family violence.<sup>119</sup>

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[reforms-still-needed/](#)>.

115 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 79.

116 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016), vol 4, 154.

117 Ibid 156.

118 Ibid 174.

119 Ibid.

The Royal Commission, in reference to the requirement of prosecutorial consent in recommending diversion present in the CJDP, stated that:

This effectively makes Victoria Police the gatekeepers of the scheme and affords them considerable discretion when deciding whether or not to recommend diversion. This raises a concern if some police choose not to utilise the scheme on the basis of their subjective opinions about the accused or the value of diversion.<sup>120</sup>

We agree with this analysis and are concerned that the requirement of prosecutorial consent is now enshrined in the CCYD (which came into effect after the findings of the Royal Commission were released).

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120 Ibid 173.

# 4. Legal Issues with the Current Scheme

## 4.1 Issues with natural justice and due process

As has been identified by the CBA, it is arguable that having informal practices or policies in place whereby certain matters are referred to diversion whilst others are denied, without an accused being informed of the reasons for this or being afforded a right of reply, may offend the principles of natural justice and due process.<sup>121</sup>

### 4.1.1 What is natural justice?

There is no one general definition for the term natural justice (which is sometimes used interchangeably with the term ‘procedural fairness’). In *Kioa v West* (1985), Mason J stated:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.<sup>122</sup>

Natural justice generally involves the ‘fair hearing rule’ and the ‘rule against bias’. The former rule requires decision-makers to inform a person of what the case against them is and to give them a voice in any proceedings. The latter rule requires that decision-makers not be biased or be seen to be biased.<sup>123</sup>

### 4.1.2 Natural justice and the legislation

Both the CPA and the CYFA state that nothing in the provisions that relate to diversion affects the requirement to observe the rules of natural justice. It is not entirely clear what these statements mean in the context of the legislation.

As noted above, it is interesting that section 356F of the CYFA sets out a number of factors that must be considered by the prosecution in determining whether or not to consent to a matter being referred for diversion.

In an administrative law context, this could give rise to grounds upon which to apply for judicial review. For example, if it could be argued that the prosecutor committed an error of law in not appropriately considering the factors in the legislation.

Despite the above, it is well established in case law that judicial review of decisions made in the exercise of prosecutorial discretion is unavailable. The reasons for this, outlined by the High Court in the case of *Likiardopoulos v The Queen* (2012) 291 ALR 1, are the importance of maintaining the reality and perception of the impartiality of the judicial process, the importance of maintaining the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings generally and finally, the importance of maintaining the width of prosecutorial discretion.<sup>124</sup>

Notwithstanding the above, it has been observed that the above position “may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth.”<sup>125</sup> Further “it may pay insufficient regard to the fact that some

121 Criminal Bar Association of Victoria, Submission to the Magistrates’ Court of Victoria, *Review of the Criminal Justice Diversion Program*, 5 June 2015, 2-3.

122 *Kioa v West* (1985) 159 CLR 550, 582.

123 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) 98-99.

124 3, (French CJ).

125 *Maxwell v R* (1996) 184 CLR 501, 534 (Gaudron and Gummow JJ).

discretions are conferred by statute.”<sup>126</sup>

Whilst these considerations were raised in *Likiardopoulos*, the High Court considered that these related to the interplay between the separation of powers and section 75(v) of the Constitution, which relates to jurisdictional error by Commonwealth officers and the constitutionally protected supervisory role of the Supreme Courts of the States. It was noted that this raised the question as to whether there is any statutory power or discretion of which it can be said, as a matter of principle, is insusceptible of judicial review. The Court declined to answer this question in this case.<sup>127</sup>

It has also been argued that any complaint about a decision of a prosecutor is more appropriately addressed by the court exercising its powers relating to abuse of process.<sup>128</sup>

In *Smiles v FCT* (1992) 107 ALR 439 at 442 Davies J undertook a review of the authorities concerning the grounds for judicial review of the decision to prosecute:

However, the Court will not interfere by way of judicial review in the ordinary processes of a prosecution. It may be appropriate for the Court to make an order of review affecting a prosecution where, for example, the decision or conduct sought to be reviewed was beyond jurisdiction or an abuse of process, or the conduct sought to be reviewed was contrary to that provided by statute, or there is a discrete point of law the early determination of which may conclude or assist the resolution of the prosecution proceedings. However, the Court will not interfere with the ordinary conduct of criminal proceedings unless exceptional cause for doing so be shown.

It follows from the above that the decision to refuse consent to diversion by a prosecutor is not a matter that can be subject to judicial review. Accordingly, it is arguable that the provisions in the legislation relating to the

126 *Maxwell v R* (1996) 184 CLR 501, 534 (Gaudron and Gummow JJ).

127 (2012) 291 ALR 1, 3, (French CJ).

128 Martin Flynn, ‘Human rights, Prosecutorial Discretion and Judicial Review - The Emergence of Missing Links?’ (Paper presented at the Prosecuting Justice conference, Australian Institute of Criminology Melbourne, 18-19 April 1996) 6.

requirements of natural justice are futile in practice.

This state of affairs adds further to the issues that arise due to the lack of transparency and formal procedure in the diversion schemes.

## 4.2 Separation of powers

It is our view that removing prosecutorial discretion in relation to the recommendation for an accused to undertake diversion and vesting that discretion with the courts would be more consistent with the principle of the separation of powers.

As per the separation of powers doctrine, the Australian government has three separate branches, namely:

1. The legislature, that is, the Parliament that makes the laws;
2. The executive, which implements those laws; and
3. The judiciary, which interprets and applies the laws.

While some overlap might occur between these branches, in principle, these arms are to be independent of one another. This is one of the reasons (as outlined above) that the courts will not interfere with the exercise of prosecutorial discretion, which is considered to fall within the scope of the executive.

It is not the intention of this report to cast doubt on the validity of this foundation of our democracy. Rather, from our consideration of the diversion process, we question whether the decision to grant diversion appropriately falls within the executive branch of government.

It is inherent in the criminal justice process that police have the discretion as to whether to issue a charge and a summons.<sup>129</sup> This discretion is exhausted upon conclusion of the decision as to whether to lay criminal charges. A matter will then proceed to the courts for determination, with the opportunity for input of both the prosecution and the defence.

As it stands in the diversion process, the police have already issued a charge and a summons. That action brings the accused person before the court. To require additionally that a prosecutor consent to the diversion process seems to blur the line between what appropriately requires the involvement of the executive (police informant and prosecution)

129 *Criminal Procedure Act 2009* (Vic), section 14.

and the judiciary (the magistrate).

The LIV concurs, stating in their 2015 submission to the Magistrates' Court of Victoria's CJD review:

[o]nce an accused person has been charged with an offence, the Magistrate is vested with the responsibility of determining what the appropriate disposition should be. It is inappropriate for the option of diversion to be conditioned on the consent of the prosecution.<sup>130</sup>

Further, noting that diversion can ultimately result in avoiding a criminal conviction and thus has a significant impact on the outcome of an accused, we consider that diversion is unlike a withdrawal of charge and more akin to a sentencing option.

It is fundamental to the separation of powers that sentencing decisions ultimately rest in the hands of the magistrate (the judiciary), without the influence of the police prosecutor (the executive).

Accordingly, it is our view that to make the decision with respect to diversion one for the court, would be to align the diversion scheme with the doctrine of the separation of powers and its underlying principles ensuring transparency and consistency.

In short, we consider that the decision to recommend diversion more appropriately falls within the ambit of the judiciary than that of the executive.

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130 Law Institute of Victoria, Submission to the Magistrates' Court of Victoria, *Review of the Criminal Justice Diversion Program*, 26 May 2015.

# 5. Recommendations

The Magistrates' Court CJDP and the CCYD are crucially important programs, with a proven track record of increasing therapeutic outcomes for the accused, addressing the needs of victims, reducing recidivism, and strengthening the community as a whole.

However, there is room for improvement. For the above reasons, it is overwhelmingly clear that the CJDP, as it stands currently, provides scope for biases, inconsistency and unfair outcomes, particularly in relation to minority groups.

Not only is this resulting in unjust outcomes in practice, but as a matter of legality it is arguable that the current scheme offends principles of natural justice.

Despite the relevance of our findings broadly to both the adult and children's jurisdictions, we acknowledge that there are differences in the way the youth and adult schemes operate in practice. Therefore, the below recommendations are centred on the CJDP and we trust that our report will assist current and future initiatives focused on the improvement on the youth scheme.

## 5.1 Decision in open court

It is notable that in discussing the 2008 Criminal Procedure Bill's compliance with the Victorian Charter of Human Rights and Responsibilities Act 2006, Attorney General Rob Hulls emphasised the importance of the principles of fairness and natural justice 'where the accused's rights are often protected by the active participation of defence practitioners.'<sup>131</sup>

It is incongruous that the diversion process, the outcome of which has so much significance for an accused, does not provide scope for defence advocacy. We are of the view that the decision as to whether or not diversion is granted to an accused should be made in open court, following submissions by both the

prosecution and the defence.

Such an approach would both protect the rights of an accused and eliminate the problems associated with having the diversion decision made behind closed doors (such as lack of transparency and accountability on the part of decision-makers), with no opportunity for review.

We are aware that a procedure exists in practice where if the prosecution consents to diversion, and if the magistrate in chambers refuses diversion, then an accused person may have an opportunity to address a magistrate in open court to argue in favour of diversion. However this situation only arises where the prosecution has already consented to diversion and it is the decision of the magistrate that is the obstacle. In our view, the opportunity to advocate for diversion in open court should occur as of right without requiring the consent of the prosecution.

With respect to section 356D(4) of the CYFA and the factors listed therein, the current state of affairs means that if the prosecution does not consent to Diversion, the matter will not reach the stage where the court is to consider the above factors. The requirement that the prosecution consent therefore means that those matters denied referral for diversion in the early stages are being denied in circumstances that are not transparent. This runs directly contrary to the "transparency and consistency" referred to by Ms Pulford in the Second Reading Speech of the Youth Justice Reform Bill, as a reason for the existence of these factors therein.<sup>132</sup> Whilst the CPA does not list factors for consideration of the prosecution in the adult scheme, the same concern regarding the lack of transparency and consistency applies.

It is not clear why it would not be considered ideal for the ultimate determination

<sup>131</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4969 (Rob Hulls).

<sup>132</sup> Victoria Parliament, *Parliamentary Debates*, Legislative Council, 8 June 2017, 3346 (Jaala Pulford).



with respect to Diversion to be made in open Court with reference to these factors. Notably, both the second reading speeches to the Youth Justice Reform Bill<sup>133</sup> and the CPA<sup>134</sup> are silent on whether this was even considered. Moreover, it is arguable that the requirement for prosecutorial consent undermines the efficacy of section 356D(4) of the CYFA.

During the consultation process which preceded the introduction of the Youth Justice Reform Act, leading organisations working in this space including VLA<sup>135</sup>, the LIV<sup>136</sup> and Smart Justice for Young People<sup>137</sup> recommended that the new scheme place the final decision on suitability for diversion with the Magistrate, following submissions by both the prosecution and the defence.

Similarly, in submissions to the Magistrates' Court of Victoria pursuant to their 2015 review into the CJDP, the CBA, LIV and VALS<sup>138</sup> supported this proposal. Specifically, the CBA recommended that:

The requirement that Diversion cannot proceed without the 'consent' of the prosecution should be restricted and, as a matter of fairness, should be able to be reviewed by the court (with the accused having a right of reply... The ultimate decision regarding whether or not a matter is suitable for Diversion

should lie with the court alone.<sup>139</sup>

On the same point, the LIV contended:

[O]nce a person is charged it should remain a matter for the presiding Magistrate as to whether that person should be afforded the opportunity for a diversion. Like all other matters heard in open court, the police remain entitled to voice their position – be it in support or opposition – but the ultimate decision is one that should rest solely with the Magistrate.<sup>140</sup>

Certainly, a less desirable alternative could be to have the factors in the CYFA inserted into the CPA, and to subsequently make it a requirement of both schemes that the prosecution furnish reasons for a decision to deny an accused diversion. In the interests of natural justice, these decisions ought then to be open to judicial review.

Whilst this could be a solution to a number of the problems identified, for the reasons outlined above, it is clear that at this point in time, the courts do not consider themselves to have the jurisdiction to consider such exercises of prosecutorial discretion.

It follows that the best way of resolving this problem and to ensure that both the youth and adult legislation observe principles of natural justice and overcome any issues of perceived bias,<sup>141</sup> is to have the decision made in open court.

In addition, we support the recommendation of VALS that in the case of diversion matters involving ATSI accused, the accused should be given the option of having their diversion application heard in the Koori Court.<sup>142</sup>

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133 Ibid.

134 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4981 (Rob Hulls).

135 Victoria Legal Aid, Submission to the Department of Justice on 'Improving Diversion for Young People in Victoria', September 2012, 4, 6.

136 Law Institute of Victoria, Submission to the Department of Justice, *Diversion for Young People in Victoria*, 5 October 2012, 4.

137 Smart Justice for Young People, 'Entrenching diversion in the youth justice system', 3 October 2012, 10.

138 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 2015, 2; Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016, 2.

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139 Criminal Bar Association of Victoria, Submission to the Magistrates Court of Victoria, *Review of the Criminal Justice Diversion Program*, 5 June 2015, 2-3.

140 Law Institute of Victoria, Submission to the Magistrates' Court of Victoria, *Review of the Criminal Justice Diversion Program*, 26 May 2015.

141 Victorian Aboriginal Legal Service Co-operative Limited, Submission to the Chief Magistrate of the Magistrates' Court of Victoria, *Review of the Diversion Program in the Magistrates' Court*, 8 March 2016, 2.

142 Ibid.

It follows that in light of the above and in order to maintain equilibrium between the police, the prosecution and the courts, we consider that an appropriate compromise would be that in instances where the prosecution do not consent, the defence should be afforded the opportunity to make a case in open court as to why diversion should be granted.

The ultimate decision as to whether to grant diversion ought then be made by the Magistrate, taking into account all the circumstances of the case.

### **What needs to occur?**

It is clear that prosecutorial consent is a matter of jurisdictional fact and unless the statute is amended to change this, at present the courts are wholly unable to intervene - no matter how arbitrary a decision to refuse diversion may be. We accordingly suggest the below technical legislative amendments of the CPA to correct this.

### **Recommendation 1**

That the CPA be amended as follows:

1. Amend paragraph 59(2)(c), which currently provides that “both the prosecution and the accused consent to the Magistrates' Court adjourning the proceeding for this purpose” to “the accused consents to the Magistrates' Court adjourning the proceeding for this purpose”, and
2. Following the existing subsection 59(2), insert new subsection 59(2A) as follows:

“(2A) For the purposes of section 59(2) (b), the Magistrates' Court may take into account whether the prosecution consents to adjourn the proceedings to enable the accused to participate in and complete the diversion program.”

The practical effect of this wording means that whilst the consent of the prosecution may be a factor that could influence the ultimate decision of the court as to whether to grant diversion, it will not be determinative.

## **5.2 Internal guidelines**

Whilst we consider that the above proposed law reform would be the most effective and clear-cut way to bring about transparency and consistency in the diversion process, we acknowledge the significant practical difficulties in achieving this. We have accordingly suggested the below, more informal measures, as a means to bring about positive change in the interim.

As discussed above, the Victoria Police Manual consulted during the preparation of this report contains only fleeting reference to diversion<sup>143</sup> and Victoria Police's Adult Diversion Policy and Matrix fails to provide adequate guidance and entrenches existing inconsistency and bias within the diversion recommendation process.

It is proposed that guidelines be developed to address this gap and provide the oversight and guidance that, as established above, is critical to assist with consistency and ensure fairness, transparency and accountability throughout the diversion process.

We propose that these changes be initially confined to Melbourne Magistrates' Court, with scope for them to be expanded across the Victorian courts if successful.

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143 Victoria Police, 'Victoria Police Manual - Policy Rules: Disposition of Offenders', last updated 30 March 2015, 7.

## What needs to occur?

### Recommendation 2

The following joint guidelines should be implemented by Victoria Police and the Magistrates' Court of Victoria:

1. Police Prosecutors consider requests for diversion at first instance instead of Police Informants, considering transparent and consistent suitability factors (see below) which prompt them to give thought to markers of vulnerability, and only objecting to diversion in exceptional circumstances. In this regard, we note that prosecutors are of relatively senior rank and have received specialised training in this area. Informants have not received this specialist training and have less daily experience of the court system to allow them to deal with these requests.
2. If the prosecutor is considering refusing diversion but forms the view that further information or supporting documents may have a material impact on the decision (e.g. psychological report), they must indicate this to the accused and give them the opportunity to provide these documents at a later date. If necessary, the court hearing of the matter will be adjourned to enable this to occur.
3. If the prosecutor is still considering refusing diversion, they must complete a Prospective Failure to Divert Declaration providing their reasons and refer the matter to a senior prosecutor for reconsideration. If the second decision-maker concurs, they should add their reasons to the Declaration. Importantly, this Declaration must be made available to the accused.
4. If a Prospective Failure to Divert Declaration has been made and seconded by a senior prosecutor, the accused (or their representative) are able to adjourn the matter to a newly created Diversion List of the Magistrates Court (similar to the Loiter list) where, in open court, the Magistrate hears submissions from the prosecution and accused (through their representative), then gives their view on the appropriateness of diversion.
5. If the Magistrate supports diversion, pursuant to an in-principle agreement police complete a recommendation for diversion and the standard diversion process is facilitated. If the decision is to refuse diversion, the matter can be adjourned or proceed to a plea of guilty.
6. Where a Magistrate deems it appropriate to refuse, or allow the accused to withdraw, a plea of guilty on the basis that the accused may be eligible for diversion, police consider the accused's eligibility for diversion in accordance with points 1 to 4 above.

### Recommendation 3

#### *Suitability factors*

The following factors should be taken into consideration when considering a request for diversion:

- ↳ If the accused identifies as Aboriginal or Torres Strait Islander;
- ↳ The accused's cultural background and any language difficulties;
- ↳ The age of the accused (specifically, their youth or older age);
- ↳ Homelessness and the relationship between this and the offending;
- ↳ The existence of family violence;
- ↳ The existence of mental illness, drug and alcohol dependence, or disability;
- ↳ What steps an accused has taken to obtain relevant treatment following the offending;
- ↳ The impact that a disclosable finding of guilt would have on the accused's current or future employment;
- ↳ The impact that a disclosable finding of guilt may have on an accused's visa status or prospects of successfully obtaining Australian permanent residency or citizenship.

It is acknowledged by all stakeholders that there are certain factors that would make a person less likely to be granted diversion (though the existence of these factors does not preclude a person's matter from being considered for diversion). These factors include:

- ↳ If the offence is of a sexual nature or involves serious injury.
- ↳ If the person had previously been granted diversion or found guilty for offences of similar nature, including in the Children's Court;
- ↳ Multiple incidents before the court (multiple matters with different Informants)

### Recommendation 4

The Diversion Coordinator roles at each court become better resourced to enable them to address increased referrals that result from the above changes.

### Recommendation 5

The duty lawyer guidelines be amended to provide for assistance with contested diversion matters at court.

# 6. Conclusion

In summary, it is our view, that as it stands, the current diversion systems in both the adult and juvenile jurisdictions have resulted in inconsistent and unfair outcomes as a result of formal and undisclosed practices that leave unchecked scope for bias and discrimination. Both adult and youth accused are disadvantaged as a result of this state of affairs, particularly those from marginalised and criminalised communities.

As a result of a system that does not prioritise rehabilitation and the reduction of recidivism, families, the community and the economy further suffer. It follows that positive reform is urgently needed in this space. We consider that the proposals we have outlined above would achieve this and additionally bring the law in line with the fundamental principles of natural justice, the separation of powers and equality before the law, which underscore the foundations of our legal system. It is our hope that this report provides some impetus in this regard and we very much look forward to further progress.

# Appendix A: Diversion Notice



## DIVERSION NOTICE

To: (name of Accused)  
Of: (address of Accused)  
**IN RELATION TO THE FOLLOWING CHARGE(S) AGAINST YOU;**

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

In this case, Victoria Police will recommend to the Court that you be granted a Diversion Order. If you are prepared to admit the facts, a magistrate may order that you undertake certain program conditions. Completing these obligations will result in the case against you being discharged.

For more information on a Diversion Order please contact one of the following;

- \* Your solicitor
- \* Your local legal aid office
- \* The diversion co-ordinator at the magistrates' court where your charges are to be dealt with.

IF YOU DO NOT WISH TO TAKE ADVANTAGE OF THE DIVERSION OPTION  
YOUR MATTER WILL BE DEALT WITH AS INDICATED IN THE CHARGE  
DOCUMENTATION

### NOTICE OF ASSESSMENT

To the Diversion Coordinator  
(location) Magistrates' Court

I, (insert name and rank) being the member of  
the Victoria Police responsible for authorising this brief/charge(s) make the following  
recommendation;

(a) This person is SUITABLE for a Diversion Order

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I suggest that the following Program Conditions be considered:

- 1.
- 2.
- 3.

\_\_\_\_\_  
Sergeant

Date...../...../.....

**NOTE:** Where there is a victim, you must attach the victims name and contact details to the court copy of the Diversion Notice to enable the court to make contact with the victim. For assistance, refer to VPM.

Copies of this notice must be;

- \* attached to Charge or Charge sheet and Summons for service on Accused
- \* attached to Court Copy Charge or Charge sheet and Summons
- \* attached to the brief of evidence



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VICTORIA**

Liberty Victoria's  
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ADVOCACY  
PROJECT**

**Rights Advocacy Project**  
[libertyvic.rightsadvocacy.org.au](http://libertyvic.rightsadvocacy.org.au)  
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