Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Discussion Paper

Submission to the Sentencing Advisory Council

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# About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner. We provide legal information, education and advice for all Victorians.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are people who are socially and economically disadvantaged; people with a disability or mental illness, children, older people, people from culturally and linguistically diverse backgrounds and those who live in regional and remote areas. We assist people with legal problems arising from criminal matters, family breakdown, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

We provide:

* free legal information through our website, our Legal Help telephone service, community legal education, publications and other resources
* legal advice and minor assistance through our Legal Help telephone service, Duty Lawyer Service and free clinics on specific legal issues
* support to people in the mental health system through non-legal advocates in the Independent Mental Health Advocacy service
* family dispute resolution services to help families make decisions about family law disputes away from court
* grants of legal aid to pay for legal representation by a lawyer in private or community law practice or a VLA staff lawyer.

VLA plays a leading role in the coordination of family violence legal services in Victoria. We provide information, advice and legal representation to women, men and children who are affected by family violence in the State and Commonwealth civil, criminal and family law systems. We provide these services through a network of offices across the state. We also fund private practitioners and community legal centres to deliver family violence legal services. People who have experienced, are experiencing, or are at risk of experiencing family violence are priority clients for VLA and we are committed to the elimination of family violence in the community.

We are also committed to procedural fairness and to upholding the rights of the accused in criminal justice processes. This ranges from the provision of duty lawyer services to respondents who breach family violence intervention orders in the Magistrates’ Court, to trial representation in the County and Supreme Courts for serious indictable offences committed in the family violence context.

In addition to helping individuals resolve their legal problems, VLA works to address the barriers that prevent people from accessing the justice system. By participating in law reform, we influence the efficient running of the justice system and ensure that the actions of government agencies are held to account. We take on important cases and campaigns that aim to improve the law and make it fairer for all Victorians.

VLA is committed to encouraging a fair and transparent justice system and to using evidence and our experience to improve legal service delivery.[[1]](#footnote-1)

# Executive summary

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Sentencing Advisory Council’s (SAC) call for submissions on the issues raised in the *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Discussion Paper*.

Our submission does not address every question posed in the discussion paper. Rather, we have focussed on key issues and concerns with ‘swift, certain and fair’ (SCF) approaches to sentencing family violence offenders which are based on our practice experience.

As the largest criminal defence practice in the state, VLA is in a unique position to comment on some of the issues raised in the discussion paper. We have extensive experience providing legal services to people who are accused of committing family violence related criminal offences. By providing these services we do not condone or excuse this conduct.

In response to the discussion paper, VLA does not recommend that SCF approaches be applied to the sentencing of family violence offenders, on the basis that:

* SCF approaches incorporate a fixed penalty, which amounts to a form of mandatory sentencing
* There is insufficient evidence to support the application of SCF approaches to the sentencing of family violence offenders
* Findings suggest that increasing the proportion of family violence offenders who serve short prison sentences (less than 12 months) is unlikely to have an impact on their likelihood of reoffending
* A SCF approach will place additional pressure on an already overburdened summary crime jurisdiction, including additional pressure on VLA’s duty lawyers
* There is currently no capacity in police cells or remand centres to house offenders on short periods of custody as part of a ‘swift, certain and fair’ program in Victoria
* SCF approaches raise a number of procedural fairness issues
* SCF approaches are likely to have a disproportionately unfair impact on some offenders, such as offenders with brain injuries, as well as Aboriginal and Torres Strait Islander people, without any known benefits for the protection of victim survivors of family violence
* Victoria’s sentencing scheme can already be used (and has the potential for greater use) to incorporate aspects of ‘swift, certain and fair’ approaches in appropriate cases. For example, the fast track listing model provides a means of providing prompt legal consequences for offending in the context of family violence. There is also scope for expanded use of judicial monitoring in appropriate cases.

We consider that the best way to keep victims safe in the long term and reduce the prevalence of family violence in the community is to address the causes of family violence, and intervene effectively at the earliest opportunity. This should include better processes for assessment and referral, and increased investment in legal and non-legal services to reduce system congestion and maximise the opportunity presented by a person’s interaction with the justice system.

We believe that criminal justice responses to family violence should be embedded in the existing processes of the justice system. In our view, the range of options available for sentencing family violence offenders is adequate. The system is already correcting itself with more significant sentencing being imposed at first instance.[[2]](#footnote-2) The Court of Appeal has also made strong pronouncements on the seriousness of family violence and has recognised that specific deterrence and general deterrence, in particular, are important sentencing factors in cases involving family violence.[[3]](#footnote-3) The community correction order (CCO) is a flexible sentencing option which can be used to consider the underlying causes of family violence and an offender’s particular circumstances. At the discretion of the court, a number of conditions can be attached to a CCO which seek to prevent family violence from occurring in the future.

VLA welcomes the recent reforms made by Corrections Victoria to its service delivery model for managing offenders on a CCO. As discussed at paragraph 4.15 in the discussion paper, this model promotes the principles of swiftness, certainty and fairness in the management of family violence offenders on a CCO through the identification of high-risk family violence offenders and the provision of tailored case management strategies to those offenders. We strongly support efforts to predict and manage risk, and see Corrections Victoria’s new management model as a positive step towards addressing this issue.

There have been a range of reforms to the criminal justice system which will alter the current landscape for criminal justice responses to family violence offending, including fast tracking of family violence matter at the Magistrates’ Court and expanding the Family Violence Court Division. We recommend that the results and impact of these reforms be evaluated before introducing a complex new sentencing regime that may be inconsistent with them.

VLA supports measures to improve perpetrator accountability. However, we note that aspects of swift, certain and fair approaches limit judicial discretion, in that they essentially require the imposition of a fixed sanction. This is akin to mandatory sentencing. We do not support mandatory sentencing for any type of offending, nor overreliance on imprisonment in the sentencing exercise. Judicial discretion is necessary to meaningfully respond to individual circumstances.

We strongly believe that offences committed in the context of family violence should be subject to the same criminal law sanctions that apply to other serious criminal offending. Departure from our existing laws and processes though the creation of specific categories of offences or specific sentencing regimes for family violence offenders may undermine efforts to bring family violence into focus and make perpetrators of family violence accountable in the same way that people who commit offences in other contexts are made accountable.

VLA supports a system that promotes rehabilitation (where appropriate) by responding to the individual circumstances of people who commit criminal offences in the context of family violence, and by delivering a response that can deal efficiently and effectively with the multiple complex legal and non-legal needs of people and families who experience family violence.

Perpetrator accountability processes which advance rehabilitation goals require attention to the individual circumstances of the offence. While it is acknowledged that the majority of family violence offenders are male, this should also include programs that assist culturally and linguistically diverse (CALD) communities who do not speak English, women and adolescents who perpetrate family violence, and family violence in a non-intimate partner context.

VLA welcomes the Government’s commitment to implement the recommendations of the Royal Commission into Family Violence, noting key recommendations around improving access to men’s behaviour change programs, including funding for programs in languages other than English and improving monitoring of offenders’ participation in men’s behaviour change programs.

VLA also welcomes the establishment of a committee of experts advising the Government on best practice approaches to perpetrator intervention programs, including men’s behaviour change programs, and an accreditation process being implemented for such programs.

# Particular issues with SCF approaches to sentencing family violence offenders

### Insufficient evidence to support use in relation to family violence offenders

VLA has concerns regarding the use of SCF approaches to family violence offenders, given the mixed evidence of the effectiveness of SCF approaches which are raised in the discussion paper.[[4]](#footnote-4) As noted, SCF approaches have traditionally been used in the management of alcohol and drug offenders but they have not yet been used to directly target family violence offenders.[[5]](#footnote-5) We share the Council’s concerns that an SCF approach might exacerbate or escalate the risk that a contravening offender might pose to victim survivors or protected persons.

It is also concerning that there is strong evidence that, compared with ‘probation as usual’ in the United States, SCF programs do not necessarily reduce recidivism, rearrests, probation revocations or time spent in jail.

Although we know that there is a proportion of family violence offenders who have substance use issues, there are marked differences in approaches and interventions directed towards family violence offenders compared with offenders who have substance use issues. We consider that any adjustments to the current laws relating to offences and sentencing should be supported by a strong evidence base.

VLA supports sentencing outcomes that advance the protective goals of the family violence system and promote accountability for the actions of perpetrators. In many cases this may include connecting offenders with programs, such as the men’s behaviour change program or drug and alcohol counselling, to give them the best opportunity to change their behaviour and have positive family relationships.

### Issues concerning consistency with the Victorian criminal justice system

VLA has concerns regarding the application of any SCF approach into the Victorian criminal justice system. As raised in the discussion paper, SCF programs have been developed and almost exclusively operate within the United States, within a very different legal context from the Victorian criminal justice system.[[6]](#footnote-6)

They have also primarily focused on managing offenders under a sentence of probation, which is not the model envisaged for sentencing family violence offenders in Victoria. The deterrence-based sanction of an SCF approach contradicts therapeutic principles which attempt to address the underlying causes of offending behaviour and the offender’s circumstances that may contribute to their offending.

VLA supports measures to improve perpetrator accountability. However, we note that aspects of swift, certain and fair approaches limit judicial discretion through the imposition of a fixed sanction, which is akin to mandatory sentencing. We do not support mandatory sentencing for any type of offending, nor overreliance on imprisonment in the sentencing exercise. Judicial discretion is necessary to meaningfully respond to individual circumstances.

### SCF approaches may increase the short-term risk to victim survivors or protected persons

VLA shares the concerns raised in the discussion paper that SCF sanctions may increase the risk to victim survivors’ safety, as offenders may externalise the blame for the sanction to the victim survivors of family violence. This may be further heightened where the victim survivor reports the contravention of a condition. SCF approaches are likely to operate as a blunt tool in the absence of reforms around better risk assessments and stronger supports for victims.

This potential risk posed to the victim survivor is too great, particularly when it is coupled with the findings from evaluations of other SCF programs which suggest that increasing the proportion of family violence offenders who serve short prison sentences (less than 12 months) is unlikely to have an impact on their likelihood of reoffending (at paragraph 3.175). The effectiveness of short terms of imprisonment (where that is the entire sentence) can be contrasted with SCF approaches, where short periods of custody are used to enforce compliance with a community-based sentence. Nevertheless, the findings suggest that custody (in the absence of treatment) may not reduce the likelihood of reoffending.

### A zero-tolerance approach can lead to inappropriate sentencing outcomes that do not target the causes and contributing factors of offending

VLA considers that the best way to keep victims safe in the long term is to stop perpetrators from offending by addressing the causes of the offending, not just by removing the opportunity to offend through imprisonment. SCF approaches tend to use punitive responses, including short terms of imprisonment, as a deterrent. This approach neglects and may undermine efforts to address the underlying behavioural issues and individual circumstances that may be contributing to the offending.[[7]](#footnote-7)

Victorian criminal law already provides scope to take family violence into account when sentencing for criminal offences. The breach of trust, defencelessness of victim survivors and history of assaults and abuse that are associated with offending in this context are recognised by the courts as aggravating factors for the purpose of sentencing.

Further, there may be a reasonable excuse for an offender’s failure to comply with a condition of a CCO. For example, an offender may fail to comply with a condition of an order because of child care responsibilities or illness. SCF approaches would be unlikely to accommodate such situations.

### Expanding alcohol exclusion powers to include use of SCRAM device

VLA has considerable practical experience providing legal assistance to people who are affected by alcohol and drug use. We see the extent to which drug and alcohol use can fuel or exacerbate family violence. VLA supports an approach to drug and alcohol abuse which treats it as a health issue requiring treatment.

VLA has concerns with expanding courts’ powers to prohibit family violence offenders from consuming alcohol entirely without appropriate supports in place. Therefore, any expansion of alcohol exclusion orders or use of SCRAM technology needs to be supported by comprehensive drug and alcohol counselling, support and/or treatment.

Our practice experience suggests that ice use is increasingly prevalent. Many of our lawyers estimate that up to (and sometimes more than) half of their criminal cases have ice as a causal or exacerbating factor. We see the alarming speed at which ice use can devastate families. We strongly believe that drug rehabilitation programs should be available and properly tailored for family violence perpetrators.

We endorse key recommendations of the National Ice Taskforce, 2015.[[8]](#footnote-8) In particular, we support the National Ice Taskforce’s recommendations that under the National Drug Strategy framework, Commonwealth, State and Territory Governments should further invest in alcohol and drug treatment services.[[9]](#footnote-9)

VLA believes that Federal, State and Territory Governments should focus their efforts on:

* comprehensive and collaborative education campaigns
* more funding for better access to treatment services for users
* targeted and intensive support services for families affected by ice
* developing a stronger evidence base in key areas, including the underlying factors leading to ice use and the most effective ways of breaking the criminal cycle of offending.

### Unsuitability of certain groups

VLA shares the concerns raised in the discussion paper in relation to SCF approaches being unsuitable or inappropriate for low-risk offenders with pro-social ties to the community, Indigenous offenders, offenders with cognition disabilities, females and offenders with primary carer responsibilities. Therefore, we strongly believe that an SCF approach would be unsuitable or inappropriate for these groups.

Our client data reveals that 15 percent of our clients who breach family violence intervention orders have disclosed a disability. Of that group, over half had a mental health issue. Seven percent had an intellectual disability and four percent had an acquired brain injury.[[10]](#footnote-10) Our data also shows that 38 percent of female clients who received a grant of aid for breach of a family violence intervention order were likely to be in receipt of a Disability Support Pension.[[11]](#footnote-11)

### Procedural fairness

VLA notes the concerns raised in the discussion paper at paragraphs 4.82 – 4.104, regarding procedural fairness issues with the implementation of a SCF program in Victoria.

VLA considers that offences committed in the context of family violence should be treated as seriously as offences committed in other contexts and perpetrators should be made accountable for their actions through existing criminal laws. When providing assistance to people charged with criminal offences in the context of family violence, we support proportionate sentencing that promotes rehabilitation where appropriate, supported by programs which will reduce the prevalence of family violence in the community by addressing the causes and contributing factors as well as the consequences of offending behaviour. In our view, victim safety is not incompatible with proportionate and rehabilitative responses to perpetrators of family violence. Targeted responses to perpetrators promote longer-term safety for victims and contribute to a reduction in the prevalence of family violence.

### Custodial capacity and resource implications

Implementing an SCF approach for family violence offenders in the form of short periods of custody will invariably increase the number of people in police cells, which will have an impact upon the entire justice system, leading to further overcrowding and the inability for the system to function effectively. It will also place pressure on the courts, court cells and transport services to and from court. These pressures will inevitably result in adjournments and delays across other parts of the system.

Over the past five years, the significant growth in Victoria’s prison population has led to significant pressure being placed on prisons and remand facilities. In the last three years in particular, overcrowding in prisons has continued to necessitate reliance on police cells as de facto prisons, and on temporary beds.

VLA lawyers have seen and experienced firsthand the consequences of this on the justice system. They have reported delays caused by the non-transportation of prisoners, which has led to significant uncertainly in the ability to finalise hearings and applications, precluded timely assessment of accused persons by support services, and regularly extended court hours beyond usual business hours. An increase in the number of adjournments and costs applications has resulted in further court congestion, backlog and expenditure.

### Victoria Legal Aid capacity

Ongoing demand for family violence legal services is one of the significant challenges for our organisation. We understand that this experience is shared by Victoria Police, Corrections Victoria and the Magistrates’ Court of Victoria. The system is labouring under the current levels of demand and the effectiveness of the response is being compromised as a result.

SCF approaches would increase the demand on VLA resources. Our data shows that between July 2015 – June 2016 our duty lawyers across the state made 5,789 appearances in matters where a person contravened a CCO and also breached a family violence order.

Within existing resources, duty lawyers are unable to assist more people without compromising effective access to justice or the quality of the legal services provided. The opportunity for an effective intervention is often lost where the court list is too busy and a person cannot be provided with legal advice and representation which is properly tailored to their individual circumstances.

Any future adjustment to the legal setting for responding to family violence needs to be matched with sufficient resource investment for the services, including legal services, that play an active role in responding to family violence and reducing its impact.

### Increasing perpetrator accountability within the existing framework

While we do not support the use of SCF approaches to the sentencing of family violence offenders, we recognise that there may be scope to increase perpetrator accountability within the current framework for sentencing family violence offenders. Initiatives such as the fast track listing model and specific family violence court programs aim to increase perpetrator accountability and reduce reoffending. We also note the rollout of specialist family violence courts as recommended by the Royal Commission into Family Violence.

In addition, there may also be scope for greater use of CCOs and the expanded use of judicial monitoring in appropriate cases. Coupled with reforms to Corrections Victoria’s service delivery model for managing offenders, there is potential for aspects of SCF approaches to be incorporated within Victoria’s existing framework for sentencing and managing family violence offenders.

# Conclusion

VLA appreciates the opportunity to contribute to the Council’s reference. We welcome measures to strengthen perpetrator accountability and protect victim survivors of family violence. However, we do not believe SCF approaches are the best way of achieving this.

Our position that SCF approaches should not be introduced in Victoria for the sentencing of family violence offenders is based on the view that there is very little to justify the introduction of an approach which:

* has mixed evidence to support its effectiveness in reducing reoffending
* will place increased pressure on an already overburdened criminal justice system and
* is largely incompatible with Victoria’s sentencing framework.

VLA ultimately supports a ‘wait and see’ approach given the range of reforms to the criminal justice system which will alter the current landscape for criminal justice responses to family violence offending. We recommend that the results and impact of these reforms be evaluated before introducing a complex new sentencing regime that may be inconsistent with them.

We trust that our contribution will assist the Council in its task and would be pleased to elaborate on any aspect of this submission, or to provide any further information if required.

1. Victoria Legal Aid, *Strategy 2015-2018*. [↑](#footnote-ref-1)
2. Sentencing Advisory Council (2013), *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, page 33 https://www.sentencingcouncil.vic.gov.au/publications/family-violenceintervention-orders-and-safety-notices [↑](#footnote-ref-2)
3. See *Pasinis v R* [2014] VSCA 97 at [56-57]*; Earl v R* [2008] VSCA 162 at [23]; *Hester v R* [2007] VSCA 298 at [19]. [↑](#footnote-ref-3)
4. Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Discussion Paper (2017)*, paragraph 2.51. [↑](#footnote-ref-4)
5. Ibid at xvii. [↑](#footnote-ref-5)
6. Ibid at xvi. [↑](#footnote-ref-6)
7. Ibid at paragraph 2.55. [↑](#footnote-ref-7)
8. <https://www.dpmc.gov.au/sites/default/files/publications/national_ice_taskforce_final_report.pdf> [↑](#footnote-ref-8)
9. Ibid. see recommendation 18. [↑](#footnote-ref-9)
10. <http://www.rcfv.com.au/getattachment/8AA65240-17CC-48F9-A50D-47D1063D98A5/Victoria-Legal-Aid> at page 33. [↑](#footnote-ref-10)
11. Victoria Legal Aid, *Research brief: Characteristics of respondents charged with breach of family violence intervention orders*, November 2015. <http://www.vla.vic.gov.au/about-us/what-we-do/research-and-analysis/characteristics-of-respondents-charged-with-breach-of-family-violence-intervention-orders> [↑](#footnote-ref-11)