Sentencing drug law reform in Victoria: A chronically relapsing disorder?

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About the Victorian Alcohol and Drug Association

The Victorian Alcohol and Drug Association (VAADA) is a non-government peak organisation representing Victoria's publicly funded alcohol and other drug (AOD) services. VAADA leads AOD policy, workforce development, and public discussion across membership, related sectors and the community to prevent and reduce AOD harms in Victoria.

VAADA's membership comprises agencies working in the AOD field, researchers, as well as those interested in the prevention, treatment and research of harms associated with AOD.

This monograph came about from discussions between Sam Biondo, VAADA's then EO, and Professor Arie Freiberg, one of Victoria's most prominent experts in criminology and criminal law, following a presentation from Professor Freiberg at VAADA's biennial conference on this topic. Despite the close (and complex) relationship between substance use and the criminal justice system, this monograph is the first to document these issues in the Victorian context. VAADA has a longstanding commitment to social justice and faith that reform of unfair, ineffective and counter-productive drug laws is always possible. It is in this spirit, and in recognition of Professor Freiberg's significant contributions to law reform in Victoria, that VAADA presents this monograph.

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Introduction

The relationship between alcohol and other drugs (AOD), the criminal law, and sentencing has a long and tortuous history in Victoria. It is a saga of changing theories regarding the nature of substance use and addiction, the link between substance use and crime[1] and oscillating responses to AOD-related crime ranging from 'law and order' to harm minimisation, from more severe penalties to decriminalisation. Over 170 years or so, Victoria's sentencing responses have evolved from the traditional sanctions of fines, imprisonment, common law bonds and probation to a complex mix of pre-sentence interventions, diversion programs, a range of intermediate sanctions, various forms of suspended sentences and problem-oriented court models such as the drug and alcohol court.

Although the criminal law forms the foundation of the legal framework for AOD offending, sentencing law and practice play an important part in that structure. They provide the context for medical and other interventions aimed at addressing the underlying causes of drug-related offending.[2] This paper argues that although there have been many innovations in sentencing, they have generally had only a marginal effect on AOD-related crime. While there exists a substantial literature on the sentencing of AOD-related offences (Sentencing Advisory Council 2015), and on AOD treatment policy (Ritter and Berends 2016), less attention has been paid to the structure, content and effectiveness of the various sanctions employed over the years. In contrast, this paper reflects on over 170 years of AOD sentencing reform, arguing that many of the interventions have been less than successful due to their poor construction, inadequate resourcing, lack of continuity and clarity of purpose, unrealistic and inflexible conditions, geographic disparity, and unresponsiveness to different groups of offenders. This paper concludes that sentencing alone can never provide *the* answer to AOD-related crime and that far more fundamental reform to the regulation of AOD-related offending is required.

These conclusions reflect the current impasse between the clear and undeniable failure of the war on drugs and the continued pursuit of the same law and order policies that, as this paper shows, have failed to provide lasting solutions.

My thanks to Dave Taylor, Sam Biondo and James Petty for their comments on earlier drafts of this paper and their editorial assistance.

1 Evidence of the link between substance abuse and crime is extensive and it is not necessary for the purposes of this article to document the nature of this relationship (Johnson 2004; Payne and Gaffney 2012; Sentencing Advisory Council, Tasmania 2017: Chapter 2). Nor is it necessary to assess the merits or otherwise of the various theoretical models that underpin the AOD-crime link (Clarke 2022:344). Clarke describes these as '(1) illicit drug use causes crime; (2) crime causes illicit drug use; (3) both illicit drug use and crime are caused by other influences; (4) the relationship between illicit drug use and crime is shared; (5) offenders use illicit drugs to self-medicate and that this results in further acts of criminality by the offender and (6) illicit drug use and criminal activity are not causally linked, but merely coexist within a complex environment of occurrences that embrace both' (Clarke 2022:344).

2 The nature or success or otherwise of treatment modalities or services, in relation to which the literature is voluminous is also not the focus of this article (Gelb et al 2016:166ff; Sentencing Advisory Council, Tasmania 2017:12; Victoria 2018: Chapter 12). Nor is the structure of AOD treatment and support services or their funding.

History, background and forces of change

In the early days of the colony, alcohol abuse and its consequential harm was a major social and criminal justice problem, particularly what was described as 'habitual drunkenness'. In 1882, 44 per cent of all arrests were for drunkenness, and public drunkenness in particular (Freiberg and Ross 1999:67; Garton 1987).[3] Victoria's attitudes towards, and responses to, habitual drunkenness reflected those in other Australian colonies as well as Britain and the United States. Public drunkenness was regarded not only as affecting the amenity of public places and posing a risk to others, but as a moral problem (McNamara and Quilty 2015:7).

The traditional sanctions for being drunk and disorderly in a public place[4] were bonds, fines and imprisonment. However, the scale of the problem led to the enactment of the first legislation specifically targeted at this class of offender, identifying them as having a medical rather than a moral problem (though this was not necessarily the prevailing social view) (Davies 2011:9). Evolving from earlier lunacy laws[5] the *Inebriates Act 1872* (Vic) provided for the licensing of 'Retreats' for the treatment and cure of 'habitual inebriates' who could apply to a Justice of the Peace to be committed (provided that the Justice was satisfied that the applicant had habitually used 'excessive quantities of intoxicating drinks' and that, at the time of the application, he was sober and understood the nature of the application).[6] In addition, a friend or relation could apply to a judge to commit such a person to a Retreat if, on the evidence of two medical practitioners, it appeared that the person was unable to control himself and (i) incapable of managing his affairs or (ii) dangerous to himself or others or (iii) suffering from chronic alcoholism or (iv) in imminent danger of death from continued drinking.[7] Later, the *Inebriates Asylums Act 1888* (Vic) created asylums for inebriates[8] while subsequent Acts extended the definition of who could apply for involuntary detention to include police.[9] The 1904 *Inebriates Act* added 'narcotic drugs' to the definition of inebriate but its purpose remained civil commitment until 1915 when a penal component was added in section 6 of the *Inebriates Act* 1915. Where an inebriate who had been thrice convicted in the preceding twelve months for an offence centring on drunkenness, a court could order that the person be placed in an institution for not more than 12 months.[10]

The *Inebriates Acts* – of which further iterations came in 1928 and 1958 – were the product of social concerns about intoxication, including the harm to women who suffered greatly from what were termed the 'evils of strong drink' (Parliamentary Library 2016:3), social pressure from temperance groups, and a series of commissions and inquiries. From the earliest days, temperance groups lobbied hard against the evils of alcohol, some arguing in favour of total prohibition (Parliamentary Library 2016:3.) In 1898, a Board was appointed to inquire into the treatment of habitual drunkards[11] and in 1901 the government appointed a Royal Commission into the Treatment of Inebriates (Davies 2011). Despite these inquiries, public drunkenness remained a criminal offence that was frequently prosecuted, revealing the endemic class divide between those who drank in private and those

3 On the problem of drunkenness in Victoria in the nineteenth century see Davies 2011.

4 See e.g. *Vagrancy Act 1852* (Vic), s 3 (habitual drunkenness); *Police Offences Act 1890* (Vic), s 25.

5 See *Lunacy Act 1867* (Vic), possibly signifying a link between mental illness and habitual drunkenness.

6 *Inebriates Act 1872* (Vic), s 4.

7 *Inebriates Act 1872* (Vic), s 6. The person was required to pay all the costs of proceedings and their stay in the Retreat, s 9.

8 Davies notes that the creation of government run institutions was the result of the failure of the privately-run retreats, presaging the later complex relationship between private and public providers of AOD services (Davies 2011:9).

9 *Inebriates Act 1904* (Vic), s 4.

10 The institutions were inspected by the Inspector-General of the Insane. Davies notes that the policy of not imprisoning habitual drunkards was not matched by the provision or adequate facilities. Inebriates often found themselves consigned to asylums for the mentally ill (Davies 2011:14).

11 See Victoria, Hansard, 1904, 751.

who could not do so. As ever, the criminal law did not apply equally to all citizens.

The addition of narcotic drugs to definition of 'inebriate' in the early twentieth century reflected the fact that the use of illicit drugs such as opiates has a long history in Victoria, as elsewhere (Manderson 1993; Victoria 2018:40). The use of cannabis, opiates and amphetamines became more prevalent in the 1960s during and following the Vietnam war as American service personnel and returning Australian soldiers imported and used these exotic substances and more and more young people used drugs and were arrested for doing so (Manderson 1993:181; Makkai 2002:1568; Victoria Ombudsman 2015:58). As the nature and extent of offending changed so did the responses of both the health and criminal justice systems. The early and dominant response of the criminal justice system was to increase the number and severity of alcohol and drug-related offences in the hope of deterring drug-related offending (Makkai 2002:1573). However, the growing realisation that conventional responses were outdated and ineffective led to the search for more innovative approaches.

The demise of the Victoria's failed *Inebriates Acts* came in the form of the *Alcoholics and Drug-Dependent Persons Act 1968 (ADDPA 1968).* Repealing the *Inebriates Act 1958,* the *ADDPA* provided for both civil commitment and compulsory treatment for criminal offenders in the form of a 'release on recognizance', a predecessor to the modern suspended sentence (Eggleston 1972; Skene 1987). Section 13 of the new act allowed the court to order a person who 'habitually used alcohol or drugs to excess' and who was convicted and sentenced to a term of imprisonment, to be released upon entering a bond on condition that they undergo treatment and abstain from using alcohol or drugs for a period determined by the court (Sentencing Advisory Council, Victoria 2006:84). It was intended to be a pathway into treatment for those convicted of serious offences and sentenced to a term of imprisonment where alcohol and/or drugs were a substantially contributing factor in their offending. If the person breached the conditions of the order, they were liable to be committed to prison. The Act also provided for the establishment of treatment and detention centres in lieu of or in addition to any custodial sentence. That the 1968 Act did not commence operation until 1974 due to issues with resourcing is emblematic of the problems that have plagued the criminal justice system before and since.

The *ADDPA* was an attempt to reconcile the inadequacies of the previous regulatory regime and the facilities that were intended to support it. By medicalising responses to alcohol or drug dependency, it sought to minimise use of the criminal law in light of these endemic (and growing) problems. Concerns regarding the Act's effectiveness and criticisms of its operation by judicial officers, lawyers, treatment staff, police and clients themselves prompted the Victorian Association of Alcohol and Drug Agencies (VAADA) to appoint a Working Party to review s 13 of the *ADDPA* (Skene 1987). The report found that there was a lack of resources for treatment and that many of those subject to an order continued to use AOD, failed to attend treatment, were not formally breached, committed further offences and were unlikely to be 'rehabilitated' within the prescribed period. It observed that the courts had gradually lost confidence in the Act and so its use declined over the years,[12] eventually replaced by other sanctions such as the community-based order (CBO). These contained conditions relating to assessment and treatment and provided a more attractive sentencing alternative (Skene 1987:252-3).

Illicit drug policy and sentencing policy remained stagnant until the early 1980s during long periods of conservative governments. When the Cain Labor government came into office in April 1982, it heralded a period of vigorous law reform, including in sentencing. Until the 1980s, Victorian sentencing law was distributed across the *Crimes Act 1958,* the *Community Welfare Services Act 1970,* the *Social Welfare Act 1970,* the *ADDPA* and the *Magistrates (Summary Proceedings) Act 1975*. The *Penalties and Sentences Act 1985* consolidated these disparate sentencing laws and, in 1985, the Victorian Sentencing Committee – chaired by Supreme Court judge Sir John Starke – was established to review sentencing policy and practice in Victoria. However, the Committee refrained from considering alcoholic and drug-dependent persons in light of VAADA's and other investigations into the *ADDPA*.

12 1n 1983, 377 s 13 orders were made, while 252 orders were made in 1986 (Skene 1987:252).

At the national level, following election of the federal Hawke Labor government in 1983, the emphasis shifted from law enforcement to harm minimization including the creation of various campaigns and policies that continued into the following decades: the National Campaign Against Drug Abuse[13] (1985 to 1998); the National Drug Strategic Plan (1993-97); the National Drug Strategic Framework (1998-2003) and the National Drug Strategy (2010-2015; Makkai 2002:1573) now in its seventh iteration – 2017-2026.[14]

The 1990s saw an increase in the use of illicit drugs such as heroin, cocaine, amphetamines and marijuana as well as an increase in crime, opioid overdoses and a decline in the age of first illicit drug use (Makkai 2002:1568). Alcohol abuse or 'problem drinking' remained a major societal issue (Makkai 2002:1571). Following a number of reviews of the Victorian Sentencing Committee's recommendations, the *Penalties and Sentences Act 1985* was repealed and replaced by the *Sentencing Act 1991,* which forms the basis of current sentencing law and practice in Victoria (Freiberg 1995:56).[15] The election of a conservative (Liberal/National Party) coalition government in Victoria in 1992 on a 'law and order' platform saw a number of substantial changes to sentencing law including the creation of new classes of offenders – serious sexual and serious violent offenders – in relation to whom the court was required to regard the protection of the community as the principle purpose of sentencing and allowed a court to impose longer than proportionate sentences.[16] In 1997, these provisions were extended to include serious drug offenders and serious arson offenders

In 1994, the Victorian government published its policy *New Directions in Alcohol and Drug Services,* which introduced the purchaser-provider split in health service delivery, a product of the neo-liberal new public management ideology, a hallmark of the Liberal-National Party government's approach to social policy (Ritter and Berend 2016:251). In the following year, the Premier's Drug Advisory Council was established under the chairmanship of Professor David Penington to examine drug use with a focus on illicit drugs. The Council's first report in 1996 made numerous recommendations in relation to the criminal justice system and noted the inadequacy of AOD services for offenders on community-based orders as well as the lack of training and guidelines for the community corrections staff and agencies managing AOD clients regarding their obligations (Premier's Drug Advisory Committee 1996:97). In 1997, the government published *Victoria's Alcohol and Drug Treatment Framework*, which sought to correct this by focusing on the provision of services across the state (Ritter and Berend 2016:251).

At the same time that the Victorian Liberal-National Party coalition government was promoting its law and order policies, there were major counter-currents at the federal level. These percolated down to the states who were enticed to adopt federal drug policies due to the generous Commonwealth funding provided for diversion programs. In Victoria, the election of a Labor government in October 1999 with a reformist Attorney-General, Rob Hulls, saw a number of major reforms to AOD-related sentencing laws. In 2000, Hulls commissioned a review into sentencing (Freiberg 2002).[17] Its terms of reference included:

> 2.3 Whether any, and if so what, sentencing changes would be required for a drug court to operate if a drug court were to be established in Victoria. The response to this term of reference should take into account the structure, jurisdiction and function of any proposed drug court.

13 Which followed a special Premier's Conference on Drugs, the main focus of which was education and training, treatment and rehabilitation, research and information and controls and enforcement (Dillon 1995; Victoria 2018:52).

14 For a brief timeline of illicit drug policy in Victoria between 1985 and 2013 see Hughes 2013. On the various strategies and sub-strategies in that period see Victoria 2018:53. The main components of the strategy were demand reduction, supply reduction and harm minimisation.

15 Since its introduction, the *Sentencing Act 1991* has been the subject of 182 amending Acts, growing from 120 pages to 609 pages currently (Darby unpublished paper).

16 *Sentencing (Amendment) Act 1993*; Fox 1993.

17 In that year Professor Penington chaired a new Drug Advisory Committee which recommended the establishment of supervised injecting centres (Victoria 2018:3).

2.4 Whether the sentencing options presently available for offenders convicted of drug, and drug-related offences are appropriate and effective and if not, what changes should be made to existing options or any new options introduced.

This review lead to the establishment of Victoria's first drug court in 2002 — the first of a number of problem-oriented courts with a less adversarial approach and incorporating the then emerging concepts of therapeutic jurisprudence and restorative justice (reflecting the broader problem-solving court movement at the international level) (King et al 2010; 2017; Nolan 2011; King 2013; Schaefer and Beriman 2019). In 2003, the Victorian Department of Justice contracted consulting firm KPMG to prepare a report on opportunities for criminal justice reform. Released in 2004 as *New Directions for Victoria's Justice System 2004-2014,* the report suggested the further development of problem-oriented courts and urged the development of a problem-solving framework to be implemented in the Magistrates' Court to address the underlying causes of offending behaviour from groups who were over-represented in the criminal justice system. It suggested the adoption of a multi-disciplinary approach for offenders who may be mentally ill, had an intellectual disability, were dependent on drugs or who were homeless. A second justice statement published in 2008 continued to support non-adversarial justice initiatives and committed to further integrate problem-oriented approaches into the courts.

In July 2004, the Victorian Sentencing Advisory Council was established as the result of the Sentencing Review of 2002. Its first reference related to suspended sentences and its reports reviewed the sanctions available to the courts including intermediate sanctions for offenders who are alcohol or drug dependent (VSAC 2008: Chapter 7). In 2006, following the example of the Red Hook Community Justice Centre in Brooklyn, New York, the Victorian Department of Justice organised a conference which brought experts in from the United States. This led to the establishment of Australia's first and only Neighbourhood Justice Centre (NJC) in the City of Yarra in Melbourne (Murray 2009; Murray 2021). The NJC has a Magistrates' Court at its centre and provides a suite of supplementary services including drug and alcohol assessment and counselling. What distinguishes this Court is not its sentencing powers, which are the same available to any other Magistrates' Court. Instead, it is the problem-oriented approach to sentencing and service delivery compared to other courts (VAGO 2017:33; Victoria 2022:531).[18]

In 2006, the Victorian Drug Strategy was adopted and in 2007 the Premier established the Ministerial Taskforce on Alcohol and Public Safety. This led to the development of the Alcohol Action Plan in 2008 which committed to a review of the *ADDPA* which was subsequently replaced by the *Severe Substance Dependence Treatment Act 2010* (DLA Piper 2015:6), the current legislation governing civil commitment of persons with severe substance dependence. The SSDTA provides for involuntary detention when it is considered necessary to save the life of someone with severe substance dependence or to prevent serious damage to that person's health. It is considered a last resort and its use remains very limited. The state government has indicated that it does not intend to extend the scheme (Victoria 2018:347).

The last decade has been a period of policy development and intense scrutiny of criminal justice system responses to the problem of AOD and crime. In 2011, the federal government published its *National Drug Strategy 2010-2015* which built on the pillars of demand reduction, supply reduction and harm reduction, albeit with one pillar—law enforcement—receiving the vast majority of funding (Ministerial Council on Drug Strategy 2011). In 2013, the Victorian Government released a plan entitled *Reducing the Alcohol and Drug Toll: Victoria's Plan 2013-2017*. This set out a whole-of-government strategy to reduce the use of illegal drugs and make alcohol and drug treatment more accessible (DLA Piper 2015b:25). Following the release of the National Ice Action Strategy in 2015, the Victorian government's *Ice Action Plan* aimed to provide a clear and comprehensive framework to help government, service providers and the community deliver a coordinated and effective response to growing use of methamphetamine, albeit

18 Other such initiatives included the Koori Court in 2002; the Family Violence Division of the Magistrates; Court in 2005; the Special Circumstances List in 2006 and the Assessment and Referral Court List in 2010.

with reportedly limited success (Victoria 2018:58). In 2018, the Victorian Parliament's Law Reform, Road and Community Safety Committee's Inquiry into Drug Law Reform made 50 recommendations. In relation to sentencing, it recommended funding the expansion of the Court Integrated Services Program (CISP) (Recommendation 14), increasing the number of Drug Courts accompanied by appropriate resources (Recommendation 15) and providing the Adult Parole Board with power to suspend parole for longer-term parolees found to use illicit substances but who have not reoffended, during which time they would be offered treatment (Recommendation 17).

Despite the recommendations, progress has been slow. Other reforms not targeting AOD specifically have had significant impact on sentencing practices in Victoria. In 2018, following a tragic incident where a man drove his car down a main pedestrian thoroughfare in Melbourne's CBD, killing six and injuring a further 27, Victoria's bail laws were tightened significantly. The main change was the 'reverse onus test' where instead of police having to demonstrate why bail should be denied, the accused had to demonstrate why it should be granted. While not targeting AOD-related offending specifically, these laws have significantly affected the sentencing of people with drug and alcohol issues.

In March 2022, the Parliament's Legislative Council, Legal and Social Issues Committee published its report on its *Inquiry into Victoria's Criminal Justice System*. The Committee made 72 findings and 100 recommendations. Reiterating, and reinforcing the observations and recommendations of so many of the previous inquiries into AOD and the criminal justice system, it noted the overrepresentation of women, particularly Aboriginal and culturally and linguistically diverse women in the criminal justice system and the fact that their offending was typically non-violent (i.e. low-level drug offending) (Finding 9); that the government should increase funding and support to social support providers offering therapeutic interventions for alcohol and other drug use (Recommendation 13); that police cautions and court-based diversion programs are important mechanisms for diverting people from the criminal justice system but that police use of cautions has declined and is inconsistent (Findings 18 and 19); that drug courts are successful and that the government should continue to support their expansion (Finding 48 and Recommendation 66); that a pilot Youth Drug Court be commenced (Recommendation 66); that transitional support for incarcerated people be strengthened to ensure continuity of service with regard to mental health and alcohol and other drug treatment following release (Recommendation 89); and that there be increased funding and other resources to support comprehensive pre-release planning for all incarcerated people (Recommendation 91).

At the time of writing (July 2023), the Government is yet to respond.

A continuum of interventions

This seemingly endless stream of inquiries and plans provides the background to the changes to sentencing law since the 1970s. There are many points of intervention in the criminal justice system, from the first point of contact with police to the expiration of a custodial sentence and, most recently, beyond (Victorian Ombudsman 2015:138). The following discussion examines each of the points of intervention from police contact to post-sentence schemes.

Diversions, cautions and other interventions

Until the late 1990s, the conventional police response to AOD-related offending was either to commence proceedings through arrest or summons depending on the seriousness of the offending. However, the growth in prison numbers due to drug-related crime, the weaknesses of a punitive approach to such crime, and the awareness of the harms associated with imprisonment for such offenders led to experiments with diversion programs. Originally funded by the Commonwealth government, these provide early and non-punitive interventions for some low-level offenders (Bull 2003; Australian Institute of Health and Welfare 2014:4). The objectives of diversion programs have been identified as (AIHW 2022):

- Avoiding the negative labelling and stigma associated with criminal conduct and contact with the criminal justice system.
- Preventing further offending by minimising a person's contact with, and progression through, the criminal justice system.
- Reducing the number of people reaching the courts and prisons and thereby the heavy caseload of courts, associated delays and the costs of court processes and incarceration.
- Reducing unnecessary social controls.
- Providing appropriate interventions to those offenders who are in need of treatment or other services.

The concept of 'diversion' is ambiguous and has proven to be problematic. Conventionally, diversion is defined as 'the redirection of offenders away from conventional criminal justice processes, with the aim of minimising their level of contact with the formal system' (Payne et al. 2008:2; Australian Institute of Health and Welfare 2014:4). However, over the years, the concept has expanded to include interventions that occur even after an offender is under sentence or in custody. Diversion can now occur in various contexts, including within police-based programs; bail-based programs; drug court programs and specialist drug prisons (the latter two of which are not 'diversionary' in that they are directed at those already incarcerated) (Victoria 2014:457).

In 1997, the Criminal Justice Diversion Program commenced in two police regions. This was a non-statutory scheme for people charged with drug offences (not including cannabis) and involved issuing a caution and diversion for assessment and appropriate treatment. The following year, the Cannabis Cautioning Program was introduced which allowed the cautioning of persons found using or possessing small quantities of cannabis, where this was the sole offence (Victoria 2018:164). Attached to the caution is a condition that the alleged offender must agree to drug counselling and to attend a drug treatment centre.[19] This program has been criticised by the Legislative Council's Legal and Social Issues Committee which expressed concern that 'the issuance of verbal and recorded cautions by Victoria Police has declined over time and is inconsistent across the community, despite being well recognised as important tools for diverting people away from the criminal justice system (Victoria 2022:xxxix). The Committee noted that similar criticism was levelled at the Cannabis Cautioning Program during their inquiry into the use of cannabis in Victoria (Victoria 2022:217). In 2020, VAADA noted inconsistent practices in the use of cautions and that, in some regions, police were opting to prosecute instead of utilising diversionary options (VAADA 2020:10).

The Criminal Justice Diversion program was based partly on bail laws and successful completion of the program

19 Payne et al 2008: xiii noted that there was a 75% compliance rate with the requirement of attendance.

would result in the matter not proceeding to court, though it would be recorded in police files. The program was extended to all Magistrates' Courts in 2001 and was eventually placed on a statutory footing.[20] Under s 59 of the *Criminal Procedure Act 2009,* where the accused acknowledges responsibility for the offence to the court and both the prosecution and defence consent, the court may adjourn the proceeding for up to 12 months to enable the offender to participate in a diversion program including drug and alcohol awareness, counselling and/or treatment.

In 1999, diversion programs received a major boost following the Council of Australian Governments' (COAG) Illicit Drug Diversion Initiative (IDDI) – a joint enterprise between the Australian, state and territory governments with the aim of developing a more systematic approach to diversion (Hughes & Ritter 2008:4; AIHW 2014:4).

From the late 1990s onwards, diversion programs were regarded as one of the best responses to low level AOD-related crime and saw hundreds of millions of dollars invested under the IDDI. By 2007, there were 51 programs operating around Australia (Hughes & Ritter, 2008). A Sentencing Advisory Council report on Criminal Justice Diversion Program in 2008 noted that, in 2006-07, over 5,000 people were placed on a diversion plan. This amounted to around 7.2 percent of all defendants in the Magistrates' Court in that year (VSAC 2008b). However, of the conditions imposed, only 2 per cent were for drug awareness programs, 0.3 percent for drug counselling and 0.5 percent for alcohol counselling (VSAC 2008b:7).

In 2020-21, the Australian Institute of Health and Welfare (AIHW) reported that in Victoria 2,869 treatment episodes[21] were provided to court diversion clients and 607 treatment episodes were provided to police diversion clients.[22]

Diversion programs were frequently evaluated (e.g. Bull 2003; Payne et al., 2008; Hughes et al 2019:11). The major question that arose was whether diversion programs had the effect of removing people from the criminal justice system permanently or instead added levels of complexity and supervision resulting 'net widening'[23]

20 In 2003 it was found in the *Magistrates' Court Act 1989*, s 128A and is now in the *Criminal Procedure Act 2009,* s 59. An evaluation of the DJDP was undertaken by Turning Point Alcohol and Drug Centre in 2004 and found that over a nearly 3-year period between 2000 and 2003 over 13,500 defendants were referred to the program and over 11,000 participated, amounting to around 6% of the Magistrates' Court criminal case load (Victoria 2014:466). Around 13 percent were subject to diversion orders involving counselling, including drug counselling or treatment.

21 From 2004 to 2021, between 5% to 8% of cases in the Magistrates' Court were adjourned for diversion, though there are no details regarding the conditions attached to those orders: see https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-magistrates-court. The Council is currently undertaking a literature review on the effectiveness of criminal justice diversion programs.

22 A 'treatment episode' includes all treatment episodes provided to a client (AIHW 2022). Australia wide, for court diversion clients, around 12% were for cannabis use, about 12% for alcohol use, around 25% for amphetamines, 3-4% for heroin and the remainder for 'other drugs' (AIHW 2022; https://www.aihw.gov.au/reports/alcohol-other-drug-treatment-services/alcohol-other-drug-treatment-services-australia/contents/diversion-programs-in-australia-data#count).

23 Net-widening 'refers to unintended effects of what are ostensibly 'diversion' programs when more people are enmeshed in the criminal justice system than previously due to the desire to provide those with programs that would not otherwise be available were they not charged with criminal offences' (Freiberg et al 2016:70; King et al. 2014, p. 190).

and sentence escalation[24] (Indermaur and Roberts 2003:138; Roberts and Indermaur 2006). In 1999, Sarre argued that diversionary services had the potential to result in 'wider nets' (more people in system), 'denser nets' (increased intensity of intervention) and 'different nets' (new services supplementing rather than replacing existing services) (cited in Indermaur and Roberts 2003:138). Confirming his theory, Sarre also observed that diversion schemes had not reduced the number of people entering the criminal justice system (Sarre 1999). Other criticisms of diversion in Victoria have been the strict eligibility requirement, limits on number of diversions a person can be given, and that the police have too much discretion (and in fact have a veto power) in use of diversion (Victoria 2018:166).

Bail-based interventions

Bail, which is not a sentence but is primarily used as a means of ensuring that a person appears in court to determine their guilt or innocence, has long been used as a mechanism to serve other purposes including support for persons awaiting trial (Freiberg and Morgan 2004). In 1997, the Court Referral and Evaluation for Drug Intervention and Treatment Program (CREDIT) was established at the Melbourne Magistrates' Court on the initiative of Magistrate Jelena Popovic after a decision was made that the United States' drug court model was not appropriate for Victoria (Popovic and McLachlan 2000; Heale and Lang 2001; Freiberg 2002a; Indermaur and Roberts 2003:143). It extended bail laws, allowing a person who was charged with a drug-related non-violent indictable offence and who was assessed as being suitable for treatment to be released for periods of up to 4 months or more.[25] The scheme allowed the magistrate to supervise the case. It did not require a guilty plea or the imposition of a term of imprisonment as a condition of entry into treatment, as does the Drug and Alcohol Court.[26]

In 2001 a Bail Advocacy and Support Services Program was introduced in a small number of Magistrates' Courts as part of the wider 'diversion' strategy in the Magistrates' Court which aimed to reduce reoffending and avoid net-widening. Its aim was to 'enhance the likelihood of a defendant being granted bail and successfully completing the bail period by providing appropriate accommodation, supervision and access to programs' (Hearity 2003:5; Bondy et al 2003). The program provided links to support agencies and medical referrals for drug and alcohol programs (Freiberg and Morgan 2004:225; VSAC 2008:264) and was combined with the CREDIT program in 2004. The CREDIT program was eventually subsumed under the Court Integrated Services Program (CISP)[27] in 2006 in three locations (Melbourne, Sunshine and LaTrobe Valley). It now operates at 20 courts around Victoria and provides accused persons, including those with AOD problems, with access to case management support and services, commencing at the time that the person is charged until their plea in court. As Freiberg et al note (2016:160):

> The CISP model recognises and addresses the complexity of issues often present with drug-related offenders, and streams offenders into different program levels to target people at

24 Sentence escalation 'occurs when a more severe sentence is imposed that would otherwise be warranted in order to receive the benefits of an intervention program' (Freiberg et al 2016:70; King et al. 2014, p. 190). Net-widening and sentence escalation can take number of forms (Freiberg et al 2016:70):

- the length of a program may be longer due to treatment or rehabilitation requirements than it would have been if treatment or rehabilitation had not been a purpose of the intervention;
- intervention programs may supplement rather than replace community interventions, thus increasing the total duration of government or other forms of interventions in an offender's life;
- the conditions of a program may be more numerous and onerous than they otherwise would be if treatment or rehabilitation had not been a purpose of the intervention; the greater the number of conditions and their stringency may result in a greater number of breaches that may in turn result in an increased number of sanctions being imposed that may also be more severe; and
- the use of sanctions and rewards within an intervention program or as part of a sentence may result in more severe sanctions than if no such mechanisms were operating within such a program or as part of a sentence.

25 A number of drug courts in other Australian jurisdictions were established on the basis of the court's bail powers (Freiberg and Morgan 2004:227).

26 See below.

27 Which commenced as the Court Intervention Program.

different levels of risk and need. This matching of intervention level with individual need is a foundational principle for interventions to address drug-related offending.

The program was expanded to include indictable crime with the creation of the County Court Drug and Alcohol Treatment Court in 2021.[28] A County Court pilot program for Aboriginal and Torres Strait Islander people has also commenced (Victoria 2018:196).[29]

An evaluation of CISP after three years of operation by Dr Stuart Ross of the University of Melbourne (Program Evaluation) in conjunction with Price Waterhouse Coopers (Economic Evaluation) found 'a high level of support for the program and its outcomes; and, compared with other court venues, offenders who completed CISP showed a significantly lower rate of reoffending in the months after they exited the program' (Victoria Report 2014:461; PricewaterhouseCoopers 2009). A 2004 evaluation of the Drug Court by KPMG found the cost of the CISP program was considerably lower than that of a comparable period of imprisonment (KPMG 2014).

Common law bonds, adjourned undertakings and deferred sentences

From the establishment of the colony until 1991, courts had a common law power to order an adjournment and require an offender to enter into "recognizance" (or bond) to be of good behaviour until called upon to be sentenced. The *Sentencing Act 1991* abolished the common law bond[30] and placed this order on a statutory basis. It simplified the various forms of unsupervised release available and created two forms of order: a conditional release and an unconditional release, either of which could be conviction or non-conviction based.[31] One of the stated purposes of these orders was to 'provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised'. [32] A key feature of these provisions is that a court may adjourn the proceedings for up to five years and release the offender into the community on the condition that the person observes certain conditions, including acceptance of medical, psychiatric or other treatment on an in-patient or out-patient basis, residential arrangements, or agreement to other forms of supervision (Freiberg 2002:69).[33] Unlike community based/corrections orders, which are supervised and supported by community correction officers, there is no state funding or resources to support any conditions that may be imposed for treatment under an unsupervised order (VSAC 2022b:59).[34]

These general adjournment powers have been augmented by provisions for diversionary or interventionary options since the late 1970s. In 1997, s 76 and s 76(1A) were introduced into the *Drugs, Poisons and Controlled Substances Act 1981*. The former, relating to small quantities of cannabis, allows a court to adjourn the proceedings for not more than 12 months to "allow the person to go at large on their giving an undertaking under s 75 of the *Sentencing Act 1991*".[35] The latter gives a court the power to release an offender on adjournment without conviction where they had been charged with possession or use of small quantities of drugs of dependence (other than cannabis). The court is required to attach conditions such as participation in a drug rehabilitation program or a road trauma awareness seminar.[36]

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28 In 2015-16 the Magistrates' Court reported that 1,128 referrals were made to CREDIT and 1,141 to the Bail Support Program (Victoria 2018:197).

29 https://www.countycourt.vic.gov.au/going-court/criminal-division/court-integrated-services-program

30 *Sentencing Act 1991, s 71.*

31 *Sentencing Act 1991, ss 72 and 73.*

32 *Sentencing Act 1991, s 70(1)(a).*

33 However, very few (3.6%) of the conditions imposed relate to AOD treatment (SAC 2022b:43-44).

34 The Sentencing Advisory Council has recommended that the Department of Justice and Community Safety 'develop a resourcing model to ensure that when programs or services are ordered as conditions of an adjourned undertaking, they can be paid for by the state in appropriate cases (2023:40).

35 This undertaking is an agreement to attend the court if called to do so, is of good behaviour during the period of adjournment, and that the offender observes any special conditions imposed by the court. *Sentencing Act 1991,* s 75(2).

36 It has not been possible to determine how often these provisions are used.

The power to defer sentence is similar to that of the power to adjourn sentencing. In 1997, the Magistrates' Court was given the power to defer sentencing of offenders aged between 17 and 25 years.[37] Section 83A of the *Sentencing Act 1991* provides that if the Magistrates' or the County Court finds a person guilty of an offence and is of the opinion that sentencing should be deferred for up to 12 month to allow (i) the offender's capacity for and prospects of rehabilitation to be assessed, (ii) to allow the offender to demonstrate that rehabilitation has taken place or (iii) allow the offender to participate in programs aimed at addressing the underlying causes of the offending, it may do so. On return to court, the offender's behaviour in the interim period can be taken into account.

Deferring sentencing can provide a court with a better understanding of an offender's prospects of rehabilitation and allow it to make a more informed decision about an appropriate sentence than if the sentence were imposed immediately after conviction.[38] As the VSAC has noted, however, if sentence deferrals are to be of value, adequate services and programs must be available to support the offender. Despite this, these are not usually state-funded unless the offender is able to access them through programs such as CISP, via Medicare or the National Disability Insurance Scheme (VSAC 2022:27-28).

Intermediate or community-based sanctions

Probation was introduced as a form of intermediate sanction in Victoria in the mid-1950s, could be imposed in lieu of any sentencing and could run for up to five years (Freiberg and Ross 1999:16). Probation, together with attendance centre and community service orders were replaced in 1985 by the community-based order (CBO) (Freiberg 1995:55). [39] This order, which could not exceed two years, contained a number of program conditions, including requiring the offender to undergo assessment and treatment for alcohol or drug addiction or to submit to medical, psychological or psychiatric assessment (Skene 1987:263; Fox and Freiberg 1999:618).[40]

The fact that many offenders sentenced to CBOs had drug and/or alcohol problems[41] but did not warrant imprisonment due to the moderate nature of their offending suggested that intermediate orders such as these could provide a suitable vehicle for achieving the various purposes of sentencing within the one sanction. However, there were a number of problems with the orders, including a lack of clarity about aims, insufficient resources, too many conditions, and inadequate monitoring and enforcement. It was sparingly used for AOD-related offending.

The CBO was replaced by the community correction order (CCO) in 2012. The CCO contains similar conditions to the CBO and was intended to provide a form of 'drug court lite' for cases that were either not serious enough for the drug court or, more commonly, where the drug court was not available in their area.[42] The conditions attached to CCOs predominantly relate to assessment and treatment. A VSAC report on CCOs published in 2014 reported that 81.8% of orders in the Magistrates' Court contained an assessment and treatment condition relating to AOD (VSAC 2014:17). A judicial monitoring

37 See *Sentencing (Amendment) Act 1999* inserting s 83A into the Act. These provisions were extended to offenders of all ages and to the County Court in 2006.

38 On the other hand, it has been argued that there are practical disadvantages to deferring sentencing including its effect on victims, continuity of case management in a busy magistrates' court, delay and creating unrealistic expectations of a non-custodial sentence (Freiberg et al 2016: 160; Sentencing Advisory Council, Tasmania 2016:110-111).

39 *Penalties and Sentences Act 1985* (Vic).

40 Support was provided by the Victorian Offender Support Agency and the Community Offenders Advice and Treatment Service (COATS).

41 In 2006-7, nearly 30% of offenders sentenced to a CBO had an assessment and treatment condition attached (VSAC 2007:9).

42 The 2002 Sentencing Review recommended a separate, flexible, intermediate order for less serious drug and alcohol cases which did not qualify for the drug court which would be less focused and less resource intensive (Freiberg 2002:171). Such an order would differ from the DTO in that it could be imposed by any court, not just the drug court, would be less restricted in the offences that it could apply to, would not have a sentence of imprisonment as the default sanction and would be supervised by Community Corrections rather than a drug court team (Freiberg 2002:173; see also VSAC 2008:145 and 158 which recommended the creation of an Intensive Correction Order (Drug and Alcohol).

condition was imposed in 10.6% of cases (VSAC 2014:17). A study of the order in the higher courts found that the likelihood of this condition being imposed increased if the offender had a history of substance abuse and drugs or alcohol influenced the offending (VSAC 2014b:31).

The possibilities for the use of the CCO in AOD-related cases are well illustrated in the first and only guideline judgment delivered in Victoria.[43] In *Boulton, Clements and Fitzgerald v The Queen*[44] both the defendants Boulton and Clements had committed a number of drug-related offences. The Court of Appeal noted the *Sentencing Act 1991*, s 48D expressly empowered a court to attach a condition to a CCO that required a defendant to undergo treatment and rehabilitation specified by the court, although it also held that the length of the CCO could not be disproportionate to the gravity of the offending.[45] The Court observed that Parliament had 'equipped sentencing courts with an unprecedented capacity to fashion a sentencing order which will address the underlying causes of the offending'.[46] Although judicial monitoring is possible under s 48K of the *Sentencing Act 1991*, the Court noted that it imposed a heavy burden on courts not equipped or funded to supervise offenders.[47]

Where previously the CBO allowed for a combination of a three-month term of imprisonment followed by a CBO of one year, in 2014 this was increased to two years' imprisonment plus a CCO (but was subsequently reduced again in 2017 to 12 months). These combined or "shandy" sentences proved problematic in that treatment in prison was often not available[48] and treatment program eligibility was limited under the CCO (Victorian Auditor-General 2017:26). In his report on community corrections, the Auditor-General observed that the increasing demand for rehabilitation and treatment placed a heavy burden on Community Correctional Services in an environment of constrained resources. He also noted the lengthy wait times for AOD programs (VAGO 2017:26). As the term of imprisonment and the CCO are separate orders (the combined order is not a single sentence), issues have arisen in relation to the coordination between those responsible for the prison component and those in Corrections Victoria responsible for community corrections component.

Combined and substituted sentences of imprisonment

Perhaps the most problematic challenge around sentencing has been finding an appropriate response to persons convicted of a serious offence but for whom some form of treatment is considered necessary and appropriate. The first attempt was the s 13 *ADDPA* bond, which became section 28 of the *Sentencing Act 1991*, which specifically described it as a suspended sentence of imprisonment. However, rather than requiring an offender to enter into a bond, the Act allowed the court to attach conditions to the order. Unlike the *ADDPA* bond, section 28 required an offender to submit to drug and alcohol testing and be supervised by the court (VSAC 2006:84). However, s 28 of the *Sentencing Act 1991* suffered from many of the same problems as s 13 *ADDPA*. It was subsequently abolished and replaced by the Combined Custody and Treatment Order (CCTO),[49] leaving only a generic form of suspended sentence which itself was abolished in 2013 as a result of a review of suspended sentenced by the Victorian Sentencing Advisory Council. In that review, the Council received a number of submissions[50] calling for the reintroduction

43 A guideline judgment is a judgment by an appellate court intended to give guidance to sentencing judges in relation to such matters as the criteria to be applied among various sentencing alternatives, the weight to be given to the various sentencing purposes, the criteria by which a sentencing court is to determine the gravity of an offence and guidelines as to the appropriate level or range of offences for a particular offence or class of offence, *Sentencing Act 1991,* s 6AC.

44 [2014] VSCA 342.

45 [2014] VSCA 342 at [75-76].

46 *Sentencing Act 1991,* s 48D(2).

47 [2014] VSCA 342 at [193].

48 See below.

49 See below.

50 Including VAADA, Victoria Legal Aid, the Federation of Community Legal Centres and the Victorian Aboriginal Legal Service.

of conditional suspended sentences for offenders with drug and alcohol issues (VSAC 2006:84). However, the Council took the view that suspended sentences were an 'inherently flawed order' which would fail to resolve some of the fundamental problems identified by the Council (VSAC 2006:88).[51] In 2013, the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* provided for the staged removal of suspended sentences, first from the higher courts and later from all courts.

The intensive correction order (ICO) was created in 1991 with the intention of providing a substitute for imprisonment by allowing a sentence of imprisonment of up to one year to be served by way of 'intensive correction in the community'.[52] It was designed for those who were considered high risk and likely to reoffend and was used regularly for driving offences involving alcohol (Freiberg 1995:80). Though intended as a diversionary option for offenders who received short terms of imprisonment, a later review concluded that it:

> … failed in this task because of the substitutional nature of the sanction, the failure to make the program conditions available, insufficient resources, high breach rates and inflexible breach conditions (Freiberg 2002:15).[53]

Its use was minimal, amounting to around 3 % of all orders.

In 1997, following a review of the *Sentencing Act 1991*, the *Sentencing and Other Acts (Amendment) Act 1997* repealed the provisions relating to conditional suspended sentences for alcoholic and drug-dependent persons and replaced them with the CCTO (Freiberg and Ross 1999:31). This order, aimed at offenders whose drunkenness or drug addiction contributed to the commission of the offence, allowed a court to impose an order of not more than 12 months, not less than six months of which were required to be served in custody and rest which could be serviced in the community subject to conditions relating to drug testing and treatment. Before making such an order, the court was required to receive a pre-sentence report, be satisfied that that the offender's drunkenness or drug addiction substantially contributed to the commission of the offence for which the sentence is being imposed, and could also receive a drug and alcohol assessment report prepared by an approved drug and alcohol assessment agency. While in prison, it was compulsory for the offender to undergo treatment for alcohol or drug addiction as directed and if they failed to participate the offender could be liable to serve the whole of the sentence in custody (Freiberg 2002:71, 74).

The CCTO was a poorly designed sanction which was doomed to fail from its inception. Submissions to the Sentencing Review of 2002 called it an 'abysmal failure' while the Victorian Aboriginal Legal Service said that it was one of the worst designed sentencing options that they had ever come across (Freiberg 2002:74). Among its major flaws were that it was anomalous in the sentencing hierarchy, it lacked flexibility, provided inadequate treatment services in prison (due to the short period being insufficient to provide treatment services in prison), lacked enforcement in prison and had inadequate transition arrangements (Freiberg 2002:74; VSAC 2006:86). Between 1999-2000 and 2003-04 fewer than half a percent of all sentenced defendants received a CCTO (VSAC 2006:86; VSAC 2008:154). The Sentencing Review recommended its repeal in 2002 as did the VSAC in 2008 (VSAC 2008:154), but it took until 2012 before it was removed from the statute book.

Drug (and alcohol) treatment order

As previously outlined, the idea to establish a drug court in Victoria followed the development of the drug court

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51 Some of these reasons related to the penological ambiguity of the order, the problematic reasoning required to reach the conclusion that a suspended sentence was warranted and the dangers of sentence escalation (VSAC 2006:88).

52 On the use of such orders around Australia see TSAC 2016:81-84.

53 Similar conclusions were reached by the Sentencing Advisory Council, Tasmania, which recommended against the creation of an ICO in that state because of the legislative restrictions in relation to the offences that are excluded from the order, the rigorous nature of the suitability criteria that exclude offenders with cognitive impairment, mental illness, substance dependency or homelessness or unstable housing, the availability of intensive correction orders in rural and remote areas, the mandatory community service work requirement, the substitutional nature of the sanction and the fact that there have been insufficient resources made available to support the sanction (TSAC 2016:83).

model in a number of state jurisdictions in the US in the late 1980s as well as the introduction of the New South Wales Drug Court in 1999 (Freiberg 2000; Makkai 2002). The Sentencing Review's Discussion Papers argued that then emerging paradigm of therapeutic jurisprudence required a completely new sentencing order (Freiberg 2002:70; Freiberg 2001a; Freiberg 2003; Freiberg 2007).

In 2001, the Sentencing Review released a Discussion Paper on drug courts and related sentencing options recommending the establishment of a drug court (Freiberg 2001). [54] After consultations with a number of key stakeholders, the *Sentencing (Amendment) Bill 2001* was introduced and passed as the *Sentencing (Amendment) Act 2002* (Freiberg 2002b:282-3). The first Victorian Drug Court commenced operation in Dandenong in May 2002. [55]

The Act also introduced a new order, the Drug Treatment Order (DTO) [56] (which could only be used in a new division of the Magistrates' Court). The order has two parts: a treatment-and-supervision part and a custodial part. The former consists of conditions that are designed to address the offender's drug or alcohol dependency, the latter being the term of imprisonment that the court would have imposed had the offender not been placed on the DTO. In the Magistrates' Court, the maximum length of the order is two years and in the County Court, four years.[57]

In one sense, the original Drug Treatment Order (DTO) was a form of suspended sentence, although it did not go by that name. The order provides for what is called an 'unactivated' term of imprisonment. The order can only be made if a term of imprisonment is warranted in the particular case, ensuring that the court deals only with serious cases, with less serious cases dealt with via the non-custodial sanctions discussed earlier.

The stated purposes of the order are:

(a) to facilitate the rehabilitation of the offender by providing a judicially-supervised, therapeutically-oriented, integrated drug or alcohol treatment and supervision regime;

(b) to take account of an offender's drug or alcohol dependency;

(c) to reduce the level of criminality associated with drug or alcohol dependency;

(d) to reduce the offender's health risks associated with drug or alcohol dependency. [58]

These illustrate the holistic approach necessary to integrate the legal, health and social domains. Most Australian drug courts have been evaluated in one form or another, some more rigorously than others, with evidence indicating that drug courts are more effective than conventional sanctions in reducing recidivism (Kornhauser 2018:90; Victoria 2018:204).

The expansion of the drug court first to Melbourne Magistrates' Court and then to regional courts in Shepparton and Ballarat indicates the growing

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54 However, 'law and order' remained on the agenda to appease those who might consider a drug court a 'soft option'. One of the Review's terms of reference was whether 'it would be desirable to change the present structure of drug trafficking offences and penalties in order to better distinguish between trafficking for profit and trafficking to feed an addiction'. Major changes were made to the offences and penalties in the *Drug Poisons and Controlled Substances Act 1981 by the Drug Poisons and Controlled Substances (Amendment) Act 2001.*

55 The establishment of the drug court was not without opposition. The Drug Policy Expert Committee argued that establishing a drug court was not the correct response to the drug-crime problems because, in practice, every court was a drug court, due to the volume of cases coming before them and because such a court might siphon funds from generalist programs, because such a court might compartmentalise a court's response and, by dealing with the most difficult cases reduce the flexibility of responses across the system and finally, because focusing on the serious end of the scale, fewer resources would be available during the early stages of offending (Freiberg 2002(b):282-3; Victoria 2014:457). Drug courts now operate in New South Wales, Queensland and in the forms of special divisions or list in Tasmania, South Australia, Western Australia and the ACT.

56 Now ss 18X-18ZS of the Act, The DTO was re-named the Drug and Alcohol Treatment Order (DATO) in 2020 following the creation a drug and alcohol court in the County Court.

57 *Sentencing Act 1991,* s 18Z(1)(d).

58 *Sentencing Act 1991,* s 18X(1).

acceptance of this form of intervention as does the creation of a Drug and Alcohol Court Division in the County Court for more serious AOD-related offending. The renaming of the DTO to a Drug and Alcohol Order (DATO) was overdue recognition of the fact that alcohol is as large a contributor to social harm as other drugs.[59]

Promising as they are, drug courts are limited in their effect on the drug/crime problem due to the limited number of offenders they can deal with. In 2020-21, only 119 DATOs were imposed in the Magistrates' Court and in total there were 269 active participants (Magistrates' Court, Annual Report 2020-21). However, the Parliamentary inquiry into the criminal justice system recommended that the government continue to support the ongoing expansion of the drug courts in Victoria including through funding the allocation of additional residential detox and rehabilitation beds.

The success of the drug court saw the establishment of a Family Drug Treatment Court in 2014 in the Broadmeadows and Shepparton Children's Court locations.[60] Though not a sentencing court per se, its aim is 'to protect children and reunite families by providing substance-abusing parents with support, treatment, and comprehensive access to services for the whole family' (Levine, 2012, para 5). As described by King et al (2014:164):[61]

> The main features of this court are that it adopts a problem-solving rather than an adversarial approach to decision-making; it uses a court-based, multi-disciplinary team approach to case management; it provides for judicial supervision and continuity through a docket system; it aims to be more expeditious in making decisions regarding family unification or permanent placement outside the home; it closely monitors the parents' rehabilitation and recovery and provides for frequent court reviews to foster compliance and connection. Unlike the criminal drug court, where the incentive is to avoid incarceration, the key incentive in this program is family reunification (Levine, 2012).[62]

59 See the comments of the Victorian Parliament's Law Reform, Road and Community Safety Committee to the effect that 'alcohol misuse creates more health, social and economic harms in the broader community than any illicit drug and is second only to tobacco as a leading cause of drug-related death and morbidity among Australians (Victoria 2018:7).

60 See https://www.childrenscourt.vic.gov.au/family-division/family-drug-treatment-court. In 2021-22 a total of 82 families were referred to the court and 46 were inducted into the program, Children's Court of Victoria, Annual Report 2021-22:11

61 See also VAADA which strongly supported the establishment of a pilot Family Drug Court (VAADA 2013b:5; VAADA 2014).

62 One form of drug court that has not been adopted in Victoria is a youth drug court of the kind that operated in New South Wales between 2000 and 2012 (Turner 2011). A Children's Court Drug Court has operated in Perth for over two decades (Ellis 2021). As the Victorian Parliament's Amphetamines Inquiry noted, the Children's Court relies on the Children's Court Clinic to provide assessments of young offenders with AOD problems and provide limited treatment, it does not operate as a drug court (Victoria 2014:473). A Churchill Scholarship report by Magistrate Jennifer Bowles recommended the establishment of a Youth Drug Court in the Children's Court, as did a later Parliamentary inquiry into the criminal justice system, recommendations that have still not been acted upon (Victoria 2022:527).

Imprisonment, parole and post-sentence measures

Despite the many early intervention programs and intermediate sentencing options available to the courts, many offenders with AOD problems are held in prison awaiting sentence and sentenced to imprisonment, in spite of the apparent recognition of the inadequacy of such responses. As at 2 April 2023, data from Corrections Victoria indicated some 41% of prisoners were held on remand (Corrections Victoria 2022).[63] However, as noted by the Victorian Ombudsman, unsentenced prisoners are largely unable to access rehabilitation programs. (2015:36). A 2018 report by AIHW on the health of Australian prisoners reported that 65% of prisoners reported illicit drug use during the previous 12 months (females 74% and males 64%) and 16.5% reported using illicit drugs in prison.[64] Methamphetamine was the most common illicit drug used. It has been estimated that between 18% and 56% of people in prison have co-occurring mental illness and substance abuse disorders (VAADA and Justice Health 2019:24).

Prisoners who enter prison are screened for a history of alcohol or drug abuse and those who are assessed as having a low risk of offending but a high need for treatment will be eligible for a health stream that aims to reduce the use of alcohol or drugs and to reduce the harms associated with them. Those assessed as having a moderate to high risk of offending will be eligible for a 'criminogenic' stream, whose programs run for between 40 and 130 hours and target the link between drug use and offending (Adult Parole Board 2020:12). Treatment or rehabilitation in prisons is problematic[65] and its effectiveness has been questioned (VAGO 2013; Victoria 2018:338). Often programs are not available or are too limited in time and scope or are simply not effective in producing behaviour change. The majority of prisoners serving short (under 12 months) sentences; too short to be able to gain the benefit of therapeutic programs (TSAC 2017:36). Low-level programs, such as drug and alcohol education and awareness programs are not sufficient for those with serious and chronic problems of abuse or addiction.

Prison programs for AOD prisoners were originally provided at the Margoneet Correctional Centre which included a residential drug program. However, due to overcrowding, high demand and long waiting lists, the drug program at Margoneet was reported as operating sub optimally (Victorian Ombudsman 2015:59).[66] Sentence management often requires program participation to lower the security rating of a prisoner and this can also impact a prisoner's progression through different units. Where parole is contingent on a prisoner undertaking a drug and alcohol program but are not able to access one, the Adult Parole Board will consider whether granting parole in such circumstances will pose a significant risk to the community, noting some programs can be provided in the community (Adult Parole Board 2020:14).

Prisoners who are released on parole, of whom there have been far fewer since Victorian Government restricted the granting of parole following the recommendation of a review by former High Court Judge Ian Callinan AC in 2013 (Callinan 2013), are subject to stringent conditions including drug testing. Despite this, they do not receive direct support from the Parole Board or Corrections Victoria after release. Both the Burnet Institute and VAADA noted the need to:

> provide more support to people upon their release from prison, in particular to address substance use issues that may not have been addressed during

63 This figure was 43% for female prisoners.

64 https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/summary; see also Victorian Ombudsman 2015:36; Corrections Victoria, Corrections Alcohol and Drug Strategy 2015: Overview: 4; Victoria 2018:331; Sentencing Advisory Council, Tasmania 2017:9). Corrections Victoria reported that in 2020-2021, 3.54% of random general drug samples collected in January 2021 were positive: Victorian Prison Report, January 2021:5.

65 For a description of programs and services in prison as at 2015 see Victorian Ombudsman 2015:56ff; Victoria 2018:333. These include health stream programs, criminogenic programs, mostly group-based which vary in intensity and duration.

66 Victoria has not introduced a compulsory prison treatment program similar to that operating in New South Wales under a Compulsory Drug Treatment Order, see Birgden 2005; NSW Law Reform Commission 2013: 329; Victoria 2018:343; 350). On the general issue of mandatory treatment for AOD offenders see Sentencing Advisory Council, Tasmania 2017.

their sentence or may still require continued support to minimise possible relapse once a person is back in the community (cited in Victoria 2018:212).[67]

Offenders who are not released on parole or who refuse to apply for parole are released without supervision or access to treatment programs.

An Ombudsman's report into the rehabilitation and reintegration of prisoners in 2015 made a number of critical observations regarding services provided to prisoners and the problems of AOD offenders on CCOs (Vic Ombudsman 2015:31). Similar criticisms were made by the Auditor-General in his 2017 report regarding the lack of support services and programs (VAGO 2017:26) and in the Victorian Parliament's Law Reform, Road and Community Safety Committee's Inquiry into Drug Law Reform (2018).

Offenders who have committed serious sexual or violent offences and are considered high risk of re-offending, and whose sentence has ended, may held in detention or be subject to supervision under the *Dangerous Offenders Act 2018*. Under this civil scheme, whose purpose is not punishment but the prevention of future serious offending, a person may be subject of either a supervision or detention order monitored by the Post Sentence Authority.[68] Supervision orders often contain conditions relating to drug or alcohol testing and treatment and rehabilitation programs, some of which may be residential. Offenders have access to mental health and AOD services (Post Sentence Authority 2022:37).

67 Drug use was at least one of the factors in 58 percent of all cancellations in 2021-22 (Adult Parole Board, Annual Report 2021-22: 30).

68 As of June 2022, 139 serious offenders were under order (Post Sentence Authority 2022:10).

Lessons to be learned

This account of the history of sentencing law reform in relation to AOD offenders and its successes and failures provides a number of insights into what a successful sentencing system might look like. In my review of the development of drug courts in Australia, I observed that (Freiberg 2000:2019):

Despite attempts to create an appropriate legal infrastructure, it can reasonably be argued that the 'traditional' court system, having been confronted by the growing drug problem for the best part of three decades, failed because it refused to recognise drug and alcohol addiction as something other than a form of wilful self-indulgence. It failed because when it has identified a problem, it has acted slowly, often too late, and has not provided adequate resources for treatment. It has been unable to recognise that with this group of offenders, a continuum of supervision or intervention is required, from pre-trial, to court, to prison and then parole, or community-based orders. When treatment or other forms of intervention have been made available, it has been unable to maintain adequate supervision of offenders during the period of treatment, nor, indeed, to provide, or arrange for the provision of, other needed services such as such as housing, primary health care, financial support employment opportunities. It has also failed because it could not accept constant relapse and recidivism as a normal part of the support process.

In the more than two decades since those observations were made, many of the same issues continue to confront the criminal justice system.

Resources

The six-year delay between the passage of the ADDPA 1968 and its commencement in 1974 due to the failure to establish the necessary treatment facilities was a harbinger of the resourcing problems that have beset the AOD and criminal justice systems in Victoria. Report after report that have noted the ineffectiveness of available interventions consistently identify a lack of resources as the major reason for their complete or partial lack of success. The evidence is that offender treatment, including appropriate treatment for drug dependence, is an effective way to reduce recidivism (Gelb et al 2016:159, 161). However, without proper resources, sanctions are bound to fail. Where they are not provided, breach of conditions risks the activation of the original sanction or the imposition of a new sentence if the breach involved the commission of a further offence, possibly resulting in sentence escalation (VSAC 2006:88).

In its submission to the Premier's Drug Advisory Committee, the Department of Justice identified a number of problems in the sentencing of drug offenders including inadequate specialist drug services for offenders with complex needs, long waiting times for access to treatment, a reluctance by agencies to accept forensic clients and a lack of accommodation facilities (Freiberg 2002:67).

Poor resourcing of programs in prisons due to high demand and increasing prison numbers were noted by the VSAC in 2008 and the Adult Parole Board in 2006-7 (VSAC 2008:154) and by the Victorian Ombudsman in 2015 (Victorian Ombudsman 2015:58). This was echoed by a VAADA submission to the Parliamentary inquiry into the criminal justice system which criticised the poor healthcare practices in prisons which inhibited offenders' prospects for rehabilitation (Victoria 2022:590). The Committee recommended (Victoria 2022:654. Recommendation 88):

> That the Victorian Government substantially increase funding to ensure that resourcing for services which treat alcohol and other drug use issues in Victorian prisons and the community is commensurate with demand for these services. Funding should also be provided to enhance connections between prison based and community based services to facilitate seamless throughcare for incarcerated people re entering the community.

It was neither the first nor last to make such a recommendation.

A continuum of interventions

Understanding the criminal justice system as a continuum of interventions requires 'that the work of police, courts, corrections, government agencies and private or community organisations is integrated, effective and efficient' (Freiberg et al 2016:65). This ideal is rarely achieved due to separate legislative and administrative regimes that fail to communicate with

each other. The Victorian Ombudsman has commented that (Victorian Ombudsman 2015:9):

> Although there is some good practice across the justice system in diversion, rehabilitation and reintegration, these are often uncoordinated, as well as demographically, geographically and financially constrained. A whole-of government approach is needed to shift the focus: to reduce offending and recidivism and to promote the rehabilitation of offenders. This requires a common intent and set of shared objectives across justice agencies, health, education and housing, and stronger links to community service organisations.

The concept of a continuum of interventions carries with it a number of implications (Freiberg et al 2016: paras 2.31; 2.6.1):

- the degree of intervention that the state may make should be tempered by the seriousness of the offence that the offender has committed;
- The severity of an intervention must be proportionate to the seriousness of the offending, including the degree of harm caused and the culpability of the offender.
- Considerations of proportionality should apply to all elements of an intervention: an intervention or sanction should not be longer or more onerous because of the desire to treat, rehabilitate or assist a person than if that were not a major purpose (*Boulton* [2014] VSCA 342; Freiberg et al 2016:2.6.1);
- Where an intervention program is not part of a sentence, and therefore the principles of proportionality do not strictly apply, there should be a relationship between the seriousness of the offending conduct and the length and severity of the program;
- A sentence, or sanction, or intervention should not be more severe than that which is necessary to achieve the purpose or purposes for which that sentence, sanction or intervention is imposed: the least restrictive alternative should be used (Freiberg et al 2016:2.6.2).

Factors of proportionality or appropriateness of sanction contributed to the failure of s 13 of the *ADDPA* partly due to the fact that defence counsel were reluctant to concede that an offender warranted a term of imprisonment (even though having a term of imprisonment imposed was the only way that treatment could be obtained) (Skene 1987:250; Freiberg 2000:217). The CCTO also required that a sentence of imprisonment be considered appropriate in all the circumstances when a less severe sentence might have served the offender better.

Continuity and integration of care and support

The Mental Health Royal Commission defined 'continuity of care' as:

> health services in the community [are] integrated and closely aligned with the health services provided in prisons such that there is no gap or interruption in the services and support a person receives as they transition from prison to the community (Royal Commission 2021:381).

Further, VAADA has argued that:

> continuity of care between the criminal justice, mental health and [alcohol and drug] systems is essential before, during and after release from prison to redress inequality and build on any health gains made during incarceration. … (Royal Commission 2021:381; VAADA and Justice Health Unit 2019).

However, continuity of care not only applies to the transition from prison to the community. There are many transition points in the criminal justice continuum, all of which requires a continuity of care in some form, including:

- bail to sentence, be it an adjourned undertaking to a CCO or prison;

- remand in custody to custody under sentence;[69]
- deferred sentence to sentence, be it an adjourned undertaking, or a CCO or prison;
- transfer from prison to hospital and back;
- imprisonment to a CCO;
- imprisonment to parole;
- imprisonment to a supervision or detention order;
- imprisonment to return to the community.[70]

The Parliamentary inquiry into the criminal justice system recommended not only increased funding for drug and alcohol treatment services in prison and the community but dedicated funding 'to enhance connections between prison-based and community-based services to facilitate seamless throughcare for incarcerated people re-entering the community' (Victoria 2022:lxii).[71] The importance of transitional support was a repeated theme of the report (Findings 66 and 67 and Recommendation 91). VAGO identified the NJC's integrated model as a good example of supporting compliance with CCOs (VAGO 2017:24; Royal Commission 2021:353).

Clear principles to inform interventions

Interventions along the criminal justice continuum should be informed by principles that determine the appropriateness of the interventions. The criminal justice system should (Freiberg et al 2016:70):

- minimise net-widening and sentence escalation: people should not be brought into the criminal justice system, or under state control for longer periods than they otherwise would have been, or that the sanctions imposed upon them or the conditions of the sanctions are more onerous than they would have been had treatment or rehabilitation not been a purpose of the intervention (Freiberg et al 2016:70; VSAC 2008:279);
- respect an offender's privacy (however, where a comprehensive criminal justice response requires cooperation between criminal justice, health and other agencies, some sharing of information between agencies may be necessary);
- exercise minimal coercion to ensure that no offender is required to acknowledge guilt or plead guilty to an offence where they wish to contest any charges merely in order to access treatment services;
- require informed consent at all stages of the criminal justice process
- respect a person's autonomy to the extent that it is consistent with other justice values and the safety of the community (King 2013:925).

Clarity of purpose

In 2002, the Sentencing Review identified the lack of clarity in the stated aims of the CBO (Freiberg 2002:163; VSAC 2008:190). In contrast, the *Sentencing Act 1991,* s 18X(1) clearly sets out the aims of the DATO including a specific direction to the court to 'regard the rehabilitation of the offender and the protection of the community from the offender (achieved through the offender's rehabilitation) as having greater importance than the other purposes set out in s 5(1)'.[72]

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69 Many offenders are refused bail and if sentenced to imprisonment afterwards, the fact that the time served in custody will be counted towards their sentence may mean that there is insufficient time in prison under sentence for meaningful interventions to take place (VSAC 2006:86).

70 The Victorian Ombudsman noted that prisoners are at particular risk of overdose after release from prison and that it was appropriate for an assessment to be made of a prisoner's AOD issues prior to their release from prison to determine their treatment needs on release (Victorian Ombudsman 2015:112). She reported that hundreds of former prisoners were on waiting lists for alcohol and drug support and mental health services in the community (Victorian Ombudsman 2015:7). The Managing Director of Caraniche, a drug and alcohol service provider described AOD post-release support as 'siloed and fragmented' (cited in Victorian Ombudsman 2015: para 723).

71 Similar observations were made by Victoria 2018:343.

72 Namely just punishment, deterrence and denunciation, see *Sentencing Act 1991,* s 18X(2).

The stated aims of the adjournment powers in the *Sentencing Act 1991,* s 73 make clear the purposes of that Division, including the aim of rehabilitation in the community, as do the provisions of *Sentencing Act 1991,* s 83A.

An ongoing debate in relation to the intermediate orders is whether conditions of the CCO relating to assessment and treatment for drug and alcohol related offending should form a separate and discrete order from the more general CCO (Freiberg 2002:172).

Timely and comprehensive information to the courts

Before making an order that requires a court to consider whether the accused is suitable for the order, the court needs sufficient information about the person, their social and offending history, the possible conditions that may be attached to the order and any treatment or other programs that may be appropriate. In its 1996 report the Premier's Drug Advisory Council noted criticisms by judicial officers that pre-sentence advice about the availability and suitability of treatment services, as well as a specialist assessment about the nature and extent of an individual's drug problem was inadequate and recommended the establishment of a specialist court advice service (1996:97). This has never been done.

Section 13(8) of the *ADDPA* required a court to consider a report by a medical officer of an assessment centre as to the mental and physical condition of the convicted person and their suitability for treatment. The introduction of the CCTO in 1997 introduced the requirement for drug and alcohol reports prepared by an approved drug and alcohol assessment agency.[73] These provisions are now found in the *Sentencing Act 1991*, ss 8E-8I where the court is considering making a CCO. Drug and alcohol treatment order assessment reports are separately provided for in *Sentencing Act 1991,* s 18ZQ.

Realistic and flexible conditions

Numerous studies have found that a history of drug use and current drug use are strong predictors of failure on many conditional orders such as probation, parole, ICOs, CBOs (Gelb et al 2016). Recognition of AOD dependence as a chronic relapsing condition requires that order conditions should (i) not be too numerous or onerous to comply with and (ii) should be flexible enough to take into account the realities of rehabilitation which include the likelihood of relapse on more than one occasion and the difficulties of assessment and delays in accessing residential rehabilitation programs (VSAC 2006:87; 156; TSAC 2017:10). Conditions need to allow clinicians and others to tailor the programs to the offender (VSAC 2006:87).[74] An assessment of section 13 of the *ADDPA* found that many clients frequently used alcohol or drugs during the period of the order without being formally breached in recognition of the fact that complete abstention is often unrealistic (Skene 1987:262). While sanctions must have effective monitoring and enforcement mechanisms (Freiberg 2000:217),[75] entences such as the DATO should be premised on the fact that offences will occur, often frequently, as part of the recovery process.

Postcode justice

The *ADDPA* was underutilised in regional areas because clients could not conveniently attend the treatment centres based in the city (Skene 1987:265). The Drug Court was originally available only in Dandenong, diversion and cautioning programs were originally only available in certain police districts as was CISP, which was originally only available in three Magistrates' courts. As the Victorian Parliament's inquiry into amphetamine use noted, these limitations adversely affected people in rural and regional centres in Victoria (Victoria 2014:485; Victoria 2018:200; 208).

To some extent, these limitations have been addressed, with the Drug Court now operating in two more regional cities, CISP in around 20 courts and caution and diversion programs in all police districts. However, limited access to supports, treatment and other programs persist in regional Victoria – both in the context of forensic orders and AOD services generally.

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73 *Sentencing and Other Acts (Amendment) Act 1997,* inserting s 99A into the *Sentencing Act 1991.*

74 Treatment options must be 'flexible, effective and accessible' (Victoria 2018:283).

75 Citing *Young* (1996) 85 A Crim R 104. 109 per Hayne J. This was one of the reasons for the lack of success of s 13 of the *ADDPA*.

Responsiveness to different groups of offenders

Over the years, the profile of drug offenders has changed as have the drugs being used. Increases in the use of amphetamines (ice), for example, has changed the nature of offending and treatment modalities (Victorian Ombudsman 2015:58). Determining the most appropriate and effective treatment modality requires not only the application of the currently dominant risk, need and responsivity model but also interventions founded on therapeutic jurisprudence and strengths-based models such as the Good Lives Model (Thacker and Ward 2010).

As the Victorian Parliamentary Inquiry into Drug Law Reform observed, 'treatment should be adapted to meet the requirements of discrete user groups' (Victoria 2018:315) of which they identified five: (i) people with co-morbid mental health conditions, (ii) Aboriginal and Torres Strait Islander people, (iii) people from culturally and linguistically diverse communities, (iv) young people and (v) prisoners. This applies with similar force to the dispositional options available to the courts.

In relation to Indigenous offenders, the harmful effects of AOD on Indigenous communities have been the subject of many legal interventions and numerous inquiries over the past two centuries (Australian Law Reform Commission 2018: Chapter 2).[76] The over-representation of Indigenous peoples in the criminal justice system has been a matter of enduring concern and shame, with few indications that the problem is decreasing. The Commission noted the importance of prison programs in addressing causes of offending such as poor literacy, drug and alcohol abuse and poor mental health as well the importance of making responses culturally appropriate and available for short term prisoners and those on remand. It also recommended programs for female Indigenous offenders be developed, designed and delivered by Indigenous organisations and services (ALRC 2017:30). It noted the lack of services in regional and remote areas and the lack of community sentencing options for those in those areas (ALRC 2017:45). In relation to community-based orders generally, it noted Indigenous offenders were more likely than others to have complex needs and experience multiple forms of disadvantage, meaning they are less likely to be eligible for community-based sentences and are therefore more likely to receive a sentence of imprisonment, or at least be at risk of breaching such an order (ALRC 2017:240).

The Commission also noted a submission by the Victorian Aboriginal Legal Service recommending consistent and flexible bail diversion programs for Indigenous peoples including a recommendation that the Magistrates' court be linked with Indigenous organisations providing bail support programs and other supports (ALRC 2017:180). Koori court officers and Koori engagement officers are available at Magistrates' Court venues where a Koori court operates to provide non-legal advice and to support culturally appropriate outcomes.[77]

In Victoria, the Koori Court has a legislated purpose of 'ensuring greater participation of the Aboriginal community in the sentencing process.'[78] The Koori Court operates in 15 Magistrates' Court locations.[79] Victoria has also developed a number of culturally appropriate community-based sentencing options such as the Wulgunggo Ngalu Learning Place and the Aboriginal Justice Agreement.

Many women offenders commit their offences under the influence of drugs or alcohol, many have a history of sexual and physical abuse and violence and have sought help for mental or emotional problems at various stages in the criminal justice system (Victoria 2010; Victorian Ombudsman 2015:95). The inquiry into the criminal justice system found that women, particularly Aboriginal and culturally and linguistically diverse women, are over-represented in the criminal justice system and that their offending is:

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76 The ALRC report uses the word 'alcohol' 411 times. On the need for specific risk assessment for Indigenous offenders see Gelb et al 2016:163.

77 https://www.mcv.vic.gov.au/find-support/aboriginal-and-torres-strait-islander

78 *Magistrates' Court (Koori Court) Act 2002,* s 1

79 https://www.mcv.vic.gov.au/about/koori-court

> often underpinned by unresolved trauma connected to sexual abuse, emotional abuse, and family and other forms of violence. Their offending typically non-violent and of a less serious nature, such as low-level drug offending (Victoria 2022:4).

The Inquiry noted the lack of appropriate treatment options for AOD issues and sexual assault trauma (Victoria 2022:146).

Intersectoral issues

Drug and alcohol problems rarely exist in isolation and many offenders also suffer comorbid or dual diagnosis conditions, including mental health disorders (VAADA and Justice Health Unit 2019). Nor does the criminal justice system exist in isolation. The overlap between AOD interventions and service providers and those relating to people with mental disorders has long been recognised. For many years, alcoholism was considered to be a form of mental illness called 'dipsomania' and later, was regarded as an illness of its own type (Carney 1972b:106). Section 27 of the *ADDPA* required that a person held in detention suffering from a mental condition suitable for admission to a psychiatric service to be transferred to a psychiatric service (Carney 1972:173) and later the various mental health Acts provided for compulsory treatment orders which could be used where mental health issues were caused by substance abuse (Victoria 2018:347).[80]

In 1996, the Premiers' Drug Advisory Committee noted that (1996:98):

> People who have problems with illicit substances commonly face multiple problems. Further, many people with substance abuse problems also live in family groups caring for young children. There is a known interaction between substance abuse, child abuse and neglect, the criminal justice system, mental health, and the disability fields. This represents an opportunity to address the delivery of services across health and community services and the criminal justice system in a manner that genuinely endeavours to address the problems of people with multiple needs … Such an approach requires services to forget their traditional boundaries and work together for the benefit of clients and their families requiring multiple services.

The Mental Health Royal Commission paid particular attention to the co-occurring experiences of mental illness and substance abuse, noting the need for an integrated approach to support consumers. However, it conceded there were many problems in the provision of appropriate services (Royal Commission 2021: Chapter 22). In relation to persons with mental health problems and the criminal justice system, the Commission recommended the expansion of the Assessment and Referral Court and better co-ordination between the criminal justice system and community services (Royal Commission 2021:350).

80 See eg *Mental Health Act 2014,* s 52; see also *Mental Health and Wellbeing Act 2022,* Part 4.5.

Conclusion: The more things change, the more they stay the same

Since the establishment of the colony of Victoria, the criminal law has formed the basis of the state's response to AOD-related harm with the number and scope of criminal offences expanding to include new drugs, higher maximum penalties and new and draconian sanctions such confiscation of the proceeds of crime (Freiberg 1992; Rowe 2001). Public drunkenness remained a crime until it was abolished in 2021,[81] though at the time of writing the law has yet to come into effect due to delays in establishing pilot sobering up centres. New sanctions have been developed, tried, mutated and abandoned, some with more effect than others, but no matter what has been tried, regardless 'of how or why people use illicit substances, a disconnect exists between the legal framework and the way people behave in the community' (Victoria 2018:6).[82] The financial costs of the use and misuse of licit and illicit drugs in Australia are great: tobacco ($136.9 billion), opioids ($15.76 billion), methamphetamine ($5 billion) and alcohol ($14.35 billion) (AIHW 2022). In relation to illicit drugs, the criminal law has been an ineffective weapon in the seemingly endless and futile 'war on drugs'.

Documenting the many changes in Victorian AOD policies, laws and practices reveals the remarkable number of changes that have been made over the past 173 years, but particularly over the past 55. Not all changes have improved the law or the delivery of services to AOD clients involved in the criminal justice system. 'Reform' implies change aimed at improving the legal system, however, some of the changes made in the 1990s, such as the CCTO, were retrograde steps which did little to improve either the well-being of defendants or the efficient or effective operation of the criminal justice system. As is clearly evident by the number of inquiries, reviews, strategic plans, campaigns and policies conducted over the years, there is no shortage of ideas for reform, but reform is as much a political exercise as it is a scientific or jurisprudential one. While evidence-based policy is promoted as the ideal way of developing new laws or programs, the reality is that decisions are often founded on policy-based evidence, emotion or political expediency (Hughes 2007; Freiberg and Carson 2020).

Having been involved in many of sentencing reforms discussed above since the early 1990s, my reflections in this paper are not a counsel of despair, nor do they lead to the conclusion that 'nothing works' in rehabilitation (Martinson 1974). Rather, they suggest that in the absence of fundamental reform to the regulation of the use of drugs, both licit and illicit, the search must continue for the most effective, humane and principled interventions and sentencing dispositions within the present legal framework.[83] They suggest that ongoing evaluation of existing sentencing structures and treatment modalities is necessary to ensure that resources are not wasted and that populism, political rhetoric and expediency do not trump the evidence-based, pragmatic incremental change that is necessary to address the needs of AOD offenders and protect the community. Until the AOD/crime paradigm ultimately changes, as it must, sentencing reform will remain a chronically relapsing process.

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81 *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Act 2021* (Vic).

82 It has been estimated that some 9 million or 43% of the Australian population aged14 and over had used illicit drugs at some point in their lives and some 3.4 million or 16.4% had used an illicit drug in the previous 12 months (National Drug Strategy Household Survey 2019 reported in AIHW 2022). The most common drugs were cannabis (11.6%), cocaine 4.2%, ecstasy (3.0%), hallucinogens (1.6%), methamphetamines (1.3%).

83 This is not the forum for a detailed discussion of fundamental reforms such as the regulation of drugs in Portugal, or the changes in the cannabis laws in some states in the United States. VAADA, for example, has recommended that Victoria should reform the law relating to the supply of cannabis for adults (VAADA 2020:9; see also Victoria 2018:193). In relation to drug decriminalisation in Portugal see Drug Policy Alliance 2019 although challenges still remain on the path to reform (Rego et al 2021).

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VAADA acknowledges the Wurundjeri Woiwurrung People as the traditional owners of the land on which it operates and pays its respect to elders past, present and emerging.