4 July 2011

Sentencing Advisory Council
Level 4, 436 Lonsdale St
Melbourne VIC 3000

By email: contact@sentencingcouncil.vic.gov.au

Dear Advisory Council,

The Young People's Legal Rights Centre's (Youthlaw) Submission on the introduction of statutory minimum sentences for gross violence

Youthlaw welcomes the opportunity to provide a submission.

About Youthlaw

Youthlaw is a specialist community legal centre that provides legal advice, information and casework to young people under the age of 25 across Victoria.

We also work to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

Should you have any questions please don't hesitate to contact lawyer Katrina Wong, on 03 9611 2412 or Katrina@youthlaw.asn.au.

Yours faithfully

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INTRODUCTION

The Young People's Legal Rights Centre (**Youthlaw**) welcomes the opportunity to provide a submission to the proposed introduction of a statutory minimum penalty for the offences of intentionally/recklessly causing serious injury (gross violence).

Youthlaw notes the limited terms of reference provided to the Sentencing Advisory Council for this project. Youthlaw believes that it is a significant oversight that the merit of the Victorian Government's proposal for statutory minimum sentences has not been included in the terms of reference. The lack of consultation and feedback afforded to the community on what will be a significant departure in sentencing principles in relation to young people and young adults is unacceptable.

Youthlaw is totally opposed to any proposal to introduce a statutory minimum sentence. We are particularly concerned about the impact of a statutory minimum sentence on children aged 16 and 17 years. We are concerned that these proposed changes will undermine the capacity of the Children's Court, being a specialist court equipped with necessary expertise to deal with young people, to appropriately sentence a young person consistent with the principles of rehabilitation. Youthlaw also has grave concerns about the exclusion of 18 – 20 year olds from participating in the 'dual track' system under the proposed changes. Such a statutory minimum regime will limit judicial discretion and provide a net-widening effect which will pull more young people unnecessarily into the custodial system.

Rather than introducing a punitive approach to sentencing that will result in an increased prison population, Youthlaw submits that resourcing programs in the community that address the underlying causes of offending by promoting rehabilitation and reintegration is key to reducing re-offending. This is particularly the case given the well known indicators of disadvantage that are characteristic of people entering the criminal justice system, such as mental illness, substance abuse, homelessness and poverty. This focus on rehabilitation within the youth justice system has contributed to Victoria's consistent low rates of incarceration in comparison with the rest of Australia.

RECOMMENDATIONS

Youthlaw strongly opposes the introduction of any statutory minimum penalty. Notwithstanding this, Youthlaw makes the following recommendations:

Opposition to a statutory minimum penalty

1. **That no statutory minimum penalty apply to 16 and 17 year olds for the offences of intentionally/recklessly cause serious injury involving 'gross violence'.**

2. **That should a statutory minimum penalty apply to adults, no statutory minimum penalty apply for 18 – 20 year olds to allow the opportunity to participate in the 'dual track' system.**

Where a statutory minimum penalty applies

3. **A separate offence of intentionally/recklessly cause serious injury (gross violence) be created to reflect the more serious nature of the offence and the more punitive nature of the penalty.**

4. **That no statutory minimum penalty applies to the offence of *recklessly* cause serious injury (gross violence).**

5. **Should a statutory minimum penalty apply to the offence of *recklessly* cause serious injury (gross violence), that there be a distinction in penalty to distinguish between those offences that are committed *intentionally*.**

6. **That 'gross violence' be narrowly defined to include elements that reflect a more serious/aggravating offence.**

7. **That the offence involving 'gross violence' must result in more than just a 'serious injury', given the broad range of injuries that may be included under current legislation and case law. This should be an injury that is permanent or life threatening.**

8. **That the proposed new offences only apply in relation to principal offenders, and not those who are merely present or aiding and abetting.**

9. **That exceptional circumstances should be *broadly* defined and left to judicial discretion. That 'youth' be considered an exceptional circumstance.**

OPPOSITION TO A STATUTORY MINIMUM SENTENCE

Youthlaw is opposed to the introduction of a statutory minimum sentence for intentionally causing serious injury (**ICSI**) and recklessly causing serious injury (**RCSI**) offences.

Youth specific approach to youth justice

It is a well-recognised concept internationally and in Australia that young people, because of their age and lack of emotional and developmental maturity, are entitled to special protections in dealing with the criminal justice system. The notion of developing maturity is as much a social concept as it is a legal concept. It has been recognised by the legal system through the development of specialised institutions (such as the Children's Court) and processes for dealing with young offenders. Traditional approaches to dealing with offenders have been shown to be ineffective when dealing with young people and can even facilitate a further downward spiral into crime:

"…Should one legal process fail to address the underlying problems, contact with that process may increase the risk for some children that they will have further, and increasingly adverse, contact with other parts of the legal system."[1]

This has accordingly led to a different approach to dealing with young offenders, involving the examination of the structural causes of juvenile crime with an emphasis of the fundamental principles of rehabilitation and reintegration. These principles currently underpin the juvenile justice system in Victoria and are enshrined in s 362 of the *Children Youth and Families Act 2005*.

Research on the psychological immaturity of children clearly shows a relationship between age and deviance and suggests that young people who have engaged in offending at a young age may not continue to do so. Reversion from deviant to mainstream identities is the norm with progressing age[2]. The distinction with young offenders is that most will 'grow out' of offending behaviour, with offending usually peaking in late adolescence and declining in early adulthood[3].

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[1] Australian Law Reform Commission, *Report 84: Seen and Heard: priority for children in the legal process";* 1997 at 4.35

[2] Braithwaite J; Mugford S; *"Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders"*; Spring 1994 *British Journal of Criminology* Vol 34 No 2; 139 -171 at 152

[3] K Richards, *What makes juvenile offenders different from adult offenders? Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011.

It is presumed that the imposition of a statutory minimum sentence will deter young offenders from offending due to a fear of incarceration. However, this assumes rational decision making, where a person is expected to weigh up the costs and benefits of a particular course of action[4]. Research has shown that the deterrent effect of punishment does not increase or decrease according to the actual punishment level.[5] Therefore the present rates of deterrence are unlikely to be affected by the proposed increase in sentencing severity. Further, recent adolescent brain development research demonstrates the incomplete brain maturation of adolescents, which is characterised by risk taking and impulsive behaviours[6], thus questioning the effectiveness of a statutory minimum sentencing regime to deter young people from re-offending.

Young people are particularly likely to be affected by the proposed statutory minimum sentences. By virtue of their age, young people are more likely to commit offences in groups and in public in comparison with adult offending. Offences committed by young people are often unplanned and opportunistic[7] and do not indicate careful planning. As highlighted by adolescent brain development research, young people are likely to undertake more risky behaviour and are prone to impulsive acts as characterised by their young age.

A proposed statutory minimum sentence for young people and young adults fails to take into account their developmental capacity and maturity and will result in unnecessary exposure to the custodial system. Youthlaw believes that young people should be dealt with differently to adults and be afforded the opportunity for rehabilitation given their particular needs.

Effectiveness of imprisonment

The introduction of a statutory minimum sentence also presumes that imprisonment will result in reduced reoffending. The research available overwhelmingly shows that imprisonment fails as a deterrent and does not reduce recidivism[8].

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[4] Sentencing Advisory Council*, Does Imprisonment Deter? A Review of the Evidence*, April 2011, Melbourne.

[5] Sentencing Advisory Council*, Does Imprisonment Deter? A Review of the Evidence*, April 2011, Melbourne

[6] K Richards, *What makes juvenile offenders different from adult offenders? Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011.

[7] C Cuneen & R White *Juvenile Justice: Youth and crime in Australia*, 3rd ed South Melbourne: Oxford University Press.

[8] Sentencing Advisory Council*, Does Imprisonment Deter? A Review of the Evidence*, April 2011, Melbourne.

The impact of imprisonment has at best, no effect, and in many cases, is likely to have a negative impact on an offender, particularly young offenders. Imprisonment can lead to more reoffending through exposure to a criminal learning environment[9] and negative associations forming in detention centres and gaols. The stigmatisation and labelling associated with imprisonment may also impact on a young person's ability to reintegrate in the community, particularly in relation to continuing education and finding employment. Imprisonment also prevents young people from maintaining community and family ties, a primary consideration in dealing with young people as found in section 362 of the *Children, Youth and Families Act 2005*. This will particularly have a disproportionate effect on Aboriginal communities and for those young people who reside in rural, regional and remote areas where the nearest detention centre may be a significant distance away from a young person's family.

Rehabilitation as a focus

It is crucial that when dealing with young people, early intervention and rehabilitative approaches are adopted to assist in diverting young offenders from the criminal justice system. Such an approach seeks to address the underlying causes of criminal behaviour by providing support services and therapeutic interventions as required. Non-custodial sentences are particularly beneficial for young offenders, as they have a 'unique capacity to be rehabilitated'.[10] Young people completing community-based sentences have been shown to have the same or lower rates of re-offending that those serving custodial sentences.[11]

Youthlaw is concerned that a statutory minimum sentencing regime for young people will represent a significant departure from widely accepted sentencing principles that regard rehabilitation as a primary consideration when dealing with young people. It is important to note that young people (and indeed adult offenders) who come before the criminal justice system experience a wide range of disadvantage and as such present with complex needs. A snapshot survey conducted by the Youth Parole Board (Victoria) of young people in custody found that:

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[9] Sentencing Advisory Council*, Does Imprisonment Deter? A Review of the Evidence*, April 2011, Melbourne.

[10] K Richards, *What makes juvenile offenders different from adult offenders? Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011,1.

[11] Department of Human Services, *Recidivism Among Victorian Juvenile Justice Clients 1997-2001*, 2001.

- 26 per cent presented with mental health issues;
- 24 per cent had a history of self harm or suicidal ideation;
- 27 per cent presented with issues concerning their intellectual functioning;
- 90 per cent were alcohol users;
- 83 per cent were drug users;
- 47 per cent had been suspended or expelled from school; and
- that offending was related to alcohol or drug use in 85 per cent of cases.[12]

In addition to this, 30% of young people who come before the Children's Court have had a history of involvement in the child protection system[13] where these young people have witnessed or been exposed to violence, trauma, neglect and abuse. Young people are also disproportionately the victims of crime, with young people comprising a substantial proportion of victims of assault and sexual assault[14]. Other background factors presenting in young people in juvenile detention include histories of homelessness, limited family support and exposure to extreme disadvantage.

Given the complex needs and levels of disadvantage experienced by young people in the criminal justice system, it is essential that an appropriate response be provided in addressing juvenile offending.

Youthlaw strongly supports a rehabilitative and early intervention approach in diverting a young person from the criminal justice system. This necessitates a holistic response that addresses the complex systemic and individual issues experienced by the most vulnerable young people in the criminal justice system. The introduction of a statutory minimum sentence will not result in greater deterrence, but will have a disproportionate effect on those young people most disadvantaged. The proposed introduction may also create a net-widening effect in exposing those young people who are at lower risk (such as: no prior criminal history, good support etc) to the criminal justice system[15].

Youthlaw strongly supports continuing funding to rehabilitative programs in the community that not only address the underlying causes of offending behaviour but also provide additional casework support to those young people requiring

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[12] Youth Parole Board Victoria, *Annual Report 2009-10*, Department of Human Services, p.12.
[13] *Protecting Victoria's Vulnerable Children Inquiry*
[14] K Richards, *What makes juvenile offenders different from adult offenders? Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011, p 4.
[15] Sentencing Advisory Council*, Does Imprisonment Deter? A Review of the Evidence*, April 2011, Melbourne.

more therapeutic intervention. Diversionary options that currently exist in Victoria need to be strengthened and bolstered to adequately meet young people's needs.

Youthlaw believes that programs such as the ROPES program, Right Step (Moorabbin Children's Court), the Koori Youth Justice Program and Group Conferencing provide effective responses at key points of the youth offending pathway and should be heavily invested in as an alternative to imprisonment.

There is a clear public interest in the rehabilitation of young people. The ineffectiveness of imprisonment on rates of reoffending and the lower recidivism rates associated with diversionary programs, particularly for young people, provides strong evidence to argue against the adoption of a punitive statutory minimum sentencing regime.

Impact on dual track

Currently in Victoria, 18 – 20 year old offenders can be sentenced to a youth justice centre order or a youth residential centre order, if a judge finds that there are 'reasonable prospects of rehabilitation'. This takes into account the particular vulnerabilities of the offender, including their level of maturity[16] as an alternative to being placed in an adult prison. The dual track system provides greater casework support and prospects for rehabilitation given the young person's particular needs.

Under the proposed statutory minimum sentences, anyone over 18 years of age who has been convicted for an ICSI/RCSI (gross violence) offence will incur a minimum sentence of 4 years imprisonment. This would effectively require young offenders to be sentenced to adult prison, by removing judicial discretion in sentencing young vulnerable adults to the 'dual track' system and eliminates the opportunity for a young adult to receive and participate in rehabilitative programs in a youth appropriate setting.

Recommendations:

- ***That <u>no</u> statutory minimum penalty apply to 16 and 17 year olds for the offences of intentionally/recklessly cause serious injury involving 'gross violence'.***
- ***That should a statutory minimum penalty apply to adults, <u>no</u> statutory minimum penalty apply for 18 – 20 year olds to allow the opportunity to participate in the 'dual track' system.***

[16] See section 32 of the *Sentencing Act 1991* (Vic).

Incompatibility with Children's Court jurisdiction

Currently, the offences of ICSI/RCSI are triable summarily and are able to be heard in the Children's Court. Section 411 of the *Children, Youth and Families Act 2005* allows a Children's Court Magistrate to sentence a young person to serve a *maximum* of two years in a youth training centre.

The proposed statutory period is a *minimum* of 2 years for 16 and 17 year olds found guilty of ICSI/RCSI (gross violence) and is clearly incompatible with the sentencing powers available to the Children's Court jurisdiction. Further to this, under the current sentencing options available under the *Children Youth and Families Act 2005,* a non parole period has never been a feature of sentencing. A Children's Court Magistrate has no power to order a young person to a non-parole period. It falls to the Youth Parole Board in its administrative role to determine when a young person may be released on parole. This decision is made after careful consideration and assessment of the young person's circumstances (which includes their rehabilitative prospects, conduct in custody and risk to the community) and involves intensive supervision upon release.

However, under the proposed statutory minimum sentence regime, there will be a two year statutory non-parole period imposed if found guilty of an ICSI/RCSI (gross violence) offence. The Youth Parole Board will no longer have the power to make a determination to release a young person on parole. This eliminates the discretion of the Youth Parole Board to make decisions about when young people should be eligible to serve their sentences in the community with the support of Youth Justice. It effectively precludes a young person who has been assessed as having good prospects for rehabilitation from being released into the community, and forcing them to stay in custody for the minimum two years.

Given the irreconcilable issues in relation to sentencing, Youthlaw strongly submits that a statutory minimum sentencing regime for young people appearing in the Children's Court cannot exist as framed by the current legislation.

Incompatibility with the *Victorian Charter of Human Rights and Responsibilities* and Australia's international human rights obligations

The proposed statutory minimum sentencing regime contravenes the juvenile justice principles of using detention as a last resort, as articulated in Article 37(b) of the United Nations *Convention on the Rights of the Child* (**CRoC**), of which Australia is a signatory. Article 37(b) states that:

"The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

Article 40 of CRoC further prescribes that sentences imposed must be proportionate to the circumstances of the offence and be subject to appeal. Statutory minimum sentences clearly fail to take into account the circumstances of the offence and impose a sentence of imprisonment without consideration of a young person's circumstances.

Also concerning is that this current proposal contravenes the State's responsibilities under the *Charter of Human Rights and Responsibilities* 2006 (Vic) (**the Charter**). In particular, section 23(3) of the Charter states that a child who has been convicted of an offence must be treated in a way that is appropriate for their age. Section 25(3) of the Charter goes further to state that a child has a right to a procedure that takes account of their age and the desirability of promoting the child's rehabilitation.

The statutory minimum sentencing proposals are clearly incompatible with the provisions in the Charter as they remove rehabilitation as a sentencing consideration and ignore the suitability of the sentence in view of the age of the offender.

Lack of Judicial Discretion

The proposed statutory minimum sentence regime eliminates judicial discretion in sentencing. Judicial discretion an integral part of the criminal justice system and allows for Judges and Magistrates to consider the various interests of relevant stakeholders in a particular matter and sentence accordingly. The weight to be applied to these various interests will vary from case to case and cannot be calculated as a fixed formula. A statutory minimum sentencing regime will lead to harsh and unjust sentences and will disproportionately affect those young people and adults most vulnerable and disadvantaged.

While statutory minimum sentencing purports to eliminate inconsistency in sentencing, the opposite can in fact occur. Unequal offenders can receive the same sentence when convicted under statutory sentencing[17], which fails to consider proportionality in determining sentences. Judicial discretion allows Judges and Magistrates to take into account all relevant factors and give appropriate weight to rehabilitation and circumstances of that individual, particularly in sentencing young people.

[17] Australian Institute of Criminology, *Statutory Sentencing (No. 138)* December 1999.

Judicial officers are best placed to impose an appropriate sentence given their impartiality and the fact that they are publicly accountable for their decision. Reducing judicial discretion also shifts the power to the hands of the police and the prosecution. This is an undesirable outcome given the lack of transparent accountability available to ensure that ICSI/RCSI (gross violence) charges are appropriately laid. There is a real risk that under the proposed statutory minimum sentencing regime, police will effectively have greater power in the plea-bargaining process which may result in further injustices. A typical example would be where police overcharge and by agreeing to withdraw a charge that incurs a statutory minimum sentence, they can secure a conviction to the lesser charge, in the absence of any evidence.

Consistency in sentencing

A key principle in the sentencing of offenders is that sentences should be proportionate to the gravity of the offence. This allows the Court to take into account factors relevant to the offence, such as the level of involvement, the seriousness of the consequence/injury and the individual circumstances of the offender. Youthlaw believes strongly that judicial officers should continue to consider such circumstances in determining an appropriate sentence. This is particularly the case when sentencing young people in order to take into account rehabilitative opportunities.

A statutory minimum sentence removes all such consideration from the sentencing process and is likely to result in harsh and unjust sentences. Based on Youthlaw's experience, we have identified a typical example of how this might occur under the current proposals:

A 15 year old, 16 year old and 18 year old have been charged with recklessly cause serious injury. They were at their local McDonalds and had consumed a significant amount of alcohol just prior to arriving at McDonalds. An argument took place between these 3 and with another group that were there at McDonalds. A fight broke out and as a result, a 19 year old sustained a broken tooth and a gash to his arm. The 15 year old had a plastic knife on him that he got from McDonalds and had struck at the victim, and the 16 and 18 year old stood by while encouraging the 15 year old.

Under the proposed changes, if found guilty of an ICSI/RCSI (gross violence) offence, the 15 year old would be entitled to judicial discretion in receiving a sentence proportionate to the nature of the offence, his age and capacity for rehabilitation. However, the 16 year old would receive 2 years as a custodial penalty and the 18 year old would be subject to 4 years imprisonment. Such a case study is not unusual with young people and young adults and is indicative of the level of impulsivity and nature of offending that takes place.

Many young people who are charged with group offending are not the 'principal' offender, but merely 'present' at the scene.

A statutory minimum sentence regime would fail to take into account proportionality and the circumstances of the individual and offence in determining an appropriate sentence. Without such considerations, there is scope for disparity in sentences which can lead to unfair and unjust punishments.

Impact on victims

Research also indicates that victims of crime prefer a reintegrative approach when dealing with young offenders, even in sexual assault cases[18]. In participating in restorative justice models such as conferencing, Braithwaite and Mugford found that victims commonly stated that they did not want the offender punished, but for them to learn from their mistake and to get their life back in order[19]. This further supports an approach focused on rehabilitation and reintegration when dealing with young offenders.

While a 'tough on crime' approach may purportedly seek to address victims' concerns, it is victims who will suffer under a statutory sentencing regime. The likelihood of more matters proceeding by way of contested hearings and the associated lengthy delays in setting a hearing date will further exacerbate the trauma and psychological harm experienced by victims. This is particularly the case where the victim is required to give evidence at the substantive hearing and be subject to vigorous cross examination, which may be a gruelling and distressing experience.

Costs of statutory minimum sentences

Increased costs in court administration

With statutory penalties prescribed for ICSI/RCSI offences involving gross violence, Youthlaw is concerned about the burden this will place on the already strained court system.

Under a statutory sentencing regime, there is little incentive for an offender to plead guilty given that the penalty is set and no discount will apply. This will result in more matters being listed for contested hearing, which will consequently extend already lengthy waiting periods to have a matter finalised

[18] Strange 2002; Daly 2006 as quoted in Chappell D; Lincoln R; "*Abandoning Identity Protection for Juvenile Offenders*"; March 2007 *Current Issues in Criminal Justice: Journal of the Institute of Criminology* Volume 18 Number 3: 481-487.

[19] Braithwaite J; Mugford S; *"Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders"*; Spring 1994 *British Journal of Criminology* Vol 34 No 2; 139-171 at 144.

at Court. Contesting a matter consumes more resources and is an expensive resolution given the costs involved. This includes:

- Costs for Victoria Police and the Office of Public Prosecution in preparing briefs of evidence;
- Increased costs for defence counsel, which will directly impact on the current resourcing of Victoria Legal Aid as more matters proceed to hearing;
- Costs to support additional court staff and judicial officers.

Non-economic costs

The short- and long-term costs to families and the community of a statutory minimum sentencing regime are significant. Some of these include the long-term costs of a young person giving up school or losing employment, the likelihood of exacerbation of mental health issues; the exposure to criminal behaviour and potential for reoffending; and the costs to the family in terms of travelling or loss of employment due to supporting a young person in custody, particularly if they are placed in a detention centre far from home.

All these factors significantly limit the capacity of an offender to rehabilitate and reintegrate into the community, which places them at further risk of re-offending.

Economic costs

The most compelling argument against the proposed statutory minimum sentencing regime is the economic costs of holding a person in custody.

The current statistics indicate that the average length of custodial sentence for a young person found guilty of ICSI is 12.3 months and for RCSI, 10.3 months. The proposed statutory minimum sentence of 2 years is significantly greater than what currently occurs in practice. Given this, there is no doubt that there will be a significant increase in the detention population. This will also be the case for the adult prison population, which will require more resources for additional prisons to be built.

Statutory sentencing is an expensive means of pursuing reductions in crime. In 2009-2010, the Victorian Government spent $240.66 per prisoner per day, which equates to $88,000 per year[20]. The costs for imprisonment in relation to young people is even greater, with the Victorian Government estimating that it currently costs approximately $528 a day to keep a young person a in

[20] Sentencing Advisory Council, *Alternatives to Imprisonment: Community Views in Victoria*, March 2011.

youth justice centre in comparison to $52 a day for community based supervision[21].

Given the benefits of rehabilitation and diversion away from the criminal justice system and the significant economic benefit of funding community based programs, the argument for introducing a statutory minimum sentencing regime becomes even less compelling. Building more prisons is an unnecessary diversion of valuable resources that would be better placed in more effective community supervision programs.

Responding to public concerns

It is noted that the Victoria Government's introduction of statutory minimum sentencing was in response to perceived community fears of inadequate sentences and a lack of confidence in the sentencing regime[22]. However, a recently published study of community views in Victoria on alternatives to imprisonment found that the public were in support of alternative sentencing options. This was particularly the case for vulnerable groups, mainly young offenders, those with a mental illness or those who had experience with substance abuse issues[23].

It is fundamental that the formulation of public policy addressing crime be based on sound evidence and research, and not fed by perceived moral panics and community expectations. Evidence based research clearly shows that imprisonment does not reduce recidivism, and in fact may lead to further re-offending. The low cost and effectiveness of community based rehabilitative programs that address the underlying causes of re-offending, particularly in relation to young people, is an approach that must be supported and given further resourcing as a matter of priority.

[21] Minister For Community Services, *Strengthening Youth Justice And Helping Young People Avoid A Life Of Crime*, Media Release, 03/05/2011.
[22] Coalition (Liberal Party), *Coalition to Set Minimum Sentence Standards for Serious Crimes*, Media Release, 23/11/10
[23] K Gelb *Sentencing Matters: Alternatives to Imprisonment: Community Views in Victoria* Sentencing Advisory Council, March 2001

'GROSS VIOLENCE' AND ADDRESSING THE TERMS OF REFERENCE

Creation of a separate offence

The policy objective behind the Victorian Government's proposed statutory minimum sentence requirements was to provide an adequate response to those offences that are committed with 'gross violence'. In describing gross violence, examples were provided that demonstrated 'extreme violence' with injuries that were permanent, critical and life threatening[24]. These were examples where the aggravating features of excessive violence and the horrific injuries sustained by the victims justified a statutory minimum sentence.

Given this rationale, it is clear that a separate offence must be created that encompasses the gravity and seriousness of the offence. It is clear that the 'gross violence' characteristic is reflective of an offence committed at the higher end of the spectrum and as such, a separate offence should be created.

Recommendation

A <u>separate</u> offence of intentionally/recklessly cause serious injury (gross violence) be created to reflect the more serious nature of the offence and the more punitive nature of the penalty.

Distinction between 'recklessly' and 'seriously' cause serious injury in instances of 'gross violence'

Youthlaw is concerned that the statutory minimum sentence proposal includes the offence of 'recklessly' cause serious injury. There is a clear distinction between committing an offence 'recklessly' and 'intentionally' and this takes into account the lower mental element required for offences committed 'recklessly'. This is reflected in case law and in current legislation. The offence of RCSI as defined in section 17 of the *Crimes Act 1958* (Vic) prescribes a maximum penalty of 15 years imprisonment, whereas the offence of ICSI prescribes a maximum penalty of 20 years imprisonment.

[24] Coalition (Liberal Party), *Violent Thugs to Face at Least Four Years in Jail for Gross Violence*, Media Release, 24/11/10

It would be inconsistent for any proposed statutory minimum sentence to disregard this important distinction in determining possible penalties.

Recommendation

- ***That no statutory minimum penalty applies to the offence of recklessly cause serious injury (gross violence).***
- ***Should a statutory minimum penalty apply to the offence of recklessly cause serious injury (gross violence), that there be a distinction in penalty to distinguish between those offences that are committed intentionally.***

What is considered 'gross violence'?

The Victorian Government has provided circumstances where they consider 'gross violence' to be made out. These include where the offender:

- Plans in advance to engage in an attack leading to cause serious injury;
- Engages in a violent attack as part of a gang of three or more persons;
- Plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury; and
- Continues to violently attack the victim after the victim is incapacitated.

Youthlaw believes that these circumstances are too widely set and will disproportionately affect young people.

Must be more than 'serious injury'

Under section 15 of the *Crimes Act 1958* (Vic), 'serious injury' is defined as a combination of injuries and includes the destruction of the foetus of a pregnant woman. No further definitions are given by the legislation. Given the wide range of injuries that could be considered 'serious', the Courts have provided some guidance on what is considered 'serious injury'. While what constitutes a 'serious injury' will be a question of fact, it does involve a value judgment that involves a comparison of injuries. What would be regarded as slight, superficial or trifling would fall short of being a 'serious injury'[25]. This can include a whole range of injuries such as:

- Suffering from black eyes;

[25] *R v Welsh and Flynn* CCA (Vic), 16 October 1987, unreported, p 10

- A broken tooth;
- A scratch that breaks the skin and causes bleeding.

Clearly, the above examples demonstrate a range of injuries that are not at the higher end of the spectrum. In order to give effect to the Victorian Government's intention of capturing those offences that result in 'devastating' injuries[26], there must be a higher threshold than 'serious injury' as currently canvassed in case law and legislation.

Youthlaw submits that an injury must be severe, permanent and life-threatening in order for it to be captured within the current new proposed offences.

Recommendation

- ***That the offence involving 'gross violence' must result in more than just a 'serious injury', given the broad range of injuries that may be included under current legislation and case law. This should be an injury that is permanent or life threatening.***

Plans in advance to engage in an attack leading to cause serious injury

Offences committed by young people often involve little deliberate long-term planning and are characterised by spontaneous acts that reflect their maturity and brain development at the time. Research on adolescent brain development (as discussed earlier in this submission) refers to adolescents engaging in risky and impulsive behaviours due to incomplete maturation of self-control and judgment. Young people due to their age do not necessarily think of the consequences of their actions and are more susceptible to negative peer influences which may lead to their involvement in an offence.

This is an important consideration to take into account, as this element of 'planning' may not be an indication of a young person's culpability and is not reflective of rational and deliberate decision making to plan to engage in an attack. The vulnerability of young people due to their age means that their irresponsible conduct is not as morally reprehensible as that of an adult.

Engages in a violent attack as part of a gang of three or more persons

[26] See examples provided in Coalition (Liberal Party), *Violent Thugs to Face at Least Four Years in Jail for Gross Violence*, Media Release, 24/11/10

Youthlaw is extremely concerned about the inclusion of a 'gang' of 'three or more' as a characteristic of an offence committed with gross violence. This will have the effect of disproportionately targeting young people, particularly those young people from different cultural backgrounds.

Young people often gather in groups and this is characteristic of the nature of socialising that occurs within that age group. Due to limited resources and a lack of appropriate places to hang out with friends, young people meet in public spaces such as parks and shopping centres. Young people from migrant and refugee backgrounds are particularly likely to hang out in groups in public spaces due to a lack of space at home, and safety concerns such as fear of racism and bullying. This means that young people hanging out in groups are far more visible and likely to come to the attention of authorities.

The use of the word 'gang' is extremely problematic given the connotation of an organised crime syndicate. The mere socialising of 3 or more young people in a group should not be referred to as a 'gang' and imposes a value judgment on what is normal social behaviour for adolescents. Given the high visibility of young people in groups in public places, it is of great concern that they may be considered part of a 'gang' intending to conduct criminal activity.

Youthlaw believes that the nature and severity of the harm caused, and not the number of people involved, should be indicative of whether an offence has been committed in 'gross violence'.

Youthlaw is also concerned about the inclusion of non-principal and non--active participants in a group who may be charged with these new offences. Consideration must be given to the participation of each individual of the group to reflect the culpability of the individual and to ensure proportionality to their involvement in the offence. Young people are often included in group offences by way of being present at the time of the offence. While currently judicial officers are able to look at an individual's involvement in the offence (as well as the personal circumstances of the individual) and exercise judicial discretion in determining an appropriate sentence, a statutory minimum sentence will eliminate this discretion. This will result in many young people being sentenced to minimum terms under the new offences even when they are merely 'present' in a group, or deemed to have a common purpose and thereby be 'aiding and abetting' in the commission of the offence. This would be contrary to the intention of the proposed changes to only apply to the principal offenders and would result in sentences that do not reflect the culpability of the offender or the seriousness of their conduct.

Given this, it is imperative that these offences only apply in relation to principal offenders, and not those who are merely present at the time of the offence or who are merely accessories.

Recommendation

- **That the proposed new offences only apply in relation to principal offenders, and not those who are merely present or aiding and abetting.**

Plans in advance to carry and use a weapon in an attack and then deliberately or recklessly uses the weapon to inflict serious injury

Youthlaw is also concerned that the carrying of a weapon is characteristic of 'gross violence'. Definitions of a weapon under current legislation[27] can include a pocket knife, a glass bottle or an aerosol can of capsicum spray.

Many vulnerable young people carry such weapons, particularly those young people who are refugees and have come to Australia after experiencing significant trauma and psychological distress from their home countries. This is also the case for young people who have been victims of crime and carry a knife or capsicum spray for the purposes of safety and for protection. Many young homeless people also carry a pocket knife, not only for protection, but also for utilitarian purposes (such a cutting up food etc). In these circumstances, these young people carry a weapon for purposes other than as a deliberate plan to inflict injury on others.

The fact that there is a weapon on a young person who is in the presence of a group, should not be a factor that is characterised as being of 'gross violence'. Such an inclusion will disproportionately impact on the most vulnerable of young people, such as homeless or CALD groups.

General recommendation on characteristics of 'gross violence'

That 'gross violence' be narrowly defined to include elements that reflect a more serious/aggravating offence. The current characteristics to define 'gross violence' are too broad and are likely to impact on vulnerable young people

[27] See for example, Schedule 2 of the *Control of Weapons Regulation 2010*

How exceptional circumstances should best be specified in imposing a non parole period of less than the statutory minimum sentence

Youthlaw reiterates its strong opposition to a statutory minimum sentencing regime and expresses support for judicial discretion in the determination of an appropriate sentence.

In determining exceptional circumstances, Youthlaw submits that such circumstances should be ***broadly*** defined and left to judicial discretion. This would allow for consideration of other circumstances that may not be specified and allow for judicial officers to take into account a whole range of factors relevant to the offence and to the individual.

As a specialist community legal centre advocating for young people, Youthlaw submits that 'youth' as a factor should be seen as an exceptional circumstance, given the lower moral culpability apportioned with criminal offending amongst young people. Youthlaw would also seek to have an express provision that requires a judicial officer to have regard to the principles of sentencing children and young people, consistent with section 362 of the *Children, Youth and Families Act* 2005 in determining 'exceptional circumstances'.

From the children and young people that Youthlaw see on a day to day basis, the following would also be examples of exceptional circumstances. They are by no means intended to be an exhaustive list:

- Young people who have a cognitive impairment, intellectual disability or acquired brain injury;
- Young people who suffer from drug and alcohol issues;
- Young people who have a history, or are susceptible to homelessness;
- Young people who have experienced neglect or abuse and have had previous involvement with the care and protection system;
- Young people who have been victims of crime;
- Young people who have been exposed to trauma or torture;
- Young people who have experienced domestic violence
- Young people who have experienced disadvantage, such as:
    - Poverty;
    - History of incarceration amongst family members;
    - Exposure to drugs and alcohol through family members; and
- Young people with limited criminal histories.

Case Study – Andy (16 years old)

Andy was aged 16 at the time of the incident. Andy and 5 of his friends were all aged between 15 and 17 met at McDonalds in the CBD after having consumed a large amount of alcohol. They decided on the spur of the moment that they would 'roll someone' to get some extra money for more alcohol. After spending only a few minutes in McDonalds they moved to Banana Alley where they saw two young men. They approached them and asked them for money. When told by the young men that they had no money, the group became frustrated and 3 out of the 5 assaulted the young men. Andy did not participate in assaulting the two men, but stood by watching as he felt that he could not intervene against his friends. They ended up stealing money and mobile phones from the two men and ran.

This was Andy's first offence that he had been charged with and he had a history of significant mental health issues that were undiagnosed at the time. He also had a history of alcohol abuse.

At the Children's Court, Andy was placed on a 3 month deferral where he was linked in with a drug and alcohol support service and referred to a youth psychiatric support service. At the time the matter was returned back to court, the Magistrate was so impressed with the level of engagement with services that they placed Andy on a 6 month Good Behaviour Bond.

The above case study demonstrates how judicial discretion was exercised in determining an appropriate sentence, taking into account the young person's limited involvement, his limited criminal history and his exceptional circumstances.

Recommendation

- **That exceptional circumstances should be *broadly* defined and left to judicial discretion. That "youth" be considered an exceptional circumstance.**