



Graduate School  
of Business and Law

RMIT Building 13  
[REDACTED]  
GPO Box 2476  
Melbourne Vic 3001  
Australia

[REDACTED]  
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## Submission to the Legal and Social Issues Committee Inquiry into Victoria's Criminal Justice System

### Introduction

Thank you for the opportunity to contribute to this very important Inquiry.

This submission focusses on the use of imprisonment and drivers of recidivism. It makes the arguments that Victoria needs to reduce its use of imprisonment, pre and post sentencing; reconsider its responses to criminal behaviour; and refocus attention and expenditure on the precursors and causes of criminal behaviour, in order to see reductions in both crime and imprisonment.

I have been researching and writing in this area for many years, and there is a vast academic and professional literature on these issues which I have not aimed to summarise here for reasons of space. I am however happy to provide details if this would be helpful to the Committee. This submission highlights key considerations which the Committee is invited to bear in mind when making its recommendations.

The evidence shows that Victoria has significantly increased the use of imprisonment, and the rate of imprisonment, over the past 20 years. The prison population increased from 3391 in 2001 (a rate of 71/100,000) to 8102 in 2019 (a rate of 123/100,000).<sup>1</sup> This does not appear to be directly related to increased criminal activity, but rather to changes in the use of imprisonment as a sentence, and stricter bail and parole laws. In the last couple of years a major part of the increase has been people held on remand: in 2014, 19% of the prison population was on remand, but by 2019 this had increased to over one-third of the population (37%).<sup>2</sup>

There is little evidence that imprisonment deters offending.<sup>3</sup> There is however considerable evidence that prisons can be harmful to detainees, and they disproportionately hold highly disadvantaged people – people with physical and mental ill-health, with cognitive impairments, with

<sup>1</sup> Sentencing Advisory Council, *Time served prison sentences in Victoria* (2020), 3-4.

<https://www.sentencingcouncil.vic.gov.au/publications/time-served-prison-sentences-victoria>. There was a reduction in Victoria's prison population in 2020, related to the COVID-19 pandemic, with 7,151 prisoners in Victorian prisons on 30 June 2020: <https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>.

<sup>2</sup> Sentencing Advisory Council, *Time served prison sentences in Victoria* (2020), 7.

<sup>3</sup> Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (2011) Sentencing Advisory Council <https://www.sentencingcouncil.vic.gov.au/publications/does-imprisonment-deter-review-evidence>

low levels of education, suffering addiction to drugs and alcohol, and (for women) having extensive experience of family violence.<sup>4</sup> Of particular concern is the over-incarceration of Aboriginal people, who are known to be both over-policed and over-incarcerated, in the context of the impact of colonisation, and intergenerational trauma.<sup>5</sup> Almost all people in prison are released at the end of their sentence; the nature of imprisonment means that it is unlikely that imprisoning people makes the community safer. This is underlined by the 54.8% recidivism rate for people leaving prison and returning to Victorian corrective services in 2019-2020.<sup>6</sup>

At the same time imprisonment is a very expensive response to criminal behaviour. In Victoria imprisonment cost \$323.45 per prisoner per day in 2019–20<sup>7</sup> (\$118,060 per prisoner per year) or \$2.3 million for the 7151 people in prison on 30 June 2020. The 2019-2020 Victorian budget included \$1.8 billion for prisons and other correctional programs.<sup>8</sup> Given cost, recidivism, and the harm to over-incarcerated groups, it is important for Victoria to look for alternative approaches to criminal behaviour.

My submission here, in summary, supports:

- Revision of bail laws to ensure there is a presumption in favour of the grant of bail, with appropriate protections where there is genuine risk;
- Reduction in the population that can be imprisoned;
- Reduction in offending and reoffending by addressing the causes of offending behaviours; and
- Extension of justice dispositions which facilitate rehabilitation and desistance.

### **Bail laws**

A significant component of the increase in Victoria's prison population has been the increase in people on remand, driven primarily by recent legislative reforms.<sup>9</sup> Victorian bail laws were revised in 2017-2018 to limit access to bail, in line with recommendations of the Coghlan Review, established in the wake of several high profile and horrific cases.

Victorian bail laws require applicants charged with a wide range of more serious offences to show that there are 'exceptional circumstances' or at least 'compelling reasons' justifying the grant of bail.<sup>10</sup> Offending falling into these categories includes breaches of the bail legislation itself, and the data shows that people are being refused bail despite committing relatively minor repeat offences such as shop theft, and without necessarily posing the 'unacceptable risk' to the community which

<sup>4</sup> AIHW, *Adult Prisoners* (2019) <https://www.aihw.gov.au/reports/australias-welfare/adult-prisoners>

<sup>5</sup> ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133) (2018); AIHW, *Indigenous community safety* (2019) <https://www.aihw.gov.au/reports/australias-welfare/indigenous-community-safety>; SBS 'Incarceration Nation' (2021) <https://www.sbs.com.au/ondemand/movie/incarceration-nation/1930938947662>.

<sup>6</sup> Sentencing Advisory Council, *Released Prisoners Returning to Prison* (2021)

<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/released-prisoners-returning-to-prison>

<sup>7</sup> <https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>. See also Anthony Morgan, *How much does prison really cost? Comparing the costs of imprisonment with community corrections* (2018 Australian Institute of Criminology).

<sup>8</sup> <https://www.corrections.vic.gov.au/corrections-budget-for-2019-20-released>.

<sup>9</sup> Sentencing Advisory Council, *Time served prison sentences in Victoria* (2020),5.

<sup>10</sup> *Bail Act 1977* (Vic) ss. 4A and 4C. If the reverse onus tests are satisfied the court is still to consider whether release on bail would involve an 'unacceptable risk': s.4E.

was previously the touchstone of the legislation.<sup>11</sup> It is not clear that this outcome has led to greater community safety. It has however resulted in over one third of the prison population now comprising unsentenced people and has caused significant hardship. Strikingly, the Sentencing Advisory Council reports:

... sentenced prisoners account for less than 8% of the overall increase in Victoria's prison population in the last five years, while unsentenced prisoners account for over 92% of the increase.<sup>12</sup>

There has been specific impact on women. The proportion of people in prison who were unsentenced – on remand – was even higher in the women's prisons and the impact has been harsh.<sup>13</sup>

In 2019, almost 9 out of 10 women entering custody were un-sentenced. While on remand, women often lack access to in-prison programs, risk being evicted from their housing, losing their job and enduring custody battles over their children. Remand growth is further compounding the crisis of Aboriginal and Torres Strait Islander women's disproportionate incarceration. Aboriginal and Torres Strait Islander women are 21 times more likely to be imprisoned than non-Indigenous women in Australia. ... In Victoria, Aboriginal and Torres Strait Islander women are the only prisoner cohort with more remandees than sentenced prisoners.<sup>14</sup>

The Sentencing Advisory Council concludes that the bail reforms then led to increased use of imprisonment as a sentence, where people have already spent time in custody on remand:

This would seem to suggest that the increase in Victoria's remand population is having an indirect effect on sentencing outcomes. Offenders who may have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending.<sup>15</sup>

The Sentencing Advisory Council observed:

[T]he findings in this report suggest that criminal justice responses have become increasingly punitive in recent years: the overall number of people in prison has increased, the number and proportion of people sentenced to imprisonment have increased, the number and proportion of people held on remand have increased, and the number of time served prison sentences that either exceed or equal the ultimate prison sentence has increased.<sup>16</sup>

<sup>11</sup> Marilyn McMahon, 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention' (2019) <https://www.parliament.vic.gov.au/publications/research-papers/summary/36-research-papers/13893-no-bail-more-jail-breaking-the-nexus-between-community-protection-and-escalating-pre-trial-detention>.

<sup>12</sup> Sentencing Advisory Council, *Time served prison sentences in Victoria* (2020), 7.

<sup>13</sup> See Centre for Innovative Justice, *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems* (2021): 2.3. <https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf>

<sup>14</sup> Emma Russell, Bree Carlton, Danielle Tyson, Hui Zhou, Megan Pearce, Jill Faulkner *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria*, (2020) Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society: Melbourne, 6. (footnotes omitted)

<sup>15</sup> Sentencing Advisory Council, *Time served prison sentences in Victoria* (2020), 10.

<sup>16</sup> Sentencing Advisory Council, *Time served prison sentences in Victoria* (2020), 18. (footnote omitted)

The consequences in terms of damage to peoples' lives, as well as increased delays and overcrowding in the criminal justice system, points to the importance of urgent amendments to provide a more targeted and appropriate approach to risk assessment for bail, remembering that the person has not been convicted of a crime. The bail system is intended to provide an appropriate balancing of the presumption of innocence with securing the alleged offender's attendance at court, and minimising risk to the community in the meantime.

Submission: the Bail Act should be amended to remove the reverse onus provisions, and to reinstate the presumption in favour of bail across the board, balanced by an appropriate formulation of 'unacceptable risk' to the community if bail is granted.

### **Strategies to reduce rates of imprisonment and recidivism**

Four strategies will be noted here: again the extensive literature on this issue is not addressed in detail in this brief submission.

#### **(1) Reducing the population entering the criminal justice system**

A starting point is to reduce the range of people who enter the criminal justice system and who then face imprisonment. This will include:

- Raising the age of criminal responsibility to at least 14 years and limiting the imposition of custodial sentences before the ages of at least 16 or 17.<sup>17</sup> The UN Committee on the Rights of the Child recommends 14 years as the minimum age at which children should be held criminally responsible. International and national calls for Australia to raise the age from 10 to 14 years have to date largely been rejected.<sup>18</sup> Victoria should take the lead in this area. This reform would align Victoria with many international comparator countries, would better reflect current understanding of child development and capacity, and would direct younger children to welfare and health-based, rather than criminal justice, avenues.
- Addressing the over-policing and over-incarceration of Aboriginal and Torres Strait Islander children and adults.<sup>19</sup>
- Ensuring that mental ill health is not managed, by default, through the criminal justice system.<sup>20</sup>

<sup>17</sup> <https://www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminal-responsibility/>. The ACT has recently committed to raising the age of criminal responsibility to 14.

<sup>18</sup> <https://www.hrlc.org.au/news/2021/7/8/australia-rejects-un-call-to-raise-the-age-of-criminal-responsibility>

<sup>19</sup> ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133) (2018); AIHW, *Indigenous community safety* (2019)

<https://www.aihw.gov.au/reports/australias-welfare/indigenous-community-safety>; SBS 'Incarceration Nation' (2021) <https://www.sbs.com.au/ondemand/movie/incarceration-nation/1930938947662>.

<sup>20</sup> See VAADA, 'Inequalities and inequities experienced by people with mental health and substance use issues involved in the criminal justice system' (2019) [https://www.vaada.org.au/wp-content/uploads/2019/07/Melbourne-Uni-JusticeHealth\\_VAADA\\_RoyalCommission\\_FINAL-003.pdf](https://www.vaada.org.au/wp-content/uploads/2019/07/Melbourne-Uni-JusticeHealth_VAADA_RoyalCommission_FINAL-003.pdf); Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (2018) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-imprisonment-of-a-woman-found-unfit-to-stand-trial/>

- Ensuring that the experience of family violence does not lead to the criminalisation and over-incarceration of women.<sup>21</sup>

## **(2) Addressing the causes of offending**

Reducing rates of imprisonment and recidivism requires attention to the factors underlying offending and re-offending. This requires real government commitment to addressing systemic disadvantage, such as poverty, mental ill health, homelessness, literacy problems, parenting problems, alcohol and drug addiction, and family violence – all recognised as linked to offending behaviours.

A framework for reducing imprisonment and supporting desistance can be found, for example, in the principles of justice reinvestment. Justice reinvestment can be implemented narrowly or broadly. It has developed narrowly in, for instance, the US, with a focus on shifting prison funding to alternative justice programming, in response to the economic pressures of hyper-imprisonment in some US states.<sup>22</sup> A broader approach is needed however, as employed in some Australian contexts<sup>23</sup>. This more comprehensive form of justice reinvestment involves distributing political and financial resources from imprisonment and punishment to activities which prevent offending and support desistance from offending. This requires substantial reorientation of justice policy but will offer greater long-term value for the community.

This preventive approach to offending would include establishing or enhancing, and resourcing:

- Comprehensive mental health services to provide (preventive) supports;
- Adequately resourced and accessible alcohol and drug treatment services;
- Early supports to overcome educational disadvantage;
- Access to affordable housing;
- Responses to the systemic historical disadvantage of Aboriginal communities; and
- Measures to redress economic disadvantage and inequality.

## **(3) Justice dispositions which facilitate rehabilitation and desistance**

If a person's behaviour brings them into contact with the criminal justice system, there must be justice options available to support rehabilitation and desistance from further offending. This could include:

- Reducing the use of imprisonment as a sentence. As noted earlier, Victoria (and Australia) is using imprisonment as a sentence more often than in the past, and more often than many comparable countries. Provisions in the Sentencing Act requiring proportionality and parsimony in sentence should be re-prioritised,<sup>24</sup> and mandatory

<sup>21</sup> See Centre for Innovative Justice, *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems* (2021): 1.1. <https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf>.

<sup>22</sup> WJ Sabol, and ML Baumann, 'Justice reinvestment: Vision and practice' (2020) 3 *Annual Review of Criminology* 317

<sup>23</sup> Matthew Willis and Madeleine Kapira, *Justice reinvestment in Australia: A review of the literature* (2018 Australian Institute of Criminology).

<sup>24</sup> *Sentencing Act 1991* (Vic) ss.5(3), 5(4)ff.

prison sentences should be repealed as unreasonably restricting judicial discretion in sentencing in a proportionate manner.<sup>25</sup>

- Extending therapeutic justice practices which aim to address the issues leading to reoffending such as alcohol and drug addiction and mental ill-health. Currently positive examples include judicial monitoring<sup>26</sup> and specialist courts.<sup>27</sup>
- Extended access to restorative justice options for both young offenders and adults – aimed at changing offender understanding of their offending behaviour as well as addressing victim justice needs for acknowledgement, voice and validation.<sup>28</sup>
- Access to effective and well-resourced programs addressing mental ill-health, alcohol, drug and gambling addictions, and family violence, to which people facing criminal charges can be referred.

It is also important that prison conditions support rehabilitation and reducing reoffending. It is widely recognised that there are inherent risks of ill-treatment in prisons, given their closed nature and the inevitable power imbalance between those detained and those managing detention.<sup>29</sup> The use of solitary confinement, for example, has particularly been criticised.<sup>30</sup> Ill-treatment of people in prison is a breach of their rights: it also makes it less likely that people leaving prison will be well-placed to avoid reoffending.

The Australian government ratified the UN OPCAT (Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment) in 2017. Implementation is to be completed by January 2022. This requires all States and Territories to establish robust independent agencies – National Preventive Mechanisms (NPMs) – to monitor prisons (and police cells and youth detention facilities – and all other places of detention) to prevent any ill-treatment of detainees. The Victorian government recently allocated a one-off amount of \$500,000 to this task in the 2021-2022 budget. It is hoped that Victoria will fulfil this obligation in a timely manner. Establishing a comprehensive monitoring framework in Victoria will demonstrate leadership in ensuring the corrections system supports desistance from crime.

#### **(4) Addressing the causes of reoffending**

##### **(a) Access to housing**

<sup>25</sup> *Sentencing Act 1991* (Vic) ss. 10, 10AA ff.

<sup>26</sup> See Pauline Spencer, 'From Alternative to the New Normal Therapeutic jurisprudence in the mainstream' (2014) 39:4 *Alternative Law Journal* 222.

<sup>27</sup> For example the Assessment and Referral Court (ARC) and the Victorian Drug Court.

<sup>28</sup> Eg VLRC (2021) 'Sexual Offences: Restorative and Alternative Justice Models' Issues Paper G [https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/2657-VLRC\\_Sexual-Offences-Issue-Papers-G-web.pdf](https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/2657-VLRC_Sexual-Offences-Issue-Papers-G-web.pdf); Restorative Justice for Victim Survivors of Family Violence – Framework (2017)

<https://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>

<sup>29</sup> See for example Victorian Ombudsman, *Implementing OPCAT in Victoria - report and inspection of Dame Phyllis Frost Centre* (2017) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/>; IBAC, *Special report on corrections* (2021) [https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c\\_2](https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2)

<sup>30</sup> See for example Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/opcat-in-victoria-a-thematic-investigation-of-practices-related-solitary-confinement-of-children-and-young-people/>; Commission for Children and Young People, *The Same Four Walls* (2017) <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/the-same-four-walls/>

(b) Access to fulfilling work

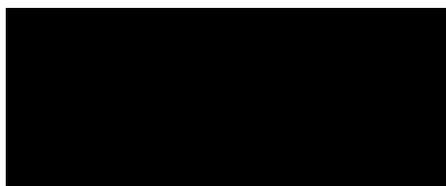
Comprehensive and ongoing supports for people leaving prison are required to support their desistance from crime. The Victorian government provides programs for some people in prison which aim to support their transition after prison.<sup>31</sup> Supports in preparing for release from prison and for return to the community need to be available to all people moving through a prison sentence, and afterwards, for as long as needed.

Key factors in supporting desistance include secure housing and fulfilling employment.

There is limited affordable housing in Victoria currently. This has been the subject of recent inquiries and reports; the Victorian government committed to a \$5.3 billion investment in public housing in the 2020-2021 Budget. It is essential that all Victorians, including people who have offended, have secure and affordable housing. This will be particularly important for women leaving prison who need support with children and protection from family violence.

Obtaining employment can also be difficult for people leaving prison. One hurdle is the existence of a criminal record. Whilst it is vital that prisons offer relevant and quality education and training to people in prison, the existence of a criminal record can make it difficult for the person to then gain the rewarding work that will support desistance from crime and enable the person to become a productive member of the community.<sup>32</sup> The new *Spent Convictions Act 2021 (Vic)* is an important step in this direction, but a range of other supports and incentives to employers are still needed, together with legislation expressly prohibiting discrimination on the basis of an irrelevant criminal record.

Submission: that to reduce rates of imprisonment and recidivism the Victorian government commit to reducing the population that can be imprisoned; reducing offending and reoffending by addressing the causes of offending behaviours; extending justice dispositions which facilitate rehabilitation and desistance; and supporting access to employment and housing for people leaving prison.



Professor Bronwyn Naylor

<sup>31</sup> The Corrections Victoria Reintegration Pathway includes the ReLink pre-release program and the ReConnect post-release program: [https://files.corrections.vic.gov.au/2021-06/transitionreint.blue\\_.pdf](https://files.corrections.vic.gov.au/2021-06/transitionreint.blue_.pdf)

<sup>32</sup> See for example Georgina Heydon and Bronwyn Naylor 'Criminal record checking and employment: The importance of policy and proximity' (2018) 51 *Australian and New Zealand Journal of Criminology*, 372.