



Submission to the Parliamentary Inquiry into Victoria's Criminal Justice System

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Introduction

I welcome the opportunity to make a submission to the current inquiry into Victoria's criminal justice system and note that I do not represent any other organisation with which I am affiliated in so doing. This submission responds to the first term of reference, with a focus on bringing to bear the evidence on the drivers of Victoria's remand and prison populations. It draws on my own research in this area over the past 15 years, arguing that excessively harsh laws, rather than crime rates, drive our prison population while doing little to keep our communities safe.

The Victorian Ombudsman has noted the high levels of disadvantage among people in Victoria's prisons:¹

A quarter of Victoria's prisoners come from just 2 per cent of the state's postcodes and half from just 6 per cent. High school completion rates are negligible: 6 per cent for men and 14 per cent for women. The average prisoner was unemployed at the time of committing the offence and has a history of substance abuse. Many female prisoners have a history of abuse, and over 40 per cent are homeless upon release. Children of prisoners are six times more likely to be imprisoned than their peers. Mental illness and cognitive disabilities are also common.

Victoria's prison population increased by 57.6% from June 2010 to June 2020; the increase to June 2019 (pre-COVID) was 78.6%. This was not due to a concomitant increase in crime, as the rate of criminal incidents remained stable over that period.² Instead, Victoria's prison population has exploded due to ever-harsher laws and a perceived political imperative to be 'tough on crime'.

As the increase in Victoria's prison population has disproportionately affected women, particularly Aboriginal and Torres Strait Islander women, the focus of this submission is on the drivers of remand and prison populations for female offenders.

Victoria's female prisoner population

By the end of July 2021, 54.8% of the women in Victoria's prisons were unsentenced, compared with 43.7% of male prisoners. In contrast, in July 2011 only 21.5% of female prisoners were on remand. The increase in the proportion of incarcerated women who are unsentenced has accelerated in the last five years, with the proportion on remand overtaking the proportion sentenced in April this year.³

More than one-quarter (26%) of women in prison have as their most serious offence a non-violent drug offence.⁴ Of those received into remand between 2015 and 2016, more than one-quarter (26%) reported experiencing homelessness or housing instability prior to entering prison, and almost two-

¹ Victorian Ombudsman (2015). *Investigation into the rehabilitation and reintegration of prisoners in Victoria*. Melbourne: Victorian Ombudsman; p. 5.

² Crime Statistics Agency (2021). *Recorded criminal incidents*. Available at: <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-criminal-incidents-2>.

³ Corrections Victoria (2021). *Monthly time series: Prisoner and offender data*. Available at: <https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data>.

⁴ Corrections Victoria (2021). *Profile of women in prison*. Available at: https://files.corrections.vic.gov.au/2021-06/Infographic_Profile_of_women_in_prison.pdf.

third (65%) had been a victim of family violence. For Aboriginal and Torres Strait Islander women, 35% did not have stable housing prior to imprisonment.⁵

Female prisoners are clearly a particularly vulnerable cohort.

Why do women end up in prison?

Research has shown that, despite general similarities in risk factors for offending for male and female youth and adults, there are differences in females' trajectories due to their unique experiences.⁶ Pathways to girls' and women's offending have been often involve significant histories of familial and domestic abuse characterised by victimisation and dysfunctional relationships; the abuse and ensuing trauma are subsequently related to substance abuse, economically-motivated offending, mental illness, self-harm, prostitution and further victimisation.⁷ While the 'school-to-prison pipeline' is often used as a short-hand description of males' pathways to incarceration, a 'sexual abuse-to-prison pipeline' would be a more apt description of the trajectories of women.⁸ Indeed, Australian research has found that 87% of women in custody had been victims of sexual, physical or emotional abuse, with the majority being victims of multiple forms of abuse. Abuse in childhood and adulthood were related to drug dependency and involvement in sex work, while mental health problems were related to drug dependency, violent offending and sex work. Almost two-thirds of these women were regular users of illegal drugs, with a high proportion attributing their offending to their illegal drug use.⁹

The effectiveness (or lack thereof) of imprisonment in reducing recidivism

Imprisonment has been postulated to exert a criminogenic effect in a number of ways, particularly as it stigmatises and labels people who have been incarcerated, making it more difficult for them to find employment or stable accommodation upon release or to regain pro-social relationships. It breaks up families, increases the risk of reoffending by disrupting pro-social support systems and exposes people to criminal networks that operate in any prison system. A conviction can also exacerbate family violence and mental health or other health problems. Any time spent in custody – even a short period on remand – can be traumatic and disruptive; remand increases the likelihood of a sentence of imprisonment being imposed and ultimately increases the risk of reoffending.¹⁰

Contact with the criminal justice system can be especially harmful for vulnerable cohorts such as Aboriginal and Torres Strait Islander people, with cascading harms that can increase both the likelihood of further criminal justice system contact and the risk of deaths in custody.

⁵ Corrections Victoria (2019). *Women in the Victorian prison system*. Available at: <https://www.corrections.vic.gov.au/women-in-the-victorian-prison-system>.

⁶ Gelb, K. (2019). *Young women and girls in youth justice: A review of literature and evaluations*. Confidential consultancy report prepared for Youth Justice, Victorian Department of Justice and Community Safety.

⁷ Shepherd, S.M., Luebbers, S. and Dolan, M. (2013). Identifying gender differences in an Australian youth offender population. *SAGE Open*, 3(2): 1-12.

⁸ Saada, M.S., Epstein, R., Rosenthal, L. and Vafa, Y. (2015). *The sexual abuse to prison pipeline: The girls' story*. Washington DC: Georgetown University Law Center.

⁹ Johnson, H. (2004). *Drugs and crime: A study of incarcerated female offenders*. Research and Public Policy Series No. 63, Canberra: Australian Institute of Criminology.

¹⁰ Heaton, P., Mayson, S. and Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review*, 69(3): 714-716.

Undoubtedly, prison is an effective option when aiming to achieve the sentencing purposes of punishment and denunciation. But the evidence on its ability to be effective at reducing crime via deterrence or incapacitation suggests that prison is not an effective deterrent and is limited in its incapacitative effect. The value of imprisonment for rehabilitative purposes is also questionable, as research has shown that treatment programs offered in a community setting tend to perform better at reducing reoffending than those offered within prisons.¹¹

The impact of Victoria's bail reform

The single biggest driver of Victoria's rising female prison population – particularly the majority of women in prison who are on remand – is Victoria's recent bail reforms.

The 2017 Bourke Street incident and its aftermath are but the latest iteration in an increasingly politicised environment around bail law reform in this country; since the 1980s, 'state governments have used the bail regime for political purposes, specifically to send a "tough on crime" message'.¹²

Legislative and operational changes to bail laws in recent decades have led to a shift away from a primary concern with ensuring that the accused does not abscond to a focus on preventing offending while on bail. Views on the purposes and principles underlying the bail system have shifted in line with a preoccupation with minimising risk. The changes to bail laws also suggest governments have become less inclined to trust individuals to make difficult bail decisions – whether they be police decision-makers, bail justices, magistrates or judges. In the absence of trust, legislative changes have created increasingly stringent bail regimes. Under such regimes, long-held principles (such as the presumption of innocence) have fallen by the wayside or been countermanded by other imperatives.¹³

In the context of significant media attention on specific types of offending in Victoria – youth gangs, car-jackings and home break-ins, in particular – and media and Opposition calls for the Government to get tough(er) on crime, bail laws have become ever more restrictive.

But as a result of amendments to *Bail Act 1977* (Vic), it has become much more difficult for people accused of a wide range of offences to be granted bail. Victoria has expanded the list of offences to which a presumption against bail applies; they include a raft of family violence offences, sex offences, violent offences, drug offences, terrorism and some driving offences. Victoria's bail laws are arguably the most onerous in Australia, although this shift to a presumption against bail has occurred around the country.

Reforms that were intended to target violent men have disproportionately affected poor women, women escaping family violence and Aboriginal and Torres Strait Islander women.

While the reverse onus provisions require a person to show 'compelling reasons' or 'exceptional circumstances' that should lead them to be released on bail, the wide range of offences to which these provisions apply means that serious, violent offences are not the only ones captured in these schemes. Under Schedule 2 of the *Bail Act 1977* (Vic), the reverse onus provisions apply for, among other

¹¹ Gelb, K., Stobbs, N. and Hogg, R. (2019). Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions. Brisbane: Queensland Sentencing Advisory Council.

¹² Quilter, J. (2014). Not for punishment: We need to understand bail, not review it. *The Conversation*, 3 July 2014.

¹³ Bartels, L., Gelb, K., Spiranovic, C., Sarre, R. and Dodd, S. (2018). Bail, risk and law reform: A review of bail legislation across Australia. *Criminal Law Journal*, 42: 91-107.

offences, committing an indictable offence while on bail. Repeat, low-level offending such as theft from a shop can fall under these provisions;¹⁴ among women, this type of offending is often associated with financial need, homelessness and a history of trauma and/or family violence. Indeed, recent Victorian research found that there are a 'constellation of circumstances' that contribute to women's criminalisation and incarceration, including homelessness, poverty, family violence, untreated health problems and addiction. The researchers conclude:¹⁵

Ultimately, this study finds that women are particularly disadvantaged across a range of factors that are relevant to making an application for bail, including access to housing, personal relationships and family support, mental health and alcohol and drug supports. The so-called 'risks' that women present with in the courtroom are not indicators of community safety concerns. Instead, they are more likely to index women's disadvantage and marginalisation.

Schedule 2 of the *Bail Act 1977* (Vic) also includes contravention of family violence intervention orders. Again, unintended consequences of the reforms have resulted in women being unjustly captured by the reverse onus provisions, as women – especially Aboriginal and Torres Strait Islander women – are misidentified by police as perpetrators of family violence.¹⁶

The bail process is not intended to assess whether the accused is guilty of committing a crime. Rather, it is an exercise in the management of risk – risk that the accused will fail to appear in court, or risk that the accused will reoffend. This purpose has been hijacked by politicians more afraid of the risk of public opinion. The result is a bail process that is accusation, judgment and punishment all rolled into one.

Is this really what the public wants?

Despite the large body of evidence that prison does not work to reduce recidivism, political rhetoric relies on the trope that 'this is what the public wants'. But five decades of research on public opinion about crime and criminal justice clearly shows that the public is not nearly as punitive as we are led to believe.¹⁷

Despite regular assertions in the media that the public demands ever-harsher responses to offending, there is a vast body of research that shows that, regarding sentencing at least, people who are well-informed about a case offer far more nuanced judgments and report sentencing preferences that are

¹⁴ Theft is an indictable offence triable summarily under the *Crimes Act 1958* (Vic) s 74. In the three years to June 2019, almost 5,000 women were sentenced for this offence in the Magistrates' Court of Victoria, representing around one-third of all people sentenced for this offence during this time. Sentencing Advisory Council (2019). SACStat Magistrates' Court: Theft from a shop.

https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/6231_74.2.html

¹⁵ Russell, E., Carlton, B., Tyson, D., Zhou, H., Pearce, M. and Faulkner, J. (2020) *A constellation of circumstances: The drivers of women's increasing rates of remand in Victoria*. Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society: Melbourne; p. 5.

¹⁶ Australia's National Research Organisation for Women's Safety (2020). *Accurately identifying the "person most in need of protection" in domestic and family violence law: Key findings and future directions*. Sydney: ANROWS; No to Violence (2019). *Predominant aggressor identification and victim misidentification*. Melbourne: NTV.

¹⁷ Gelb, K. (2009). Myths and misconceptions: Public opinion versus public judgment about sentencing. *Federal Sentencing Reporter*, 21(4): 288-290.

very similar to those actually imposed by the courts. For example, the Victorian and Tasmanian jury sentencing studies found that jurors were typically *more lenient* in their sentencing preferences than the judge.¹⁸

Justifying the creation of ever-harsher laws by claiming that they respond to community demands is thus disingenuous. Such 'tough on crime' approaches offer clear examples of penal populism – creating laws on the basis of their supposed popularity rather than on the evidence of their effectiveness.

Conclusion

Our criminal justice policies should be based on evidence, not emotion. Victoria's recent bail reforms were an emotional and populist response to a particularly horrific yet extremely rare crime; they led to Victoria's bail laws being touted as the most onerous in the nation.

But with these reforms came a raft of unintended consequences. Victoria is now in an alarming and untenable position: more than half of women in prison are being held on remand – women who are among the state's most vulnerable and disadvantaged.

I urge the Parliamentary Inquiry to recommend that **the Victorian Government undertake an urgent review of bail laws** to reignite two of the fundamental principles of our criminal justice system: first, that a person is innocent until proven guilty and, second, that imprisonment should only be used as a last resort.

¹⁸ Warner, K., David, J., Walter, M., Bradfield, R. and Vermey, R. (2011). Public judgement on sentencing: Final results from the Tasmanian Sentencing Study. *Trends & Issues in Crim and Criminal Justice* no. 407. Canberra: Australian Institute of Criminology; Warner, K., Davis, J., Spiranovic, C., Cockburn, H. and Freiberg, Arie (2017). Measuring jurors' views on sentencing: Results from the second Australian jury sentencing study. *Punishment & Society*, 19(2): 180-202.