

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

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August 2021

## 1. Introduction

The Centre for Innovative Justice ('the CIJ') welcomes the opportunity to contribute to the inquiry of the Legal and Social Issues Committee of the Legislative Council into Victoria's criminal justice system. In this submission, we focus attention on the experiences and needs of the fastest growing group in Victoria's prison population – women, and more specifically, Aboriginal and Torres Strait Islander women.

The need for alternative, non-carceral responses for criminalised women is a priority area of research for the CIJ. This submission draws on the CIJ's program of work related to women's 'decarceration' to apply a gendered lens to three of the Committee's Terms of Reference (TOR), namely:

- 1) factors influencing Victoria's growing remand and prison populations;
- 2) strategies to reduce rates of criminal recidivism; and
- 3) how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime.

Rather than focussing on the specific goal of reducing recidivism, the CIJ provides a broad outline of suggested reforms aimed at minimising women's interaction with the criminal justice system. This approach is supported by a significant body of literature which suggests that criminal justice involvement for less serious offenders is itself criminogenic, and that the social exclusion, stigmatisation, anti-social influences and trauma resulting from imprisonment encourages and reinforces offending behaviour.<sup>1</sup>

## 2. The CIJ's expertise

The CIJ's objective is to develop, drive and expand the capacity of the justice system to adapt to the needs of its diverse users. It is committed to finding innovative and workable solutions to complex problems that manifest in the justice system. We do this by conducting rigorous research with a focus on impact and achievable reform and prioritises direct engagement with service users and frontline service agencies.

Through our work across the interrelated themes of the incarceration of women, family violence, disability and support for victims of crime, the CIJ has gained insight into the experiences and needs of women in the justice system. This submission draws heavily from an Issues Paper recently released by the CIJ, which is attached to this submission. [\*Leaving custody behind: Foundations for safer communities and gender-formed\*](#)

[criminal justice systems](#) brings together evidence on women in the justice system and the drivers behind the escalating female imprisonment rate in Victoria, outlining a roadmap for gender-responsive reform.

More broadly, this submission is informed by the CIJ's wider program of work relevant to women's experiences of the justice system, including the following projects:

- A [feasibility study](#) into a Residential Program for Aboriginal women in contact with the criminal justice system as an alternative to prison;
- An [evaluation of the Women Transforming Justice project](#), a multiagency collaboration providing legal and outreach support to women in contact with the criminal justice system;
- The delivery of financial counselling services into Dame Phyllis Frost Centre's Women's Prison and the subsequent development of a [practice guide](#) for integrating financial counselling in a legal service;
- A project investigating women's experiences of bail and sentencing since COVID-19 restrictions were imposed to track patterns of subsequent contact with the criminal justice system and associated support needs during this time (the *Lessons from COVID-19* project, pending);
- A project delivered in partnership with the Law and Advocacy Centre for Women and the Victorian Amateur Football Association which links women in contact with the justice system with community football clubs (the *Community SupPORT Pathways for women* project, pending);
- A [submission to the Parliamentary Inquiry into Homelessness](#) regarding the impact of homelessness on women's incarceration rates;
- A [submission to the Royal Commission into Family Violence](#), focusing on the intersection of family violence and women's incarceration rates;
- Projects looking at the [intersection of gambling and crime](#) and [positive justice interventions](#) to address this;<sup>2</sup> and
- A [review of government funded services responding to victims of crime in Victoria](#) completed in early 2020.

Our work on criminal justice reform is enriched by the contributions of our colleague Dorothy Armstrong, a Lived Experience Expert employed by the CIJ since 2019.

### 3. Why criminal justice reform demands a gendered focus

There are compelling reasons for maintaining a specific focus on the needs and experiences of women in the criminal justice system. This section provides a snapshot of key issues relevant to the growing rate at which women - and more specifically Aboriginal women and unsentenced women - are being incarcerated in Victoria. More detail on the drivers of women's criminalisation and women's experience of justice processes can be found in *Part One: Gender and criminalisation* and *Part two: Systemic drivers – the Victorian context* in the *Leaving Custody Behind* issues paper.

#### 3.1 Women are being imprisoned at a faster rate than men

Although only constituting around 7 per cent of the prison population, there has been exponential growth in the number of women imprisoned in Victoria over the last decade. In the 10 years to June 2018, the number of women in prison in Victoria increased by close to 138 per cent, compared with an 81 per cent increase in the male prison population over the same period.<sup>3</sup> In 2020, a temporary drop of almost 30 per cent in the female prison population occurred following the introduction of COVID-19 risk management measures in prisons.<sup>4</sup> However, the number of women in prison in Victoria is again on the rise.<sup>5</sup>

Aboriginal women are the fastest growing group in Victorian prisons. The number of Aboriginal women entering prison in Victoria more than tripled between 2012 and 2018,<sup>6</sup> and the rate at which they are imprisoned has more than doubled in the last 20 years.<sup>7</sup> By 30 June 2019, close to 14 per cent of all women

entering custody identified as Aboriginal or Torres Strait Islander, up from 7 per cent in 2007.<sup>8</sup> This is despite Aboriginal people constituting 0.8 per cent of the Victoria's general population.<sup>9</sup>

Australia's track record on female imprisonment rates does not compare favourably with comparable countries. While the increasing imprisonment of women is part of a world-wide trend, the most recent data from the World Prison Brief shows that Australia imprisons more women per 100,000 head of population than Canada, the UK, and many European countries.<sup>10</sup>

### 3.2 Most women charged with offences are themselves victims of crime

Most women in the prison system have histories of sexual, physical or emotional abuse occurring in childhood and as an adult. An estimated 77 per cent to 90 per cent of incarcerated women have prior trauma exposure that is directly linked to experiences of victimisation.<sup>11</sup>

When left untreated, trauma from gendered violence is a key factor in women entering, and re-entering prison.<sup>12</sup> Evidence indicates that victimisation from gendered violence can lead women to commit criminal offences in a variety of ways, including through using drugs and alcohol to self-medicate; being forced into sexual exploitation; resisting violence through physical force (and being misidentified by police as the predominant aggressor as a result); experiencing systems abuse; or through associated poverty, often entrenched through financial abuse by a partner.<sup>13</sup>

### 3.3 Women in the justice system are one of the most disadvantaged groups in society

Women's complex and interrelated support needs often intersect, compounding disadvantage for women experiencing trauma and poverty. This makes women in the justice system a priority cohort for responses that focus on support, rather than incarceration.

#### **Trauma and mental ill-health**

Women entering Victorian prisons, especially Aboriginal women, have high rates of mental ill health and substance dependence, both of which are associated with past experiences of violence and abuse. Aboriginal women carry a particularly heavy mental ill health burden. In one study, 92.3 per cent of a sample of Aboriginal women presented with a form of mental illness, and 46% met one criterion of PTSD (compared to 14.7 per cent of Aboriginal men).<sup>14</sup>

Criminalised women are more likely to experience suicide attempts and substance overdoses,<sup>15</sup> and face an increased risk of premature, unnatural death following their release from prison.<sup>16</sup> Women in UK prisons have been found to have five times the rate of self-harm as men.<sup>17</sup>

#### **Substance dependence**

The link between women's justice involvement and substance dependence is a particularly strong one. Research confirms strong links between childhood sexual abuse, mental illness, lack of housing and substance dependence – suggesting that substance dependence may be one step on the path from victimisation to offending, rather than a “cause” of offending.

Women in prison are more likely than men to have committed offences while under the influence of substances, or to support their substance dependence. For women serving a second or subsequent sentence, 90 per cent of their offences have been found to be related to drug and alcohol dependence.<sup>18</sup> Substance related female offending is also fast becoming an entrenched issue. The proportion of women whose imprisonment is associated with a drug-related offence increased from nearly 15 per cent in 2008 to 24.4 per cent in 2018 and is associated with increased use of crystal methamphetamine, or ‘ice’.<sup>19</sup>

#### **Poorer physical health**

According to the Australian Institute of Health and Wellbeing (AIHW), women entering Australian prisons have considerably poorer physical health with close to half (45 per cent) found to have a chronic health condition, compared to 28 per cent of men. They are also less likely than men to have consulted a doctor in the previous

12 months and, given they are in custody for shorter periods, find it harder to access treatment and support while in prison.<sup>20</sup>

Aboriginal women involved in the justice system are also likely to experience other health issues, including diabetes, heart attack and stroke,<sup>21</sup> as well as high rates of reproductive health problems, many of which are associated with gendered violence.<sup>22</sup> Aboriginal women who are in custody sustain more physical injuries from violence than non-Aboriginal women and are more likely than men in prison to have acquired brain injuries, in part related to family violence.<sup>23</sup>

### Housing needs

Difficulties accessing safe and affordable housing for themselves and their children, is a key factor driving women into criminalisation.<sup>24</sup> In Victoria, the state with the lowest proportion of social housing stock in Australia,<sup>25</sup> this is a long-standing and deepening issue. A 2010 Victorian Parliamentary Inquiry into the link between drug-related offending and female prisoner numbers, identified housing as “the most overwhelming problem”<sup>26</sup> facing criminalised women, and one closely linked to women’s offending and reoffending. The Committee referred to evidence of women being placed on remand or having release from prison postponed purely due to lack of available housing.<sup>27</sup> Recent research suggests that little has changed,<sup>28</sup> except perhaps the scale of the problem.

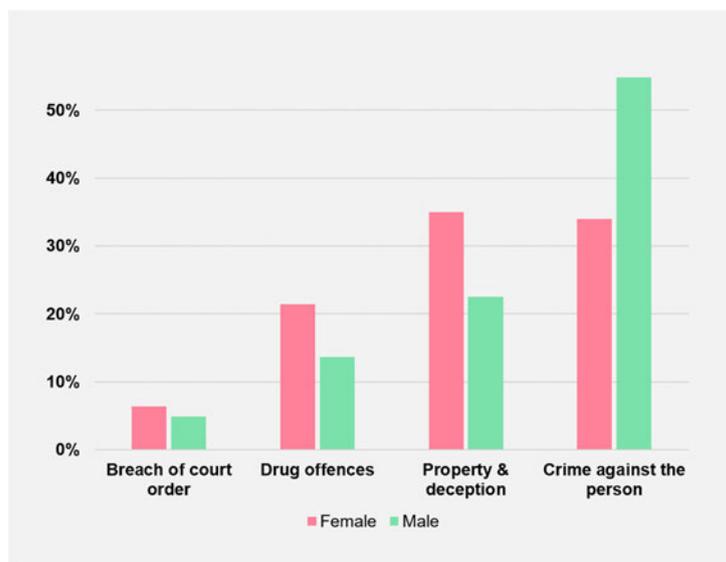
Housing is essential for women to transition successfully from prison and to be reunited with children placed in care during their incarceration.<sup>29</sup> UK researchers have estimated that stable accommodation could reduce the risk of re-offending by 20 per cent.<sup>30</sup> This is supported by women interviewed in prison who indicate that early support to find housing would have prevented them from offending or reoffending.<sup>31</sup>

Imprisonment acts to disrupt women’s access to housing further. Spending even a short period in custody can result in a woman losing housing and possessions.<sup>32</sup> A 2015 study of women leaving Silverwater Prison in NSW over a 12-month period found that only 12 per cent had stable housing on release from prison.<sup>33</sup>

### 3.4 Women are charged with less serious offending

Women tend to be charged with less serious offences than men – such as property or economic crimes and low-level drug offences – and have fewer previous convictions.<sup>34</sup> This makes women good candidates for programs that divert them from prison and link them with supports in the community.

Figure 1: Comparison of most serious charge for male and female prisoners at June 2019



Source: CIJ analysis of prison data

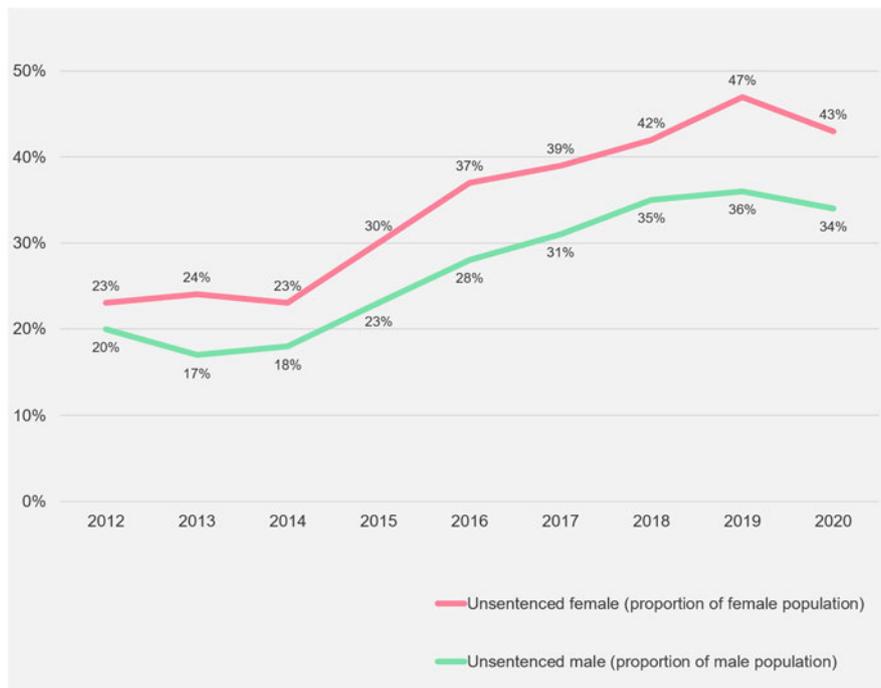
While there are complex and inter-related reasons for the growing female imprisonment rate, there is no evidence to suggest that women are committing more crime, or that their offending is becoming more serious.

In fact, the proportion of women entering Victorian prisons on remand who were charged with violent crimes or 'offences against the person' dropped by 7 per cent between 2012 and 2018.<sup>35</sup>

### 3.5 More women than men are imprisoned on remand

Women figure disproportionately in both the rate at which Victoria's prison population and, more specifically, the remand population is growing. As Figure 2 below illustrates, the rate at which women are held on remand (i.e., before being sentenced) is significantly and consistently higher than that for men.

Figure 2: Total unsentenced male and female prison population 30 June 2012 to 2020



Source: Updated version of Figure 1, DJCS, 2019, p.5<sup>36</sup>

The proportion of unsentenced women received into prison is increasing. Prison reception data from 2019-20 indicates that 90 per cent of all women entering prison have no charges proven against them, up from 62 per cent in 2009/10.<sup>37</sup> Around 40 per cent of these women will spend more time on remand than they eventually get as a sentence.<sup>38</sup>

### 3.6 Imprisoning women causes disproportionate harm

Incarcerating women is, in effect, a "double punishment". This is both in terms of the impact of incarceration on individual women and the intergenerational impact that the disruption of women's child rearing and other caregiving roles has in the community.

Because they commonly face less serious charges than men, women are more likely to spend short, damaging periods in custody. Not only do these brief periods of detention act to compound disadvantage and disconnections from family and community, they also mean that women have less opportunity to get the support they need in prison, as well as following release, to address the issues that led to offending.

Women in prison are more likely than men to be the primary carer of dependent children or other family members. Over half have at least one dependent child.<sup>39</sup> In 2018, the Prison Reform Trust estimated that 17,240 children are separated from their mothers as a result of incarceration every year in the UK.<sup>40</sup> Even short periods of separation can have profoundly devastating impacts on the mother-child bond. In addition, imprisoning a woman who is the sole or primary caregiver puts her children at increased risk of being placed in out of home care – a well-recognised pathway to the youth justice system<sup>41</sup> and a lifetime of dependence on the justice and social service systems more broadly. Imprisonment impacts disproportionately on Aboriginal women when responsibilities for the care of non-biological children and extended family across

kinship networks are disrupted, resulting in significant down-stream implications for child welfare and family cohesion.

Women in prison who lose custody of their children have also been found to be at higher risk of self-harm and are more likely to return to custody than women whose connection with their children had been supported.<sup>42</sup>

### 3.7 Australia is bound by international rules to divert women from custody

In recognition of the different profiles of women charged with criminal offences, in 2010 the United Nations established international standards for the treatment of women in the justice system. The Bangkok Rules<sup>43</sup> require governments to cater more effectively for women's needs and to make laws and policies that divert them from prison. Australia also has obligations under the UN Convention on the Rights of the Child to ensure that the best interests of the child is the primary consideration "in all actions concerning children", including those taken by a court of law.<sup>44</sup>

Despite these international obligations – and even though the crime rate in Australia is falling – Victoria has increased the use of prison for women. While it is welcome news that the Victorian Government has committed to an upgrade of facilities at the Dame Phyllis Frost Centre, Victoria's maximum-security prison for women,<sup>45</sup> the scope of work announced in March 2021 includes an increase in bed capacity. This suggests that women's incarceration rates are not expected to reduce in the short- or medium-term future.

## 4. Systemic drivers of female imprisonment

While experiences of structural inequality, victimisation and trauma can make women vulnerable to committing offences, exponential growth in the number of women in custody on remand or sentence<sup>46</sup> is currently being accelerated by specific laws, policies and practices in the Victorian justice system. This section explores the systemic factors that are driving up the female imprisonment rate in Victoria, and more specifically, the disproportionately high rate at which women are remanded in custody, instead of being granted bail.

### 4.2 Policing

Police policy and practice<sup>47</sup> has a direct impact on the number of people being arrested, as well as the rate at which particular groups of people are prosecuted, rather than receiving a caution, a fine, or being referred to a diversion scheme. One Australian academic has described police practice as it relates to women, and in particular to Aboriginal women, as "the over-policing as offenders, and the under-policing as victims".<sup>48</sup>

There is clear evidence of discriminatory policing practices involving the disproportionate use of prosecution against Aboriginal people in Australia. A recent NSW study found that over 80 per cent of Aboriginal people arrested for possession of small amounts of cannabis were prosecuted, compared with just over 52 per cent of non-Aboriginal people arrested for the same offence.<sup>49</sup> Similarly, Aboriginal women are more likely to face imprisonment for minor offences such as disorderly conduct; minor property and traffic offences; and breach of court orders.<sup>50</sup>

There are also growing concerns that reforms to improve family violence policing practices in Victoria<sup>51</sup> may be having a *counterproductive* effect for women more generally. Evidence suggests that zero tolerance approaches to family violence have resulted in an increase in women being misidentified as perpetrators in family violence callouts. Women's Legal Service Victoria has reported that, in a sample of client case files involving women who were initially named as perpetrators on police applications for Family Violence Intervention Orders, 57 per cent were found to be victim/survivors.<sup>52</sup>

### 4.3 Bail

Victoria's restrictive bail laws, passed in response to a series of high-profile violent crimes,<sup>53</sup> have also made it harder for people charged with non-violent offences to qualify for bail. Studies have pointed to the disproportionate impact that these reforms – which include the introduction of a reverse onus test that displaces the presumption of bail for some offences and in some circumstances, and of requirements to "show

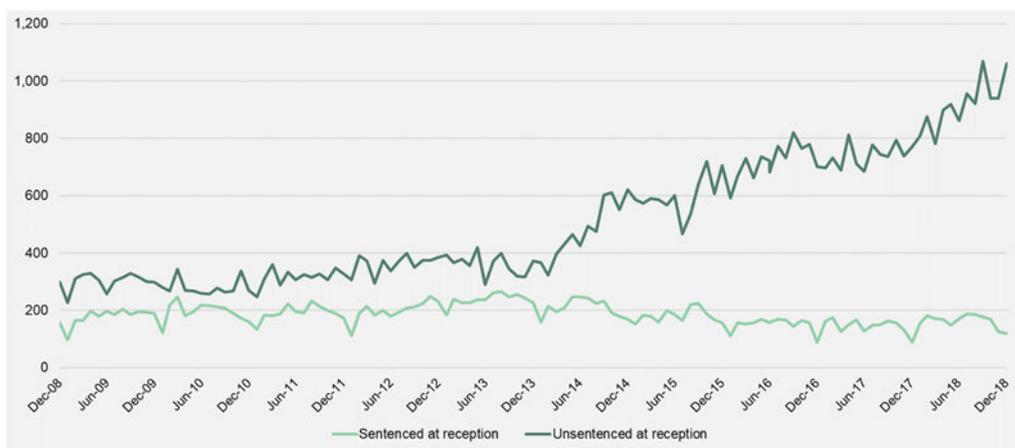
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compelling reasons” and/or “exceptional circumstances” as to why bail should be granted – have had a disproportionate effect on women.

A recent Victorian study<sup>54</sup> indicates that stringent bail criteria results in many women not applying for bail, particularly if they have no legal representation, or being refused bail when they do. Russell and colleagues found that 72 per cent of a sample of women appearing in the Bail and Remand Court during 2019 had made no application for bail, and that high rates of homelessness and substance addiction amongst women increase the likelihood of being refused bail due to a perceived risk of reoffending.<sup>55</sup>

This has resulted in a growing proportion of women in prison being held on remand. While the number of women received into prison under sentence in Victoria has remained relatively stable, there were more than four times as many unsentenced women entering Victorian prisons in December 2018 than December 2008,<sup>56</sup> representing the largest numerical change in unsentenced prisoners in Australia.<sup>57</sup>

Figure 3: Monthly female prison reception by legal status



Source: Walker et al., 2019, Figure 2, p 5.

The rise in ‘breach bail’ charges reflects a component of the reforms which have arguably had the most dramatic effect on women’s prison numbers in Victoria.<sup>58</sup> Unlike some states, breaching a condition of bail in Victoria is a criminal offence, even where bail is breached because a person misses their court date or is residing at another address. This means that women with mental ill health and substance dependence who struggle to comply with bail conditions can be subject to the highest legal test for bail – the same threshold that applies to people charged with murder and terrorism offences.<sup>59</sup>

By 2015, half of all unsentenced women in prison were charged with one of these new offences.<sup>60</sup> Overall, there was a 630 per cent increase in the number of women facing breach of order charges, most commonly breach of bail and breach of Family Violence Intervention Order, as the most serious charge between 2012 and 2017.<sup>61</sup>

#### 4.4 Sentencing

In addition to the rising number of women on remand, evidence suggests an increase in the use of custodial sentences for women. A study into trends in the imprisonment of women in Australia and New Zealand found an increase of approximately 13 per cent in the number of women receiving a sentence of imprisonment in Australia between 2005 and 2012.<sup>62</sup> Similarly, the Sentencing Advisory Council has previously reported both an “increase in the proportion of women being sentenced to imprisonment and an increase in the average length of imprisonment terms”.<sup>63</sup>

There are a number of factors driving this trend. One is the narrowing of sentencing options available to judicial officers in Victoria, including via the abolition of suspended sentences in 2012,<sup>64</sup> as well as a more proscriptive approach to Community Corrections Orders.<sup>65</sup> Legislative changes that mandate imprisonment for certain offences, impose statutory minimum sentences, or set minimum non-parole periods are also likely to have contributed to the growing rate of female incarceration.

The use of community-based sentencing more broadly is also declining. By March 2019, Victoria's rate of community-based sentences stood at the lowest rate in Australia.<sup>66</sup> Between 2017 and 2020, the number of female clients of Community Correctional Services dropped by 36 per cent, with the greatest reductions occurring in the number of women on supervised court orders (26 per cent) and reparation orders (65 per cent).<sup>67</sup> Despite indications that community-based sentences cost a tenth of a custodial sentence, with successful completion more likely to lead to a reduction in reoffending than custodial responses,<sup>68</sup> the extent to which they operate effectively for women needs to be interrogated. This is discussed further in section 5 of this submission.

Former Deputy Chief Magistrate Popovic has previously noted that women "provide sentencing dilemmas for Magistrates" because the multiple needs which women are experiencing which are not addressed by appropriate support, make fines or community based orders less viable, yet "detention for the sake of imposing a form of punishment on persons whose crimes are generated by need...is not appropriate."<sup>69</sup>

#### 4.5 Limited opportunities for rehabilitation and support

A 2015 investigation into rehabilitation and transitional programs provided in Victorian prisons by the Victorian Ombudsman found significant deficiencies in the support available to people in prison,<sup>70</sup> with little or no support available in the early phase of sentences and on release. This "lost opportunity" was seen to result from delays accessing in-prison programs, including substance dependence programs, due to a growing prisoner population, combined with limited investment in the provision of transitional support. Only 20 per cent of prisoners released were found to have received follow-up support in the community post-release.

As indicated at 3.5 above, the short, sharp nature of women's imprisonment means that there is limited scope for women navigating the criminal justice system to access services which meet their immediate practical and more long-term, therapeutic needs. Equally, it means that there are minimal opportunities for women to benefit from a planned transition to the community post release. Just as importantly, a lack of gender-informed programs and supports at earlier points of the criminal justice pathway results in a dearth of research evidence on best practice responses to address the complex and multiple vulnerabilities of criminalised women.

With the high prevalence of homelessness experienced by justice-involved women, and the associated growth in the female remand rate, there is an urgent need for tailored housing options for women at risk of imprisonment or exiting prison, such as women's bail hostels or transitional housing. While men have access to a residential program to help in the transition from prison to the community in Victoria, there is currently no equivalent service for women.<sup>71</sup> Women also have limited access to gender-specific and culturally relevant residential treatment programs more generally, particularly those that accommodate children.

It is also increasingly recognised that a one-size-fits-all approach to justice related support programs does not serve women well. Court-based therapeutic bail support programs which aim to reduce reoffending on bail and provide an alternative to detention on remand, such as that provided under the Court Integrated Services Program (or CISP) at the Magistrates' Court of Victoria,<sup>72</sup> provide a case in point.

While an evaluation of CISP soon after its introduction in 2006 found evidence of benefits for participants,<sup>73</sup> there was little focus on how particular cohorts, including women, experienced the program. Stakeholders consulted by the CIJ for the *Leaving custody behind* paper and the WTJ evaluation reported that mandated programs available under CISP do not align with women's immediate priorities (i.e., housing and regaining custody of children), but are skewed towards issue-specific, target-based interventions. They further noted that program processes do not adequately take into account women's responsibilities as caregivers of young children.

These reports echoed findings from an earlier Victorian study that, as a management tool for "people experiencing multiple markers of vulnerability",<sup>74</sup> court-based therapeutic bail can in fact act to marginalise vulnerable cohorts further, particularly when viewed in the context of inadequate service provision. The study concluded that, for those whose life circumstances result in non-compliance with mandated conditions,

therapeutic programs are experienced as punitive, and can effectively widen the reach of the penal system's power to pre-trial processes.<sup>75</sup>

Women-specific bail support programs, such as that provided by Fitzroy Legal Service (FLS), the Law and Advocacy Centre for Women (LACW) and Flat Out Inc. under the Women Transforming Justice pilot, provide a template for more effective and holistic responses to support women to remain safe and stable in the community while on release.

## 5. Key strategies to reduce female imprisonment

Rising rates of recidivism suggest that the increased use of imprisonment against women is not an effective response. Data from the ABS National Prisoner Census indicates that, as at 30 June 2019, close to 38 per cent of all women in adult prisons in Victoria (sentenced and un-sentenced), and approximately 49 per cent of Aboriginal women, had a prior experience of custody. In Victoria, 43.7 per cent of all people in custody (male and female) released during the 2015 -16 financial year returned to prison within two years.

Section three of the *Leaving Custody Behind* paper outlines a suite of high-level reforms aimed at halting Victoria's escalating female imprisonment rate, delivered under a Women's Justice Reinvestment Strategy. These reforms seek to minimise women's interaction with the criminal justice system more broadly and to maximise opportunities for contact with the system to have a positive impact on women's lives.

Given the breadth and complexity of the issue under discussion, in this section the CIJ provides a summary of the reforms to address systemic factors impacting on women as set out in section 4 above. We refer the Committee to the Issues Paper for a more comprehensive account of the Women's Justice Reinvestment Strategy, including approaches to working with Aboriginal communities in the delivery of community-led and culturally safe reforms.

### 5.1 Reform the bail laws

There is an urgent need for changes to Victoria's approach to bail. Reducing the flow of unsentenced people into Victorian prisons would limit the damaging and unnecessary exposure to the prison system which, in itself, contributes to recidivism. It would also assist an already over-burdened justice system to address the backlog of criminal matters resulting from COVID restrictions. Failure to do so may lead to people languishing on remand for much longer periods of time.

Changes to the bail regime should include at a minimum:

- Removal of the reverse-onus provisions in the current bail laws and a return to a presumption of bail, with consideration of a specific requirement that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and
- Removal of 'double uplift provisions', with a single test for bail decisions which assesses whether there is an unacceptable risk to community safety.

In addition, the CIJ recommended:

- Referral of the operation of the remainder of Victoria's bail laws to the Victorian Law Reform Commission for comprehensive review.

A detailed examination of the impacts of substantial tranches of reform to the state's bail mechanisms will surface considerable evidence about the way in which these laws have been impacting certain cohorts in the community. This examination will also interrogate the extent to which these laws have been achieving their stated objective of increasing community safety or compromising safety instead.

The review could involve a more substantial rethink of Victoria's approach to bail, including consideration of recent changes to bail laws and practice implemented in New York City (NYC) to curtail pre-trial detention.<sup>76</sup> Based on a *presumption of release* in all cases, the NYC laws extend earlier reforms in that jurisdiction by imposing a ban on pre-trial detention for the majority of people charged with a misdemeanour or non-violent felony. With twin imperatives of halving the city's prison population within six years of the 2020 changes while

maintaining public safety, the reforms were based on evidence relating to flight risk; the likelihood of failure to attend court; the impact of refusal of bail on plea decisions; inconsistency in judge-made bail decisions; and the criminogenic effect of even short periods of detention.

Bail reforms should also involve consideration of the development of risk assessment tools to assist bail decision-makers to make more evidence-based and consistent bail determinations.<sup>77</sup> This includes ensuring that lack of adequate accommodation or access to appropriate support cannot be used as a reason to refuse bail and that ensuring that assessments of “risk” are not equated with assessments of “need”.

## 5.2 Divert women and adapt policing

While there are many changes to policing policy and practice that have the potential to reduce the number of women moving through the justice system, here the CIJ focuses on two priority actions.

First, there should be greater opportunities available to police to divert women involved in low-level offending from prosecution.<sup>78</sup> As recommended by the Human Rights Law Centre, this could be achieved by implementing legislative and policy change requiring Victoria Police to consider all alternatives to prosecution for low-level offending, including “cautions, warnings, concession penalty notices and diversion programs that allow for pre-charge referrals”.<sup>79</sup>

Evaluations of non-gender specific programs have found that female participants tended to achieve more successful outcomes than men.<sup>80</sup> This suggests that, rather than being available only to first time offenders, diversion is an effective path for criminalised women overall, albeit with the provision of appropriate supports.

An example of a women’s conditional caution program is the Humberside Police Adult Female Triage Project piloted in the UK, where women who admitted to low-level offending were diverted from prosecution. Participation was conditional on women attending a Together Women one-stop women’s centre for assessment and then engaging with the supports offered.<sup>81</sup> An evaluation of the program found a 46 per cent reduction in re-arrest over a 12 month period and, when compared with a control group of similar justice-involved women, a 48 per cent lower daily likelihood of rearrest.<sup>82</sup>

The Koori Women’s Diversion Program delivered by the Victorian Aboriginal Child Care Agency provides a model for gender-specific, culturally informed diversion. Providing up to 12 months intensive case managed support and referral for Aboriginal women, the program is aimed at reducing offending, reoffending and contact with the justice system overall. The program also supports Koori women on bail or CCOs and includes healing programs.

A second proposed reform is the development and implementation of a framework for a gender-informed approach to policing, including training around appropriate assessments of risk and decisions in relation to bailing women. This could include the appointment of a Women’s Policing Lead at a senior command level to drive strategies such as:

- Guidelines on good practice in relation to women in contact with the criminal justice system, including women-specific approaches to risk assessment, staff training, diversionary measures and referral to local support services;<sup>83</sup>
- Transparent reporting on progress on training provided by the Victoria Police Family Violence Centre of Learning regarding common trauma responses to family violence, as well as the appropriate identification of predominant aggressors when attending family violence incidents;<sup>84</sup>
- The implementation of *Police and Aboriginal Community Protocols Against Family Violence* (PACPAFV - formerly known as the *Aboriginal Family Violence Police Protocols* or *Koori Family Violence Protocols*)<sup>85</sup> across the state and ongoing training of members on the application of the protocols and appropriate responses to family violence, “including preventative intervention and prompt response”, as recommended by the ALRC in the *Pathways to Justice* report;<sup>86</sup> and
- The establishment of independent investigative and complaints mechanisms for reporting breaches of the good practice guideline and failure to comply with the PACPAFV.

### 5.3 Expand community-based sentencing options

Given the high proportion of criminalised women serving short, damaging periods in custody, a clear need exists for greater use of community-based sentencing options as an alternative to imprisonment, and just as importantly, their application in a gender-responsive way.

Increased opportunities for women to serve sentences in the community, however, necessitate access to well resourced, evidence-based and integrated programs which support compliance, rehabilitation and integration into the community over the longer term (discussed further under section 5.4). The limited evidence available suggests that Victoria's community-based sentencing options are not operating as effectively for women, due largely to a lack of sensitivity to women's specific needs and the supports needed to address them.

As appears to be the case in relation to court-based therapeutic bail programs discussed above, research indicates that community order conditions and supervision approaches that do not take into account women's specific circumstances can set them up to fail.<sup>87</sup> Supervision practices and the tools used to assess risk are based on the behaviours, risks and needs of men, with little regard for the caring responsibilities, trauma experiences and socioeconomic marginalisation relevant to women.<sup>88</sup> This can result in women struggling to comply with community-based bail or sentencing conditions and consequently spending time in custody for breach of orders that were originally in place for low-level offences and would not otherwise warrant a custodial sentence.<sup>89</sup>

To support the increased use of community-based sentencing for women, wider reforms are needed that impose legislative limits on the use of imprisonment. These could include:

- Restrictions in the use of imprisonment in non-violent crimes;
- A prohibition on sentences of six months or less (subject to access to appropriate community-based alternatives);<sup>90</sup>
- A presumption against remanding in custody or imprisoning pregnant women or women with dependent children, as stipulated under the Bangkok Rules;
- Changes to increase the availability of parole, or release "on licence". In the UK, adults serving a prison sentence of less than two years are released after serving half their sentence, with the remainder of the sentences served in the community "on licence" (or subject to conditions), and a further period of supervision under the Transforming Rehabilitation Programme;<sup>91</sup> and
- Provision for culturally appropriate sentencing dispositions which take greater account of the circumstances of the individual charged and the context of the offending, as recommended by the ALRC.<sup>92</sup>

### 5.4 Guidance for judicial officers

Like the proposed gender-sensitive approach to policing, a clear need exists for the development of a framework which can guide judicial officers to understand the practical, as well as trauma-based, needs of women seeking to comply with bail conditions or community-based sentences, as well as to sentence appropriately.

Researchers in the UK have highlighted that the degree to which expanded community sentencing options impact on women's incarceration rates depends on how these options are perceived by those making sentencing decisions, as well as the degree to which they are gender focused. Hedderman and Gunby suggest that Magistrates would benefit from guidance on how different community order conditions might be ranked in relation to each other.<sup>93</sup> This aligns with findings from the WTJ evaluation that advocacy tools are needed to ensure that bail decision-makers understand the practical issues relevant to criminalised women when making orders, including access to transport and phones and caregiving responsibilities.<sup>94</sup>

Judicial officers would be assisted in this task if there was an articulation of the over-arching principles guiding sentencing more broadly, and associated action, as discussed in section 5.3, to ensure that practice aligns with

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these principles. For example, it may surprise many people that the *Corrections Act 1986* (Vic), makes no reference either to the rehabilitation of people in the corrections system or to the reduction of recidivism as a purpose of the legislation.<sup>95</sup> This absence has led researchers to describe Victoria's legislative framework for rehabilitation as being "virtually non-existent".<sup>96</sup>

In addition to setting considerations relevant to sentencing decisions, introducing clear objectives into the 'purposes' sections in key criminal justice legislation relating to bail, sentencing, youth justice and Corrections would help to promote greater consistency across criminal justice agencies; set standards for criminal justice reform; and send a strong message to the community about the wider role of the justice system in preventing reoffending.

As noted above, any sentencing reform that involves the increased use of community-based orders must ensure that the conditions set; the supervision provided; and the policy and processes relating to breaches take into account the specific challenges faced by women and other cohorts. Crucial to the success of these reforms is investment in effective support programs, discussed in the next section.

## 5.5 Investment in services and support

Given what is known about the role played by trauma and socio-economic disadvantage in women's criminalisation, the first priority of government should be to invest in early intervention services *in the community* to prevent women from coming into contact with police and courts in the first place. Nonetheless, there is considerable scope for justice mechanisms to function as a positive intervention in the lives of criminalised women by delivering specialist and mainstream supports at early and multiple points of a woman's contact with the criminal justice system, including in custody<sup>97</sup> and post-release.

While there is limited data on the efficacy of custodial rehabilitation programs designed for women, it is well established that measures to address the causes of offending and to support integration into the community upon release are successful in reducing recidivism. In fact, without rehabilitation, incarceration alone is likely to *increase* rates of offending.<sup>98</sup> Reforms which aim to promote rehabilitation therefore have important implications for community safety, as well as meeting social justice and cost-saving objectives.

The CIJ proposes that the Women's Justice Reinvestment Strategy be the vehicle to drive investment in:

- Specialist gender informed bail supports and therapeutic court interventions;
- Residential bail options for women;
- A residential transitional release facility for women, with through-care support via continued case-managed, holistic supports;
- Holistic, case-managed, trauma-informed and culturally appropriate support in prison that involves comprehensive assessment of the support needs of women entering prison, as well as services delivered by community agencies to address these needs;
- Planning and delivery of transition and post release support that operate on a collaborative, rather than surveillance, model;
- An integrated and adequately resourced community sector; and
- Targeted research to bridge current knowledge gaps relating to women in the criminal justice system, and to ensure that tailored responses are evidence-based and data driven.

To perform an early intervention, crime-prevention function, the Women's Justice Investment Strategy should also commission a feasibility study for the piloting of an independent, community-based woman's support hub in Victoria. Learning from The Miranda Project in NSW and similar initiatives in the UK, the pilot program should incorporate the following characteristics:

- Working closely with Community Correctional Services in the support of women on bail, CCOs, or on parole;

- Engaging with courts and judicial officers to ensure that the service is viewed as an appropriate referral point for women seeking bail;
- Providing mentoring opportunities to women in contact, or at risk of contact, with the criminal justice system through collaboration with, and investment in, existing Victorian mentoring programs;
- Most crucially, operating as a community-based project, rather than as an extension of Corrections, and funded independently of Corrections.

To support women's access to and engagement with these supports, the Women's Justice Reinvestment Strategy should include the development of targets for the rehabilitation and reintegration of prisoners, with specific targets relating to Aboriginal people, women and young people, as well as for individual prisons. These targets should be reported to the Victorian Parliament, with updates on progress in meeting those targets to be provided every 12 months. Targets should also be set in relation to women's engagement with early intervention, in-prison, transition and post release services, including universal supports such as medical, mental health and disability services.

Development of minimum standards in the delivery of post-release support should also be incorporated into the *Standards for the Management of Women Prisoners in Victoria*. The minimum standards should include case-managed support to ensure that women are provided with: short-term housing for women at risk of homelessness on release; adequate documentation for proof of identity; a Medicare and Myki card; financial assistance for the first week of release; assistance to establish an email account and procure a mobile phone; copies of educational and vocational qualifications, including those attained in prison; and appropriate transport on release.

## 6. Conclusion

Given that women, particularly Aboriginal and Torres Strait Islander women, are the fastest growing cohort being locked away – and with a relative absence of focus on women in a system designed predominantly for men – this submission focuses primarily on women's experiences. It does so while acknowledging the intersections of a wide range of issues which bring women into contact with the criminal justice system, including at an early age, as well as the damaging impacts that this contact can have. Developing specific justice responses for women would minimise the disproportionate harm, or double punishment which women currently experience in the criminal justice system. It would also increase the likelihood of reducing or avoiding women's repeat engagement with police, courts and prisons.

Further, a focus on women as a sub-set of the Victorian prison population provides an opportunity to implement change in a targeted way; and to measure the impacts of this reform so that it can potentially be applied more broadly across the Victorian criminal justice landscape. This means that a focus on the 'decarceration' of women – a concerted and purposeful attempt to reverse the use of incarceration as a response to contact with the criminal justice system – may offer a range of wider lessons in which we can reduce crime and make the community safer, not by increasing rates of custody, but by leaving custody behind.

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- <sup>1</sup> Cullen, F., Jonson, C., & Nagin, D. (2011) 'Prisons do not reduce recidivism: The high cost of ignoring science.' 91(3) *The Prison Journal*; Cid, J. (2009) 'Is imprisonment criminogenic? A comparative study of recidivism rates between prison and suspended prison sanctions' 6(6) *European Journal of Criminology*, 459-480; Vieraitis, L., Kovandzic, T., and Marvell, T. (2007) 'The criminogenic effects of imprisonment: Evidence from state panel data, 1974–2002' 6(3) *Criminology & Public Policy* 589-622; Spohn, C., and Holleran, D. (2002) 'The effect of imprisonment on recidivism rates of felony offenders: A focus on drug offenders,' 40(2) *Criminology* 329–358; Bales, W., & Piquero, A. (2012) 'Assessing the impact of imprisonment on recidivism' 8(1) *Journal of Experimental Criminology*, 71–101; It is interesting to note that assessment tools used by Corrections Victoria to measure the service needs and criminogenic risk (risk of reoffending) of people received into prisons (Level of Service/Risk, Need, Responsivity, or LS/RNR) are explicit in citing time in custody as increasing this risk.
- <sup>2</sup> An Australian study of 127 women in prison found that 64 per cent exhibited lifetime prevalence of problem gambling. Largely linked to the proliferation of electronic gambling machines (EGMs), this study suggests that rates of gambling issues may now be higher among women in prison than their male counterparts. Riley, B., Larsen, A., Battersby, M. and Harvey, P. (2017) 'Problem Gambling and Female Prisoners Lifetime Prevalence' 17(3) *International Gambling Studies* 401.
- <sup>3</sup> Corrections Victoria, (2020) *Annual Prisoner Statistical Profile 2018-19. Overview of female prisoners at 30 June* (Table 1.2). By June 2019, that 10-year percentage increase dropped to 104%.
- <sup>4</sup> This compared to only a 10.4% reduction in the male prison population over the same period. Corrections Victoria (2021) *Monthly Prison and Offender Statistics*, Table 1.12.
- <sup>5</sup> Corrections Victoria (2021) *End of month prisoner numbers by gender and warrant status*, Table 1.
- <sup>6</sup> Walker, S., Sutherland, P. & Millstead, M. (2019), *Characteristics and offending of women in prison in Victoria 2012-2018* (Crime Statistics Agency, Melbourne), 15.
- <sup>7</sup> Tubex, H. 'Prisoner numbers in Australia may have decrease, but we're not really sure why yet.' *The Conversation*, 21 January, 2020 <https://theconversation.com/prisoner-numbers-in-australia-have-decreased-but-were-not-really-sure-why-yet-129696>.
- <sup>8</sup> As at 30 June 2019, the proportion of the male prison population that identifies as Aboriginal was 10.4%. Corrections Victoria, (2020) *Annual Prisoner Statistical Profile 2009-10 to 2019-20*. Table 1.4 – Overview of Aboriginal and Torres Strait Islander prisoners at 30 June.
- <sup>9</sup> Australian Bureau of Statistics, (2017) *Census of Population and Housing: Nature and Content, Australia, 2016* Catalogue No 2901.0.
- <sup>10</sup> World Prison Brief, Highest to Lowest – Prison Population Total (web page) [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All).
- <sup>11</sup> Green, B., Jeanne, M., Daroowalla, A., & Siddique, J. (2005) 'Trauma exposure, mental health functioning and program needs of women in jail', 51 (1) *Crime & Delinquency* 133-151, 134; Ogloff, J., Cutajar, M., Mann, E., & Mullen, P. (2012) 'Child sexual abuse and subsequent offending and victimisation: A 45-year follow-up study' *Trends and Issues in Criminal Justice*, No. 440 Australian Institute of Criminology.
- <sup>12</sup> Stathopoulos, M., & Quadara, A. (2014) *Women as offenders, women as victims: The role of Corrections in supporting women with histories of sexual abuse*, Corrective Services NSW; Prison Reform Trust, (2017) *There's a reason we're in trouble: Domestic abuse as a driver to women's offending*, United Kingdom; Wright, E. M., Voorhis, P. V., Salisbury, E. J., & Bauman, A. (2012) 'Gender-responsive Lessons and Policy Implications for Women in Prison: A Review' 39 (12) *Criminal Justice and Behaviour*; Stone, U. B., (2013) 'I'm still your Mum: Mothering inside and outside prison', Master of Arts thesis, RMIT University; Australian Institute of Health and Welfare (2015) *The health of Australia's prisoners 2015* Canberra; Swavola, E., Riley, K., & Subramanian, R., (2016) *Overlooked: Women and Jails in an Era of Reform*. New York: Vera Institute of Justice; Segrave, M., & Carlton, B., (2010) 'Women, Trauma, Criminalisation and Imprisonment.' *Current Issues in Criminal Justice* 22 (2), 287-305; Loxley, W. & Adams, K. (2009) 'Women, drug use and crime: Findings from the drug use monitoring in Australia program', Research and public policy series, No. 99, Australian Institute of Criminology; Salisbury, E & van Voorhis, P. (2009) 'Gendered Pathways: A Quantitative Investigation of Women Probationers' Paths to Incarceration' 36(6) *Criminal Justice and Behaviour* 541-566; Bartels, L, Eastale, P. & Westgate, R. (2020) 'Understanding women's Imprisonment in Australia' 30 (3) *Women and Criminal Justice*, 204-219; Day, A., Casey, S., Gerace, A., Oster, C., & O'Kane, D. (2018) *The forgotten victims: Prisoner experience of victimisation and engagement with the criminal justice system* (Research report, 01/2018). Sydney, NSW: ANROWS.
- <sup>13</sup> Salisbury & van Voorhis, above n 12; Richie, B.E. (1996) *Compelled to crime: The gender entrapment of battered black women*, Routledge; Day et al. above n 12; Gilfus, M. (2002) *Women's experiences of abuse as a risk factor for incarceration*, Applied Research Forum, National Online Resource Center on Violence Against Women.
- <sup>14</sup> McEntyre, E. (2019) 'But-ton kidn doon-ga: Black women know - Re-presenting the lived realities of Australian Aboriginal women with mental and cognitive disabilities in the criminal justice system' 19 (2) *Australian Indigenous Health Bulletin*; Baldry, E., McCausland, R., Dowse, L. & McEntyre, E. (2015) *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* UNSW Sydney; Heffernan, E., Anderson, K., McEntyre, E., & Kinner, S. (2014) 'Mental Disorder and Cognitive Disability in the Criminal Justice System' in Dudgeon, P., Milroy, H. & Walker, R. (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, Commonwealth of Australia 165.
- <sup>15</sup> Stone, above n 12; Wright et al, above n 12; Segrave & Carlton, above n 12.
- <sup>16</sup> Davies, S., & Cook, S. (2000) 'Dying out, dying outside: Women, imprisonment and post-release mortality' Conference Paper, Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services SA, 31 October – 1 November 2000.
- <sup>17</sup> Ministry of Justice, United Kingdom. (2018) *Female Offender Strategy*.

- <sup>18</sup> Drug and Crime Prevention Committee, Parliament of Victoria (2010) *Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers*, Parliamentary Paper No 371.
- <sup>19</sup> Prisoner Profile (date unknown). Retrieved 10 June 2020 from: <[https://www.corrections.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2020/06/aa/114d40f57/infocv\\_prisoner\\_profile2019.PDF](https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/aa/114d40f57/infocv_prisoner_profile2019.PDF)>.
- <sup>20</sup> Australian Institute of Health and Welfare, above n 12.
- <sup>21</sup> Meehan, T., Jones, D., Stedman, T., Johnson, D., Suetani, S., Foreman, E. (2017) 'The physical health of Indigenous and non-Indigenous patients participating in residential rehabilitation programs: a comparison study' 25(2) *Australasian Psychiatry*, 164-167.
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- <sup>23</sup> Jackson, M., Hardy, G., Persson, P., & Holland, S. (2011) *Acquired Brain Injury in the Victorian Prison System*, Research Paper Series No 04, Corrections Victoria, 6.
- <sup>24</sup> Russell, E, Carlton, B, Tyson, D., Zhou, H, Pearce, M and Faulkner, J., *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, 2020.
- <sup>25</sup> Social housing in Victoria currently sits at 3.2% of all housing stock – one percent less than the national average. Topsfield, J. & Millar, R. (15 November 2020) \$5.3b blitz on new public housing to 'change lives' *The Age*.
- <sup>26</sup> Drug and Crime Prevention Committee, above n 18, page v.
- <sup>27</sup> *Ibid.*, page iv.
- <sup>28</sup> Russell et al., above n 24.
- <sup>29</sup> Sheehan, R. '(2013) Justice and Community for Women in Transition in Victoria, Australia' in *Women Punishment and Social Justice: Human Rights and Social Work* (eds.) Margaret Malloch and Gill McIvor (Routledge).
- <sup>30</sup> Social Exclusion Unit, Office of the Deputy Prime Minister, (2002) *Reducing re-offending by ex-prisoners*; See also Stathopoulos, M. (2012) *Addressing Women's Victimization Histories in Custodial Settings*, No. 13, Australian Centre for the Study of Sexual Assault, 6-7.
- <sup>31</sup> Prison Reform Trust & Soroptomist International, (2014) *Transforming lives. Reducing Women's imprisonment*, 2014.
- <sup>32</sup> *Ibid.*, 14.
- <sup>33</sup> Legal Aid NSW, (2015) *Aboriginal Women Leaving Custody: Report into Barriers to Housing 4*.
- <sup>34</sup> However, Corrections Victoria data indicates that women received into prisons in Victoria are facing more numerous charges. Walker et al, above n 6.
- <sup>35</sup> *Ibid.*
- <sup>36</sup> Department of Justice and Community Safety (Vic) (2019) *Women in the Victorian Prison System*.
- <sup>37</sup> Corrections Victoria, above n 8. Table 2.2 – All Prisoner Receptions, by Sex and Legal Status on Reception.
- <sup>38</sup> Walker et al, above n 6.
- <sup>39</sup> Australian Institute of Health and Welfare, *The Health and Welfare of Women in Australia's Prisons*, November 2020.
- <sup>40</sup> Beresford, S. (2018) *What about me? The impact on children when mothers are involved in the criminal justice system*, Prison Reform Trust: United Kingdom.
- <sup>41</sup> Sentencing Advisory Council, (2019) '*Crossover Kids: Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court*, Victorian Government; Victoria Legal Aid, (2016) *Care not custody. A new approach to keep kids in residential care out of the criminal justice system*.
- <sup>42</sup> Mitchell, B.K., & Howells, K. (2002) 'The Psychological needs of women prisoners: Implications for rehabilitation and management' 9 (1) *Psychiatry, Psychology and Law* 34-43; Hooper, C.A. (2003) 'Abuse, interventions and women in prison: A literature review', London: HM Prison Service, Women's Estate Policy Unit.
- <sup>43</sup> United Nations Office on Drugs and Crime (UNODC), (2010) 'United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (The Bangkok Rules).'
- <sup>44</sup> United Nations, Office of the High Commissioner. See Article 3(1).
- <sup>45</sup> Media Release 19 March 2021. Construction set to start on Women's Prison upgrade <https://www.premier.vic.gov.au/construction-set-start-womens-prison-upgrade>.
- <sup>46</sup> McMahon, M. (2019) *No bail, more jail? Breaking the Nexus between community protection and escalating pre-trial detention*, Research Paper No 3, Parliamentary Library; Russell et al., above n 24; Walker et al., above n 6.
- <sup>47</sup> Changes in policing can be driven by a range of factors including crime reduction targets; police focus on specific types of offenders or offence types; and increases in police numbers. Weatherburn, D. (2020) "Is Tougher Sentencing and Bail Policy the Cause of Rising Imprisonment Rates? A NSW Case Study." 53(4) *Australian & New Zealand Journal of Criminology*, 563–584, 565.
- <sup>48</sup> As characterised by Dr Hannah McGlade in the Law Council of Australia webinar, 'Closing the Justice Gap: Implementing the ALRC's Pathways to Justice Roadmap', (Webinar, 29 October 2020). <https://www.lawcouncil.asn.au/media/news/closing-the-justice-gap-implementing-the-alrcs-pathways-to-justice-roadmap-webinar>.
- <sup>49</sup> McGowan, M. & Knaus, C. (10 June 2020) 'NSW police pursue 80% of Indigenous people caught with cannabis through courts' *The Guardian* <<https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>>.

- <sup>50</sup> MacGillivray, P. & Baldry, E. (2015) *Australian Indigenous Women's Offending Patterns*, Brief 19 Indigenous Justice Clearinghouse; Anthony, T. & Blagg, H. (2013) 'STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia' 22(1) *Social and Legal Studies*, 43.
- <sup>51</sup> Resulting from recommendations arising from Victoria's Royal Commission into Family Violence. See recommendations 41 to 59, State of Victoria, Royal Commission into Family Violence (2016). *Summary and Recommendations*, Parliamentary Paper No. 132 (2014 – 2016).
- <sup>52</sup> Ulbrick, M. & Jago, M. (2018) '*Officer, she's psychotic and I need protection*': police misidentification of the 'primary aggressor' in family violence incidents in Victoria. Women's Legal Service Victoria, Monash University.
- <sup>53</sup> Coghlan, P. (2017) *Bail Review*. First advice to the Victorian Government.
- <sup>54</sup> Russell et al, above n 24.
- <sup>55</sup> Ibid.
- <sup>56</sup> Walker et al, above n 6.
- <sup>57</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue No 4517.0, 2019).
- <sup>58</sup> Sentencing Advisory Council, (2016) *Victoria's Prison Population 2005 to 2016 Victoria*.
- <sup>59</sup> Russell et al., above n 24
- <sup>60</sup> Walker et al., above n 6, 23.
- <sup>61</sup> Department of Justice and Community Safety (2019) *Women in the Victorian Prison System*, State of Victoria: DJCS.
- <sup>62</sup> Jeffries, S. & Newbold, G., (2016) 'Analysing trends in the imprisonment of women in Australia and New Zealand' 23(2) *Psychiatry, Psychology and Law*, 184-206.
- <sup>63</sup> Sentencing Advisory Council (2010) *Gender differences in sentencing outcomes*, Victorian Government.
- <sup>64</sup> A suspended sentence is form of community-based sentencing. It involves the suspension of all or part of a sentence of imprisonment for a specified period, during which the offender is free to live in the community on the condition that they do not commit a further offence punishable by imprisonment. Where this condition is breached, in addition to being sentenced for the new offence, the suspended prison sentence will be activated unless there are exceptional circumstances. Suspended sentences were introduced in Victoria in 1985 and abolished in 2012. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).
- <sup>65</sup> Department of Justice and Community Safety, above n 36, page 8.
- <sup>66</sup> Sentencing Advisory Council, (2020) *Community-Based Sentences*, Victoria  
<<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/community-based-sentences>>
- <sup>67</sup> Corrections Victoria (date unknown) Profile of people in Community Correctional Services (CCS). Infographic. <[https://www.corrections.vic.gov.au/sites/default/files/embriage\\_cache/emshare/original/public/2020/12/5c/649ca0f30/Infographic\\_Offender\\_ProfileCCS\\_2020.pdf](https://www.corrections.vic.gov.au/sites/default/files/embriage_cache/emshare/original/public/2020/12/5c/649ca0f30/Infographic_Offender_ProfileCCS_2020.pdf)>.
- <sup>68</sup> Picard, S., Tallon, J. & Kralstein, D. (2019) 'Court-Ordered Community Service: A National Perspective', Center for Court Innovation, <<https://www.courtinnovation.org/publications/community-service>> ; Andrews, D. & Bonta, J. (2010) 'Rehabilitating criminal justice policy and practice' 16(1) *Psychology, Public Policy, and Law*, 39-55.
- <sup>69</sup> Drug and Crime Prevention Committee, above n 18, page 34.
- <sup>70</sup> Victorian Ombudsman, (2014) *Investigation into the Rehabilitation and Reintegration of prisoners in Victoria*, Discussion Paper, October 2014.
- <sup>71</sup> We note however recent announcements by the Victorian Government of plans to build transitional housing for women. These include housing for Aboriginal women who are exiting prison and facing homelessness, and self-contained units to be built in the Greater Bendigo area for women leaving prison, the latter due to be completed by mid-2022. See respectively, Victorian Government, (2020) 'Housing to help Aboriginal women leaving prison' (Media Release, 13 February 2020); and Victorian Government (2021) 'Stable housing and supports for a safer community' (Media Release, 31 May 2021).
- <sup>72</sup> CISP has recently been expanded to defendants appearing in the County Court, excluding people accused of sex offences. Court Integrated Services Program (CISP) Pilot factsheet, County Court of Victoria, January 2021.
- <sup>73</sup> Ross, S. (2009) *Evaluation of the Court Integrated Services Program*. Final report, University of Melbourne, 2009.
- <sup>74</sup> Colvin, E. (2014) *Conditional justice: Therapeutic bail in Victoria* (Doctor of Philosophy thesis, Monash University), page v.
- <sup>75</sup> Ibid.
- <sup>76</sup> Rempel, M., & Pooler, T. (2020) *Reducing pre-trial detention in New York City: Data-driven strategies for decarceration*, Centre for Court Innovation. The authors note that Washington DC and New Jersey, New York have implemented similar measures.
- <sup>77</sup> McMahon, above n 46. McMahon quotes evidence from other jurisdictions that more than 80 per cent of people bailed do not offend while on bail; those who do reoffend while on bail tend to commit offences similar to the original alleged offence; and those on bail for violent offences were the least likely to commit similar offences while on bail (p.19). See also Queensland Productivity Commission (QPC) (2019b) *Inquiry into Imprisonment and Recidivism. Summary report*, Queensland Government.
- <sup>78</sup> While there is an Adult Pre-Charge Diversion Program currently available at the Magistrate's Court, it is limited in scope, and is available primarily for first-time offenders and where the prosecutor agrees. The program allows for judicial officers to set conditions – such as an apology to the victim, counselling or treatment, or donations to charitable organisations – that must be completed as part of a diversion plan. Magistrates' Court of Victoria, <<https://www.mcv.vic.gov.au/find-support/diversion>> (page updated March 2020).
- <sup>79</sup> Human Rights Law Centre. (2018) 'Ending racially discriminatory laws that lead to the over-imprisonment of Aboriginal and Torres Strait Islander women and girls. Submission to the Wiyi Yani Thangani (Women's Voices) project', 17 December 2018.

<sup>80</sup> Police and Crime Commissioner for Cambridgeshire and Peterborough, (2018) *Conditional Caution scheme evaluation: Final report* <https://www.cordisbright.co.uk/admin/resources/conditional-caution-evaluation-final-reportfinal.pdf>; Easton, H., Silvestri, M., Evans, K., Matthews, R., & Walklate, S. (2010). Conditional Cautions: Evaluation of the women specific condition pilot. *Ministry of Justice Research Series 14*, 10.

<sup>81</sup> Depending on the woman's history and needs, this could include a range of courses designed to help women with skills such as parenting, anger management and domestic abuse awareness.

<sup>82</sup> Brennan, I., Green, S., & Sturgeon-Adams, L. (2015). *Centre for Criminology and Criminal Justice report: An experimental evaluation of an adult female triage pilot project for Humberside Police*. University of Hull.

<sup>83</sup> See for example the specific Police Guidance on working with women in the criminal justice system, "Managing Vulnerability", developed as part of the UK's Female Offender Strategy. This Guidance provides data and evidence on women's experiences and needs; evidence around 'what works'; and emphasis on a gender-specific, 'Whole System Approach' for police to assess and identify the most appropriate outcome for women with whom they interact. Ministry of Justice, UK Government, (2018b) *Managing vulnerability: Women. Fact pack*.

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721190/police-guidance-on-working-with-vulnerable-women-web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721190/police-guidance-on-working-with-vulnerable-women-web.pdf)>

<sup>84</sup> The need for this training to include emphasis on preventative intervention and prompt responses when police are engaging with Aboriginal and Torres Strait Islander people and communities, was a recommendation of the 2017 ALRC inquiry (Recommendation 11–2). Australian Law Reform Commission, (2017) *Pathways to justice – Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples: Final Report* Report 133, Australian Government.

<sup>85</sup> First established in 2008, PACPAFVs are operating at 10 sites in Victoria (Ballarat, Bairnsdale, Dandenong, Darebin, Latrobe, Mildura, Shepparton, Swan Hill, Warrnambool, and Wimmera) with a further two sites at Geelong and Echuca planned. The protocols reflect a trilateral partnership between the Dhelk Dja Partnership Forum, Aboriginal Justice Forum and Victoria Police, and is informed by a statewide family violence steering group involving Dhelk Dja, Family Safety Victoria, Koori Justice at the MCV and representatives from a range of Aboriginal agencies. Police currently receive no specific training on the application of the protocols, but undertake cultural competency delivered at the local level in addition to a mandatory online learning module, 'Understanding family violence in the Aboriginal community.' Email communication with Victoria Police, March 2021.

<sup>86</sup> ALRC, above n 84, Recommendations 11-2. See also recommendation 151 of the Royal Commission into Family Violence (RCFV).

<sup>87</sup> Swavola et al., above n 12; Kendall, above n 22; Turnbull, S., & Hannah-Moffat, K. (2009) "Under these conditions: Gender, Parole and the Governance of Reintegration", 49(4) *British Journal of Criminology* 532-51; Hannah-Moffat, K. (2010) 'Sacrosanct or Flawed: Risk, Accountability and Gender- Responsive Penal Politics' (22)2 *Current Issues in Criminal Justice: Beyond Prison: Women, Incarceration and Justice*, 193-215. This appears to be supported in the SAC's 2017 examination of CCOs, although not including analysis of women's gender-specific needs or risks, found that women are more likely to breach a CCO through non-compliance than men. Sentencing Advisory Council, (2017) *Contravention of Community Correction Orders*, Victoria, 46-8.

<sup>88</sup> Swavola et al., above n 12, 32; Sheehan, R., Mclvor, G. & Trotter, C. (2010) *Working with Women Offenders in the Community*, Taylor and Francis; Kendall, above n 22, 41.

<sup>89</sup> Russell et al., above n 24.

<sup>90</sup> A NSW Parliamentary Select Committee investigating the increase in the state's prison population in 2002 calculated that simply abolishing prison sentences of six months or less would immediately bring about a 60 per cent drop in the number of prisoners received into custody weekly: Lind, B., & Eyland, S. (2002) 'The impact of abolishing short prison sentences', NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin*. Section 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires a court to provide reasons when sentencing someone to a term of imprisonment for 6 months or less.

<sup>91</sup> See the *Offender Rehabilitation Act*, which came into force in 2015. Determinate prison sentences Sentencing Council, UK (Web Page) <<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/determinate-prison-sentences/>>.

<sup>92</sup> See recommendation 6 of the ALRC Pathways to Justice report, which sought to ensure that sentencing takes into account "unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples." and 'Indigenous Experience' reports to inform sentencing in higher courts. ALRC 2017, above n 84.

<sup>93</sup> Hedderman, C., & Gunby, C. (2013). Diverting women from custody: The importance of understanding sentencers' perspectives, (2013) *Probation Journal* 60(4) 425–438.

<sup>94</sup> Campbell, E., Macmillan, L., Caruana, C. (2020) *Women Transforming Justice: Final Evaluation Report*, Centre for Innovative Justice, RMIT University. See recommendations 3 and 5e.

<sup>95</sup> Winford, S., (7 May 2019) *Reversing the trend of mass incarceration – do prisons have a role? Some simple steps to start turning the tide on Victoria's prison population*, Centre for Innovative Justice, RMIT University.

<sup>96</sup> Heseltine K, Sarre R & Day A. (2011) *Prison-based correctional rehabilitation: An overview of intensive interventions for moderate to high-risk offenders*. Trends & issues in crime and criminal justice no. 412. Canberra: Australian Institute of Criminology. The purposes of the Act are defined in section 1 to be: (a) to provide for the establishment management and security of prisons and the welfare of prisoners; and (b) to provide for the administration of services related to community-based corrections and for the welfare of offenders; and (c) to provide for other correctional services. By way of comparison, the ACT has incorporated a legislative mandate for rehabilitation into its sentencing and correction legislation (*Crimes (Sentence Administration) Act 2005*, which is to be read together with the provisions of the *Corrections Management Act 2007*).

<sup>97</sup> The CIJ is mindful that advocacy for investment in the rehabilitative capacity of prisons can seem at odds with a decarceration and justice reinvestment approach. The CIJ's clear position is that institutions which have a primary function of depriving people of their liberty should never be prioritised as the location for treatment and support when that support could be more appropriately provided in the community.

<sup>98</sup> Bartels L. & Gaffney, A. (2011) *Good Practice in women's prisons: A literature review Technical and Background Paper 21*, Australian Institute of Criminology; Heseltine et al., above n 96; Andrews & Bonta, above n 68; Chen, M.K., & Shapiro, J.M. (2007) 'Do harsher prison conditions reduce recidivism? A discontinuity-based approach'. *American Law and Economics Review* 9: 1–29.