



# Inquiry into Victoria's Criminal Justice System

<b>Motive for the Inquiry</b>	<b>5</b>
<b>Issues</b>	<b>6</b>
<b>A. An analysis of factors influencing Victoria's growing remand and prison populations</b>	<b>7</b>
Historical Establishment of Victorian Bail Laws	7
Victorian Bail Laws	8
Victoria's increasing prison population	8
Impact of unnecessary remandment for the individual:	9
Offending whilst on bail - How common is it?	9
New Prisons or Looser bail laws?	10
Targeted Programs :	11
Imprisonment and recidivism	11
Prison expansion	12
Dame Phyllis Frost Centre	12
Overall Summary	13
<b>B. Strategies to reduce rates of criminal recidivism;</b>	<b>14</b>
Prisoner education	16
Computers in cells	16
Justice Reinvestment	17
Housing	17
Employment	19
<b>C. the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skill-set necessary for judges and magistrates overseeing specialist courts.</b>	<b>21</b>
Focus	21
Judicial Appointment in Victoria	21
Appointments to the Supreme and County Courts of Victoria	21
Appointments to the Magistrates' and Corner's Courts	22
Judicial Appointment Processes in Other Jurisdictions	22
Important Sources:	22
Retention of the existing system?	22
Advisory Panels: Law Institute Victoria ('LIV')	22
Independent appointments commission	23

American Judicial Selection Process	23
NSW Judicial Appointment Process	23
QLD Judicial Appointment Process	24
Particular Skill-set Necessary	24
What abilities, skills and qualities are ideal?	24
Framework of Judicial Abilities and Qualities for Victorian Judicial Officers	24
Current Undertakings by the Government	25
Department of Justice and Community Safety: Corporate Plan 2019-23	25

# Terms of Reference

## Motive for the Inquiry

In consideration of the Terms of Reference, motives for the inquiry are as follows:

- Determine reasons for the increasing prison population as a result of custodial remand i.e. why are fewer people being bailed out
  - Is the increase in remand actually leading to courts imposing prison sentences more frequently in accordance with the suggestion in the Sentencing Advisory Council Report
- Evaluate the implications and effects of custodial remand on those imprisoned
  - Opportunity to transition back to the community
  - Rehabilitation

The Inquiry was put into motion by Northern Victoria MP Tania Maxwell in an effort to center the voices and experiences of victims.<sup>1</sup> Those with lived experience of the justice system provide valuable knowledge and will form the basis of the inquiry. Maxwell had been advocating for the inquiry since co-founding a campaign striving for tougher sentencing for repeat and violent sexual offenders. Committee chair Fiona Patten highlighted that the criminal justice system was failing as the prison population continued to grow while crime rates remained unchanged.<sup>2</sup>

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<sup>1</sup> Erin Somerville and Charmayne Allison, 'Inquiry into Victoria's criminal justice system begins in Wangaratta', *ABC News* (online, 30 June 2021)  
<<https://www.abc.net.au/news/2021-06-30/victoria-criminal-justice-system-inquiry-begins/100255928>>

<sup>2</sup> Ibid.

## Issues

- Increase in prison population; both in remand and recidivism.
  - Factors influencing growth in remand and recidivism
  - Analysis of these factors ie. how and the extent to which they contribute
- Strategies to reduce rates of criminal recidivism
  - Need for enhanced services of support for people who have left prison to ensure they don't return
    - What type of services/strategies needs be in place
    - How should they be implemented
  - A set system which supports people from reentering prison
- Judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders
  - What constitutes appropriate knowledge and expertise?
    - Understanding of recidivism
    - Causes of crime
    - Others (not named in the letter) ie. rehabilitation
- Judicial appointment processes in other jurisdictions with emphasis on specialist courts and the specific skill-set necessary for those overseeing these specialist courts
  - Compare and contrast similar and distinct appointment processes
  - Evaluate advantages and disadvantages

Specific issues raised in the motion to the House by Tania Maxwell MP<sup>3</sup>

- the inadequate monitoring of some high-risk offenders;
- the lack of a public sex offenders' register;
- waves of child pornography activity;
- soaring levels of drug abuse;
- rife smuggling of contraband into correctional facilities;
- shocking numbers of assaults on emergency workers (including custodial and correctional officers);
- youth justice and child protection systems under ever-present strain;
- crumbling court infrastructure in some locations;
- legislation that's sometimes not accurately targeted;
- prolific domestic and family violence (including growing numbers of infanticide, and adolescent, parent-child and child-on-child violence cases);
- growing pressures on judicial officers themselves, insufficient continuing education for lawyers, magistrates and judges, and the need for more prosecutors and specialist staff; and
- the lack of 24 hour police stations in a number of parts of Victoria, especially across rural and regional areas.

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<sup>3</sup> <https://taniamaxwell.com.au/we-secured-an-inquiry-into-victorias-justice-system/>

## A. An analysis of factors influencing Victoria's growing remand and prison populations

### Historical Establishment of Victorian Bail Laws

Prior to Victoria's enactment of the *Bail Act 1977 (Vic)* ('BA'), concerns about community safety was not a predominant factor affecting the determination of whether alleged offenders would be detained on remand.<sup>4</sup> In the 1970s and 1980s, four risk factors were routinely included in determining bail applications. The statutory formulation of the Victorian BA subsequently reflected these risk factors and required the decision-maker to consider whether there was an 'unacceptable risk' that the bail applicant would:

- not attend court for the hearing of their matter;
- commit an offence while on bail;
- endanger the safety or welfare of members of the public; or
- interfere with witnesses or otherwise obstruct the course of justice.<sup>5</sup>

Restrictive and risk-oriented bail practices developed due to the emergence of 'community safety' concerns and its intersection with tougher approaches in the criminal justice system.<sup>6</sup> Consequently, individual liberty in general is increasingly predicated on risk assessment and bail progressively functions as a 'mechanism of crime prevention'.<sup>7</sup>

Later amendments of the BA in response to murder of Jill Meagher in 2012 and the Bourke Street rampage 2017<sup>8</sup> led to a full examination of the bail system to prioritise the protection of the community at the cost of a fair and equal justice system. These reforms are funneling men and women into prisons to be warehoused on remand before they have been sentenced for a crime. Thereby, lending individuals to become vulnerable to frameworks that action criminal conduct, and blurring the distinction between the functionality of prison, as a place for those found guilty.

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<sup>4</sup> Parliamentary Library & Information Service, Department of Parliamentary Services and Parliament of Victoria 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention' (Research Paper No. 3, August 2019) 8 ('No bail, more jail?').

<sup>5</sup> *Bail Act 1977 (Vic)* ss 5(1), 9(3).

<sup>6</sup> No bail, more jail (n 4) 8-9.

<sup>7</sup> Ibid 9.

<sup>8</sup> BBC News, Melbourne car deaths: Bail laws changed in Victoria state (Web Page, 23 January 2017) <<https://www.bbc.com/news/world-australia-38713950>>.

## Victorian Bail Laws

### Victoria's increasing prison population

In the last decade, the prison population of Victoria has grown by 67%; from 3,908 to 6,520. This is predominantly due to an increase in the refusal of bail particularly for violent offenders. Victoria's strict bail laws stem from the introduction of the *Bail Act* in 1977. Most recent substantive reforms occurring in 2017-2018. Introduced due to escalation of concern for community protection against individuals who present a risk of committing offences if released on bail.

- A 154%<sup>9</sup> increase in the number of unsentenced prisoners (those being held on remand awaiting trial or sentencing) compared with a 46% increase for sentenced prisoners;
- A 147%<sup>10</sup> increase in the number of Aboriginal and Torres Strait Islander prisoners (compared with a 62%<sup>11</sup> increase for non-Indigenous prisoners); and
- A 75% increase in the number of female prisoners (compared with a 66% increase for males).<sup>12</sup>

Since 2014, there has been an increase in unsentenced prison population (65%) and decrease in the sentenced prisoner population (7%)<sup>13</sup>.

- Increase in unsentenced prisoner population is a result of the rise of the number of people being held on remand.
- Unsented prisoner population made up 29% of the total prison population as of 30 June 2016. A decade before, it was only 19%. This figure means that one in three prisoners has not been sentenced.<sup>14</sup>
- The Sentencing Advisory Council today released a report examining case outcomes for children held on remand\* in Victoria in 2017–18. It reveals that two-thirds of remanded children did not receive a custodial sentence.<sup>15</sup>
- June 2011 to June 2019, 'the number of children held on remand on an average day in Victoria more than doubled from 42 to 90. Remanded children now make up nearly half (47%) of all children in detention in Victoria, compared to 22% seven years ago.'<sup>16</sup>

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<sup>9</sup> 'Victoria's Prison Population 2005 to 2016', *Sentencing Advisory Council* (Web Page, November 2016) <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Victorias\\_Prison\\_Population\\_2005\\_to\\_2016.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Victorias_Prison_Population_2005_to_2016.pdf)> p. 4.

<sup>10</sup> Ibid, p.4

<sup>11</sup> Ibid, p.4

<sup>12</sup> Ibid, p.4

<sup>13</sup> Ibid, p.5

<sup>14</sup> Ibid, p.11

<sup>15</sup> 'Two-Thirds of Children Held on Remand Aren't Ultimately Sentenced to Detention: New Report', *Sentencing Advisory Council* (Web Page, 29 September 2020) <<https://www.sentencingcouncil.vic.gov.au/news-media/media-releases/two-thirds-of-children-held-on-rem-and-arent-ultimately-sentenced-to-detention>>.

<sup>16</sup> Ibid.

The Bail system requires an overhaul. Note that the following statistics and report came out three months after the inquiry was officially proposed.

However, during the COVID-19 pandemic Victoria's prison population has decreased to a two-year low, with a reduction in crime and increased approval of bail applications arresting a 20-year trend of putting more people behind bars.<sup>17</sup> This reduction has led defence lawyers and justice reformers to say that the figures should be a “circuit breaker” to reverse trends that have occurred over the past decade, with increasing incarceration rates.

The discussion of ‘bail’ has become a site of political focus, instigated through scare tactics by the media. Initial increases in Victoria's prison remand population was seen as a positive at the time of wide coverage (e.g. Bourke Street Rampage 2017). However, greater community protection through reformed bail laws has been costly; as increases in remanding people may decrease community safety as periods of incarceration (even short), are associated with higher rates of recidivism.<sup>18</sup>

### Impact of unnecessary remandment for the individual<sup>19</sup>:

- Possible loss of employment.
- Separation from family.
- Reduced ability to prepare for legal proceedings.
- Exposure to the dangers of a prison environment.
- Detainment pre-trial increases chances of pleading and being found guilty.

All these factors that lend the individual to be exposed to the criminal justice system at lengthy periods can increase their vulnerability to criminal conduct, as the system is seen as less therapeutic.

### Offending whilst on bail - How common is it?<sup>20</sup>

- High political attention given to crimes committed whilst on bail. However, there is an extremely limited amount of information that has been published regarding offending by those released on bail.
- Therefore, the perception given that large amounts of offending occurs by individuals on bail is based on ‘a small number of highly publicised, violent crimes’.<sup>21</sup>
- Lack of published information within Australia results in information being derived from other jurisdictions in different time periods - still can be of use.

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<sup>17</sup> Victoria's Prison Population, *Sentencing Advisory Council* (Web Page,2020 )

<<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-prison-population>>

<sup>18</sup> ‘No Bail, More Jail?’, *Breaking the Nexus Between Community Protection and Escalating Pre-Trial Detention*, McMahon (2019)

<sup>19</sup> Ibid.

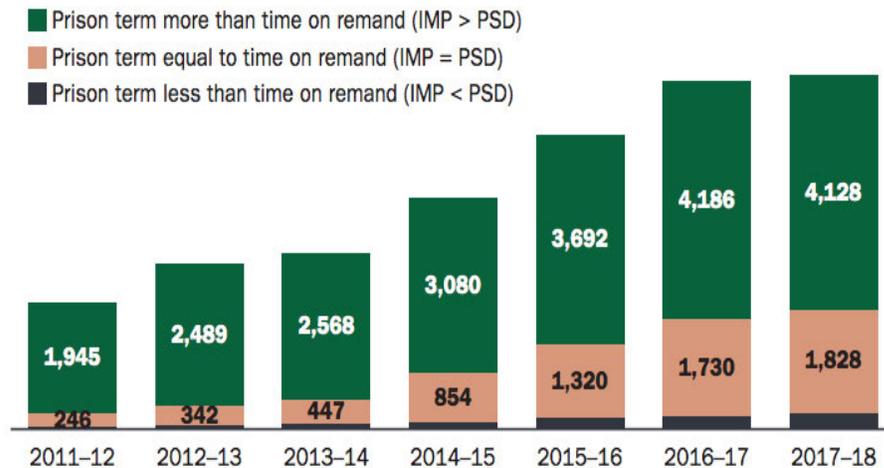
< <https://apo.org.au/sites/default/files/resource-files/2019-08/apo-nid253906.pdf> >.

<sup>20</sup>Ibid.

<sup>21</sup>Ibid.

- Studies from England, Scotland, US and NZ indicate most people (over 80%) do not commit offences while on bail.<sup>22</sup>

**Figure 7:** Prison terms imposed, according to whether they were more than, less than or equal to the length of pre-sentence detention for offenders sentenced to prison after spending time on remand, all adult courts, 2011–12 to 2017–18<sup>19</sup>



## New Prisons or Looser bail laws?<sup>23</sup>

The Victorian Government is expanding the prison system, with current policies resulting in a predicted over-capacity of the prison system by 2024 as the government is not reducing the growing demand for space by ways of alternative measures.

Without major reform the excessive funding for prisons has long term effects, reducing the government's ability to fund educational, health and social housing services which are all necessary in lowering crime rates. Confidential high-level government documents from late 2019 and early 2020 expect the annual cost of managing prisons to more than double to \$3.5 billion by 2023-24<sup>24</sup>.

In an effort to forestall the new spending and expansion of prisons, government bodies have looked at:

- reducing the number of offenders in the system. Options include winding back restrictive bail laws implemented after the 2017 Bourke Street massacre.

<sup>22</sup> Ibid.

<sup>23</sup> 'New prisons or looser bail laws? Labor's unpalatable choice' May 2021: Media Article <https://www.theage.com.au/politics/victoria/new-prisons-or-looser-bail-laws-labor-s-unpalatable-choice-20210513-p57rkf.html>

<sup>24</sup> Ibid.

- A review by Justice Paul Coghlan, suggested abolishing prison sentences of less than three or six months, or reinstating home detention programs.<sup>25</sup>
- The government has also looked at reclassifying which offences are listed as summary (minor) or indictable (serious) under the Crimes Act. By reclassifying some non-violent offences as summary, bail would become available to more alleged offenders thereby reducing the overpopulation of prisons.

## Targeted Programs <sup>26</sup>:

There are limited opportunities for the criminal justice system to provide targeted programs addressing offending behaviour to someone held on remand, given that they are presumed innocent until proven guilty. Furthermore, the lack of certainty about the length of time they will be retained in custody makes it difficult to plan for provisions of targeted programs.

- By 2018, more than 92% of the nearly 2,000 additional prisoners in Victoria in the last five years were unsentenced prisoners held on remand.<sup>27</sup>
- Victoria's increasing remand population is causing courts to impose prison sentences more often, without actually requiring people to spend more time in prison

## Imprisonment and recidivism

Imprisonment is strongly connected to re-offending as individuals who are sentenced to prison, as opposed to another form of penalty, are significantly more likely to re-offend.

The NSW Reoffending Database, compiled by the Bureau of Crime Statistics and Research (BOCSAR) demonstrates this disparity. In NSW in 2019, adults who received a penalty other than prison were half as likely to re-offend in the next 12 months than those released from prison (21% compared to 42.4%).<sup>28</sup> In Victoria, 44.2% of prisoners released during 2017-18 returned to prison within the following two years (to 2019-20).<sup>29</sup> This data provides insights into the failings of prisons as places of rehabilitation.

Evidence reveals that time in prison, even in short periods on remand, may actually decrease community safety as imprisonment is associated with higher rates of subsequent criminal

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<sup>25</sup> Bail Review: First Advice to the Victorian Government (2017); Paul Coghlan, Bail Review: Second Advice to the Victorian Government (2017).

<sup>26</sup> Paul McGorrey, 'Time Served Prison Sentences in Victoria', Sentencing Advisory Council (published report, 2020)  
<[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time\\_Served\\_Prison\\_Sentences\\_in\\_Victoria.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf)>

<sup>27</sup> Ibid.

<sup>28</sup> 'Re-offending statistic for NSW', BOCSAR (web page),  
<[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Re-offending.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx)>

<sup>29</sup> 'Released Prisoners Returning to Prison', Sentencing Advisory Council Victoria (web page)  
<<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/released-prisoners-returning-to-prison>>

offending.<sup>30</sup> Prisons are criminogenic as they connect networks of offenders, isolate them from their loved ones and the community, and diminish employment prospects, explaining the prison cycle.<sup>31</sup> This is particularly damaging given the high proportion of the prison population that are unsentenced. As prison populations continue to increase, this highlights that Australia's preoccupation with punishment, regardless of its efficacy, is still at the forefront of our criminal justice approach. Overcrowding reduces the availability and effectiveness of rehabilitation, vocational and educational programs, and is linked to increased rates of violence and mental health issues.<sup>32</sup>

## Prison expansion

Data shows that when prisons are built, they are filled - further contributing to increased recidivism. A \$798 million program has been established by the Andrews Labor Government to expand the capacity of five Victorian prisons<sup>33</sup>. This project rests upon the promise to keep the community safe as well as deliver thousands of jobs, while the reality will be increased recidivism. The State Government's proposed expansion raises significant concerns for local legal services. The Victorian Aboriginal Legal Service has since raised concerns about the increasing rates of Aboriginal and Torres Strait Islander inmates and the possibility of more Victorian deaths in custody.<sup>34</sup>

## Dame Phyllis Frost Centre

There is particular concern over the proposed expansion of the Dame Phyllis Frost Center as women in prison are overwhelmingly victims and survivors of trauma, sexual assault and family violence. Prison further compounds trauma as women are exposed to practices, such as strip searches and solitary confinement. Women are isolated from their families, having profound and enduring impacts on their children and entire communities. As children of imprisoned mothers are placed in out-of-home care, this increases the likelihood of time spent in juvenile detention, a known pipeline to prison.<sup>35</sup>

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<sup>30</sup> Marilyn McMahon, 'No bail, more jail?', Department of Parliamentary Services Victoria, (published report, 2019) <<https://apo.org.au/sites/default/files/resource-files/2019-08/apo-nid253906.pdf>>

<sup>31</sup> Christopher Knaus, 'Prisons at breaking point but Australia is still addicted to incarceration', *The Guardian* (online, 29 December 2017), <[<sup>32</sup> Ibid.](https://www.theguardian.com/australia-news/2017/dec/29/prisons-at-breaking-point-but-australia-is-still-addicted-to-incarceration#:~:text=Repeated%20studies%2C%20including%20one%20on.increase%20the%20chance%20of%20reoffending.&text=The%20latest%20data%20shows%2033.or%2013%2C182%20people%2C%20is%20unsentenced.></a>></p></div><div data-bbox=)

<sup>33</sup> 'Prison Expansion to Boost Capacity and Create Jobs', *Premier of Victoria* (2021)(web page) <<https://www.premier.vic.gov.au/prison-expansion-boost-capacity-and-create-jobs>>

<sup>34</sup> Rachel Knowles, 'Victoria to expand prison system one week after death in custody', *National Indigenous Times* (online, 22 March 2021), <<https://nit.com.au/victoria-to-expand-prison-system-one-week-after-death-in-custody/>>

<sup>35</sup> 'Build Homes not Prisons' (Open Letter, 7 July 2021).

The plan to increase capacity from 604 to 710 beds is a step in the wrong direction. As capacity has grown over the last ten years from 183 women in 2000 to 575 in June 2019, it is clear that increased capacity results in increased imprisonment. A significant proportion of Victoria's female prison population are awaiting trial for non-violent offences that do not warrant imprisonment and are largely driven by homelessness, poverty and poor health.<sup>36</sup> These compounding disadvantages should be addressed at the community-level, rather than through the expansion of prisons. In January 2020, Yorta Yorta woman Veronica Marie Nelson Walker died in custody at Dame Phyllis Frost Centre while on remand for shoplifting.<sup>37</sup> This tragedy highlights the complex disadvantages that contribute to crime as well as the urgent need for improved safety and prison reform, as opposed to expansion. A new 20-bed "management unit", code for solitary confinement and segregation cells, has been proposed in the tender documents for the expansion of the center.<sup>38</sup> Solitary confinement is torture and prevents any possibility of effective rehabilitation and reintegration into the community.<sup>39</sup>

Ultimately, as the Government's approach prioritises prison expansion over addressing the root causes of offending, the prison population will continue to increase. This establishes a feedback loop as time in prison significantly increases the likelihood of recidivism. Prisons do not rehabilitate people or create safer communities but instead compound and exacerbate existing disadvantages.<sup>40</sup> Greater investment and attention is needed on rehabilitative and community-driven approaches, outlined in section B.

## Overall Summary

- The increase in the number of unsentenced prisoners who are on remand awaiting trial, rather than being charged on summons or granted bail is increasing the Victoria prison population<sup>41</sup>

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<sup>36</sup> Emma Russel, Bree Carlton, Danielle Tyson, Hui Zhou, Megan Pearce, Jill Faulkner, 'A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria', (Report, July 2020), <[https://d3n8a8pro7vhm.cloudfront.net/fitzroylegal/pages/52/attachments/original/1594001770/Constellation\\_of\\_Circumstances\\_Report\\_digital\\_landscape.pdf?1594001770](https://d3n8a8pro7vhm.cloudfront.net/fitzroylegal/pages/52/attachments/original/1594001770/Constellation_of_Circumstances_Report_digital_landscape.pdf?1594001770)>

<sup>37</sup> Rachel Knowles, 'Victoria to expand prison system one week after death in custody', *National Indigenous Times* (online, 22 March 2021) <<https://nit.com.au/victoria-to-expand-prison-system-one-week-after-death-in-custody/>>.

<sup>38</sup> 'Dame Phyllis Frost Centre - 106 Bed and Supporting Infrastructure Expansion Project', *Australian Tenders* (online, 22 March 2021) <<https://www.australiantenders.com.au/tenders/401864/dame-phyllis-frost-centre-106-bed-and-supporting-infrastructure-expansion-project/>>.

<sup>39</sup> Linda Mussell and Marsha Rampersaud, 'Solitary confinement by any other name is still torture', *The Conversation* (online, 19 November 2020). <<https://theconversation.com/solitary-confinement-by-any-other-name-is-still-torture-149670>>.

<sup>40</sup> Rachel Knowles, 'Victoria to expand prison system one week after death in custody', *National Indigenous Times* (online, 22 March 2021) <<https://nit.com.au/victoria-to-expand-prison-system-one-week-after-death-in-custody/>>.

<sup>41</sup> Paul McGorrey, 'Time Served Prison Sentences in Victoria', Sentencing Advisory Council (published report, 2020)

- People held on remand have largely been driven by legislative reforms designed to tighten bail eligibility.<sup>42</sup>
- Growing remand may be due to lack of certainty about how long a remandee will remain in custody. They may be released without much notice if they are bailed or receive a time served prison sentence, making it difficult to plan for the provision of certain programs that can tailor against recidivism.<sup>43</sup>
- Prison expansion lends to recidivism as rehabilitation programs, education and housing funding is subdued.

## B. Strategies to reduce rates of criminal recidivism;

The rate of recidivism is alarmingly high with 44.2% of released prisoners returning to prison for further offending within two years in Victoria.<sup>44</sup> Additionally, 54.8% returned to corrective services within two years.<sup>45</sup> However, the study was not able to measure recidivism beyond two years in Victoria and did not examine the reasons as to why prisoners returned to prison.<sup>46</sup>

Findings show that in order to measure the rate of recidivism, there are minimum requirements which need to be adopted by all the jurisdictions in Australia.<sup>47</sup> There must be a consistent measurement across the jurisdictions for comparative purposes, the measurements must be done in a timely fashion and the measurements must be conducted on an ongoing basis.<sup>48</sup>

There are a number of strategies proposed to help reduce reoffending:<sup>49</sup>

1. Implementing integrated offender management
2. Improving reintegration programs
3. Improving outcomes for short-term sentenced prisoners and unsentenced prisoners
4. Addressing family violence
5. Improving education, training and employment
6. Aboriginal Justice Agreement Phase 3 (AJA3)

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[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time\\_Served\\_Prison\\_Sentences\\_in\\_Victoria.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf) p.3.

<sup>42</sup> See *ibid.*

<sup>43</sup> *Ibid* p.14

<sup>44</sup> 'Released Prisoners Returning to Prison', *Sentencing Advisory Council* (Web Page, 19 July 2021)

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

<sup>45</sup> *Ibid.*

<sup>46</sup> 'Who Returns to Prison?', *Corrections, Prison and Parole* (Web Page, 19 July 2021)

[https://files.corrections.vic.gov.au/2021-06/who\\_returns\\_to\\_prison.pdf?VersionId=nLjf5M5Wu8YrW\\_RvGdRCo88D0mPUityB](https://files.corrections.vic.gov.au/2021-06/who_returns_to_prison.pdf?VersionId=nLjf5M5Wu8YrW_RvGdRCo88D0mPUityB).

<sup>47</sup> Jason Payne, 'Recidivism in Australia: findings and future research', (Research and Public Policy Series No 80, Australian Institute of Criminology, 2007) 104.

Recidivism in Australia: findings and future research, Australian Institute of Criminology 2007

<https://www.aic.gov.au/sites/default/files/2020-05/rpp080.pdf>

<sup>48</sup> *Ibid.*

<sup>49</sup> Department of Justice and Regulation, *Delivering Effective Control Services for a Safe Community* (Report, 2015) 14.

## 7. Addressing needs of specific cohorts

The Corrections Victoria Strategic Plan (2015–2018) outlines key guiding principles and a range of initiatives to scaffold a vision for delivering a safe, correctional services community.<sup>50</sup> There are five strategic priorities that are the driving force of this action plan:

1. Building a sustainable system
2. Reducing reoffending
3. Managing risk - safety and security
4. Delivering public value
5. Engaging the community

In particular, Strategic Priority 2: Reducing Reoffending proposes integrated rehabilitation and reintegration initiatives that aim to decrease the likelihood of recidivism and increase community safety and well-being by:

1. Improving reintegration programs;
  - Transitional services, including support for accommodation, programs to assist with education and employment, and increased assistance to reconnect with family and support networks, will help to reduce the likelihood of reoffending following release and improve community safety<sup>51</sup>.
2. Improving outcomes for short-term sentenced prisoners and unsentenced prisoner:
  - Increasing access to programs for short-term sentenced prisoners and time-served prisoners.
  - 'improve access to programs and services for unsentenced prisoners, maximising their opportunity for bail and reducing likelihood of return to custody.'<sup>52</sup>
3. Improving education, training and employment:
  - Providing access to education and training in prison would enable prisoners to gain new skills which can increase their employment opportunities post-release.<sup>53</sup>

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<sup>50</sup> Victoria State Government. (2021). *Corrections Victoria Strategic Plan: Delivering effective correctional services for a safe community*.

<https://www.corrections.vic.gov.au/corrections-victoria-strategic-plan-2015-2018-delivering-effective-correctional-services-for-a-safe?fbclid=IwAR2dwm0K-ItT56F0CkuHCwXYeikIU7nJxRJoiB6DbqeCshXNIN6ECKIs3f4>

<sup>51</sup> Victoria State Government. (2021). *Corrections Victoria Strategic Plan: Delivering effective correctional services for a safe community*.

<https://www.corrections.vic.gov.au/corrections-victoria-strategic-plan-2015-2018-delivering-effective-correctional-services-for-a-safe?fbclid=IwAR2dwm0K-ItT56F0CkuHCwXYeikIU7nJxRJoiB6DbqeCshXNIN6ECKIs3f4>

<sup>52</sup> Victoria State Government. (2021). *Corrections Victoria Strategic Plan: Delivering effective correctional services for a safe community*.

<https://www.corrections.vic.gov.au/corrections-victoria-strategic-plan-2015-2018-delivering-effective-correctional-services-for-a-safe?fbclid=IwAR2dwm0K-ItT56F0CkuHCwXYeikIU7nJxRJoiB6DbqeCshXNIN6ECKIs3f4>

<sup>53</sup> Victoria State Government. (2021). *Corrections Victoria Strategic Plan: Delivering effective correctional services for a safe community*.

<https://www.corrections.vic.gov.au/corrections-victoria-strategic-plan-2015-2018-delivering-effective-correctional-services-for-a-safe?fbclid=IwAR2dwm0K-ItT56F0CkuHCwXYeikIU7nJxRJoiB6DbqeCshXNIN6ECKIs3f4>

## Prisoner education

As noted in the Corrections Victoria Strategic Plans 2015-18, providing education programs for prisoners have important implications on breaking the cycle of recidivism through enhancing employability. This suggestion comes in line with findings a meta-analysis conducted by RAND Corporation, which explored the effectiveness of correlational education, where “inmates who participate in correctional education programs had a 43% lower odds of recidivism than those who did not”<sup>54</sup>.

Prisoners typically spend 18 hours in their cells. By engaging in studying and completing assessment tasks, prisoners are given opportunities to gain knowledge and skills as well as develop self-expression and personal growth.

Education carries enormous potential, not merely to facilitate individual development, but also as a positive outlet for incarcerated individuals. Specifically, education provides benefits for prisoners including:

- improved mental and physical wellbeing;
- reduced substance abuse;
- decreased chance of recidivism; and
- increased chances of post-release employment, rehabilitation, and personal development.<sup>55</sup>

Structured education programs, such as courses offered by TAFE or AETVI, would be valuable in providing prisoners with necessary training which can allow them to be job-ready when released back into the community.

## Computers in cells

Providing prisoners with access to computers has seen only positive impacts, as it gives prisoners access to education, counselling, and legal services.<sup>56</sup> Education is seen to have the most profound impact on prisoners as it provides a multitude of benefits, including the improvement of mental and physical wellbeing, the reduction in substance abuse, and the increase in the chances of post-release employment.<sup>57</sup> Thus, it has been recognised as instrumental in the successful rehabilitation of prisoners, and has contributed to the reduction of recidivism rates.<sup>58</sup>

Access to online counselling and legal services has also had positive results. Online counselling provides prisoners with external counsellors, through which prisoners can engage in Cognitive

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<sup>54</sup> Robert Bozick et al., ‘Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults.’ (Research Report, RAND Corporation, 2013).

<sup>55</sup> Robert Bozick et al., ‘Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults.’ (Research Report, RAND Corporation, 2013).

<sup>56</sup> <https://justiceaction.org.au/computers-in-cells/>

<sup>57</sup> <https://justiceaction.org.au/education-for-prisoners/>

<sup>58</sup> Ibid 16.

Behavioural Therapy (CBT). This form of therapy facilitates positive and long-term changes to offenders' behaviour, and is more effective online than face-to-face.<sup>59</sup> Online counselling encourages the empowerment and self-management of prisoners, and provides stable counselling throughout the sentence and after the release.

Prisoners are isolated from support but have the time and will need to exercise their right to a fair trial. This can be combated through the provision of online legal services, which equip prisoners with sufficient materials allowing them to exercise their legal rights.<sup>60</sup> Online legal services are available to some prisoners, however, it is not yet regarded as a legal right. Providing computers in cells will allow for an increase in access to and quality of education, counselling, and legal services, which will thus see the rehabilitation of prisoners and contribute to the reduction of recidivism rates.

## Justice Reinvestment

Justice Reinvestment is a community-driven and evidence-based network that works to develop strategies that support local communities with high-rates of contact with the criminal justice system, particularly for Aboriginal and Torres Strait Islander Australians.<sup>61</sup> The aim of this ongoing initiative is to identify problems and build solutions to reduce the amount of people imprisoned for major or minor offences. This plays a significant role in the criminal justice system by bringing awareness to criminal tendencies, establishing systematic change and creating state-level legislative reform to build safer and stronger Australian communities.<sup>62</sup>

## Housing

Evidence reveals that areas with increased spending on prisons and less on housing and social services have higher crime rates on average. Local legal services and community organisations emphasise Victoria's urgent need for more public housing and community support.<sup>63</sup> Homelessness is one of many complex factors that impact upon whether a person engages in crime. Homeless people often engage in nonviolent "survival crimes" to support themselves<sup>64</sup>. While homeless people are generally perceived as perpetrators of crime, they are more likely the victims of violence. A UK study found that compared with the public, homeless people were 13 times more likely to have experienced violence and 47 times more likely to have been victims

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<sup>59</sup> <https://justiceaction.org.au/online-counselling-in-prison-cells/>

<sup>60</sup> <https://justiceaction.org.au/online-legal-services/>

<sup>61</sup> Justice Reinvestment Network Australia (n.d.). *Justice Reinvestment in Australia*.

<https://justicereinvestment.net.au/community-profiles/>

<sup>62</sup> Just Reinvest NSW Inc. (2019). *The role of Just Reinvest in NSW*.

<https://www.justreinvest.org.au/about-us/>

<sup>63</sup> Rachel Knowles, 'Victoria to expand prison system one week after death in custody', *National Indigenous Times* (online, 22 March 2021),

<https://nit.com.au/victoria-to-expand-prison-system-one-week-after-death-in-custody/>

<sup>64</sup> 'Violent cycles: Homelessness and Crime', *Sydney Criminal Lawyers* (online, 27 January 2016),

<https://www.sydneycriminallawyers.com.au/blog/violent-cycles-homelessness-and-crime/>.

of theft.<sup>65</sup> Although a disproportionate number of homeless people have a criminal history, their crimes tend to be less-serious in nature.<sup>66</sup> This highlights the need for greater investment in housing to reduce recidivism and crime rates within Victoria.

### **Build Homes not Prisons<sup>67</sup>**

There is growing support for the funds for the expansion of the Dame Phyllis Frost centre to be diverted into public housing, highlighted in the Build Homes not Prisons campaign. The budget for the expansion is \$188.9 million, which could be used to build 1,000 new public housing homes, creating a safer and fairer Victoria in the process.<sup>68</sup> Without safe and permanent housing, women cannot access bail, parole or successfully complete community treatment orders.

The Andrews Government emphasises the creation of 130 jobs as a significant benefit of the prison expansion. Construction of public and Aboriginal and Torres Strait Islander housing would create more jobs, not only in construction but also in support for the women and children who will live there. The \$5.3 billion Big Housing Build in the 2020/21 state budget is focussed on expanding privately owned and operated “community” and “affordable” housing - not public housing. It is important to note that most “affordable” private housing is not accessible to criminalised women and their children because:

- Rents are not capped at 25% of income and that a significant proportion excludes tenants with criminal histories, drug dependencies and even mental illness.
- Tenancies are more insecure, with much higher eviction rates for households struggling with extreme poverty, family violence, alcohol and other drugs and poor mental health.
- Community housing providers are not under the same obligations as government to give priority access to applicants who are homeless or at risk of homelessness.
- Rooming houses can be classified as “community housing”. They are short-term, insecure, often dangerous and unsuitable for women, especially women with children.

Women are capped against accessing bail, parole or successfully complete community correction orders without these safe and permanent housings.

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<sup>65</sup> ‘Homeless people: their risk of victimisation’, *Australian Institute of Criminology*, AICrime reduction matters no. 66. (Report, 2008) <<https://www.aic.gov.au/publications/crm/crm66>>

<sup>66</sup> ‘Violent cycles: Homelessness and Crime’, *Sydney Criminal Lawyers* (online, 27 January 2016), <<https://www.sydneycriminallawyers.com.au/blog/violent-cycles-homelessness-and-crime/>>.

<sup>67</sup> Build Homes not Prisons’ (Open Letter, 7 July 2021).

<sup>68</sup> Lawson, J., Pawson, H., Troy, L., van den Nouwelant, R. and Hamilton, C. (2018) *Social housing as infrastructure: an investment pathway*, AHURI Final Report No. 306, Australian Housing and Urban Research Institute Limited, Melbourne, <https://www.ahuri.edu.au/research/final-reports/306>, doi:10.18408/ahuri-5314301.

There needs to be more community action in providing programs that deliver more housing on Housing First principles, including:

- Access to permanent, safe, self-contained homes that meet people's cultural and social needs – including Aboriginal community-controlled housing.
- No treatment or behavioural eligibility pre-conditions.
- Full tenancy rights and standard rental conditions with security of tenure.
- Intensive support, independent of housing management, that focuses on social and community inclusion and is provided as long as needed.

More than half of women leaving prison expect to be homeless on release. The lack of safe and secure housing for women exiting prison puts them at increased risk of returning to custody; as there is more security within their daily lives.<sup>69</sup>

## Employment

As of 2021, the Victorian Government is looking to expand support services and programs to reduce the number of incarcerated women, as well as reoffending<sup>70</sup>. The female prison population in the state has nearly doubled in the last decade with an alarmingly increased number of Indigenous Australian women at a faster rate than that of all women<sup>71</sup>. Between 2013-2019, there was a 33% increase of women in custody, 32% of which were Aboriginal. The Keeping Women Out of Prison Coalition condones that employment is a key predictor of post-release success for former prisoners and their financial independence. Although, the stigma of having a criminal record disproportionately affects women. This is due to gender discrimination and prejudice, which often prevents such individuals from accessing employment services.<sup>72</sup> Thus the abolition of these social barriers is a key solution to reduce rates of recidivism. With the aim of successfully reconnecting such women with employment, Women's Employment Specialists will be integrated in women's prisons to increase vocational opportunities for women leaving custody. \$2.7 million of this \$14.5 million investment will go towards improving access to post-custody housing, and \$2.3 million will contribute to legal and housing support for Indigenous women.<sup>73</sup>

<sup>69</sup> Build Homes not Prisons' (Open Letter, 7 July 2021).

<sup>70</sup> Victoria State Government (2021). Reducing women's reoffending. *Corrections, Prisons & Parole*. <https://www.corrections.vic.gov.au/reducing-womens-reoffending>

<sup>71</sup> Victoria State Government (2021). Reducing women's reoffending. *Corrections, Prisons & Parole*. <https://www.corrections.vic.gov.au/reducing-womens-reoffending>

<sup>72</sup> Keeping Women Out of Prison Coalition. (2020). *Employment Opportunities For Women Leaving Prison*.

[https://www.sydneycommunityfoundation.org.au/wp-content/uploads/2020/12/KWOOP-PS-No-8-Employment\\_15Oct20.pdf](https://www.sydneycommunityfoundation.org.au/wp-content/uploads/2020/12/KWOOP-PS-No-8-Employment_15Oct20.pdf)

<sup>73</sup> Victoria State Government (2021). Reducing women's reoffending. *Corrections, Prisons & Parole*. <https://www.corrections.vic.gov.au/reducing-womens-reoffending>

C. the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skill-set necessary for judges and magistrates overseeing specialist courts.

## Focus

- Attract, appoint and equip the best candidates for judicial office to most proficiently meet the demands and needs of contemporary courts and society
  - Improve the quality and transparency of the processes and criteria for judicial appointments
  - Compare Victoria's with other States and Territories
- What process of judicial appointment best ensures
  - Judicial independence
  - Merit-based appointments;
  - Equality and diversity;
  - Transparency and accountability.

## Judicial Appointment in Victoria

Appointments to the Supreme and County Courts of Victoria<sup>74</sup>

- Sections 75B, 77, and 82 of the *Constitution Act 1975*
- Section 104 of the *Supreme Court Act 1975*
- Section 24 of the *Courts Legislation Miscellaneous Amendments Act 2010*
- Division 3 of the *County Court Act 1958*
- 'Supreme Court judges are appointed by the Governor of Victoria. To be eligible for appointment as a judge of the Supreme Court, a person must be, or have been:
  - a judge of the High Court of Australia, or of a Court created by the Parliament of the Commonwealth
  - a judge of a court in Victoria or another state or territory
  - admitted to legal practice in Victoria or another state or territory for five years or more.'<sup>75</sup>

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<sup>74</sup> <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>

<sup>75</sup> <https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary>

## Appointments to the Magistrates' and Coroner's Courts

- Sections 7, 9, 10 and sections 16B, 16C, 16D of the *Magistrates' Court Act 1989*
- Section 94 of the *Coroners Act 2008*.

## Judicial Appointment Processes in Other Jurisdictions

### Important Sources:

- Reviewing the Judicial Appointment in Victoria 2010
  - <https://www.liv.asn.au/getattachment/47a4c3b2-8dd6-4c74-bfa3-ae71031b01a5/Reviewing-the-Judicial-Appointments-Process-in-Vic.aspx>
  - Summarised below

### Retention of the existing system?

- 'Current system has a fundamental fault, in that it allows the Executive branch of government unfettered influence over the judicial appointments process, leading to the spectre of political appointments.'
- '...current system of appointments for the County and Supreme Courts lacks transparency'.

### Advisory Panels: Law Institute Victoria ('LIV')

Important resource:  
<https://www.liv.asn.au/getattachment/47a4c3b2-8dd6-4c74-bfa3-ae71031b01a5/Reviewing-the-Judicial-Appointments-Process-in-Vic.aspx>

- 'The LIV supports the establishment of advisory panels for general judicial appointments, and submits that the appointment to head of jurisdiction should be made in the same way as all other appointments. We submit that the head of each jurisdiction is ideally placed to assist in the selection of their own replacement, having an intimate knowledge of the pressures of the role and the skills and qualities required.'<sup>76</sup>
- LIV does not support lay persons being on the advisory panel.

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<https://www.liv.asn.au/getattachment/47a4c3b2-8dd6-4c74-bfa3-ae71031b01a5/Reviewing-the-Judicial-Appointments-Process-in-Vic.aspx> page 9

- 'The LIV submits that the Attorney-General should not have the right to select a person who has not been recommended by an advisory panel.'<sup>77</sup>
  - Allowing such a right would undermine judicial appointment process + constitute executive influence of judicial influence

#### Independent appointments commission

- The UK Commission oversees every judicial appointment in the UK.

#### American Judicial Selection Process<sup>78</sup>

- *Executive nomination and Legislature confirmation*: In the United States, president makes nominations → confirmed by a majority vote of the US Senate
  - Advantages:
    - Open appointment process to public scrutiny
  - Disadvantages:
    - Increase the likelihood of political appointments (e.g. American experience)
    - Would not necessarily promote diversity in courts
    - Senate veto is merely *negative* (shield to keep undesirable appointees off the bench). However, *positive* measures are required ie. ensuring great candidates that are a cross-section of the entire society
- *Election by Legislature*: Judges are elected by a vote of the General Assembly.
- *Election by citizens/popular election model*: Elected through popular vote.
  - Not adopted in any common law country
  - Advantages:
    - Lift the veil of secrecy in regards to judicial selection processes → in turn offering transparency
    - Possibly resulting in gender and ethnic diversity → reflecting composition of community
  - Disadvantages:
    - Political considerations would be exacerbated by this model
    - General public are not necessarily suited to judge judicial temperament

#### NSW Judicial Appointment Process

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<sup>77</sup> Ibid page 10

<sup>78</sup>

<https://www.parliament.nsw.gov.au/researchpapers/Documents/judicial-appointments/briefing%20paperjudicial%20appointments.pdf> page 7

- *Supreme Court Act 1970*, s 26; *District Court Act*, s 13; *Local Court Act 2007*, s 13 'provide for judges to be appointed by the Governor, acting upon the advice of the Executive Council.'<sup>79</sup>
- 'In practice, the Attorney-General makes recommendations to Cabinet, and then advises the Governor. The relevant courts legislation also sets out the qualifications for office: a person is eligible to be appointed as a judge of the Supreme Court or District Court if the person is an Australian lawyer of at least 7 years standing (5 years standing in the case of appointments to the Local Court).'<sup>80</sup>

## QLD Judicial Appointment Process

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## Particular Skill-set Necessary

What abilities, skills and qualities are ideal?

- Judiciary needs to more fairly represent the community<sup>81</sup>
  - Especially represent those currently underrepresented
  - 'Judiciary should not be drawn from a narrow and homogenous group'
  - Awareness of diversity in the community
- Experience working in the community
- Technical legal excellence, expertise and an in depth knowledge of evidence law
- Consistent temperament and given consistent rulings
- Knowledge of alternative dispute resolution processes and mediation + willingness to use them
  - Evidence of alternatives to traditional court processes reducing rates of recidivism.

## Framework of Judicial Abilities and Qualities for Victorian Judicial Officers

- <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-05/2009jcvframework-jcvsite1.pdf>

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<sup>79</sup> Ibid 8.

<sup>80</sup> Ibid.

<sup>81</sup>

<https://www.liv.asn.au/getattachment/47a4c3b2-8dd6-4c74-bfa3-ae71031b01a5/Reviewing-the-Judicial-Appointments-Process-in-Vic.aspx> page 4

## Current Undertakings by the Government

Department of Justice and Community Safety: Corporate Plan 2019-23

'Focusing on early intervention and crime prevention for at-risk groups and developing innovative approaches to reduce recidivism:

- Providing grants and programs to prevent and reduce negative contact with the criminal justice system and to support local communities to improve community safety
- Countering violent extremism through improved case management and information sharing, and increasing availability of disengagement programs that specifically address the ideological basis of involvement in forms of violent extremism
- Partnering to design and deliver a crime prevention reform agenda and strategy
- Supporting whole of Victorian Government (WoVG) initiatives to reduce entries into the criminal justice system and recidivism
- Developing approaches to pre- and post-release support for prisoners and offenders
- Supporting community-based offenders and enhancing reintegration pathways
- Using pre-plea options to divert young people from the criminal justice system
- Supporting children and young people with complex needs, addressing the unique circumstances and context of youth offending and holding young offenders to account.<sup>82</sup>

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[https://www.justice.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2020/06/ae/6aec0566f/DJCS\\_Corporate\\_Plan\\_2018-19.pdf](https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/ae/6aec0566f/DJCS_Corporate_Plan_2018-19.pdf) page 6