

**Submission to Parliamentary Committee Inquiry into Victoria's Criminal Justice System  
 by Dr Diana Johns, Senior Lecturer in Criminology, The University of Melbourne**

Thank you for the opportunity to make this submission to the Parliamentary Inquiry into Victoria's Criminal Justice System. I wish to specifically address the following issues, within the Inquiry's Terms of Reference:

- Factors influencing Victoria's growing remand and prison populations;
- Strategies to reduce rates of criminal recidivism; and
- 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.

**My background and credentials**

My name is Diana Johns and I am a Senior Lecturer in Criminology at the University of Melbourne. I am a mother of three daughters, and I have twenty years' experience teaching and researching in the criminal justice field. I have also worked in support, case work and advocacy roles with long-term unemployed and people with disabilities. I hold a Bachelor of Arts degree in Criminal Justice Administration, a Master of Arts degree in Applied Criminology focused on youth justice group conferencing, and a PhD in Criminology focused on men's experience of release from prison. My book [Being and Becoming an Ex-Prisoner](#), based on my PhD research, was published in 2018 by Routledge UK. I have attached a recent article, 'Confronting the Disabling Effects of Imprisonment: Toward Prehabilitation', which was published in the international journal *Social Justice* in 2019, and which contains insights and evidence relevant to this submission.

My areas of expertise are imprisonment and post-prison reintegration, restorative and therapeutic justice, youth justice policy and practice, and young people's justice system involvement. In recent research I have studied young people's prolific offending in the UK (working with the Youth Justice Board, Wales); evaluated the Youth Diversion Pilot Program for the Children's Court of Victoria (with colleagues at RMIT); gathered evidence about the effects of demonising media representation on South Sudanese young people in Victoria (with colleagues at Monash University and the Centre for Multicultural Youth); and examined African Australians' post-release support needs.

My current research projects include: The Empowering African Mothers Project: Ubuntu in Practice, with community partners AAFRO and Afri-Aus Care (funded by the Department of Justice and Community Safety); evaluating Afri-Aus Care's Black Rhinos Basketball Program; evaluating restorative responses to adolescent family violence; evaluating the e-recovery app for the Neighbourhood Justice Centre; and therapeutic approaches in youth justice custodial settings. I co-founded and co-convene the [Justice-Involved Young People \(JYP\) Network](#), based at the University of Melbourne, which is part of the Smart Justice for Young People coalition (SJ4YP has made a separate submission to this Inquiry, focused on children, young people and youth justice, to which I am also a signatory).

This submission is oriented towards an agenda of '*non-reformist reform*', that is one "conceived not in terms of what is possible within the framework of a given system and administration, but in view of *what should be made possible in terms of human needs and demands*'<sup>1</sup> (my emphasis). I believe we can improve Victoria's criminal justice system by expanding the things that are working but, more importantly, imagining and building in *alternatives to the things that are not working*, such as prison and the growing use of imprisonment. This means rethinking what we have – in terms of *justice-making infrastructure* – and building what we need, where we need it, according to the needs and aspirations of each community affected by conflict, harm or violence, rather than merely reforming or tinkering with the structures and processes already in place.

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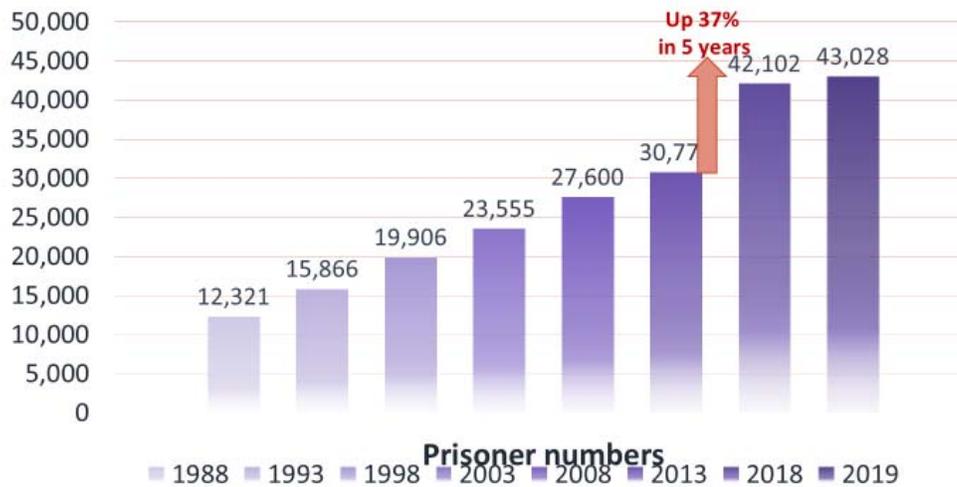
<sup>1</sup> To borrow from André Gorz's (1967) *Strategy for Labor: A Radical Proposal* (Boston, MA: Beacon Press), p.7.

**Factors influencing Victoria's growing remand and prison populations:**

Broadly speaking, there are two underlying causes of Victoria's growing remand and prison populations: 1) reforms to bail legislation and parole administration and the subsequent changes in decision-making emphases and assumptions about 'risk'; and 2) a popularly held and politically endorsed misperception that prison 'works' to keep the community safe, a view that fails to account for the criminogenic (i.e. crime-causing) effects of imprisonment and the many ways that prison *fails* to keep us safe and fails to address the causes of crime.

It is clear that, across Australia, prison populations have been increasing – both in number and as a proportion of the population – over the last four decades. The figure below (based on [Australian Bureau of Statistics](#) and [Corrections Victoria](#) data) shows the dramatic jump in prisoner numbers, largely as a result of changes to bail laws and decision making.

**Australia's prison population over 35 years**



**Bail and remand**

Victoria's growing remand population is the direct consequence of changes to bail legislation over recent years, which have made it increasingly harder for people to be granted bail and have thereby increased the likelihood of people being remanded to custody. In 2016, the [Sentencing Advisory Council](#) attributed the increase in Victoria's prison population over the preceding decade to the rising number of people refused bail, particularly for violent offences; 2016-17 saw 33% of bail applications refused, for example, compared to 21% in 2011-12. The same report identified a 154% increase between 2005 and 2016 in the number of remand prisoners compared with a 46% increase for sentenced prisoners. Since that time, in the wake of the 2017 Bourke Street massacre, and aimed at violent men such as James Gargasoulas (who was on bail at the time), Victoria's bail restrictions have tightened even further.

Justice Coghlan's 2017 review of bail laws recommended that a wide range of offences be included under the 'compelling reason' and 'exceptional circumstances' categories. These 'reverse onus' provisions, embedded in changes to the Bail Act 1997 (Vic) in 2018, have significantly increased the number of people refused bail and remanded to custody to await trial. Far from making the community safer, however, these reforms have had disproportionate and devastating effects on certain groups: young people, women experiencing disadvantage, and First Nations women. Between 2009-10 and 2019-20, for instance, [Corrections Victoria figures](#) show the proportion of prisoners entering prison on remand

increased from 60% per cent to 87% of all receptions and, significantly, 90% of women imprisoned in 2019-20 were initially on remand. As Russell *et al.* (2020)<sup>2</sup> note, this is not because they pose a risk to the community but because of *their own risks* – of poverty, homelessness, mental illness, and family violence – and precarious living circumstances that often make it difficult for women to meet the legal test for why they should be granted bail.

To address these injustices, as the [Human Rights Law Centre recommends](#), the Government needs to:

- **Repeal the reverse onus provisions** in the Bail Act, particularly the ‘show compelling reason’ and ‘exceptional circumstances’ provisions;
- **Create a presumption in favour of bail** for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk;
- **Insert an explicit inclusion** in the Bail Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment. (This is particularly important for young people, given [the Sentencing Advisory Council's 2020 report](#) that 66% of children remanded did not receive a custodial sentence); and
- **Repeal these offences:** committing an indictable offence while on bail (section 30B); breaching bail conditions (section 30A); and failure to answer bail (section 30).

### **Parole reforms**

Rising imprisonment rates can thus be attributed in large part to increasing numbers on remand and increasing rates of imprisonment among women and Indigenous women<sup>3</sup>. Another factor contributing to increasing prison populations is that people are spending longer periods of time in prison, which is a consequence of changes in how parole is administered in Victoria, as outlined in the Sentencing Advisory Council's (2016) [Parole and Sentencing: Research Report](#). Anecdotal evidence also suggests that many people in prison no longer apply for parole on the assumption that their request will be denied. So, what's behind this trend? Well, if we trace the emergence of Victoria's increasingly restrictive bail, parole and supervision regimes, changes have largely been implemented in swift response to serious and shocking incidents of public violence. I noted above that bail laws changed most recently following the Bourke Street massacre. Similarly, in the wake of Jill Meagher's murder in 2012, the Callinan Review led to an increased emphasis on community safety in parole decision making, and after the murder of Masa Vukotic in 2015, the Harper Review led to the establishment of the Public Protection Authority. On one hand, such rationales about protecting the community are impossible to argue with; yet, on the other hand, they highlight just how reactive and politicised penal decision-making tends to be. And reactive politicised decisions lead to short-sighted ill-informed policies, rather than those grounded in the best solid evidence about *what actually keeps us safe* as a community.

### **More released prisoners**

As prison populations swell, numbers of released prisoners also increase. Tighter bail and parole regimes mean more people are released without supervision or support, either from remand or at the end of a sentence. Many complex factors combine with these rising numbers of people released ‘straight to the street’, producing a confluence of factors that contribute to further social isolation, economic

<sup>2</sup> See Russell, E, Carlton, B, Tyson, D, Zhou, H, Pearce, M & Faulkner J (2020) [A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria](#), Fitzroy Legal Service & the La Trobe Centre for Health, Law & Society.

<sup>3</sup> See Russell, S & Baldry, E (2017) [Three charts on: Australia's booming prison population](#), *The Conversation*, June 14, 2017.

exclusion, poverty, family breakdown and – ultimately – the conditions for drug use and reoffending. These include:

- **Release to homelessness** – housing is the single biggest issue facing people released from prison, and one of the factors associated with the well-documented increased risk of death in the hours, days and weeks following release. Prisoners are released to homelessness every day of the week, sometimes with a 3-night motel voucher in hand.
- **Aging prisoners** is an increasing phenomenon with significant implications and costs associated with increased ill-health that accompanies this group.
- **Mental illness, cognitive impairment** and intellectual disability are recorded at staggeringly high rates among imprisoned populations. These issues frequently overlap with substance use disorders and/or poly-drug use, which both exacerbate and add to mental ill-health and diminish people's ability to cope with life in the community.
- **Normalised violence** is often part of prison life, part of a culture that fosters, promulgates and 'hothouses' toxic forms of masculinity and norms such as homophobia, misogyny, domination and retributive violence. These can become the 'cultural tools' that people use to survive life in prison, and that can be difficult to leave behind when they return to the community.
- **The serial depletion of resources** refers to the whittling away of social, economic, cultural and community resources that accompanies and accumulates with every term of repeat imprisonment, resources that people need to survive and thrive in the community. This is one of the main ways in which prison itself is criminogenic and increases reoffending risks.
- **The high rate of recidivism** and reimprisonment – [44% of adults imprisoned in Victoria](#) return to prison within two years – is evidence of the serial depletion of resources noted above.
- **Children with imprisoned parents** experience the shame and stigma of parental imprisonment as well as the material and relational implications of family breakdown, instability, and fear and uncertainty associated with their parent's return. For these reasons, among others, children of imprisoned parents can experience increased risk of criminalisation and contact with the criminal justice system themselves.

For all these reasons, beyond the enormous financial costs of building and managing more and more prisons, penal expansion is not sustainable.

### ***The violence and harms of imprisonment***

Another important factor that is frequently overlooked in public debates about increasing remand and prison populations is that imprisonment itself is *criminogenic*: it causes crime and produces violence. Prison is also *iatrogenic* – it is used as a 'solution' or remedy to the problem of crime, while at the same time creating the causes and conditions for further offending, violence and drug-related crime, and exacerbating related problems such as homelessness, mental illness and social isolation. The evidence of this is clear in the high rates of recidivism and return to custody, especially among young men, women experiencing disadvantage, and Aboriginal and Torres Strait Islander men and women. Despite these realities, and in the face of all the evidence of its failure as an institution, a strong faith in the prison persists and prevails in our community.

This faith is based on our urge to punish those who offend against and harm us, which is an entirely understandable and legitimate emotional response. Yet victims of crime, when asked, consistently express a need and desire for *reassurance* that the harm will not happen again, to them or someone else, far more than the desire for vengeance or retribution. As humans we want to know that someone who harms us is held accountable for that harm, but also to know that *they won't do it again*. Prison works to

achieve its punishment aim, but it fails miserably in meeting our need for accountability or achieving its aim of so-called rehabilitation. This is what we must address if we are to build a criminal justice system that serves us, serves justice, and keeps us safe as a community in Victoria.

To highlight the many profound ways that prison not only fails to achieve its aims, but *causes harm* to individuals, families and communities, I draw on a recent article that I mentioned earlier, 'Confronting the Disabling Effects of Imprisonment: Toward Prehabilitation' (attached to this submission). This article draws on a wide range of international evidence, my own research on men's experience of release from prison in Victoria, including interviews with previously imprisoned men and post-release support practitioners, and ongoing insights gained through formerly imprisoned people sharing their lived experiences through my teaching and research.

In this article I explain how the typical prisoner is 'disabled' – in the sense that the verb 'disable' means *to deprive of legal right, qualification, or capacity; to make incapable or ineffective, especially to deprive of physical, moral, or intellectual strength*. This occurs in the first instance by life experiences of violence, marginalization, and exclusion in the community, to which layers are added by the experience of the violence, marginalization, and exclusion of incarceration. In the article I describe the myriad ways that imprisonment reproduces violence and amplifies disadvantage and ill-health. I examine the multiple layers of the violence of the prison: from physical and psychological violence; to institutionally structured violence; to cultural and epistemic violence (how the logic of imprisonment *doesn't make sense* to so many people subject to it, including but not only Indigenous people). I explain how these harms and forms of violence leak out into the post-prison realm, affecting not only released prisoners themselves, but the families, children and communities to whom they return. I pose the question, how can the prison – as a place shaped and characterized by violence in all these ways – possibly achieve the positive transformation or 'rehabilitation' of its inhabitants amid such conditions of abject negativity?

Recognizing that penal harms militate against prisons' rehabilitative aim and capacity, I argue for *prehabilitation* as a means of strengthening communities, working upstream *with communities* to ultimately reduce our reliance on imprisonment as a supposed crime reduction strategy.

### **Strategies to reduce rates of criminal recidivism:**

Short of a radical 'non-reformist reform' agenda, which would see the secure penal estate shrink to accommodate only the small minority of truly 'dangerous' intractable people – and imprisonment used truly as a sanction of last resort – there are changes we can make to put the brakes on penal expansion, and make our criminal justice responses more effective in reducing crime and addressing its causes.

For example, introducing alternative ways of responding to interpersonal harms and violence, based in the community and engaging with affected communities, allowing people to participate actively in justice-making. These include (but are not limited to):

- **Restorative responses** that can hold people to account for harms they have caused, allow people to make amends for harms they have caused, and give people affected by those harms a voice in the justice-making process. For example, [Jesuit Social Services' pilot program 'RESTORE'](#) is based at the Children's Court of Victoria and seeks to build families' capacity to reduce violence and resolve conflict in ways that avoid the harms of criminalisation.
- **Circles of Support and Accountability (COA)** are an example of restorative practice that have specifically developed as a response to managing the risk of sexual offending against children, but that also hold great potential for use with a range of other groups and offence types in the community. One example is a [pilot program for sex offenders in South Australia](#), another is (currently not operating) Melbourne-based [Five 8](#) (rhyming prison slang for 'my mate').

- **Community-based alternatives to imprisonment** and community embedded healing places such as [Wulgunggo Ngalu Learning Place](#) for Aboriginal men (in Gippsland), [On Country camps](#) for Aboriginal and Torres Strait Islander men and young people (in Northern Australia), or [Black Fella Way Wellbeing Centre](#) for Aboriginal families and children (in South Australia).
- **Residential rehabilitation** for drug and alcohol recovery and healing – more beds, more access, more support is needed for these established and emerging services.
- **Therapeutic Communities (TCs)** – such as [HMP Dovegate in Staffordshire, UK, 'a safe prison'](#)
- **Women's Centres** as alternatives to women's imprisonment – therapeutic settings where women can find refuge and safety, reconnect with family, transition to stable housing, receive treatment and support. See for example, the [218 Service in Glasgow](#) – a 'time out' centre for women.
- **Community-based organisations** that provide diversion programs as alternative to imprisonment, such as [Deadly Connections Community and Justice Services](#) for First Nations people (in Sydney), [Afri-Aus Care Inc](#) in South East Melbourne, or [AAFRO](#) in Melbourne's West<sup>4</sup>.

#### *Diverting people and diverting funds*

Diversion includes **diverting people** away from the formal structures and processes of criminal justice, to options such as those listed above. But it can also refer to **diverting government spending** away from prison infrastructure and towards community-based alternatives, such as those listed above, and into larger scale projects and approaches such as:

- **Justice Reinvestment** – involves placed-based community-driven initiatives such as the [Maranguka Project](#) in Bourke, NSW.
- **Specialist Courts** – moving away from 'one-size-fits-all' generalist courts towards specialist problem-solving courts, such as Koori Courts, drug courts, mental health courts, family violence courts, and community-based courts such as the [Neighbourhood Justice Centre](#) in Collingwood.

#### *And it includes legislative changes including:*

- **Raise the age of criminal responsibility** from 10 to *at least* 14, and preferably 16 or 18. Children and young people who experience criminalisation and imprisonment at a young age risk further progression through and entrenchment in the criminal justice system, which can be avoided by working holistically with young people in their family, social, cultural and community context.
- **Raise the age of Youth Justice** from 18 to 25, in line with neuro-developmental evidence about adolescent transitions to maturity. The [Port Phillip Prison's Youth Unit, led by Anne Hooker](#), has demonstrated over two decades an effective model of care and responsibility to interrupt young men's criminal trajectories. It is worth emulating.
- **Abolish short sentences** – in 2019, recognising the harms of people cycling in and out of custody on remand and short sentences, Scotland legislated to abolish sentences of up to three months. The Scottish Government has since extended the presumption against sentences of less than 12 months and is [monitoring its implementation](#). Victoria could learn from Scotland in this respect.
- **Reintegrative ritual** to 'welcome' or accept people back to community after punishment – Victoria's recently introduced Spent Convictions Scheme is an example of this at the legislative level (what we might call 'judicial rehabilitation'). But we also need such mechanisms of recognition and 'recertification' at the community level too, so that courts and corrections do the work of *symbolic reintegration* as well as punishment, denunciation, supposed deterrence and rehabilitation.

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<sup>4</sup> I declare an affiliation with both Afri-Aus Care and AAFRO, with whom I am currently engaged in research projects.

**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.**

Complex trauma, arising from experiences and conditions of violence and fear, has profound effects on human development and social interactions, shaping our brain and our perceptions of the world around us. Colonisation traumatised Aboriginal and Torres Strait Islander peoples in ways that have become embedded in families and communities, through shared experiences of violence and fear. This reality manifests in the many ways Aboriginal lives are still controlled and managed by the State through its organisations and agencies, as depicted in the recent SBS documentary [Incarceration Nation](#). In this way, for Aboriginal and Torres Strait Islander communities, the effects of colonisation are not a distant historical past but are lived as an everyday and ongoing reality.

People administering criminal justice – including judges and magistrates – deal with the effects of trauma every day. For this reason, they need to be equipped with a deep understanding of complex and intergenerational trauma and its effects, and knowledge about the conditions that give rise to trauma, to be able to do their work effectively, compassionately, and humanely. One way to equip judges and magistrates with this knowledge and understanding is to embed the voices of *lived experience* into judicial and court-based training and professional development. To listen to those who have lived it.

Dr Diana Johns  
1<sup>st</sup> September 2021.