BAIL FOR THE BENEFIT OF SOCIETY: A 'LESS RESTRICTIVE MEANS' APPROACH

Submission to the Legal and Social Issues Committee,
Parliament of Victoria

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I INTRODUCTION

1. We welcome this inquiry into the Victorian criminal justice system and appreciate the opportunity to make a submission to the Legal and Social Issues Committee.

2. The inquiry's terms of reference indicate that submissions may address various issues associated with the operation of Victoria's justice system, including, but not limited to the

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factors related to Victoria's growing remand and prison population, and judicial education related to sentencing or causes of crime. This submission argues for reforms to the bail system which adversely affects particularly vulnerable groups. This relates directly to Victoria's growing remand population.

3. Victoria has led the way in human rights in Australia by enacting the Victorian *Charter on Human Rights and Responsibilities Act 2006* ('the Charter'). This submission argues that, despite this, Victoria falls short of human rights standards in its approach to bail.

4. This submission commences with a summary of recommendations before analysing international human rights law as it compares to Victorian bail laws. After highlighting where Victoria laws fall short of international standards, the submission summarises current discourse on the impact that these failings have on particularly vulnerable groups including women, aboriginal Victorians, and those with other specific vulnerabilities.

II RECOMMENDATIONS

Recommendation 1: Reform bail laws at a minimum to accord with the principles proposed in the *Bail Amendment (Reducing Pre-trial Imprisonment of Women, Aboriginal, and Vulnerable Persons) Bill 2021* (***Bail Amendment Bill***).

Recommendation 2: Prioritise reasonable alternatives to remand in custody, particularly for vulnerable people, including First Nations people, women, and those with significant health issues.

Recommendation 3: Address the apparent lacuna in bail laws in relation to trafficked persons.

Recommendation 4: Train all stakeholders, particularly non-court decision makers and decision makers in the lower courts, on how bail can operate in a non-discriminatory way and be a community safe approach.

III LIST OF ANNEXURES

We attach to this submission 2 annexures:

A. A schedule of relevant international material which demonstrates the need to approach vulnerable people accused of crime differently, including First Nations people, women, and those with significant health issues. This is not to suggest that there should be separate categories of persons entitled to bail over others, but to demonstrate how far Victoria has moved away from the foundational principle as established by international law of starting from a presumption of liberty for accused persons awaiting trial, and how that move risks discrimination and harm without a proven increase to public safety.

B. A schedule of bail cases in Victoria over the last four years which demonstrates significant problems in the application of bail laws, particularly by the lower courts.

   The detailed analysis of bail cases over this period provided with this submission paints a clear but alarming picture of the state of bail in Victoria. In particular, the following trends were observed: First, the lower courts are more risk averse when considering granting bail. In 2018, 2019 and 2021, bail was granted on appeal at rates between 56.5% and 75.5%. While this rate was lower in 2020 (50%), it can be understood as an outlier attributed to mixed judicial responses to the COVID-19 pandemic. Secondly, judges were regularly varied in their weighting of particular factors. For instance, certain judges considered delay brought on by COVID-19 as an influential factor, others viewed it as the norm. Finally, most applicants were young, had deprived social backgrounds, mental and physical health related concerns, and/or substance use issues.

   The analysis of bail cases provided with this submission suggests discrepancies between the lower and upper courts' handling of such cases, which may be derived from factors such as training, funding, caseload and legal representation. Overall, this analysis demonstrates that the current Victorian bail laws are institutionalising our most vulnerable populations.

IV INTERNATIONAL HUMAN RIGHTS LAW AND BAIL

5. Victoria has tough bail laws, particularly in relation to its 'reverse onus' provisions in ss 4AA-4D. This impacts severely on vulnerable people including First Nations people, women, children, and those with significant health issues.

6. International human rights law ('IHRL') is relevant to consideration of Victoria's bail laws through the application of the Charter. This is because the Charter is based on international legal obligations accepted by the Australian Government such as the *International Covenant on Civil and Political Rights*[6] ('ICCPR'), the *International Convention on the Elimination of All Forms of Racial Discrimination*,[7] *International Convention on the Elimination of All Forms of Discrimination Against Women*,[8] and the *Convention on the Rights of the Child*.[9] The Charter requires that 'all public authorities…give proper consideration to human rights and to act in a way that is compatible with human rights.'[10]

7. IHRL recognises bail as a protection of the right to personal liberty and freedom from arbitrary detention and as an essential part of the right to a fair trial, relating to the right to presumed innocence.[11] IHRL also recognises that some rights, including the right to liberty, can be limited. However, limitations on rights are only permitted where the limitation is necessary, proportionate, and non-discriminatory.[12]

8. Regarding non-discrimination, IHRL recognises that discrimination does not need to be intentional. Instead, actions may still be discriminatory where there is an 'unjustifiable disparate impact upon a particular group distinguished by race, colour, descent, or national or ethnic origin.'[13] Further, the European Court of Justice has found that, in relation to sex

[6] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[7] *International Convention on the Elimination of all Forms of Racial Discrimination,* opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).
[8] *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[9] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[10] *Charter of Human Rights and Responsibilities (2006)* (Vic) s 38(1) ('*Victorian Charter*').
[11] *ICCPR* (n 6).
[12] Ibid art 4; *Victorian Charter* (n 10) s 7.
[13] Committee on the Elimination of Racial Discrimination, *General Recommendation 14, Definition of Racial Discrimination,* UN Doc HRI/GEN/1/Rev.6 (1993) para 2.

discrimination, 'indirect' discrimination 'arises where a […] measure, albeit formulated in neutral terms, works to the disadvantage of far more [of one group] than [another]' and that the measure is not objectively justified.[14]

9. Necessity and proportionality have been interpreted in international and Victorian case law as requiring the 'least restrictive means' by which an individual's right is limited.[15]

10. Regarding pre-trial detention, Article 9(3) of the ICCPR states:

> *…It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*[16]

11. In interpreting this provision, the United Nations Human Rights Committee in its General Comment No 35 states the following, indicating that pre-trial detention should be a last resort and less restrictive means should be considered:

> 38. *…Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances… Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.*[17]

[14] See for example *Gómez-Limón Sánchez-Camacho* (C-537/07) [2009] ECR I-6525, [54]; *Brachner v Pensionsversicherungsanstalt* (C-123/10) [2011] ECR I-10003, [56].
[15] See for example Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments By Commonwealth Laws* (Report No 129, December 2015) 43; *Momcilovic v The Queen* (2011) 245 CLR 1.
[16] *ICCPR* (n 6) art 9(3).
[17] Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 12 [38] (citations omitted).

12. Interpreting a similar provision in the American Convention on Human Rights,[18] the Inter-American Court of Human Rights limited pre-trial detention further to solely circumstances that would ensure trial, and even then, where there were no less restrictive means:

> *65. As far as the special nature of pretrial imprisonment is concerned, as a general principle, deprivation of liberty should be limited to those persons for whom there is a conviction, since otherwise preventive imprisonment could be considered as an advance sentence, which is contrary to the principle of presumption of innocence established in Article XXVI, paragraph 1 of the Declaration and Article 8(2) of the Convention. However, pretrial imprisonment is a measure accepted by the Convention consisting in deprivation of liberty prior to a conviction by the courts. Hence it is appropriate when a person is legally innocent. Therefore, pretrial imprisonment is exclusively an exceptional measure.*
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> *66.* ***The requirement imposed by the Convention is that preventive imprisonment is used only to guarantee the trial, or in other words its only purpose is to guarantee the legal proceedings, such as preservation of evidence, or to guarantee the presence of the accused at all stages of the proceedings, as long as the same objectives cannot be achieved by any other less restrictive means*** [emphasis added].[19]

13. In Victoria, the provisions of the *Bail Act 1977* (Vic) (‘*Bail Act’*) operate in some circumstances as a presumption against bail and have an unjustifiable disparate impact on particular groups, meaning that in practice, the law disproportionately affects them in a manner which could constitute indirect discrimination.

14. Victoria can provide reasonable alternatives to remand in custody for accused persons. This would be in keeping with international legal principles to assess ‘less restrictive means’. It would be of positive benefit when applied to many vulnerable groups. Furthermore, society

[18] *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) (‘*American Convention*’).
[19] *Waldemar Gerónimo Pinheiro and José Víctor Dos Santos v Paraguay (Judgment)*, Inter-American Court of Human Rights, Case 11.506 (27 December 2002).

will benefit from those with health and vulnerability issues being offered support and treatment rather than incarceration, which compounds recidivism.

V CURRENT VICTORIAN BAIL LAWS

15. Section 4 of the *Bail Act* entitles everyone to bail, subject to the provisions that follow in the Act. Section 4E provides that the prosecutor—rather than the accused—must raise why bail would be an 'unacceptable risk' for bail to be refused. Bail must be refused based on 'unacceptable risk' if it is shown that the accused, if released, would: 1) harm herself or others; 2) commit an offence; 3) interfere with a witness or otherwise obstruct justice; or 4) fail to surrender into custody as dictated by bail conditions.

16. However, under ss 4AA-4D, an accused bears the burden of showing either 'exceptional circumstances' or 'compelling reason' why bail should be granted. These provisions have a blanket application to those accused of Schedule 1 or Schedule 2 offences and are considered 'reverse onus' provisions—they create a presumption against bail, albeit rebuttable.

17. In s 4AA matters, a decision maker is required to take into consideration 'surrounding circumstances', including amongst other issues home environment and background (s 3AAA(g)) and 'other vulnerabilities' (s 3AAA(h)). Section 3A that requires a bail decision maker, in s 4AA matters or not, to take into consideration Aboriginality. However, s 3A does not require that Aboriginality has any greater weight than other criteria.

18. That a blanket assumption that 'protection of community' is enhanced by pre-trial detention or presumptions against bail is not appropriate or supported by evidence. Further, it is at least arguable that s 4AA, although rebuttable, violates the 'no general rule' principle.

19. The use of a 'less restrictive means' test may prioritise bail but still be ineffective if reasonable alternatives are not considered or not available. The reverse onus provisions can thus result in individuals, including vulnerable ones, being held on remand because of their prior offending or the type of crime alleged, without a focus on the least restriction available in the circumstances.

20. If options for 'less restrictive means' (i.e. alternatives to detention) are not being considered or are not available to the bail decision- maker, then the practical reality is that any reverse onus may result in disparate impact to those who most need alternatives. The result is that the operation of the reverse onus becomes discriminatory, is unnecessary in a state with the resources to provide alternatives and has a disproportionate, effect on vulnerable groups. It follows that reverse onus provisions cannot be objectively justified under IHRL principles relating to pre-trial detention.

VI BAIL PROVISIONS FALLING SHORT REGARDING WOMEN

21. Across the world, women represent between 2% and 10% of national prison populations with this percentage increasing rapidly.[20] In Victoria, women's imprisonment is growing at a disproportionately higher rate than men.[21]

22. Women may often face charges for economic, non-violent offences linked to their financial situation or experience of violence. Poverty, persisting discriminatory laws, lack of enjoyment of economic, social, and cultural rights and related obstacles in accessing justice, increase the likelihood of women being detained.

23. Similar observations have been made by the Human Rights Law Centre to this Inquiry as follows:[22]

    - *Recent data from Corrections Victoria shows that over half the women in Victorian prisons are unsentenced for the alleged offending that they were arrested for.*
    - *More women are being denied bail, not because they pose a risk to the community, but because they themselves are at risk – of family violence, homelessness, economic disadvantage and mental illness.*

[20] 'Women and Detention' (Fact Sheet, Office of the High Commissioner for Human Rights, September 2014).
[21] Department of Justice and Community Safety - Corrections Victoria, *Women in the Victorian Prison System* (Report, January 2019) 8.
[22] Human Rights Law Centre, Submission No 58 to the Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (24 August 2021) [4.12]-[4.14].

- *These intersecting forms of disadvantage make it harder for women to put forward a case in favour of bail, which often makes time behind bars the default setting.*
- *This results in the injustice of women typically spending short periods in prison on remand and often pleading guilty and receiving a 'time served' sentence.*
- *This raises concerns, as identified by the Sentencing Advisory Council, about whether the increasing likelihood of receiving a time served prison sentence might inappropriately encourage some people on remand to plead guilty in the hope of being released earlier than if they proceeded to trial.*

24. Women in the criminal justice system have a heightened vulnerability requiring rehabilitation services including sexual and reproductive health, mental health services, rehabilitation from substance abuse, and counselling for victims of physical and sexual abuse. These services are not widely and effectively available while on remand. The impact of imprisonment can further be extremely severe if the prisoner is the primary carer of the children—a role that is still overwhelmingly held by mothers. Even a short period on remand may have damaging, long-term consequences for the children concerned. Particular groups of women, such as pregnant women, girls, women with disabilities, women living with mental health problems, drug problems or HIV and AIDS, women who are foreign nationals and/or from Indigenous and minority communities, and lesbian, bisexual and transgender women have further needs specific to them.

25. International standards address the rights of persons deprived of their liberty and States' corresponding obligations. In the Vienna Declaration on Crime and Justice,[23] States agreed to the development of crime prevention strategies that address root causes and risk factors related to crime and victimization through social, health, educational and justice policies. For women offenders, these root causes may include poverty, caused by discrimination in education and employment, gender-based violence and drug and alcohol addiction.

26. To address the lack of standards providing for the specific characteristics and needs of women offenders and prisoners, in 2010, the UN General Assembly adopted the United

[23] Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Vienna, *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, UN Doc A/CONF.187/7/Rev.3 (15 April 2000).

Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('Bangkok Rules').[24]

27. The Bangkok Rules together with other international standards call for States to address the pathways that lead women to prison and the consequences of their incarceration. States thus have a duty to address the causes that contribute to women's incarceration. Further, the Bangkok Rules note that the principle of non-discrimination requires States to address the unique challenges that women prisoners face and to take into account their gender-specific needs. The principle of non-discrimination also requires States to take into account and address the disparate impact of criminal justice strategies on women and children.

28. States also have a duty to provide alternatives to incarceration must take into consideration the gender specificities of, and the consequent need to give priority to applying non-custodial measures to, women who have come into contact with the criminal justice system. The Bangkok Rules require States to develop gender-specific diversionary measures and pretrial alternatives to incarceration that take into account the history of victimization of many women and their caretaking responsibilities.[25]

29. In Victoria, Emma Russell, Senior Lecturer in Crime, Justice and Legal Studies at La Trobe University has recently observed as follows:[26]

    - *Over the 12 months before August 2021, up to 1,200 women spent time in Victoria's maximum-security women's prison without being convicted and sentenced to a term of imprisonment. They were on remand: waiting in custody for their trial or sentencing, or to be granted bail.*

    - *Since 2018, Victoria's bail laws have made remand the default option for an expanded list of offences. Even when a woman's alleged offending is non-violent and relatively low level, her chance of being granted bail can be impossibly low. This is especially so if she is experiencing severe social disadvantage.*

[24] *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),* UN Doc A/RES/65/229 (16 March 2011, adopted 21 December 2010).
[25] Taken in part *Women and Detention* (n 20).
[26] Emma Russell, 'Number of women on remand in Victoria soars due to outdated bail laws', *The Conversation* (online, 9 August 2021) <https://theconversation.com/number-of-women-on-remand-in-victoria-soars-due-to-outdated-bail-laws-165301>.

Many women will be denied bail because they don't have an address: they're living in their car, couch-surfing, or unable to return home because of family violence.

- *Thanks to a series of punitive bail reforms, the remand situation in Victoria's prisons has now reached crisis level.*

- *In the past ten years, the number of people entering the women's prison on remand in Victoria has trebled.*[27] *For First Nations women, the number has increased five-fold.*[28]

- *Shockingly, remandees now outnumber*[29] *sentenced prisoners in the women's system. Most will spend less than one month on remand, although a significant proportion (32%)*[30] *spend between one and six months in custody. The majority will leave the women's prison without having spent any time under sentence.*[31]

- *Unfortunately, Victoria is not an outlier. In New South Wales, 43%*[32] *of women in prison are on remand, compared to 31% in 2013. National figures show more than a third (37%)*[33] *of women in prison are unsentenced, up from 22% in 2010.*

- *On a global scale, Australia's startling rate of growth in its remand populations far outpaces those of similar jurisdictions internationally, such as England and Wales, and Canada.*[34]

[27] 'Monthly time series prisoner and offender data', Corrections, Prisons & Parole (Web Page, 23 August 2021) <https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data>.
[28] 'Annual Prisoner Statistical Profile 2009-10 to 2019-20', Corrections, Prisons & Parole (Web Page, 19 July 2021) <https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20>.
[29] 'Monthly time series prisoner and offender data' (n 27).
[30] Women in the Victorian Prison System', Corrections, Prisons & Parole (Web Page, 15 June 2021) <https://www.corrections.vic.gov.au/women-in-the-victorian-prison-system>.
[31] Ibid.
[32] 'Custody Statistics', New South Wales Bureau of Crime Statistics and Research (Web Page, 5 August 2021) <https://www.bocsar nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx>.
[33] 'Prisoners in Australia', Australian Bureau of Statistics (Web Page, 3 December 2020) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2020#data-download>.
[34] Roy Walmsley, Institute for Crime & Justice Policy Research, *World Pre-trial/Remand Imprisonment List* (4th ed) (Brief, 2020) <https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf>.

- *Although remand is not intended to inflict punishment, its punitive effects[35] are difficult to ignore. Being remanded can result in someone losing their housing, their job, and having their children removed and placed in out-of-home care.*

- *When the harmful effects of imprisonment are given serious consideration – with or without a pandemic – women can and should be diverted from prison.*

- *To reduce rates of remand, we need to repeal changes to the Bail Act that have made prison the default,[36] not a last resort. Diverting prison funds towards public housing will also produce longer-term benefits for women, their children, and the community.*

VII BAIL PROVISIONS FALLING SHORT REGARDING ABORIGINAL VICTORIANS

30. In December 2020 Doreen Chen produced a research brief for the Indigenous Justice Clearing House examining the impact of bail on Indigenous criminal justice outcomes in Australia and New Zealand.[37] It was published by the Council of Attorneys General. It adopts an international comparative perspective both to diversify the policy discourse and so as to explore available international literature and data on bail for Indigenous and minority populations. It then assesses the impact of bail on Indigenous people through its corollary – remand – and then through bail itself. The following sections are worthy of note:

    - *Another example of the erosion of the presumption of liberty is 'show cause' provisions (ALRC 2018). introduced in Canada, New South Wales, QLD and a Victoria for example, these provisions trigger the application of a 'reverse onus' for certain charged crimes (Coady 2018: np). this places the onus on the accused person to demonstrate why they should be released pretrial. It is therefore based*

[35] Emma K Russell, Bree Carlton and Danielle Tyson, 'Carceral churn: A sensorial ethnography of the bail and remand court' (2020) *Punishment & Society* 1462-4745:1-19.
[36] Federation of Community Legal Centres Victoria and Law Institute of Victoria, *Pathway to Decarceration: A Justice System Response to COVID-19* (Plan, 26 August 2020).
[37] Indigenous Justice Clearinghouse, *International perspectives on using bail to improve Indigenous criminal justice outcomes* (Research Brief No 29, October 2020).

on the presumption of pre-trial detention, challenging the international law right to a presumption of innocence (Coady 2018: np).

- *[T]here are indications that remand may have a criminogenic impact. A Corrective Services NSW paper and noted that limited support is available during remand and has a short term focus (eg suicide watch), as opposed to longer term treatment options that could have a greater impact on criminogenic factors (Galouzis and Corben 2016: 13).*

- *Moreover, data from both Australia and New Zealand suggest it is possible that detention, and therefore remand, may have a criminogenic effect, at least on Indigenous populations. For instance, data from both countries shows that most Indigenous people detained at any stage of the criminal process will be re-imprisoned in the future. In Australia, 76% of Indigenous prisoners nationally had a prior record of imprisonment (ALRC 2018: np)… In addition, Indigenous prisoners in both countries were significantly more likely than non-Indigenous prisoners to have a prior record of imprisonment of any kind, except for Pasifika prisoners in New Zealand.*

- *International data also supports the hypothesis that remand may have an especially harmful impact on outcomes for minorities, including Indigenous people. A Canadian study found that denying Indigenous persons bail renders them more likely to plead guilty (Bressan and Coady 2017: 9-13). This [was] owed to fear/distrust of the system; a desire to accelerate the legal process; or desire to leave remand and secure reduced prison sentence. It also owed to cultural differences between Western judicial processes and Indigenous customs; differing notions of guilt and responsibility; and the desire to minimise individual/community exposure to the justice system (Bressan and Coady 2017: 9-13).*

31. The Human Rights Law Centre has observed for this Inquiry as follows:[38]

[38] Human Rights Law Centre (n 22) 8, [4.18], [4.20]-[4.22].

- *In Victoria, the number of Aboriginal and Torres Strait Islander women in prison has increased significantly and peaked at 14 per cent of the female prison population in 2019. By virtue of this, Aboriginal and Torres Strait Islander women are also over-represented in the remand population. 89.2 per cent of Aboriginal and Torres Strait Islander women entering prisons are unsentenced on reception.*

- *The current bails laws set up a system that makes it very hard for many Aboriginal and Torres Strait Islander women to succeed. Bail conditions imposed by decision makers frequently fail to properly take into account cultural and practical considerations.*

- *The Australian Law Reform Commission has highlighted that bail conditions, such as curfews, can restrict people from contacting their networks and performing cultural responsibilities. Aboriginal and Torres Strait Islander women can also be less able to comply with bail conditions where they do not have culturally appropriate supports — particularly when they might be experiencing family violence and have limited control over their own security, living arrangements and daily choices.*

- *While section 3A of the Bail Act 1977 requires that a person's "Aboriginality"—including their cultural background, ties to extended family or place and other relevant cultural issues or obligations - be considered when making a decision about bail, this does not appear to have had the impact of reducing the number of Aboriginal and Torres Strait Islander people being detained on remand. Since the introduction of the provision in 2010, the percentage and number of Aboriginal and Torres Strait Islander people—particularly women—on remand has continued to rise. According to the Australian Law Reform Commission, s 3A is not well understood and is underutilised.*

VIII BAIL PROVISIONS FALLING SHORT REGARDING OTHER VULNERABILITIES

A *Trafficked persons*

32. We refer to the submission to this inquiry on a modern slavery defence by Gerry et al.[39] In summary, Principle 7 of the UN Trafficking Principles and Guidelines states that:

> *Trafficked Persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.*[40]

33. Article 4(2) of the International Labour Office (ILO) Protocol of June 2014 (updating the existing ILO Convention 29 on Forced Labour) requires States to:

> *[T]ake the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.*[41]

34. Importantly, the Working Group on Trafficking in Persons identified that fear of prosecution and punishment often prevents victims from seeking protection and assistance.[42]

[39] Felicity Gerry et al, Submission No 75 to the Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (31 August 2021).
[40] United Nations Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1 (20 May 2002).
[41] *Protocol No 29 of 2014 to the Convention Concerning Forced or Compulsory Labour, 1930* (adopted 11 June 2014, entered into force 9 November 2016).
[42] Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: Administrative and judicial approaches to offences committed in the process of such trafficking – Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009) 5; see also, Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons involvement in criminal justice proceedings: An Indonesia case study' (2013) 451 *Trends & Issues in Crime and Criminal Justice* 1, 4.

35. The Commonwealth *National Action Plan to Combat Modern Slavery* (2020–25)[43] also made it a strategic priority to:

> *[U]ndertake a targeted review of support and legislative protections, defences and remedies available to modern slavery victims and survivors, particularly women and children, taking into account existing reviews and inquiries.*[44]

36. Section 11 of the Victorian Charter specifically addresses slavery, servitude, forced and compulsory labour.[45] A legislative defence to all crimes for victims of modern slavery should be introduced in Victoria to ensure that the individual's status as a victim is protected, whilst also encouraging their cooperation in the prosecution of those responsible. This would prevent Victoria from placing 'victims in the dock' and, instead, enhances law enforcement understanding of modern slavery and promotes the prosecution of those responsible for exploiting the victims of human trafficking. [46]

37. Until such legislation is enacted, protective investigative practices, a non-prosecution policy and non-punishment guidance should be developed and published to protect victims of modern slavery in Victoria.

38. Human Trafficking does not appear to have been a consideration in the formulation of bail laws at all. This lacuna needs to be addressed.

B *People with Health Issues*

39. On the issue of health, the relevant material is in the annexures and the 'health, law and education submission by Gerry et al.[47]

40. The right to health encompasses the right to proper healthcare as well as the underlying right to live in an environment which does not generate disease and mental disabilities.

[43] Department of Home Affairs, *National Action Plan to Combat Modern Slavery 2020-25* (Report, 9 December 2020).
[44] Ibid, 27 [Action Item 26].
[45] *Victorian Charter* (n 10) s 11.
[46] Gerry et al, Submission No 75 (n 39).
[47] Felicity Gerry et al, Submission No 86 to the Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (1 September 2021).

41. For those whose health issues affect their criminal responsibility, consideration should be given, where possible, to treating them in the community without resort to the courts with suitable mechanisms to facilitate linkages between services responsible for non-custodial measures and other relevant agencies in the criminal justice system, social development, and welfare agencies, both governmental and nongovernmental, in such fields as health, housing, education and labour.

42. Unless meaningful alternatives are available for those with significant health issues, the courts in Victoria are left without a less restrictive means. Axiomatically there comes a point where the absence of services means that alternatives are unreasonably unavailable. An absence of services, together with the afflictive risk of incarceration, will contribute to recidivism rather than reduce it.

C *Children*

43. We submit it is axiomatic that children should not be remanded in custody at all but should be the subject of specialised services and support as a process of safeguarding and protection. The priority for the benefit of society should be the full exercise of the rights of children. We cross-refer to the submission on health, law and education submitted by Gerry et al.

IX CONCLUSION

44. The 2018 reforms to the *Bail Act 1977* have had a significant and disproportionate impact on First Nations people, women, children and people with significant health issues in Victoria. There is no evidence that crime rates have dropped or that increased pre-sentence detention was likely to reduceoffending amongst those groups we have identified. Prison leads to family separation and job loss and compounds the stressors and root causes of offending, it does not offer a solution. This is especially so for remand prisoners who need access to services, including treatment, educationand other supports.

45. The IHRL makes it clear that, whenever possible, accused persons should not be detained in custody while awaiting trial. Further, international instruments emphasize that detention or imprisonment should be imposed only when there is no alternative.

46. The criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions, to avoid the unnecessary use of imprisonment. Pre-trial detention shall be used as a means of last resort in criminal proceedings, and alternatives to pre-trial detention should be employed as early as possible. The development of such non-custodial measures should be encouraged and closely monitored, and their use systematically evaluated.

47. This promotes greater community involvement in the management of criminal justice, specifically in the treatment of offenders whilst encouraging offenders to have a sense of responsibility towards society. And maintaining a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention. Non-custodial measures are appropriate as a means of reducing the use of imprisonment while, at the same time, meeting the needs of justice for the offender, the victim and the community. Conditional and temporary release, if they form part of a plan and are properly supervised, can be a very important part of the process of reintegrating an offender into the community at the end of a prison sentence.

48. The principles proposed in the *Bail Amendment (Reducing Pre-trial Imprisonment of Women, Aboriginal, and Vulnerable Persons) Bill 2021* (***Bail Amendment Bill***) are a start in this direction but this inquiry has the opportunity to recommend the provision of alternative services that enable the courts to truly consider meaningful alternatives that are capable of having a significant effect on both the reduction in the remand population and the reduction in recidivism.

49. We respectfully urge the Inquiry to acknowledge the relevance of international law to the operation of the Charter by recognising (a) the value of liberty through reformed bail laws; (b) the value of providing alternatives to custody; (c) the value of training to ensure that the principle of less restrictive means is known and acted upon in a non-discriminatory way, particularly for First Nations people, women, trafficked persons and those with significant health issues.

50. We welcome further consultation on these matters at your convenience.

Felicity Gerry QC

21 September 2021