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LAW & ADVOCACY  
CENTRE FOR WOMEN

# Inquiry into Victoria's Criminal Justice System

SUBMISSION ON BEHALF OF THE LAW AND ADVOCACY  
CENTRE FOR WOMEN LTD

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# Inquiry into Victoria's Criminal Justice System

Submission on behalf of the Law and Advocacy Centre for Women Ltd

## Background

On 3 June 2020 the Legislative Council of Victoria agreed that the Legal and Social Issues Committee would inquire into, consider and report, by no later than 28 February 2022, on various issues associated with the operation of Victoria's justice system, including, but not limited to:

- (1) an analysis of factors influencing Victoria's growing remand and prison populations;
- (2) strategies to reduce rates of criminal recidivism;
- (3) an examination of 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; and
- (4) the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skillset necessary for judges and magistrates overseeing specialist courts.

This submission responds to these issues and advocates for key reforms that are vital in improving the ways in which Victoria's criminal legal system responds to women.

## Introduction

The Law and Advocacy Centre for Women (LACW) is a community legal centre located in Carlton and operating across Victoria. It is the only legal service in Victoria whose primary focus is to provide a gender-specific approach to assisting women who are in, or at risk of entering, the criminal justice system. LACW was established in 2016, specifically in response to the rising rates of imprisonment and criminalisation for women. Its mandate is to combat these trends by providing a holistic approach to women in the justice system, providing a wraparound service that combines legal advice and representation alongside case management to address the underlying causes of women's criminalisation and imprisonment. The majority of LACW's legal work is in the provision of criminal defence advocacy. Other areas of practice include infringements and fines; victims of crime assistance; child protection and family violence intervention orders.

LACW acknowledges that we operate on Aboriginal land, and that our office is located on the stolen land of the Wurundjeri people of the Kulin Nation. We pay our respects to Elders past, present and emerging. Sovereignty over this land was never ceded and it always was, and always will be, Aboriginal land.

We acknowledge also that Aboriginal and Torres Strait Islander people experience disproportionate adverse impacts across the whole spectrum of the justice system – including as a result of discriminatory and racist policing practices, inter-generational trauma, and systemic failures leading to their gross over-representation in the prison system. We also recognise the resilience and strength of Aboriginal and Torres Strait Islander communities, and the leadership they have shown and continue to show in advocating for and implementing reforms to this system.

We encourage the inquiry to centre the voices of women with lived experience of the criminal justice system – in particular, Aboriginal and Torres Strait Islander women – in identifying the problems with the current system and developing proposed reforms.

LACW supports the advocacy of a range of allied legal centres and community organisations that are working together to reduce women’s criminalisation in Victoria. We endorse the submission made to this inquiry on behalf of Smart Justice for Women, a subcommittee under the broader Smart Justice Coalition coordinated by the Federation of Community Legal Centres. Below, we emphasise or expand on the matters raised in those submissions as they relate to the inquiry’s terms of reference.

## Women in the criminal justice system

The support needs of criminalised women are interrelated and complex. Women’s pathways into and interactions with the criminal justice system are different to men’s.

Many of the support needs with which criminalised women present are gender specific. There is often a direct relationship between women’s trauma and personal relationships and their contact with the justice system; between complex health needs - including mental health and chronic illness – and criminalisation; and between substance abuse, past trauma and victimisation.

Criminalised women are more likely than men to have experienced childhood victimisation (particularly sexual abuse), as well as subsequent victimisation as adolescents and adults, including sexual assault and family violence.<sup>1</sup> Evidence suggests that between 77 per cent to 90 per cent of incarcerated women have been exposed to traumatic events.<sup>2</sup> A 2004 Australian Institute of Criminology study found that 87 per cent of women in custody were victims of sexual, physical or emotional abuse.<sup>3</sup>

The strict dichotomy between victims of crime and ‘offenders’ posited by the criminal legal system fails to acknowledge or address the complex relationship between violence and vulnerability. Victoria’s current justice system responses are based on this false dichotomy and therefore fail to provide trauma-informed support for criminalised women. Criminal legal processes and gaol serve to exacerbate the trauma experienced by most criminalised women, by re-traumatising them and undermining their prospects for rehabilitation. Likewise, services for victims of violence alienate women who have been involved with the criminal justice system themselves.

The experiences of criminalised women are not universal. Aboriginal and Torres Strait Islander women, and women from culturally and linguistically diverse backgrounds experience over policing and other forms of systemic racism. Women with disability face increased social and economic marginalisation, as well as experiences of victimisation and trauma.<sup>4</sup> The discrimination faced by

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<sup>1</sup> Stathopoulos, Mary and Antonia Quadara, *Women as offenders, women as victims: The role of Corrections in supporting women with histories of sexual abuse* (Report for the Women’s Advisory Council of Corrective Services NSW, 2014) 25-26.

<sup>2</sup> Green, Bonnie, Jeanne, Miranda, Daroowalla, Anahita and Juned Siddique, ‘Trauma exposure, mental health functioning and program needs of women in jail’ (2005) 51 (1) *Crime & Delinquency* 133-151, 134.

<sup>3</sup> Johnson, Holly, ‘Drugs and crime: A study of incarcerated female offenders’ (Australian Institute of Criminology: Research and public policy series, 2004) xiv.

<sup>4</sup> Winford, Stan, Howard, Anna and Jessica Richter, *Recognition, respect and support. Enabling justice for people with an acquired brain injury* (Centre for Innovative Justice Report, RMIT University, 2018).

trans and gender diverse people in the community is linked to criminalisation,<sup>5</sup> and transphobic stigma, discrimination and assault make carceral settings especially damaging for them.<sup>6</sup> We urge the inquiry to be alive to the various and intersecting forms of marginalisation experienced by criminalised women and seek input from a diverse range of women with lived experience of the criminal justice system.

Given the complexities of the causes of women's criminalisation, this inquiry must adopt a gendered lens when examining the causes of the growing remand and prison populations in Victoria. A gendered perspective must also be applied to diagnosing the causes of high rates of recidivism in Victoria. Reforms proposed to address these issues that do not account for the distinctive experiences of women will be ineffective.

In responding to the inquiry's terms of reference, it is LACW's submission that there are a number of key causes of the growing remand and prison populations in Victoria:

1. Current bail laws;
2. The inadequate supply of public housing;
3. Certain features of Victoria's sentencing regime;
4. The criminalisation of poverty;
5. The failure to implement a health and harm-minimisation response to drug use;
6. The over-policing of Aboriginal and Torres Strait Islander and CALD communities; and
7. The inadequate resourcing of gender specific and culturally safe, wrap-around support services directed towards addressing the causes of women's ongoing criminalisation.

This submission is structured around the key themes of bail laws, housing, sentencing and the need for additional investment in wrap-around services – specifically as they relate to women's experiences of the criminal justice system – with the additional factors outlined above intersecting with each of these key themes. We note that many of the issues identified as contributing to Victoria's growing remand and prison populations also contribute to high rates of recidivism in Victoria – for example, the inadequate supply of public housing. To this end, we advocate for a number of key reforms that would address both the growing remand and prison populations and recidivism, including:

1. Increasing funding for wrap-around support services that are gender-informed and culturally safe;
2. Increasing the supply of public housing, including with specific housing directed to women exiting the prison and justice systems;
3. Reforming bail and sentencing laws;
4. Redirecting funding from prisons and policing to instead invest in community services.

We also support calls by a growing number of health and legal services to raise the age of criminal responsibility.

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<sup>5</sup> Lenning, Emily and Carrie Buist, 'Social, psychological, and economic challenges faced by transgender individuals and their significant others: Gaining insight through personal narratives' (2012) 15 (1) *Journal of Culture, Health, and Sexuality*, 45-57.

<sup>6</sup> Ministry of Justice United Kingdom, *Review of the care and management of transgender offenders* (Report, 2016).

## 1. Victoria's growing remand and prison populations

The number of women held in Victorian prisons has more than doubled over the past decade, growing from 248 in 2008 to 581 in 2018.<sup>7</sup> For several years, women have been the fastest growing cohort in Australian prisons. Between 2009 and 2019, the female prison population in Australia increased by 64 per cent, compared with 45 per cent for males.<sup>8</sup>

Aboriginal and Torres Strait Islander women are grossly over-represented in these figures. The number of Aboriginal women in prison has more than tripled, growing from 42 in 2012 to 147 in 2018.<sup>9</sup>

In April 2021, for the first time in the history of reporting of female prisoner statistics, the number of unsentenced female prisoners in Victoria exceeded the number of sentenced women, with 53 per cent of women in custody being held on remand.<sup>10</sup> As at 31 May 2021, that number increased to 55 per cent.<sup>11</sup>

Housing large numbers of unsentenced women in custody is an expensive holding pattern, costing the Government \$391.18 per woman, per day.<sup>12</sup>

This exponential and unprecedented growth in the number of women on remand and in prison is the result of three key factors: recent reforms to the *Bail Act 1977* (Vic), increasing rates of homelessness and housing insecurity, and Victoria's sentencing regime.

### The impact of changes to the *Bail Act* on Victoria's remand and prison populations

The 2013 and 2018 legislative amendments to the *Bail Act 1977* (Vic) introduced a new bail regime that has led to a substantial increase in the numbers of accused persons facing a 'reverse onus' test for bail, where they bear the onus of proving why they should be released from custody, rather than the prosecution having to establish why bail should not be granted. These changes have significantly expanded the circumstances in which an individual can be deprived by the State of their fundamental right to liberty prior to their criminal charges being heard. Preservation of this right through the granting of bail stems from the presumption of innocence, and is foundational to our criminal legal system.

The 2018 amendments introduced a new 'show compelling reasons' threshold test for bail, and greatly extended the circumstances under which a person would be required to show 'exceptional circumstances' to satisfy the reverse onus test. In addition to the wider range of offences attracting the reverse onus tests, the amendments also detail other circumstances in which particular offending is subject to these tests – including where an offence was allegedly committed while on parole or bail for an indictable offence, or while 'undergoing sentence' (including a Community Corrections Order or adjourned undertaking/good behaviour bond).

These reforms have increased the number of women who are remanded in custody for low-level, non-violent offending that is a direct result of their poverty and disadvantage. This commonly occurs

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<sup>7</sup> Note that this number has reduced due to the COVID-19 pandemic. Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

<sup>8</sup> Australian Institute of Health and Welfare, *The health and welfare of women in Australia's prisons*, November 2020.

<sup>9</sup> Crime Statistics Agency (n 7).

<sup>10</sup> Corrections Victoria, *Monthly Times Series Prisoner and Offender Data* (May 2021) Table 1.

<sup>11</sup> Ibid.

<sup>12</sup> Morgan, Anthony, *How much does prison really cost? Comparing the costs of imprisonment with community corrections* (Australian Institute of Criminology Report, 2018) 40.

when a woman is already on bail for an indictable offence (such as theft from a shop) and is then arrested for new offending. Such women are now subject to the reverse onus tests for bail, and depending on the circumstances are required to meet the 'exceptional circumstances' test previously reserved for only the most serious offences.

Recent studies have shown that these legislative changes disproportionately affect women, with the more difficult tests for bail meaning that women may not apply for bail at all or are unsuccessful when they do.<sup>13</sup>

#### Case examples: Impacts of bail legislation

LACW has represented several women facing relatively minor charges who have been caught by the reverse onus and double-uplift provisions of the Bail Act. Specific examples include:

- One LACW client was charged with the theft of essential grocery items during a period of homelessness and was remanded in custody for allegedly offending on bail despite the fact that the charges would not have resulted in a term of imprisonment being imposed as a penalty.
- A woman was misidentified as the primary aggressor in a family violence incident, was propelled into the 'exceptional circumstances' category for bail due to existing driving offences and ended up spending over 30 days on remand despite never been in custody before.

The 2018 bail reforms were introduced following the Coghlan Bail Review, which the Victorian Government commenced in response to the Bourke Street tragedy on 20 January 2017. That Review concluded 'that a greater emphasis should be placed on assessment of risk.'<sup>14</sup> However, Victorian data shows that women are generally not remanded for the serious violent offending that the reverse onus tests sought to address.

Of unsentenced women in custody in Victoria, almost one-third had drug offences as their most serious charge and over thirty-five percent were charged with theft, fraud or other property related offences.<sup>15</sup>

Spending time on remand frequently interrupts important opportunities for recovery and rehabilitation that may address the underlying causes of women's criminalisation: community supports, including mental health intervention is interrupted; stable housing is generally put at risk; and employment or job readiness programs are paused. This leads to increasing numbers of women being released into the community in circumstances where they are more likely to reoffend.<sup>16</sup> There are several bail reforms that could be introduced to reduce the number of women on remand and in prison.

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<sup>13</sup> Russell, Emma; Carlton, Bree; Tyson, Danielle; Zhou, Hui; Pearce, Megan and Jill Faulkner, *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (Report of Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society, 2020).

<sup>14</sup> The Hon. Paul Coghlan QC, *Bail Review: First advice to the Victorian Government* (Report, 2017) 3.

<sup>15</sup> Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, July 2021.

<sup>16</sup> Stathopoulos (n 1).

### Recommendations: Bail reform

In line with the submission by Smart Justice for Women, the following reforms are urgently needed to the bail and remand system in order to stem the increasing numbers of women on remand and in prison:

1. Repeal the reverse-onus and double uplift provisions of the Bail Act and provide a presumption in favour of bail unless there is a specific and immediate risk to the safety of another person.
2. Adopt a gendered and culturally appropriate approach to determining 'risk' to community safety that takes into account the specific disadvantage and marginalisation experienced by women.
3. Ensure that women are not refused bail due to homelessness or a lack of social and affordable housing. Investment is required to ensure all women have access to safe, stable and affordable housing that meet their specific needs.
4. Reclassify, as summary offences, those low-level offences that are often committed by women due to their poverty, disadvantage and marginalisation, including drug offences, theft and property offences, and public nuisance and unlawful assembly.
5. Improve police responses to women charged with low-level offending, including increased use of charging on summons, review of police decisions, and transparency around police bail decisions.

### The link between housing insecurity and criminalisation

Increasing rates of homelessness in Victoria are directly contributing to the growth in Victoria's remand and prison populations. 115,300 clients were assisted by specialist homelessness services in Victoria in 2019-20.<sup>17</sup> The total number of clients being assisted by such services in Victoria has increased 3.7 per cent on average each year from 2011.<sup>18</sup> In 2019-20, 61 per cent of clients who sought assistance from such services in Victoria were women.<sup>19</sup> On average, 108 requests for assistance from homelessness services went unmet each day in Victoria in 2019-20.<sup>20</sup>

A recent report by the Australian Institute of Health and Welfare outlined that one in three people entering prison reported being homeless in the four weeks before prison,<sup>21</sup> while over half of the people being discharged from prison expect to be homeless upon release.<sup>22</sup> This statistic reflects the experiences of many of LACW's clients, for whom homelessness is a key contributor to their involvement with the criminal justice system.

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<sup>17</sup> Australian Institute of Health and Welfare, *Specialist homelessness services 2019-20: Victoria* (Fact Sheet, 2020) 1.

<sup>18</sup> Australian Institute of Health and Welfare, *Specialist homelessness services historical data 2011-12 to 2019-20: Victoria* (2020) Table 1.

<sup>19</sup> Australian Institute of Health and Welfare (n 17).

<sup>20</sup> Ibid.

<sup>21</sup> Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report, 2019) 22.

<sup>22</sup> Ibid, 24.

### Case examples: Homelessness and criminalisation

For many of LACW's clients, homelessness contributes to their criminalisation. For example:

- One LACW client has been on the high priority transfer list for her public housing property since April 2017. She cannot live in the property for safety reasons. In May 2020 she was offered a new property but was unable to accept the offer because she was in custody. Without that property, she was released from custody into a motel for a few days and then started sleeping rough and stealing groceries to survive.
- One LACW client was subjected to family violence at the hands of her partner for many years. She was then misidentified as the perpetrator of family violence and charged with assaulting him. She was living in a community housing property but was evicted after she was charged with this offending and her children were removed from her care. She was homeless for three years and started using drugs to cope. During that period, she was charged with possessing cannabis and stealing petrol. The assault charges that led to her eviction were later withdrawn.
- One LACW client was born overseas and moved to Australia in her early 20s. She had a traumatic childhood and complex mental health issues. As she was not an Australian citizen, she was not eligible for Centrelink so was financially dependent upon her Australian partner. When she fled the relationship because of family violence, she had no income and became homeless. She was sleeping rough and started stealing clothes and blankets from department stores.

The provision of social housing is the strongest protection factor against homelessness,<sup>23</sup> yet there is currently not enough social housing in Victoria to meet the needs of the most vulnerable people in our community. As of June 2021, the Victorian Housing Register listed 51,823 applications (many applications will have multiple people listed on the application) for social housing, with 28,427 applications in the 'priority access' category.<sup>24</sup> Victoria currently has the lowest proportion of social housing stock in Australia, sitting at 3 per cent of all housing stock in 2020 – 1.2 per cent lower than the national average.<sup>25</sup> We know that LACW clients are waiting years for a 'Homeless with Support' highest priority housing application.

Relatedly, the affordability of the private rental market remains an ongoing issue for criminalised women, many of whom receive Commonwealth government income support. There is a limited supply of rental properties that are available or accessible to people on a low income. Anglicare Australia's 2021 Rental Affordability Snapshot surveyed 74,266 rental listings across Australia in March 2021 to assess their affordability for people who receive Commonwealth government income support or are paid the minimum wage.<sup>26</sup> Of 74,266 listings, Anglicare Australia found just three rentals that were affordable for a single person on the JobSeeker payment.<sup>27</sup>

The findings of this study reflect the difficulties LACW's clients have finding affordable properties in the private rental market. This issue is exacerbated by competition for the lower rent stock by

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<sup>23</sup> Johnson, Guy; Scutella, Rosanna; Tseng, Yi-Ping and Gavin Wood, 'How do housing and labour markets affect individual homelessness?' (2018) *Housing Studies* 34 (7) 1089, 1101.

<sup>24</sup> Department of Families, Fairness and Housing (Vic), 'Victorian Housing Register,' *HousingVic* (Web Page, 15 September 2021) <<https://www.housing.vic.gov.au/victorian-housing-register>>.

<sup>25</sup> Australian Institute of Health and Welfare, *Housing Assistance in Australia 2019-20: State and territory summary data* (June 2021).

<sup>26</sup> Anglicare Australia, *Rental Affordability Snapshot* (National Report, 2021) 7.

<sup>27</sup> *Ibid* 8.

households with a higher income.<sup>28</sup> The cost of a private rental, coupled with the required photo identification, income guarantee and reference checks, means that criminalised women are effectively locked out of the private housing market. The affordability of a room in a rooming house or boarding house can be an issue for people on Newstart Allowance, as is the prohibitive Centrepay direct debit payments required by many boarding house managers. The required Centrepay payments are well above the 'housing stress' figure of anything above 30% of a household's gross income on housing.<sup>29</sup> In addition, rooming houses and boarding houses are for the most part unsafe and unsuitable for women, in particular women with caring responsibilities.

Case examples: Problems accessing private rental accommodation

LACW's clients often cannot access accommodation in the private rental market due to few affordable options and requirements of real estate agents. For example:

- A woman contacted our service when she was living in private rental accommodation. The accommodation was uninhabitable in several ways, including that it had mould and many basic amenities did not work. She had two dogs and four children so could not find suitable alternative rental accommodation for her family. She is from Melbourne but had to move to a hotel in regional Victoria for temporary accommodation.
- A LACW client was looking for accommodation in the private rental market for many months. She was repeatedly refused properties she applied for because she had little and interrupted rental history, a criminal history and was de-skilled in managing a home after years of being homeless. She was finally offered suitable private rental accommodation but could not accept the offer because she could not afford to pay a month's rent upfront nor pay for the bond.

Rising rates of homelessness, affordability challenges in the private rental market and insufficient supply of social housing, and in particular public housing, all contribute to the growth in the number of women in custody in Victoria, by further entrenching their disadvantage and contributing to their criminalisation. Women in prison indicate that early support to find housing would have prevented them from offending or reoffending.<sup>30</sup>

These issues also increase the number of women in custody because stable housing is a crucial element of satisfying tests for bail. Women who do not have an address to be bailed to or who are in insecure housing circumstances are unlikely to be granted bail and can often be remanded purportedly for their "safety" as they have nowhere else to go. A lack of housing and support services are particular barriers to women being granted bail in Victoria.<sup>31</sup> A Victorian Parliamentary Inquiry found that women were being placed in remand or having their release from prison postponed purely due to a lack of available housing.<sup>32</sup>

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<sup>28</sup> Yates, Judith and Maryann Wulf, 'W(h)ither Low Cost Private Rental Housing?' (2000) *Urban Policy and Research* 45.

<sup>29</sup> Australian Institute of Health and Welfare, 'Housing Affordability' *Australia's welfare* (Web Page, 30 June 2021) <<https://www.aihw.gov.au/reports/australias-welfare/housing-affordability>>.

<sup>30</sup> Prison Reform Trust United Kingdom, *Transforming lives: reducing women's imprisonment* (Final Report, 2014).

<sup>31</sup> Russell (n 13) 21.

<sup>32</sup> Drug and Crime Prevention Committee, Parliament of Victoria, *Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers*, (Parliamentary Paper No 371, 2010).

Further, even brief periods of time in custody can undermine the housing security of women who were housed before they were remanded. Women can lose their housing by the time they return to the community and have trouble finding new accommodation with a criminal record, complex support needs and an interrupted record of stable housing.<sup>33</sup>

Case examples: Housing insecurity for women exiting prison

LACW is regularly required to provide funding for emergency housing and transportation for women being released from custody, due to the significant gap in connecting women in custody with emergency accommodation and support services. For example:

- LACW is aware of one instance where a woman released from custody was required to stay at three different motels over three consecutive nights.
- LACW knows of one woman who came out of prison with multiple supports in place and a strong will to stay out in the community, however, with only hotel accommodation available, she became isolated and fearful. She ended up reaching out to her old connections and acquaintances, which led to her reoffending. She identified being isolated in the hotel after her release as the reason for this.
- One LACW client was offered a Homelessness to Home package and told her LACW case manager that “it was going to change her life.” However, she has not immediately been able to address the other causes of her criminalisation – including her mental illness, substance use and complex trauma – so has reoffended after being housed. Her package is constantly under threat because if she goes into prison for too long, she will lose it.

Research comparing the post-release needs of men and women in custody indicated that the top three post-release priorities for women are housing, finances and substance abuse.<sup>34</sup> Recent Australian research has found that people who have exited prison and receive public housing had better outcomes across a range of criminal justice measures than those who exited prison into other forms of housing. When people who leave prison are allocated public housing, they report an 8.9 per cent per year reduction in police incidents, with court appearances down 7.6 per cent per year, proven offences down 7.6 per cent per year, time in custody down 11.2 per cent per year, time on supervised orders after an initial increase, down 7.8 per cent per year, and justice costs per person down \$4,996 initially, then a further \$2,040 per year.<sup>35</sup>

This corroborates the experiences of LACW clients, for whom stable housing can act as a circuit breaker to break the cycle of offending and imprisonment.

There are a range of reforms that could be implemented to reduce homelessness and housing insecurity in Victoria, which would in turn reduce Victoria’s remand and prison populations.

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<sup>33</sup> Flat Out Inc. and the Centre for the Human Rights of Imprisoned People, *Submission to the Drugs and Crime Prevention Committee, Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers*, (Submission, 2010).

<sup>34</sup> Worrall, Anne and Loraine Gelsthorpe, ‘What works’ with women offenders: The past 30 years’ (2009) 56(4) *Probation Journal* 329; Sheehan, Rosemary, ‘Justice and Community for Women in Transition in Victoria, Australia’ in Malloch, Margaret and Gill McIvor (eds) *Women, Punishment and Social Justice: Human Rights and Social Work* (Routledge, 2013).

<sup>35</sup> Martin, Chris; Reeves, Rebecca; McCausland, Ruth; Baldry, Eileen; Burton, Pat; White, Rob and Stuart Thomas, *Exiting prison with complex support needs: the role of housing assistance* (Report of the Australian Housing and Urban Research Institute Limited No. 361, 2021) 75.

### Recommendations: Housing

In line with the recommendations of Smart Justice for Women, we call for the following reforms:

1. Ensure that there is adequate public housing provided to women who are in or at risk of entering the criminal justice system, including ensuring the immediate availability of housing for women who are released from prison, provided on the basis of Housing First principles.
2. Ensure that women are not criminalised due to a lack of affordable and social housing and the increased risk of entering or re-entering the criminal justice system due to homelessness.
3. Ensure that all housing provided to women – social, affordable and private housing – is aimed at ensuring that women have a home, and should meet accepted community standards of what constitutes a home.
4. Ensure that women have access to housing that is stable and secure, including security of tenure or an ongoing lease agreement and tenancy rights.
5. Take into account the specific needs of women regarding safety and childcare in meeting their housing needs, including the provision of housing that is safe and free from violence, has appropriate space, is appropriate for children and is culturally appropriate.
6. Empower women to exercise control over their own lives, including by keeping the provision and management of their housing separate from their access to supports, and ensuring that no single organisation has an undue level of influence over a woman's life.
7. Empower women to make their own choices about where they live, who they live with and who comes into their home and when.
8. As per Housing First principles,<sup>36</sup> and in recognition of housing as a basic human right, access to and retention of housing should not be conditional upon engagement with supports or run through Corrections Victoria.

### Inflexibility of community corrections orders and increasing use of 'time-served' sentences

The number of women in prison and on remand is also increasing due to several features of Victoria's sentencing regime, in particular: the inflexibility of community corrections orders and the increasing use of 'time-served' sentences.

Under the *Sentencing Act 1991* (Vic), there is only one community-based sentencing option: the Community Corrections Order (CCO). The jump from a Community Corrections Order (CCO) to imprisonment leaves little room for other rehabilitative options that may be appropriate, particularly where a previous CCO has not been complied with. Where the Court will not impose a CCO due to previous non-compliance or an adverse assessment by Corrections, the next step up the 'hierarchy' is, by design, imprisonment.

The sentencing regime must include flexible options for community-based treatment and rehabilitation of women. These options must be tailored to their individual circumstances and responsive to changes in their circumstances. Such options must be sensitive to the relationship between women's criminalisation and their complex trauma, prior victimisation and homelessness. It is particularly important to understand the impact that these experiences can have on the ability of women in the criminal justice system to comply with the current CCO regime and avoid setting them up to fail. For instance:

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<sup>36</sup> Padgett, Deborah; Henwood, Benjamin; and Sam Tsemberis, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, (Oxford Scholarship Online, November 2015).

- It is virtually impossible for a woman to successfully complete a community corrections order where she has unstable housing.
- Even when housing is available, the housing may be unsuitable and unsafe due to family violence.
- However, it is imperative that homelessness not be a precursor to imprisonment due to the lack of available sentencing alternatives.

It is vital that there be a greater range of rehabilitative programs and orders available to enable flexibility and responsiveness to the particular circumstances of the person subject to the order, and ensure prison is a sentence of last resort.

#### Case Examples: Inflexibility of community corrections orders

LACW regularly represents women who are assessed as unsuitable for a CCO due to unstable housing or are unable to complete their CCOs due to mental illness, substance use and/or homelessness. For example:

- One LACW client had a history of complex trauma, having had family violence perpetrated against her for many years. She struggled with anxiety and depression. She was evicted from her property after she was charged with criminal offending and started drinking heavily to cope. Her matter was adjourned for a CCO assessment to take place. She was assessed as unsuitable due to her unstable housing and chaotic living situation.
- An Aboriginal woman was sentenced to an 18-month CCO upon release from custody. She was homeless on release so was living on a friend's couch. Her first CCO report was positive, she was engaging with counselling services and expressed a motivation to start volunteering work. However, her mental health declined due to her homelessness and the pressure that her couch surfing was putting on her relationship with her friend. During her period of poor mental health, she failed to attend one of her CCO appointments and missed several calls from her corrections worker over a few weeks. Corrections commenced contravention proceedings for her CCO.

Additionally, the 2018 bail reforms described above have had a flow-on effect to sentencing outcomes.<sup>37</sup> As noted by the Sentencing Advisory Council, 'offenders who may have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending.'<sup>38</sup> Such sentences are likely to be short, and much more likely to be imposed in the Magistrates' Court than in higher courts.<sup>39</sup>

As concluded by the Sentencing Advisory Council (SAC):

"The increase in the number of time served prison sentences (both with and without a CCO) suggests that Victoria's increasing remand population is indirectly affecting sentencing outcomes. Time spent on remand seems to increase the likelihood that a court will ultimately impose a sentence of imprisonment. Sentencing courts are more frequently being put in the position of having to impose sentences on people who have, for all intents and purposes, already been punished. This may be, at least in part, due to increasing delays in the court process as a result of constrained resources and growing demand."

<sup>37</sup> Sentencing Advisory Council Victoria, *Time Served Prison Sentences in Victoria*, 4 February 2020.

<sup>38</sup> Sentencing Advisory Council Victoria (n 37).

<sup>39</sup> The SAC found that "Between 2013–14 and 2017–18, the Magistrates' Court imposed 85% of all prison sentences [and] more than 95% of time served prison sentences."

The increasing use of ‘time-served’ sentences and of remand more generally can result in unfairness to the accused person and can undermine their prospects of rehabilitation. Specifically:

- It may encourage inappropriate guilty pleas;
- Prisoners on remand are not able to access the same rehabilitative programs as sentenced prisoners;
- There is a lack of post-release support for people who receive a ‘time-served’ sentence;
- Having a sentence of imprisonment on their record may compromise a person’s future employment prospects, visa eligibility and their ability to travel overseas; and
- Having a sentence of imprisonment also pushes the person up the sentencing hierarchy, making it more likely that they will be sentenced to time in prison if they appear before the courts in the future.

#### Case Examples: The sentencing regime

LACW represents women who plead guilty because bail is too difficult to obtain and receive ‘time served’ sentences due to time already spent on remand. For example:

- One Aboriginal woman was referred to us when she was in custody. She had been using methamphetamine for approximately a year before she was remanded, and accrued several criminal charges during that period. An application for bail was made seeking her release to a culturally appropriate residential rehabilitation program. The Magistrate refused bail because they considered that she posed an unacceptable risk of reoffending. She instructed that she wanted to plead guilty instead. She was sentenced to ‘time served’ and released into the community without any drug and alcohol support.
- The partner of LACW’s client perpetrated family violence against her throughout their relationship, including when she was pregnant. She fled the relationship with her two young children and was living alone as a single parent in crisis accommodation. She was struggling financially and the pressure of looking after her children alone in unstable accommodation was putting her under immense stress. She was then charged with a serious indictable offence and remanded in custody. After an unsuccessful bail application, she instructed that she wanted to plead guilty so that she could start the process of reconnecting with her children. She made this decision despite advice that there were significant weaknesses in the prosecution’s case. She was sentenced to ‘time served.’

As most women in custody have been victims of violence, the prison environment serves to re-traumatise women and undermine prospects for rehabilitation. Effective rehabilitation that is trauma-informed, culturally sensitive and gender-specific cannot occur in a carceral environment. Therefore, sentencing options must focus on community-based solutions that address these underlying issues. Such sentencing options will reduce the number of women in custody and interrupt cycles of reoffending by offering women meaningful opportunities for rehabilitation.

Given this, LACW is opposed to the planned expansion of the Dame Phyllis Frost Centre. Funds set aside for the planned expansion should be redirected to community programs, in particular public housing and rehabilitation programs, that will have long-lasting benefits for criminalised women and for the community in general. We submit that trauma-informed care is vital in addressing the underlying causes of women’s criminalisation and imprisonment, and that such care cannot be effectively delivered in a carceral environment.

### Recommendations: Sentencing reform

In line with the recommendations of Smart Justice for Women, we call for the following reforms:

1. Review the sentencing hierarchy and Community Corrections Orders to provide additional options for community-based treatment and rehabilitation that is tailored to the specific needs of women.
2. Require decision-makers to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples as part of the sentencing process, and require training to be undertaken by decision-makers to ensure the appropriate implementation of these considerations.
3. Increase therapeutic sentencing practices and the use of structured sentence deferral to deliver tailored, rehabilitative outcomes.
4. Abolish short sentences whilst providing safeguards against 'sentence creep,' to ensure that women are not imprisoned for short periods of time disrupting their support system, including employment, education, caring responsibilities and housing. This should be referred to the Victorian Law Reform Commission for consideration.
5. Take into account the significant increase in numbers of women on remand in Victoria when considering reforms to sentencing.
6. Adopt a harm-reduction approach to drug-related offending that prioritises rehabilitative and community-based responses.
7. Include a person's caring responsibilities as a specific consideration in sentencing, requiring decision-makers to consider the impact of a sentence on dependent children.

## 2. Strategies to reduce criminal recidivism

LACW notes that in Victoria, 44.2% of prisoners released during 2017–18 returned to prison within two years (to 2019–20).<sup>40</sup> This clearly indicates that the current criminal justice system is not working to address the underlying causes of criminalisation.

However, these statistics should not be viewed in isolation. Instead, they tell a story of failures across the legal and support systems in Victoria. There are several key reforms LACW proposes to address the drivers of criminalisation and reduce recidivism.

### Increased funding for wrap-around support services for women

As discussed above, Victoria should move towards more community-based sentences to support the rehabilitation of criminalised women and reduce their likelihood of reoffending. In addition to the need for increased funding for stable housing, women must also be provided with wrap-around support services that address the underlying causes of their interaction with the justice system.

Women are more likely than men to have experienced trauma before entering prison. Between 70 to 90 per cent of women in prison have been victims of violence and abuse.<sup>41</sup> Women in prison also have higher rates of mental ill-health, substance use and homelessness compared to men.<sup>42</sup> Rates of

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<sup>40</sup> Sentencing Advisory Council Victoria, *Released Prisoners Returning to Prison*, (Web Page, 16 September 2021) < <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/released-prisoners-returning-to-prison>>.

<sup>41</sup> Johnson (n 3); Justice Health New South Wales, *Network Patient Health Survey 2015* (Report, 2017); Wilson, Mandy; Jones, Jocelyn; Butler, Tony; Simpson, Paul; Gilles, Marisa; Baldry, Eileen; Levy, Michael and Elizabeth Sullivan, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, (SAGE Open, January 2017).

<sup>42</sup> Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2019* (Report, 2020).

substance use are high in the lead up to and during offending; at time of arrest; and after incarceration.<sup>43</sup>

According to the AIHW, 36 per cent of female prison entrants reported having been diagnosed with a current chronic condition.<sup>44</sup> 33 per cent of women in prison in Victoria had an acquired brain injury prior to entering prison, compared to 2 per cent of the general Australian population.<sup>45</sup> Aboriginal women in custody have high rates of reproductive health problems, many of which are associated with gendered violence.<sup>46</sup> Aboriginal women are also likely to experience other health issues like diabetes, heart attack and stroke.<sup>47</sup>

These intersecting vulnerabilities cannot be addressed through a carceral environment that is re-traumatising and replicates environments of surveillance and control that have been experienced by a significant proportion of women in the justice system.

#### Case examples: Criminalisation due to poverty

For many of LACW's clients, poverty, substance use, mental illness and/or disability contribute to their criminalisation. For example:

- A woman with complex mental health issues and intellectual disabilities was in receipt of funding through the NDIS, with her money managed by state trustees. This arrangement left her without access to funds, prompting her to regularly re-offend by stealing food and basic items.
- One LACW client who was extremely mentally unwell and had an intellectual disability was repeatedly released into the community from either prison or acute mental health wards without mental health outreach or disability support upon release. Without any support in the community, she was caught in a cycle of re-offending (often theft) followed by remand and/or admission to a mental health facility, then release without adequate support.
- A LACW client was diagnosed with borderline personality disorder. She would consistently present at hospital and be discharged into homelessness or insecure accommodation. There was no outreach available to work with her face to face because of the COVID-19 pandemic, and her difficulties accessing support were compounded by the stigmatisation of borderline personality disorder within mental health and justice services. Without outreach support, she was repeatedly remanded in relation to damaging property.

The social and health support system can play a critical role in identifying and responding to these issues and preventing women from being criminalised and reducing the harms associated with involvement in the justice system.

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<sup>43</sup> Prison Reform Trust United Kingdom (n 30); Johnson (n 3).

<sup>44</sup> Australian Institute of Health and Welfare (n 8).

<sup>45</sup> Jackson, Martin; Hardy, Glen; Persson, Peter and Shasta Holland, *Acquired Brain Injury in the Victorian Prison System*, (Corrections Victoria Research Paper Series 4, 2011).

<sup>46</sup> Kendall, Sacha; Lighton, Stacey; Sherwood, Juanita; Baldry, Eileen and Elizabeth Sullivan, 'Holistic Conceptualizations of Health by Incarcerated Aboriginal Women in New South Wales, Australia' (2019) 29 (11) *Qualitative Health Research* 1549, 1557.

<sup>47</sup> Meehan, Tom; Jones, Donna; Stedman, Terry; Johnson, Dean; Suetani, Shuichi and Emma Foreman, 'The physical health of Indigenous and non-Indigenous patients participating in residential rehabilitation programs: a comparison study' (2017) 25(2) *Australasian Psychiatry* 164.

### Case Examples: The positive impact of wrap-around support

LACW case management provides a range of support to women to address their disadvantage and the underlying causes of their offending behaviour. Some examples of the impact of this support include:

- A LACW client had a disability and an unused NDIS package because she did not know how to access it. She had complex mental health issues and was the primary carer for her son. Her case manager supported her to access her NDIS funding, linked her with regular social support and counselling, and found her some respite support as a carer. She has since reduced her mental health medication, is happy and connected to her community and is linked to a paid employment pathway. Before working with her LACW case manager, she struggled to find other support given her involvement with the criminal justice system and criminal history.
- One LACW client regularly used alcohol in excess and committed all her offending when she was intoxicated. Her LACW case manager connected her with a drug and alcohol service and provided her with counselling and emotional support. She has not reoffended since.
- A LACW case manager was working with one older woman who had a traumatic childhood, suffered from mental illness and had experienced a long period of homelessness. When she was referred to us, she was sleeping rough and was unmedicated and suicidal. Her LACW case manager has supported her to find stable accommodation, which means she has been able to re-engage with her doctor and access medication and support for her mental illness. She has benefited from having one consistent case manager who has taken a trauma-informed approach to supporting her.

Support services must be appropriately funded and structured to provide long-term support to criminalised women. Suggested reforms are listed below.

### Support System

In line with the recommendations of Smart Justice for Women, we call for the following reforms:

1. Ensure that supports are responsive to women's needs at the first risk of criminalisation.
2. Ensure that supports are accessible and sustained to enable women to reconnect with their community and to reduce the risk of reoffending.
3. Ensure that supports are safe and respectful of the specific needs of women engaged with the criminal justice system, including the adoption of trauma-informed and integrated practice across the service system.

### Redirection of funding for police to community services

Another factor driving women's contact with the criminal justice system is the way in which particular communities and behaviours are policed. Evidence suggests that 'tougher' police responses, which do not always account for the context in which alleged offending behaviour took place, has a strong effect on prison numbers.<sup>48</sup>

As set out below, deploying Victoria Police as first responders in circumstances of family violence and mental ill-health is increasing interactions between criminalised women and police. These problems are especially pronounced for Aboriginal women and women from culturally and

<sup>48</sup> Wan, Wai-Yin, 'The relationship between police arrests and correctional workload,' *New South Wales Bureau of Crime Statistics and Research* (Crime and Justice Bulletin No. 150, 2011); Russell (n 13); Weatherburn, Don, 'Is Tougher Sentencing and Bail Policy the Cause of Rising Imprisonment Rates? A NSW Case Study' (2020) 53 (4) *Australian & New Zealand Journal of Criminology* 563.

linguistically diverse backgrounds, who are subject to racial profiling and over-policing. Funding for Victoria Police should be redirected to community services, to address the underlying causes of criminalisation and reduce recidivism.

#### *Intersections between family violence, policing and women's criminalisation*

In Victoria, there is growing concern that policing reforms introduced following the *Royal Commission into Family Violence* are having a counterproductive effect in some contexts. For example, Women's Legal Service Victoria surveyed a sample of client files involving women who were initially named as perpetrators on police applications for intervention orders and found that 57 per cent of those women were victim/survivors.<sup>49</sup> The experience of LACW's clients suggests that this is a prevalent issue faced by women, in particular women from culturally and linguistically diverse backgrounds.

Where women are already involved in the criminal justice system for unrelated matters, reporting family violence to the police may place them at even greater risk of further criminalisation.

#### *Case Examples: Police responses to family violence*

LACW has represented several women who have been mis-identified as the primary aggressor in family violence incidents, including:

- One LACW client was charged with assault and made the subject of a police application for an intervention order, despite neighbours identifying her as the victim of family violence and contacting police to call for help.
- LACW was assisting one client who was on a spousal visa and her husband had perpetrated family violence against her for many years. This included physical violence and coercive control. Police attended their home after the pair had an argument and her husband called the police. Upon their arrival at the scene, our client was heightened and emotional and was misidentified as the perpetrator of the violence. Our client instructs that her misidentification as the perpetrator was due in significant part to the fact the English is not her first language, whereas her husband is a native English speaker.
- One woman's ex-partner perpetrated family violence against her for many years. She was misidentified as the primary aggressor when police attended her home. An intervention order was put in place where she was the respondent. She suffered from depression and suicidal ideation. Police were called when she attempted suicide. Her ex-partner was also in attendance, and she was charged with breaching the family violence intervention order.

#### *Intersections between mental health responses and women's criminalisation*

Using police as first responders to women in mental health crises also increases their risk of further criminalisation. Under s 351 of the *Mental Health Act 2014* (Vic), police have the power to apprehend a person who appears to have mental illness where the person needs to be apprehended to prevent serious and imminent harm to the person or any other person. As soon as practicable, police must arrange for the person to be taken to a registered medical practitioner or mental health practitioner to be examined. A lack of mental health services is contributing to an increased reliance on the police to respond to people experiencing mental illness or psychological distress.<sup>50</sup> The *Royal*

<sup>49</sup> Ulbrick, Madeleine and Marianne Jago, "Officer, she's psychotic and I need protection': police misidentification of the 'primary aggressor' in family violence incidents in Victoria," *Women's Legal Service Victoria* (Report, 2018).

<sup>50</sup> *Royal Commission into Victoria's Mental Health System* (Final Report, 2021) Vol 1, 514.

*Commission into Victoria's Mental Health System* recommended that 'wherever possible,' emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police.<sup>51</sup> We submit that adequate resourcing must be provided to health services and professionals so that there are no circumstances under which a health led response is not 'possible'.

Given the circumstances under which women experience mental health crises, the involvement of police in these circumstances can be humiliating and traumatic. This is especially true for women who have previously had negative interactions with police or have been subject to over policing, like Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse backgrounds. The experiences of LACW clients demonstrate that the use of police as responders in these circumstances frequently escalates the crises and regularly leads to women in crisis being charged with offences for resisting arrest or assaulting police officers.

*Case Examples: Police responses under the Mental Health Act 2014 (Vic)*

LACW has represented several women who have been charged with criminal offending following a police dispatch under the *Mental Health Act 2014 (Vic)*, including:

- A LACW client with bipolar disorder was having a mental health episode in a shopping centre. She was highly distressed and crying out for help. Shopping centre staff called triple zero for assistance and reported that they believed that she had a knife in her bag. She hid from police and they eventually threatened her with pepper spray. She tried to push past them and was charged with assaulting a police officer and resisting arrest.
- LACW was approached to act for a woman who was 50 years old and had no criminal history. She had borderline personality disorder and post-traumatic stress disorder and was struggling with grief. She called triple zero for assistance but became highly distressed when police arrived. She became fearful and refused to leave the premises. Police entered the premises and she became more and more distressed and allegedly kicked one of the police officers who was trying to restrain her. She was charged with recklessly causing injury, which attracts a minimum term of imprisonment of six months when committed against an emergency worker on duty unless the court finds that a special reason exists.

*Over-policing of particular communities and women's criminalisation*

Another factor driving increasing interactions with police and courts is the over policing of Aboriginal and Torres Strait Islander women and women from culturally or linguistically diverse backgrounds.

A recent study showed that such discriminatory practices in relation to Aboriginal people were also reflected in prosecutions by police: 80 per cent of Aboriginal people arrested for possession of small amounts of cannabis were prosecuted, compared with just over 52 per cent of non-Aboriginal people arrested for the same offence.<sup>52</sup> Aboriginal women are more likely than non-Aboriginal

<sup>51</sup> *Royal Commission into Victoria's Mental Health System* (n 50) Executive summary and recommendations, 46.

<sup>52</sup> Michael McGowan and Christopher Knaus, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts,' *The Guardian Australia* (online, 10 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>>.

women to be imprisoned for minor offences such as disorderly conduct, minor property and traffic offences and breaches of court orders.<sup>53</sup>

People from culturally and linguistically diverse backgrounds are also subject to over policing in Victoria. There has been renewed concern about racial profiling in Victoria following the policing response to the media generated African gang crime scare and recent reporting of Victoria Police's use of a "Youth Network Offender" database.<sup>54</sup> Discrimination in policing during the COVID-19 pandemic has also been reported.<sup>55</sup> Racial profiling increases interactions between people from culturally and linguistically diverse backgrounds and police. The experiences of LACW's clients show that such interactions can lead to charges relating to resisting arrest or assaulting police officers, thus increasing criminalisation and recidivism.

#### Case Examples: Over policing of ATSI and CALD communities

Some examples of over policing and racial profiling experienced by LACW clients include:

- An Aboriginal woman with an acquired brain injury was released on bail while she was facing several charges of theft from a supermarket and a petrol station. She called our office when she was highly distressed to inform us that the police informant had been attending her property every day to check that she was complying with her bail conditions.
- One LACW client from a CALD background appears to be targeted due to her association with other members of her community. Police briefs of evidence often contain descriptions of charges alleged against people she associates with, even if there is no allegation that she is involved in the commission of those offences. This is not a practice commonly seen with other clients.

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<sup>53</sup> Anthony, Thalia and Harry Blagg, 'STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia' (2013) 22(1) *Social and Legal Studies* 43; Cunneen, Chris and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016); Purdy, Jeannine, 'Postcolonialism: the emperor's new clothes' (1996) 5 (3) *Social and Legal Studies* 405; Heffernan, Edward; Anderson, Kimina and Abhilash Dev, 'Inside Out—The Mental Health of Aboriginal and Torres Strait Islander People in Custody,' *Queensland Government* (Final Report, 2012); Finnane, Mark and John McGuire, 'The uses of punishment and exile: Aborigines in colonial Australia' (2001) 3 (2) *Punishment and Society* 279.

<sup>54</sup> Leanne Weber, 'You're Going to Be in the System Forever: Policing, Risk and Belonging in Greater Dandenong,' *Monash University* (Report, 2020) 16.

<sup>55</sup> Osman Faruqi, 'Compliance Fines under the Microscope', *The Saturday Paper* (online, 18 April 2020) <<https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710>>.

### Recommendations: Policing

In line with the recommendations of Smart Justice for Women, we call for the following reforms:

1. Divert funding for policing into community services, including front-line health services, CALD community services and Aboriginal and Torres Strait Islander community controlled organisations.
2. Reduce the over policing of Aboriginal and Torres Strait Islander and CALD communities in Victoria, taking into account the need to address systemic racism and the discrimination and racism inherent in policing practices in Victoria.
3. Increase transparency, accountability and oversight of police, including through a robust and independent system for effective oversight of police complaints and misconduct and proper implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).
4. Improve responses to victims of family violence who are misidentified by police as the primary aggressor, resulting in increased criminalisation of women who are victim-survivors of family violence.
5. Increase opportunities for women to engage in pre-charge and diversionary programs, including gender-informed and culturally appropriate programs and making diversion available at the instance of a Magistrate without the need for the consent of police or prosecutors.
6. Increase transparency and accountability of police in regard to their charging practices and bail decisions, including a new requirement for police to always provide reasons when refusing to grant bail
7. Minimise the role of police in the response to public drunkenness and instead implement a health-based response to public drunkenness that is properly funded and resourced, and based on co-design and consultation with community organisations and health services, including Aboriginal and Torres Strait Islander communities.
8. Adopt a health-based, harm-reduction approach in responding to drug use, and reinvest resources for the law enforcement response into community-based health and treatment services for drug use.

### Parole reform

An Australian study found that prisoners who received parole supervision upon release from custody took longer to commit a new offence, were less likely to commit a new indictable offence and committed fewer offences than prisoners who were released unconditionally into the community.<sup>56</sup> The same research showed that more active supervision can reduce recidivism only if it is focused on rehabilitation.<sup>57</sup>

For a woman to be eligible for parole (to serve the remainder of her sentence in the community under supervision), she must have received a sentence that includes a “non-parole period.” Once the non-parole period expired, the woman is then eligible to apply for parole. The number of women being released on parole in Victoria has declined significantly from 2013. In 2006/7, 26 per cent of women released from prison were released on parole. By 2018/19, grants of parole had fallen to just 4 per cent.<sup>58</sup>

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<sup>56</sup> Wan, Wai-Yin; Poynton, Suzanne; van Doorn, Gerard and Don Weatherburn, *Parole supervision and reoffending*, (Australian Institute of Criminology Report No. 485, 2014) 6.

<sup>57</sup> Ibid.

<sup>58</sup> Corrections Victoria, *Annual Prisoner Statistical Profile 2006-7 to 2018-19* (2020) Table 3.10 - All Prisoner Discharges, By Sex and Discharge Type.

This decline in the number of women being released in parole follows reforms introduced by the Victorian Government in 2013, which reduced access to parole for people exiting Victorian prisons. These reforms were introduced in response to recommendations of the *Review of the Parole System in Victoria*, carried out by Ian Callinan AC in 2013. This review was commissioned by the Victorian Government in response to several widely publicised, high-profile, violent crimes committed by men who were on parole at the time.

Prior to those reforms, there was a presumption that parole should be granted at the eligibility date unless there was a compelling reason not to do so. The onus is now on the person in prison to apply for parole. If they don't make an application – or as is often reported by women, if administrative delays with their assessments prevent them making an application in time – they serve their full sentence.

The Callinan Review recommended that no person should be granted parole who has not undertaken programs that the Court or Corrective Services has ordered or believes should be taken. Shortages of clinical and other staff have caused significant problems with delivery of programs at the Dame Phyllis Frost Centre. The lack of availability of rehabilitation programs has had a huge impact on women's eligibility for parole.

Since the Callinan Review, the Adult Parole Board has required that an applicant for parole have a "suitable and stable accommodation" address before they will even consider an application for parole. As discussed above, access to stable accommodation remains a significant problem for criminalised women. This creates a huge barrier to even having an application for parole prepared.

Reform is required to make it easier for women to access parole and be supported in their transition back into the community after spending time in custody.

#### Recommendations: Parole reform

In line with the recommendations of Smart Justice for Women, we call for the following reforms:

1. The purpose of parole for women should be to support their rehabilitation and reintegration into the community, including reunification with their children.
2. Ensure that women are not refused parole due to homelessness or a lack of social and affordable housing. Investment is required to ensure all women have access to safe, stable and affordable housing that meet their specific needs. Women who are eligible for parole and provide their consent should be automatically put on the priority waiting list for social housing.
3. The Adult Parole Board should automatically consider whether women are suitable for parole at the earliest eligibility date. Women need to be provided with appropriate and accessible support throughout the application process, and decision-makers should take into account the reasons for any non-completion of a rehabilitation or other program while in prison.
4. The Adult Parole Board should cease to be exempt from the Charter of Human Rights and Responsibilities Act 2006 (Vic), be bound by the rules of natural justice, and allow for applicants to be legally represented.

#### Raising the age of criminal responsibility

Most women in Australian prisons have children, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.<sup>59</sup> Children removed from

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<sup>59</sup> Australian Institute of Health and Welfare (n 8).

their mothers on remand or in prison are placed in the care of family members, kinship carers or into state care. This is traumatic for mothers and children alike – and for many, sets in motion a complex trajectory.<sup>60</sup>

Most young people under youth justice supervision (60.4 per cent) in Victoria also received a child protection service over a recent 4-year period.<sup>61</sup> This is over ten times the rate of child protection involvement among the general Victorian youth population.<sup>62</sup> For Aboriginal and Torres Strait Islander children under supervision, 69 per cent had also received child protection services.<sup>63</sup>

Research shows that early interactions with the criminal legal system significantly increases the likelihood of further offending and life-long involvement with the legal system.<sup>64</sup> On the other hand, the *Royal Commission into the Protection and Detention of Children in the Northern Territory* noted that most children who are dealt with outside the formal system do not reoffend and are more likely to grow up into an environment that promotes their healthy development and education.<sup>65</sup>

#### Case Examples: Raising the age of criminal responsibility

While LACW does not represent clients with criminal matters in the Children’s Court, many of our clients had their first involvement with the criminal justice system at a young age. For example:

- LACW acted for one Aboriginal woman who was raised in out of home care due to neglect and drug use by her parents. She was housed between group home settings and in foster care placements. She was the victim of childhood sexual assault and family violence in her childhood and had her first contact with the criminal justice system when she was 11 years old. Her history of institutionalisation, complex trauma, drug use and mental illness all contribute to her ongoing criminalisation.

The age of criminal responsibility in Victoria – 10 years old – is well out of step with international standards. Given this, LACW supports the growing number of Aboriginal and Torres Strait Islander organisations, expert United Nations bodies, human rights organisations, medical and legal bodies, and academics calling for the age of criminal responsibility to be raised to at least 14 years old, without exception.

#### Recommendations: Raising the age of criminal responsibility

1. The minimum age of criminal responsibility should be increased to 14 years, without any exceptions.

### 3. Issues concerning judges and magistrates

There are a range of systemic issues that need to be addressed to address the current failings in Victoria’s criminal justice system, as outlined above in particular in relation to bail decision making

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<sup>60</sup> Victorian Government, *Youth Justice Strategic Plan 2020-2030*, found that over 40 per cent of children and young people in contact with the youth justice system are the subject of current or previous child protection intervention (p. 9).

<sup>61</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016) 6.

<sup>62</sup> Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision 1 July 2013-30 June 2017* (2018) Table S4a.

<sup>63</sup> Ibid.

<sup>64</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (December 2016) 26.

<sup>65</sup> *Royal Commission into The Protection and Detention of Children in the Northern Territory* (Final Report, 2017).

and sentencing. LACW notes that prior reforms have eroded the discretion of judicial decision makers to carefully weigh the information before them and make the most appropriate decision in the individual circumstances of the case.

All judicial training must include a specific focus on the drivers of women's criminalisation, the relationship between women's trauma and personal relationships and their contact with the justice system; between complex health needs - including mental health and chronic illness – and criminalisation; and between substance abuse, past trauma and victimisation. Training must also unpack the false dichotomy between victims of crime and 'offenders' posited by the criminal legal system, which fails to acknowledge or address the complex relationship between violence and vulnerability, in particular for criminalised women.

Further training on the importance of understanding the vulnerabilities of people coming before the courts, in particular in the context of bail applications, must be provided. Specifically, all decision-makers must be trained in the recommendations of the Royal Commission into Aboriginal Deaths in Custody and in the need to reduce the gross over-representation of Aboriginal and Torres Strait Islander people in the prison and justice systems.

LACW supports the expansion and further resourcing of specialist courts such as Koori Courts and the Assessment and Referral Court (ARC) in Victoria. In addition to the gender-based training outlined above, decision-makers should have specific training to preside over these jurisdictions.

Increasing the availability of those courts would extend their specialised and therapeutic rehabilitation options to more criminalised women. However, women cannot enjoy the benefits of those specialised and therapeutic approaches if services are not adequately funded to provide wrap around support to women engaged with them.

*Submission made on behalf of the Law and Advocacy Centre for Women Ltd, with thanks to Eleanor Ryan for her assistance in preparing this submission.*

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