

# The Sentencing Act Reform Project

## Submissions of the Law and Advocacy Centre for Women Ltd

### Introduction

The Law and Advocacy Centre for Women Ltd (LACW) supports reforms to the *Sentencing Act 1991* (the Act) that:

- Prioritise the rehabilitation of offenders, and recognise and provide scope for the particular rehabilitative needs of female offenders, in the context of what is currently a male-centric justice system;
- Prioritise flexible, community-based sentencing options that address the underlying causes of offending in a holistic, client-centred way;
- Seek to address the gross over-representation of Aboriginal and Torres-Strait Islander people, in particular women, in Victoria's prison system by providing for culturally appropriate and gender-specific community-based sentencing options; and
- Acknowledge the nexus between trauma, prior victimisation, homelessness and offending, in particular for female offenders, and address these issues in a gender-sensitive, trauma-informed way.

In response to the call for submissions to the Sentencing Act Reform Project (Project), this submission will focus primarily on the adequacy of the sentencing hierarchy, with discussion points and recommendations that also touch on other aspects of the Project, including promoting consistency and transparency in the sentencing framework. It will suggest specific reforms that could be introduced, as well as outlining general principles that should be applied when considering how the Act and the sentencing process more generally should be reformed.

### Background

The Law and Advocacy Centre for Women (LACW) is a community legal centre and member of the Federation of Community Legal Centres. 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 offending 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 offending. 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; and family violence intervention orders.

### Women in the criminal justice system

LACW's submissions to the Project must be understood within the context of women's criminalisation and imprisonment in Victoria. Specifically:

- Imprisonment rates for women in Victoria have dramatically increased in recent years and this upward trend continues. In the past decade, the number of women in Australian prisons

rose by 85%. In Victoria, there was a 137% increase.<sup>1</sup> The number of women imprisoned in Victoria has grown from 248 in 2008 to 581 in 2018.<sup>2</sup>

- In 2018, one in seven women in Victorian prisons identified as Aboriginal or Torres Strait Islander.<sup>3</sup> This is contrasted with one in 125 women identifying as Aboriginal or Torres Strait Islander in the wider Victorian community.<sup>4</sup>
- These high rates of imprisonment have been driven by a huge increase in the numbers of women on remand in Victoria. In mid-2017, 39% of women in prison were on remand.<sup>5</sup> Currently, close to 50% of women in prison in Victoria are on remand.

The support needs of criminalised women are interrelated and complex. Criminalised women commonly need support in relation to homelessness, mental health, family violence, child protection involvement and substance abuse, all of which are often interrelated. For the vast majority of criminalised women, these issues stem from experiences of multiple forms of trauma.

Many of the support needs with which criminalised women present are gender specific. There is often a direct relationship between:

- trauma, personal relationships and offending;
- complex health needs – including mental health and chronic illness – and offending; and
- substance abuse, past trauma and victimisation.<sup>6</sup>

Fundamentally, prison is not a safe place for women. This has again been demonstrated by the recent deaths in custody of two Aboriginal women in Victoria's prison system (one in police cells and one at the Dame Phyllis Frost Centre). The COVID-19 crisis further highlights the inherent dangers within carceral systems and has brought into sharp focus the inherent risks to health presented by the prison environment. These risks are exacerbated by over-crowding, and by the compromised health suffered by a high proportion of people in the criminal justice system, in particular Aboriginal and Torres Strait Islander people.

The COVID-19 crisis presents an unprecedented opportunity for us, as a community, to reassess our dependence on incarceration as the default response to criminal offending, and refocus our efforts on community-based rehabilitation and sentencing options. These options are more successful in reducing recidivism, and are also safer and less costly than building more prisons. The costs associated with building and maintaining prisons should be redirected to community programs, in particular community housing and rehabilitation programs, that will have long-lasting benefits for criminalised women and for the community in general. Diversion from prison into residential rehabilitation programs has been shown to have particular benefits for Aboriginal and Torres Strait

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<sup>1</sup> Australian Bureau of Statistics, Prisoners in Australia, 2018, 'Prisoner characteristics, States and Territories (Tables 1 to 13)'

<sup>2</sup> Corrections Victoria (2019). Annual Prisoner Statistical Profile 2006-2007 to 2017-2018. Melbourne: Corrections Victoria

<sup>3</sup> Australian Bureau of Statistics, Prisoners in Australia, 2018, 'Prisoner characteristics, States and Territories (Tables 14 to 35)'

<sup>4</sup> [https://quickstats.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/IQS2](https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/IQS2) and

[https://quickstats.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/2?opendocument](https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/2?opendocument)

<sup>5</sup> [https://www.corrections.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2019/03/71/021fe80ab/women\\_in\\_prison2019.pdf](https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/03/71/021fe80ab/women_in_prison2019.pdf)

<sup>6</sup> [https://www.corrections.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2019/03/71/021fe80ab/women\\_in\\_prison2019.pdf](https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/03/71/021fe80ab/women_in_prison2019.pdf)

Islander people, in terms of reducing recidivism, improving health incomes and providing a cost saving to the community.<sup>7</sup>

Given the vast majority of women in Victoria's prison system have been the victim of violence, including sexual assault and family 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.

With these considerations in mind, LACW submits that:

- Imprisonment must remain a punishment of last resort, and should be reserved only for offenders that pose a threat to community safety.
- Rehabilitation should be prioritized as the primary factor to consider in sentencing for non-violent offences.

### The adequacy of the sentencing hierarchy

The current range of sentencing options under the Act is not broad enough to address the wide-range of circumstances of offenders coming before the courts. In particular, 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.

It is vital that the sentencing regime include options for community-based treatment and rehabilitation that are better tailored to the individual circumstances of offenders, particularly female offenders. These options need to take into account the nexus between trauma, prior victimization (in particular family violence), homelessness and women's criminalisation. 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:

- 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 offender, and ensure prison is a sentence of last resort.

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<sup>7</sup> Australian National Council on Drugs and the National Indigenous Drug and Alcohol Committee, *An Economic Analysis for ATIS Offenders: Prison vs Residential Treatment*, Deloitte Access Economics, p. xi.

In addition, the process of imposing sentences could be improved by:

- Extending existing therapeutic sentencing courts such as ARC and Koori Court to a greater number of locations.
- Extending therapeutic courts and therapeutic sentencing practices, such as structured deferral of sentences, to a greater number of people coming before the courts.

#### *Alternatives to imprisonment*

While LACW advocates for greater flexibility and availability in community-based sentencing options, we have concerns regarding the use of semi-carceral options, such as home detention as an alternative to imprisonment.

Specifically:

- Home detention is only available to people with stable and secure housing. As outlined above, homelessness, including housing instability, disproportionately impacts women in the criminal justice system, and even more so for Aboriginal and Torres Strait Islander women.
- Unstable housing is more common for women living in poverty than for women with means. Accordingly, if home detention orders were introduced as an alternative to imprisonment, they would be limited in operation to those offenders with stable housing, and would therefore create a class-based system that would privilege offenders with access to resources and accommodation over those without access to stable accommodation, for whom imprisonment would be the more likely alternative.
- If subject to home detention, women experiencing family violence may be placed at greater risk of further violence. Being confined to the family home may increase the risk of violence occurring, including through coercive control. At the same time, a home detention order may deter a woman from reporting violence due to fears that this will lead to additional police surveillance, the loss of stable housing and a likelihood of imprisonment as a result.

#### *Community-based rehabilitation*

LACW strongly advocates for the resourcing of women-specific rehabilitation options, including residential rehabilitation, that will bolster the chances of women succeeding on community-based orders. However, we do not advocate for the introduction of 'rehabilitation prisons' such as those in Western Australia and New South Wales. In order to be successful, we submit that rehabilitation must occur in community-based settings rather than carceral or semi-carceral settings.<sup>8</sup>

To this end, LACW advocates for the establishment and resourcing of a women-specific, community-based residential rehabilitation facility that can provide stable accommodation and intensive, holistic rehabilitation programs to criminalised women in a community setting. Such a facility must also be culturally appropriate for Aboriginal and Torres Strait Islander women and informed by the experiences of Aboriginal and Torres Strait Islander communities and trauma-affected women. This must occur along-side increased investment in community housing more generally to interrupt the pathway from homelessness into criminalisation and imprisonment.

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<sup>8</sup> Smart Justice Fact Sheet (2011) More prisons are not the answer to reducing crime, Federation of Community Legal Centres.

### *Presumption against short sentences.*

LACW would support the introduction of a presumption against short sentences. However, this should only be done where:

- Adequate community-based options are available and properly resourced to ensure that short sentences are replaced with community-based sentences; and
- Safeguards are put in place to protect against ‘sentence creep’ where an offender is sentenced to a greater period of imprisonment than would otherwise be warranted in order to overcome the presumption.

On average, women are serving shorter prison sentences than men.<sup>9</sup> Women are most likely to be charged with drug-related offences, assault and property offences (other than burglary),<sup>10</sup> which typically result in shorter sentences.

Even brief periods of time in custody are detrimental, particularly to women.<sup>11</sup> Short sentences do not allow time to address the underlying causes of any offending behaviour through participation in rehabilitation programs, yet they disrupt crucial support systems women have in place, such as employment, caring for children or family, and most importantly, housing.

Of particular concern is the effect of short terms incarceration on female Aboriginal and Torres Strait Islander offenders. Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-indigenous counterparts.<sup>12</sup> Furthermore, over one-fifth of Aboriginal and Torres Strait Islander prisoners in Australian prisons are serving sentences of less than 12 months with a median time spent on remand of 2.7 months.<sup>13</sup> This suggests Aboriginal and Torres Strait Islander prisoners are being incarcerated for relatively minor, or repeat low level offences.

Short periods in prison for women frequently trigger significant life events which can result in further offending upon release and subsequent imprisonment.<sup>14</sup> A common scenario seen by our lawyers is a short prison term resulting in a women losing her rental property, and then having her children removed because she no longer has adequate housing and employment to support her children. This can then result in self-medication with alcohol or other drugs, which in turn can lead to

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<sup>9</sup> <https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824>

<sup>10</sup> [https://www.corrections.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2019/03/71/021fe80ab/women\\_in\\_prison2019.pdf](https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/03/71/021fe80ab/women_in_prison2019.pdf)

<sup>11</sup> Prison Reform Trust (2017) ‘There’s a reason we’re in trouble: Domestic abuse as a driver to women’s offending,’ Retrieved from [http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic\\_abuse\\_report\\_final\\_lo.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic_abuse_report_final_lo.pdf); Centre for the Human Rights of Imprisoned People (CHRIP) (2010). *Culturally and Linguistically Diverse Women in Victorian Prisons*. Retrieved from Melbourne, Victoria: <http://apo.org.au/node/22959>

<sup>12</sup> <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2019~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13>

<sup>13</sup> [https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/4-sentencing-options/short-sentences-of-imprisonment/#\\_ftnref40](https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/4-sentencing-options/short-sentences-of-imprisonment/#_ftnref40)

<sup>14</sup> [https://www.lawcouncil.asn.au/docs/0f08ee12-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20\(Discussion%20Paper%2084\).pdf](https://www.lawcouncil.asn.au/docs/0f08ee12-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20(Discussion%20Paper%2084).pdf) NSW Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004); Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (2017).

reoffending.<sup>15</sup> It is clear that short prison sentences are inefficient if the purpose of the punishment is to reduce crime.

Short periods of imprisonment for Aboriginal and Torres Strait Islander women feed into the escalating rates of Aboriginal children in out-of-home care. This cycles Aboriginal women into deeper abuse, homelessness, mental health disorders and poverty.<sup>16</sup>

However, there is a risk that a presumption against short sentences may lead to ‘sentence creep,’ where a person would receive a longer sentence that would otherwise be warranted in order to get over the ‘hurdle’ set in relation to the presumption. For this reason, LACW advocates for:

- Introducing a *presumption against* short sentences (as has been introduced in Scotland), rather than the abolition of short sentences;
- Ensuring there are clear guidelines for when the presumption can be overridden, and a short sentence imposed;
- Requiring decision makers to address these guidelines when the presumption is over-ridden;
- Requiring decision makers to give reasons when imposing sentences that are just above the threshold;
- Ensuring that appropriate community-based programs are available and adequately resourced to provide a real and viable alternative to short prison sentences.

#### *The nexus between current bail laws, short sentences and ‘time-served’ sentences*

Any consideration of a presumption against short sentences, and of sentencing reform generally, must also include a consideration of the current bail laws in Victoria.

In 2018, significant changes to the *Bail Act 1977* extended the application of a presumption against bail to a wide range of offences and circumstances, placing the onus on applicants to demonstrate that they meet certain thresholds (compelling reasons or exceptional circumstances) which would justify the granting of bail in relation to particular offences.<sup>17</sup> This has caused a sharp increase in the numbers of people spending time on remand and had a flow-on effect to sentencing outcomes.<sup>18</sup> That is, “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>19</sup> Such sentences are likely to be short, and much more likely to be imposed in the Magistrates’ Court than in higher courts.<sup>20</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

<sup>15</sup>[https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented\\_online.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf)

<sup>16</sup> [https://www.lawcouncil.asn.au/docs/0f08ee12-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20\(Discussion%20Paper%2084\).pdf](https://www.lawcouncil.asn.au/docs/0f08ee12-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20(Discussion%20Paper%2084).pdf)

<sup>17</sup>[https://www.crimestatistics.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2019/11/bc/a6e7a8e9f/Crime%20Statistics%20Agency%20-%20Characteristics%20and%20offending%20of%20women%20in%20prison%20in%20Victoria%2C%202012-2018.pdf](https://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/11/bc/a6e7a8e9f/Crime%20Statistics%20Agency%20-%20Characteristics%20and%20offending%20of%20women%20in%20prison%20in%20Victoria%2C%202012-2018.pdf) p3

<sup>18</sup> Sentencing Advisor Council Victoria, ‘Time Served Prison Sentences in Victoria’, 4 February 2020.

<sup>19</sup> Ibid

<sup>20</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.”

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.”

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;
- 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.

Accordingly, any reform of the sentencing regime must occur along-side a review of the current bail laws that have triggered the large increase in Victoria’s remand population and the use of ‘time-served’ sentences. This is particularly the case where it relates to a presumption against short sentences and the expansion of community-based rehabilitation options.

#### *Caring responsibilities as a specific consideration in sentencing*

LACW strongly advocates for the inclusion of a specific provision in the Act requiring decision-makers to consider the impact of the imposition of a term of imprisonment on dependent children. This aligns with the UN Convention on the Rights of the Child, which requires in Article 3(1) that:

*‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.*

This should also be extended to considerations of the impact of imprisonment on other dependants.

Women are overwhelmingly the primary carers of children, as well as carers for the sick and elderly in their community. When women are imprisoned, even for short periods, the impacts ripple throughout families and communities and have long term effects. The Australian Human Rights Commission noted that ‘mothers that are prisoners can impact family relationships and can lead to their children suffering from emotional and behavioural problems’.<sup>21</sup> It is estimated that more than half of women in prison are the primary carers of children,<sup>22</sup> and 80 per cent of Aboriginal and Torres Strait Islander women in prisons are mothers.<sup>23</sup>

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<sup>21</sup> Australian Human Rights Commission, Human Rights and Prisoners (2009).

<sup>22</sup> Rachel Carbonell ‘When mum goes to prison’ ABC, 23 June 2017.

<sup>23</sup> Juanita Sherwood and Sacha Kendall, ‘Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison’ (2013) 46 Contemporary Nurse: A Journal for the Australian Nursing Profession 83, 85.

Children whose mothers are in prison are more likely to have disrupted education, poor health and unstable housing, all of which are factors that heighten the risk of young person entering child protection or justice systems.<sup>24</sup> For instance, the Australian Institute of Health and Welfare indicates that young people on child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.<sup>25</sup>

A similar requirement already exists in the United Kingdom, where personal mitigation considerations specifically include whether the offender is a sole or primary carer for dependant relatives. For offenders on the cusp of custody, sentencing principals provide that imprisonment should not be imposed where there would be an impact on dependants. Where custody is unavoidable, the impact on dependants is relevant to the length of the sentence imposed and whether the sentence is suspended. The court is also required to have all the relevant information about dependent children before deciding on sentence.

Likewise, in South Africa the Constitutional Court has ruled that the best interests of the child must be taken into account when sentencing a primary carer of minor children. In particular, the Court has held that if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

### Further information

Thank you for the opportunity to contribute to the Project. For further information, please contact:

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*LACW acknowledges that it operates on Aboriginal country and that sovereignty over this land was never ceded. We pay our respects to the traditional owners of all the lands on which we operate, and in particular, to the Wurundjeri people of the Kulin nations, and to their elders past, present and emerging.*

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<sup>24</sup> Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 Contemporary Nurse: A Journal for the Australian Nursing Profession 83, 85.

<sup>25</sup> Australian Institute of Health and Welfare, 'Young People in Child Protection and Under Youth Justice Supervision 2013-14' (Data Linkage Series No 21, 2016) vi.