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LAW & ADVOCACY  
CENTRE FOR WOMEN

# **Yoorrook Justice Commission – Systemic Injustice in the Criminal Justice System**

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

November 2022

*LACW acknowledges that we operate on First Nations 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 and present. We recognise that sovereignty over this land was never ceded, and it always was, and always will be Aboriginal land.*

*We acknowledge also that First Peoples 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 First Nations communities, and the leadership they have shown and continue to show in advocating for and implementing reforms to this system.*

## Contents

<b>About the Law and Advocacy Centre for Women</b> .....	4
<b>Background</b> .....	4
<b>First Nations women in the criminal justice system</b> .....	5
<b>Bail, remand and custody</b> .....	6
The impact of changes to the Bail Act on Victoria’s remand and prison populations .....	7
The link between housing insecurity and criminalisation.....	9
Inflexibility of community corrections orders and increasing use of ‘time-served’ sentences .....	13
The role of judges and magistrates in addressing systemic issues .....	16
<b>Over-policing</b> .....	16
Redirection of funding for police to community services .....	16
Over-policing of First Nations communities and women’s criminalisation.....	17
Intersections between family violence, policing and women’s criminalisation.....	18
Intersections between mental health responses and women’s criminalisation .....	18
<b>Independent police oversight</b> .....	20
Importance of police oversight.....	20
Tailored approaches required for First Nations women .....	20
The importance of advocates for complainants.....	21
<b>Raising the age of criminal responsibility</b> .....	22
Raising the age of criminal responsibility .....	22
<b>Rehabilitation</b> .....	23
Increased funding for wrap-around support services .....	23

## About the Law and Advocacy Centre for Women

The Law and Advocacy Centre for Women Ltd ('LACW') is a community legal centre operating across the state of Victoria, Australia. 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 criminalisation and imprisonment 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 with 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 child protection, family violence intervention orders; infringements and fines and victims of crime assistance. Approximately 30% of LACW's clients identify as First Nations women.

## Background

The Yoorrook Justice Commission (Yoorrook) has been established as a Royal Commission to formalise a truth telling process into the historical and ongoing injustices experienced by First Peoples in Victoria. Yoorrook will deliver a Critical Issues report on June 2023 regarding the systemic injustices faced by First Peoples in the child protection and criminal justice systems.

LACW has prepared these submissions in relation to the following key issues identified by Yoorrook:

- the connection between colonisation and contemporary systemic injustice experienced by First Peoples in the criminal justice system
- imprisonment rates
- bail and remand
- over-policing and under-policing
- independent police oversight
- raising the age of criminal responsibility
- gaps in health and disability screening and services
- connections between systemic injustice in the criminal justice system and systemic injustice relating to issues including child protection, homelessness, family violence, health, mental health and disability and substance misuse
- rehabilitation

These submissions will focus on the experiences of First Nations women who have had involvement with the criminal justice system.

## First Nations women in the criminal justice system

Victoria has been criminalising and incarcerating First Nations women at a rate that surpasses that of non-First Nations women and all men.<sup>1</sup> While this trend is not new, the rate has accelerated rapidly in recent years, despite a falling crime rate.<sup>2</sup>

The support needs of criminalised First Nations women are interrelated and complex, and their pathways into and interactions with the criminal justice system are different to other groups. Many of the support needs with which criminalised First Nations women present are gender specific and require culturally safe responses. 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>3</sup> Evidence suggests that between 77 per cent to 90 per cent of incarcerated women have been exposed to traumatic events.<sup>4</sup> One Victorian study found that than 92 per cent of First Nations female prisoners were given mental illness diagnoses expected to last their lifetime, and almost half were diagnosed with Post Traumatic Stress Disorder.<sup>5</sup>

The dichotomy between victims of crime and 'offenders' fails to capture 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 First Nations women. Criminal legal processes and gaol serve to exacerbate the trauma experienced by most criminalised people, by re-traumatising them and undermining their prospects for rehabilitation. Likewise, services for victims of violence alienate people who have been involved with the criminal justice system themselves.

The experiences of criminalised people differs according to the intersecting forms of marginalisation they experience. First Nations women 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>6</sup> The discrimination

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<sup>1</sup> Australia Bureau of Statistics, Prisoners in Australia, 2021.

<sup>2</sup> RMIT University Centre for Innovative Justice, Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems | Issues Paper July 2021 (2021); Leigh, Andrew. "The second convict age: Explaining the return of mass imprisonment in Australia." *Economic Record* 96.313 (2020): 187-208.

<sup>3</sup> RMIT University Centre for Innovative Justice, Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems | Issues Paper July 2021 (2021); 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; 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> Green, Bonnie, Jeanne, Miranda, Darowalla, 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>5</sup> Victoria Department of Justice, Koori Prisoner Mental Health and Cognitive Function Study—Final Report (2013) 13.

<sup>6</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).

faced by trans and gender diverse people in the community is linked to criminalisation,<sup>7</sup> and transphobic stigma, discrimination and assault make carceral settings especially damaging for them.<sup>8</sup>

Given the complexities of the causes of First Nations women's criminalisation, it is important to not only adopt a gendered lens when examining the injustices of Victoria's criminal justice system, but to also centre the voices and experiences of First Nations women. Reforms proposed to address these issues will only be impactful if they account for the distinctive experiences of First Nations women in the system.

## Bail, remand and custody

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>9</sup> Between 2009 and 2019, the female prison population in Australia increased by 64 per cent, compared with 45 per cent for males.<sup>10</sup> First Nations women are grossly over-represented in these figures. The number of First Nations women in prison has more than tripled, growing from 42 in 2012 to 147 in 2018.<sup>11</sup> This overrepresentation increases First Nations women's exposure to the injustices of the criminal legal system, and to the failures apparent in intersecting sectors that do not provide a culturally safe response.

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>12</sup> As at 31 May 2021, that number increased to 55 per cent.<sup>13</sup> The latest figures from Corrections at the time of writing (November 2022) indicate that 12.7 per cent of women in Victorian prisons are First Nations women, and that 53 per cent of women in prison are on remand.

There are a number of reasons for the persistently disproportionate number of First Nations women in Victoria's prisons and in the criminal legal system more generally. Findings from the Royal Commission into Aboriginal Deaths in Custody more than 30 years ago regarding the over-representation of First Nations people in the justice system, and more specifically the over-policing of First Nations communities, remain relevant today. Subsequent inquiries, inquests and reports likewise traverse the systemic racism that persists in policing practices and justice system responses. For example, police are 10.7 times more likely to apprehend First Nations people for public order offences,<sup>14</sup> five times more likely to arrest First Nations women compared to non-First Nations women,<sup>15</sup> and First Nations women are more likely to

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<sup>7</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>8</sup> Ministry of Justice United Kingdom, *Review of the care and management of transgender offenders* (Report, 2016).

<sup>9</sup> Note that this number has since reduced due to the COVID-19 pandemic. Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

<sup>10</sup> Australian Institute of Health and Welfare, *The health and welfare of women in Australia's prisons*, November 2020.

<sup>11</sup> Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

<sup>12</sup> Corrections Victoria, *Monthly Times Series Prisoner and Offender Data (May 2021) Table 1*.

<sup>13</sup> Corrections Victoria, *Monthly Times Series Prisoner and Offender Data (May 2021) Table 1*.

<sup>14</sup> *Review of the Victoria Police Aboriginal Strategic Plan 2003-2008* (2011).

<sup>15</sup> Equal Opportunity Commission Victoria 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System' (2005).

be arrested and charged with low level offences, with theft and breach of justice offences against First Nations women in Victoria making up almost 50% of charges laid.<sup>16</sup>

Issues relating to the over-policing of First Nations communities will be addressed in more detail below.

This section of our submission will focus on three areas of concern that have driven the more recent exponential and unprecedented growth in the number of First Nations women on remand and in prison:

- i) recent reforms to the *Bail Act 1977 (Vic)*;
- ii) increasing rates of homelessness and housing insecurity; and
- iii) 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 increased numbers of accused persons bearing the onus of establishing that they should be granted bail. This significantly lowered the previously high bar set for an individual to be deprived by the State of their fundamental right to liberty, which stems from the presumption of innocence, and is foundational to the 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' in order to be granted bail.

The 2018 reforms resulted in a wider range of offences attracting reverse onus tests for bail. In addition, the reforms also set out 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 if on a Community Corrections Order or adjourned undertaking/good behaviour bond).

These reforms have increased the number of First Nations women who are remanded for low-level, non-violent offending that is a direct result of their poverty and disadvantage. This commonly occurs when a woman is already on bail for an indictable offence (such as theft from a shop) and is then arrested for new offending. Following the 2018 reforms, such women are subject to the reverse onus tests for bail, and depending on the circumstances, are in many cases 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, particularly First Nations women, with the more difficult tests for bail meaning that they may not apply for bail at all or are unsuccessful when they do.<sup>17</sup>

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<sup>16</sup> Peta MacGillivray and Professor Eileen Baldrey (2015).

<sup>17</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).

### Case examples | Impacts of bail legislation

LACW has represented several First Nations women facing relatively minor charges who have been caught by the reverse onus and double-uplift provisions of the Bail Act. For example:

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.

The 2018 bail reforms were introduced following the Coghlan Bail Review, which the Victorian Government commenced in response to heightened public concern following the Bourke Street tragedy on 20 January 2017. That Review concluded 'that a greater emphasis should be placed on assessment of risk.'<sup>18</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>19</sup>

Spending time on remand frequently interrupts important opportunities for recovery and rehabilitation that may address the underlying causes of offending behaviours: community supports, including mental health intervention are interrupted; stable housing is generally put at risk; and employment or job readiness programs are paused. Perversely, this increases the likelihood that when eventually released, there is a greater risk of reoffending.<sup>20</sup> There are several bail reforms that could be introduced to reduce the number of First Nations women on remand and in prison.

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<sup>18</sup> The Hon. Paul Coghlan QC, Bail Review: First advice to the Victorian Government (Report, 2017) 3.

<sup>19</sup> Corrections Victoria, Monthly Time Series Prisoner and Offender Data, July 2021.

<sup>20</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.



## Recommendations | Bail reform<sup>21</sup>

The following reforms are urgently needed to the bail and remand system in order to stem the increasing numbers of First Nations women on remand and in prison:

1. Repeal the reverse-onus and double uplift provisions of the Bail Act and create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.
2. Adopt a gendered, culturally appropriate and non-discriminatory 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 their social and medical circumstances (including, for example, homelessness or mental illness and / or psychological distress). 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, low-level indictable offences that are often committed by women due to poverty, disadvantage and marginalisation, including drug offences, theft and property offences, and public nuisance and unlawful assembly. Review all offences, including summary offences, with a view to decriminalising low-level offences linked to poverty, disadvantage and substance dependency.
5. Improve police responses to First Nations 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 of the numbers of First Nations women in custody.<sup>22</sup> 115,300 clients were assisted by specialist homelessness services in Victoria in 2019-20.<sup>23</sup> The rate of Victorian First Peoples presenting to these services has grown from less than 10 per cent of the cohort to almost 17 per cent between 2011 and 2020.<sup>24</sup> In 2019-20, 61 per cent of clients who sought assistance from such services in Victoria were women.<sup>25</sup> On average, 108 requests for assistance from homelessness services went unmet each day in Victoria in 2019-20.<sup>26</sup>

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<sup>21</sup> These recommendations are in line with the recommendations in the policy platform of Smart Justice for Women, a coalition of members from the Community Legal Sector, Aboriginal Community Controlled Organisations, Community Services Sector, Legal Assistance Sector, academia and other organisations with an interest in reducing the criminalisation of women in Victoria, of which LACW is a member.

<sup>22</sup> RMIT University Centre for Innovative Justice, Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems | Issues Paper July 2021 (2021).

<sup>23</sup> Australian Institute of Health and Welfare, Specialist homelessness services 2019-20: Victoria (Fact Sheet, 2020) 1.

<sup>24</sup> Australian Institute of Health and Welfare, Specialist homelessness services 2019-20: Victoria (Fact Sheet, 2020) 1.

<sup>25</sup> Australian Institute of Health and Welfare, Specialist homelessness services 2019-20: Victoria (Fact Sheet, 2020) 1.

<sup>26</sup> Ibid.

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>27</sup> while over half of the people being discharged from prison expect to be homeless upon release.<sup>28</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.

### **Case examples | Homelessness and criminalisation**

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

One LACW client became homeless because she had experienced intense trauma at the hands of her partner in her home. He had been extremely violent towards her and sexually assaulted her children. Her mental health declined as a result of her trauma and she turned to drug use as a means of coping. As a result of her homelessness and drug use, she was charged with minor criminal offending. She had never previously been involved with the criminal justice system. Her children were removed from her and placed in out of home care. Despite LACW's efforts to arrange a priority transfer into public housing for our client, she remains unable to find a property.

The provision of social housing is the strongest protection factor against homelessness,<sup>29</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>30</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>31</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>32</sup> Of 74,266 listings, Anglicare Australia found just three rentals that were affordable for a single person on the JobSeeker payment.<sup>33</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

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<sup>27</sup> Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report, 2019) 22.

<sup>28</sup> Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report, 2019), 24.

<sup>29</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>30</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>31</sup> Australian Institute of Health and Welfare, *Housing Assistance in Australia 2019-20: State and territory summary data* (June 2021).

<sup>32</sup> Anglicare Australia, *Rental Affordability Snapshot* (National Report, 2021) 7.

<sup>33</sup> Anglicare Australia, *Rental Affordability Snapshot* (National Report, 2021) 8.

rent stock by households with a higher income.<sup>34</sup> The cost of a private rental, coupled with the required photo identification, income guarantee, reference checks and racist attitudes, means that criminalised First Nations 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>35</sup> In addition, rooming houses and boarding houses are for the most part unsafe and unsuitable for women, in particular women with caring responsibilities.

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 First Nations 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>36</sup>

These issues also increase the number of First Nations 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>37</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>38</sup>

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>39</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:

A young, First Nations client in her early 20s was remanded for accusations of family violence. She was eventually bailed to a residential rehabilitation facility where she

<sup>34</sup> Yates, Judith and Maryann Wulf, 'W(h)ither Low Cost Private Rental Housing?' (2000) Urban Policy and Research 45.

<sup>35</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>36</sup> Prison Reform Trust United Kingdom, Transforming lives: reducing women's imprisonment (Final Report, 2014).

<sup>37</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) 21.

<sup>38</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).

<sup>39</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).

received intensive support. However, after successfully completing her stay at this facility our client has not been able to find stable housing. She is unable to return to her home due to an intervention order. Youth support services are not able to help her as they say she is on the cusp on being 25 and ineligible for their services, while adult services deem her too young. Our client is currently staying in a hostel where she is residing in a room with a woman who has been using drugs. Our client fears for her sobriety and feels hopeless about the prospect of finding a safe, long-term home.

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>40</sup> Recent Australian research has found that ex-prisoners who received 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>41</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 the number of First Peoples in custody in Victoria.

### **Recommendations | Housing<sup>42</sup>**

We recommend the following reforms:

1. Ensure that First Nations women are not criminalised, incarcerated or delayed in release from prison due to a lack of affordable and social housing and the increased risk of entering or re-entering the criminal legal system due to homelessness.
2. Ensure that all housing provided – social, affordable and private housing – is aimed at ensuring that First Nations women have a home, and should meet accepted community standards of what constitutes a home.
3. Ensure that First Nations women have access to housing that is stable and secure, including security of tenure or an ongoing lease agreement and tenancy rights.

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<sup>40</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>41</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.

<sup>42</sup> As above, these recommendations are in line with those of Smart Justice for Women.

4. Ensure that housing is provided to criminalised First Nations women on a Housing First basis<sup>43</sup> and includes alcohol and other drugs, mental health, family violence and parenting support from agencies outside the criminal legal system, especially Aboriginal Community Controlled Organisations.
5. Take into account the specific needs of First Nations 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 safe.
6. Recognising that an address is required for release from prison, ensure victim-survivors of family violence do not return to unsafe or unstable living arrangements upon their release from prison.
7. Empower First Nations 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.
8. Empower First Nations women to make their own choices about where they live, who they live with and who comes into their home and when.
9. Build a minimum of 60,000 new public and community homes by 2032 to ensure all Victorians have access to affordable and secure homes.
10. Invest in data and monitoring to determine future housing needs for First Nations women in contact with the criminal legal system.

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

The number of First Nations 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 First Nations 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:

- It is virtually impossible for a woman to successfully complete a community corrections order where she has unstable housing.

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<sup>43</sup> Padgett, Deborah; Henwood, Benjamin; and Sam Tsemberis, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, (Oxford Scholarship Online, November 2015).

- 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:

A First Nations 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>44</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>45</sup> Such sentences are likely to be short, and much more likely to be imposed in the Magistrates' Court than in higher courts.<sup>46</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."

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;

<sup>44</sup> Sentencing Advisory Council Victoria, Time Served Prison Sentences in Victoria, 4 February 2020.

<sup>45</sup> Sentencing Advisory Council Victoria (n 37).

<sup>46</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."

- 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 First Nations woman was referred to LACW 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. Our client then 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.

As most First Nations 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, it is vital that prison spending is curbed, that prison expansion is not allowed to go ahead, and that funds are instead 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 First Nations women’s criminalisation and imprisonment, and that such care cannot be effectively delivered in a carceral environment.

### **Recommendations | Sentencing reform<sup>47</sup>**

We recommend 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 First Nations women.
2. Require decision-makers to consider the unique systemic and background factors affecting First 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.

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<sup>47</sup> As above, these recommendations are in line with those of Smart Justice for Women.

4. Abolish short sentences whilst providing safeguards against 'sentence creep,' to ensure that First Nations 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 First Nations 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.

### *The role of judges and magistrates in addressing systemic issues*

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. To promote more equitable sentencing and bail decision-making where judicial discretion is required, it is critical that judges receive training on the drivers of First Nations women's criminalisation, the relationship between historical and current 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 First Peoples 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 First Nations women. However, First Nations women cannot enjoy the benefits of those specialised and therapeutic approaches if services are not adequately funded to provide wrap around support to those who are engaged with them.

## **Over-policing**

### *Redirection of funding for police to community services*

Another factor driving First Nations 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 First Nations women 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.

### *Over-policing of First Nations communities and women's criminalisation*

A recent study showed that discriminatory practices in relation to First Peoples were also reflected in prosecutions by police: 80 per cent of First Peoples arrested for possession of small amounts of cannabis were prosecuted, compared with just over 52 per cent of those who were not First Peoples arrested for the same offence.<sup>49</sup> First Nations women are more likely than non-First Nations women to be imprisoned for minor offences such as disorderly conduct, minor property and traffic offences and breaches of court orders.<sup>50</sup>

Discrimination in policing during the COVID-19 pandemic has also been reported.<sup>51</sup> 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 First Nations communities**

An example of over policing and racial profiling experienced by LACW clients includes:

A First Nations 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.

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<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, 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); 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.

<sup>49</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>>.

<sup>50</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>51</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-themicroscope/15871320009710>>.

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

The misidentification of women as the predominant aggressor in family violence incidents leads to the criminalisation of family violence victim-survivors. This issue was highlighted in a study by the Women's Legal Service Victoria which 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>52</sup> This disproportionately impacts First Nations women and 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 Torres Strait Islander client was charged with assaulting her ex-partner and made the subject of a police application for an intervention order, despite multiple reports and letters by support workers and other people in their lives attesting to our client being the victim of family violence. Our client's ex-partner manipulated her using the intervention order, threatening to report false breaches to the police if she did not comply with his demands. Further, our client lost custody of her children. She feels particularly distressed that they cannot maintain connection to their culture through her and her family.

### *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>53</sup> The *Royal 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>54</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

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<sup>52</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>53</sup> Royal Commission into Victoria's Mental Health System (Final Report, 2021) Vol 1, 514.

<sup>54</sup> Royal Commission into Victoria's Mental Health System (n 50) Executive summary and recommendations, 46.

especially true for women who have previously had negative interactions with police or have been subject to over policing, like First Nations women. 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 First Nations client called emergency services to inform them that she was having thoughts of self-harm and suicide. Police were dispatched to her home to check on her. Before arriving, the police found that our client had outstanding warrants for her arrest. Upon arriving, the police found our client in a despondent state. She explained to them that her father had recently passed away. Despite our client's presentation and the fact she had sought assistance herself, the police arrested her and took her to the station for processing. Our client assaulted an officer during this process and was given a mandatory sentence of six months in custody. It remains unclear why the police did not execute their responsibility to take our client to hospital despite clearly being unwell, and instead acted in a way that exacerbated her already disturbed mental state.

### **Recommendations | Policing<sup>55</sup>**

We recommend the following reforms:

1. Divert funding for policing into community services, including front-line health services, Aboriginal Community Controlled Organisations and CALD community services.
2. Reduce the over policing of First Nations communities in Victoria, taking into account the need to address systemic racism and the discrimination and racism inherent in policing practices in Victoria.
3. 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.
4. 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.
5. 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.
6. 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 First Nations communities.
7. 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.

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<sup>55</sup> As above, these recommendations are in line with those of Smart Justice for Women.

## Independent police oversight

This section draws on LACW's submissions to the Victorian Government for its systemic review into Victoria's police oversight system following a recommendation of the Royal Commission into the Management of Police Informants.

### *Importance of police oversight*

Members of the public making complaints against police must have confidence that the investigation of their complaints will be independent of Victoria Police. LACW clients who report police misconduct to their lawyers or support workers frequently do not make complaints, or choose to discontinue complaints about police because they do not trust police to investigate the matter thoroughly and fairly.

This reluctance of LACW clients is born out of a history of over-policing of particular communities by Victoria Police, in particular of First Nations women. For example, a recent study showed that such discriminatory practices in relation to First Peoples were reflected in prosecutions by police: 80 per cent of First Peoples arrested for possession of small amounts of cannabis were prosecuted, compared with just over 52 per cent of non-First Peoples arrested for the same offence.<sup>56</sup> First Nations women are more likely than non-First Nations women to be imprisoned for minor offences such as disorderly conduct, minor property and traffic offences and breaches of court orders.<sup>57</sup>

The current complaints system – where the vast majority of complaints against police are investigated internally, or, if escalated to IBAC, are still referred back to Victoria Police for subsequent investigation – severely limits police accountability and undermines community confidence in the system. This must be replaced by an independent mechanism for police oversight, that is, a Police Ombudsman.

### *Tailored approaches required for First Nations women*

A Police Ombudsman must be culturally-sensitive, accessible and gender-responsive.

The long history of over-policing and police mistreatment of First Nations women makes them very unlikely to trust a complaints process involving Victoria Police. The establishment of a Police Ombudsman to investigate complaints should have at its centre the experiences of First Peoples to ensure access to a fair and transparent complaints and redress system for those who are most impacted by policing practices. The experiences of this group should be central to the design of a Police Ombudsman, to ensure access to a fair and transparent complaints and redress system is available to those who are most impacted by policing practices.

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<sup>56</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) .

<sup>57</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.

The complaints process should be tailored to the lived experience of the complainant and the complaint in question. For example, a woman making a complaint about sexual harassment or assault should be able to make that complaint to a female complaints officer if she chooses. Such options should not rely on the complainant requesting them but should be offered to all complainants at the intake stage.

### *The importance of advocates for complainants*

Complainants should be permitted to provide evidence through an advocate. Many LACW clients have disclosed experiences of police misconduct to their lawyers or support workers, and having such advocates attend or support them in providing evidence would help reduce their revictimization through the complaints process.

Complainants should be allowed to be accompanied by an advocate in all interactions with the Ombudsman. This should not be up to complainants to elect but should be asked as a matter of course as soon as possible in the complaints process. LACW clients who have experienced police misconduct are often understandably mistrusting of figures of authority, so having an advocate attend all meetings or interviews with the Police Ombudsman would help build trust in the complaints process.

### **Recommendations | Police oversight<sup>58</sup>**

We recommend the following reforms:

1. Establish a Police Ombudsman to investigate complaints against police ensuring it is human rights compliant, appropriately resourced, independent, transparent, victim-centred and responsive to the needs of First Nations women.
2. Implement OPCAT for police custody including the establishment of a National Preventive Mechanism, embedding its cultural safety into its operations and policy.
3. Improve education and applied training for police members about issues relating to the criminalisation of women and First Nations communities.
4. Establish a regime for monitoring police conduct and performance and publicly report the data collected. The metrics should include:
  - a. police response to culturally and linguistically diverse women;
  - b. police responses to family violence, including police-perpetrated family violence and mis-identification of victim survivors as perpetrators of family violence (including, gender and demographic data);
  - c. police use of force and weapons;
  - d. the perceived ethnicity of people subject to a police stop and search;
  - e. complaints and complaint handling data; including complaints about police's family violence responses;
  - f. the impact of litigation against Victoria Police
5. Policing practices should include referrals to support services for First Nations women, women with complex needs, including women with a disability.

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<sup>58</sup> These recommendations are in line with the recommendations in the policy platform of Smart Justice for Women.

## Raising the age of criminal responsibility

### *Raising the age of criminal responsibility*

Research shows that early interaction with the criminal legal system significantly increases the likelihood of further offending and life-long involvement with the justice system.<sup>59</sup> Conversely, 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 criminal justice system do not reoffend and are more likely to grow up into an environment that promotes their healthy development and education.<sup>60</sup>

There is a clear link between child protection involvement and criminalisation for young First Nations people. 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 First Nations children under supervision, 69 per cent had also received child protection services.<sup>63</sup> Likewise, there is a strong correlation between parental incarceration and the placement of children in out of home care. These issues are discussed extensively in our accompanying submission on Systemic Injustice in the Child Protection System.

The criminalisation of children from the age of 10 in Victoria sets in place a dangerous trajectory that damages the development of children who are already marginalised due to systemic factors that make it more likely they will come into contact with both the Child Protection and criminal legal systems. These children require care and support, not criminalisation.

The age of criminal responsibility in Victoria – 10 years old – is well out of step with international standards. LACW supports the overwhelming calls from First Nations 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.

#### **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 First Nations 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

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<sup>59</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (December 2016) 26.

<sup>60</sup> Royal Commission into The Protection and Detention of Children in the Northern Territory (Final Report, 2017).

<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> 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.

she was 11 years old. Her history of institutionalisation, complex trauma, drug use and mental illness all contribute to her ongoing criminalisation.

### Recommendations | Raising the age of criminal responsibility

1. The minimum age of criminal responsibility should be increased to 14 years.

## Rehabilitation

In Victoria, 44.2% of prisoners released during 2017–18 returned to prison within two years (to 2019–20).<sup>64</sup> This clearly indicates that the current criminal justice system is not rehabilitative or 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*

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

We know that women are more likely than men to have experienced trauma before entering prison. A New South Wales study found that 70 per cent of First Nations female prisoners were survivors of child sexual abuse, with 44 per cent being subject to ongoing sexual abuse and 78 per cent to physical violence into adulthood.<sup>65</sup>

First Nations women in prison also have higher rates of mental ill-health, substance use and homelessness compared to other groups.<sup>66</sup> Rates of substance use are high in the lead up to and during offending; at time of arrest; and after incarceration.<sup>67</sup>

According to the AIHW, 36 per cent of female prison entrants reported having been diagnosed with a current chronic condition.<sup>68</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

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<sup>64</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>65</sup> Human Rights Law Centre and Change the Record Coalition, Mary Stathopoulos and Antonia Quadara, 'Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse' (Women's Advisory Council of Corrective Services NSW, 2014) 18.

<sup>66</sup> Australian Institute of Health and Welfare, The Health of Australia's Prisoners 2019 (Report, 2020).

<sup>67</sup> Prison Reform Trust United Kingdom (n 30); Johnson, Holly, 'Drugs and crime: A study of incarcerated female offenders' (Australian Institute of Criminology: Research and public policy series, 2004) xiv.

<sup>68</sup> Australian Institute of Health and Welfare, The health and welfare of women in Australia's prisons, November 2020.

Australian population.<sup>69</sup> First Nations women in custody have high rates of reproductive health problems, many of which are associated with gendered violence.<sup>70</sup> First Nations women are also likely to experience other health issues like diabetes, heart attack and stroke.<sup>71</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.

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.

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

### **Recommendations | Rehabilitation<sup>72</sup>**

We recommend 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 culturally safe and respectful of the specific needs of First Nations women engaged with the criminal justice system, including the adoption of trauma-informed and integrated practice across the service system.

*Thank you for the opportunity to provide a submission. For further information, please contact Elena Pappas, CEO, at [epappas@lacw.org.au](mailto:epappas@lacw.org.au).*

*With thanks to Riya Kundu for her assistance in preparing this submission.*

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<sup>69</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>70</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>71</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.

<sup>72</sup> As above, these recommendations are in line with those of Smart Justice for Women.